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THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHIEF JUDGE STEPHANIE K. SEYMOUR

Judge Seymour was born in Battle Creek, Michigan in 1940. She was graduated *magna cum laude* from Smith College in 1962, and from Harvard Law School in 1965. After graduating from law school, Judge Seymour practiced law in Boston, Massachusetts from 1965 until 1966, in Tulsa, Oklahoma in 1967 and in Houston, Texas from 1968 until 1969. From 1971 to 1979 she practiced with the Tulsa law firm of Doerner, Stuart, Saunders, Daniel & Anderson. In 1979, she was appointed to the United States Court of Appeals for the Tenth Circuit.

She is a member of Phi Beta Kappa and the American and Oklahoma County Bar Associations. Additionally, Judge Seymour served as a bar examiner from 1973 through 1979; she served on the United States Judicial Conference Committee on Defender Services, 1985-87, and as chair, 1987-90.

JUDGE JOHN J. PORFILIO

Judge Porfilio was born in Denver, Colorado in 1934. He received his B.A. from the University of Denver in 1956 and received his LL.B. from the University of Denver College of Law in 1959. Judge Porfilio then practiced law with the Denver firm of Carbone & Walsmith until 1962. From 1962 until 1975, he worked in the Colorado Attorney General's Office. Specifically, Judge Porfilio served as Assistant Attorney General from 1962 until 1967, as Deputy Attorney General from 1967 to 1972, and as Attorney General for the State of Colorado from 1972 until 1975.

In January, 1975, Judge Porfilio was appointed to the Bankruptcy Court of the United States District Court for the District of Colorado where he served until 1982. Judge Porfilio was then appointed to the United States District Court for the District of Colorado. In 1985, he was appointed to the United States Court of Appeals for the Tenth Circuit.

JUDGE STEPHEN H. ANDERSON

Judge Anderson was born in 1932. He attended Eastern Oregon College from 1949 to 1951, and Brigham Young University from 1955 to 1956 when he graduated. Judge Anderson then attended the University of Utah College of Law where he received his LL.B. degree in 1960. He was Editor in Chief of the Utah Law Review, Order of the Coif, and Phi Kappa Phi. He then served as a trial attorney in the tax division of the United States Department of Justice until 1964.

Judge Anderson subsequently joined the law firm of Ray, Quinney & Nebeker in Salt Lake City, Utah in 1964 where he practiced until he was appointed to the United States Court of Appeals for the Tenth Circuit in 1985.

Judge Anderson has appeared as lead counsel in federal courts in seventeen states, and in the United States Supreme Court. He has served as President and Commissioner of the Utah State Bar. Additionally, Judge Anderson has been a member of the Utah Judicial Counsel and the Utah Judicial Conduct Commission, and he has served as Chairman of the Utah Law and Justice Center Committee. Judge Anderson's civic activities include lectures at the University of Utah College of Law, member of the Executive Committee of the Salt Lake Area Chamber of Commerce, and director of numerous corporations. He is a Master of the Bench, American Inn of Court Number VII.

JUDGE DEANELL R. TACHA

Judge Tacha grew up in Scandia, Kansas. She received her B.A. in American Studies from the University of Kansas in 1968 and was a member of Mortar Board and Phi Beta Kappa. Judge Tacha then attended law school and received her J.D. from the University of Michigan in 1971.

In 1971, she was selected to be a White House Fellow. During her year as a White House Fellow, Judge Tacha was sent on official trips to southeast Asia, east and central Africa, and the European Economic Community. After her fellowship, Judge Tacha was an associate with the law firm of Hogan and Hartson in Washington, D.C. In 1973, she returned to Kansas and entered private practice in Concordia, Kansas.

Judge Tacha was appointed to the faculty of the University of Kansas Law School in 1974. In 1979, she became associate Vice

Chancellor of Academic Affairs, and in 1981, she became the Vice Chancellor for Academic Affairs.

Judge Tacha was appointed to the U.S. Court of Appeals for the 10th Circuit in 1985.

JUDGE BOBBY R. BALDOCK

Judge Baldock was born in Rocky, Oklahoma, in 1936, however, he grew up in Hagerman and Roswell, New Mexico. Judge Baldock attended the New Mexico Military Institute, where he graduated in 1956. He received his J.D. from the University of Arizona College of Law in 1960.

From 1960 until 1983, Judge Baldock practiced as a trial lawyer for the firm of Sanders, Bruin & Baldock, P.A. In 1983, he became a federal district judge in Albuquerque, New Mexico and was appointed to the United States Court of Appeals for the Tenth Circuit in 1985. In 1988, Judge Baldock received an Outstanding Judge Award from the State Bar of New Mexico.

JUDGE WADE BRORBY

Judge Brorby was born May 23, 1934 in Omaha, Nebraska. He was raised in Upton and Newcastle, Wyoming. Judge Brorby attended the University of Wyoming and received a B.S. in Business. He graduated with a J.D. with Honor from the University of Wyoming in 1958.

Judge Brorby served in the United States Air Force from 1958 to 1961. He engaged in the private practice of law in Gillette, Wyoming from 1961 to 1988. Judge Brorby was appointed to the United States Court of Appeals for the Tenth Circuit in 1988.

Judge Brorby served on the Uniform Laws Commission and was Chairman of the Wyoming Judicial Supervisory Commission. He has served on numerous Bar committees.

JUDGE DAVID M. EBEL

Judge Ebel was born in Wichita, Kansas in 1940 and grew up in Topeka, Kansas. He received his B.A. in economics from Northwestern University in 1962 and received his J.D. from the University of Michigan Law School in 1965, where he graduated first in his class. While at the University of Michigan Law School, he was elected to the Order of Coif, the Barrister Society, and he was Editor-in-Chief of the Michigan Law Review.

Judge Ebel then clerked for Justice Byron R. White of the United States Supreme Court during the 1965-66 term. From 1966 until 1988, he practiced as a trial lawyer with the Denver law firm of Davis, Graham & Stubbs. In 1988, Judge Ebel was appointed to the United States Court of Appeals for the Tenth Circuit.

Judge Ebel's civic activities include teaching Corporations as an adjunct professor at the University of Denver College of Law, teaching Professionalism and Ethics at Duke University School of Law, teaching the confirmation class at the St. James Presbyterian Church and participating in numerous Bar Association activities. He has served as vice-president of the Colorado Bar Association and is a fellow of the American College of Trial Lawyers, a senior judge of the Doyle Inns of Court, and a member of the Town & Gown Society.

JUDGE PAUL J. KELLY

Judge Paul J. Kelly, Jr. was born in Freeport, New York, in 1940. He received a B.B.A. in Economics and Finance from the University of Notre Dame in 1963 and his J.D. from Fordham University School of Law in 1967.

From 1968 to 1992, Judge Kelly engaged in a general litigation practice with the New Mexico law firm of Hinkle, Cox, Eaton, Coffield & Hensley. Judge Kelly served in the New Mexico House of Representatives from 1977 to 1981.

Currently, Judge Kelly is a member of the Board of Visitors of the Fordham University School of Law and serves as President of the Northern New Mexico American Inn of Court. Judge Kelly has been active in various Bar activities. He has served on a New Mexico Board of Bar Examiners, the New Mexico Appellate Judges' Nominating Commission, as a reviewing officer and Hearing Committee chair for the Disciplinary Board of New Mexico Supreme Court, as a member of the New Mexico Public Defender Board, the New Mexico State Personnel Board and as President of the Chaves County Bar Association. Judge Kelly was appointed

to the United States Court of Appeals for the Tenth Circuit in 1992.

JUDGE ROBERT H. HENRY

Judge Henry was born in Shawnee, Oklahoma on April 3, 1953. He received his B.A. in Political Science in 1974 and his J.D. in 1977, both from the University of Oklahoma.

After graduating from law school, Judge Henry opened a private law practice in Shawnee and served in the Oklahoma House of Representatives for five terms. In 1986, at the age of thirty-three, he was elected Oklahoma Attorney General, running unopposed for re-election in 1990. In 1991, he became Dean of the Oklahoma City University School of Law, where he taught in the areas of state and local government law and legislation.

Judge Henry served on numerous committees of the National Association of Attorneys General, including the Supreme Court Committee, which he chaired, and the State Constitutional Law Advisory Board. He is an American Bar Foundation Fellow, a Commissioner for Oklahoma on the National Conference of Commissioners on Uniform State Laws, and a member of the American Law Institute. Judge Henry has also served on numerous civic and educational boards including the Oklahoma Nature Conservancy, the Board of Visitors of the University of Oklahoma Press, and the Western History Collection of the University of Oklahoma. He has received the Conservationist of the Year Award from the Oklahoma Wildlife Federation, the Human Rights Award from the Oklahoma Human Rights Commission, and is a member of Phi Beta Kappa.

Judge Henry was appointed to the United States Court of Appeals for the Tenth Circuit in 1994.

JUDGE CARLOS F. LUCERO

Judge Lucero was born in Antonito, Colorado in 1940. He received his B.A. from Adams State College and his J.D. from George Washington University. In 1995, he was appointed to the United States Court of Appeals for the Tenth Circuit.

Judge Lucero clerked for Judge William E. Doyle of the District Court of Colorado for the 1964-1965 term. Prior to his clerkship, he was a staff aide for the United States Senate Judiciary Subcommittee on Administrative Practice and Procedure. He entered private practice in Alamosa, Colorado where he became a senior partner in the law firm of Lucero, Lester and Sigmund.

While in private practice, Judge Lucero served on the Colorado Supreme Court Board of Law Examiners, the ABA Action Commission to Reduce Court Cost and Delay, the advisory board to the ABA Journal, the ABA Committee on the Availability of Legal Services, and the CBA Ethics Committee. He also served on President Carter's Presidential Panel on Western State Water Policy, the Board of Directors of Colorado Rural Legal Services, the Colorado Historical Society and the Santa Fe Opera Association of New Mexico. In addition, he was president of the Colorado Bar Association in 1977-1978.

SENIOR JUDGE MONROE G. McKAY

Judge McKay was born in Huntsville, Utah, in 1929. He graduated from Brigham Young University in 1957 with high honors. Judge McKay then received his J.D. from the University of Chicago in 1960 and was the law clerk for Justice Jesse A. Udall of the Arizona Supreme Court for the 1960-61 term. From 1961 to 1974, Judge McKay practiced with the law firm of Lewis and Roca in Phoenix, Arizona; however, he did take a two year leave to serve as Director of the United States Peace Corps in Malawi, Africa. Judge McKay was a law professor at Brigham Young University from 1974 until 1977. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit. Judge McKay currently resides in Provo, Utah.

SENIOR JUDGE OLIVER SETH

Judge Seth was born in 1915 and grew up in Santa Fe, New Mexico. He received his A.B. degree from Stanford University in 1937 and his LL.B. from Yale University in 1940. During World War II he served as a Major in the U.S. Army and was decorated with the Croix de Guerre. In 1962, he was appointed to the United States Court of Appeals for the Tenth Circuit. He served as Chief

Judge from 1977 until 1984. In 1984, Judge Seth assumed senior status.

Judge Seth has served as director of the Santa Fe National Bank, chairman of the Legal Committee of the New Mexico Cattlegrowers' Association, Regent of the Museum of New Mexico and as a director of the Santa Fe Boy's Club.

SENIOR JUDGE WILLIAM J. HOLLOWAY, JR.

The son of a former Oklahoma governor, Judge Holloway was born in Hugo, Oklahoma in 1923 and later moved to Oklahoma City in 1927. During World War II, he served as a First Lieutenant in the Army. After the war, Judge Holloway returned to complete his undergraduate studies at the University of Oklahoma, receiving his B.A. in 1947. Judge Holloway then attended Harvard Law School, where he graduated in 1950.

In 1951 and 1952, Judge Holloway was an attorney with the Department of Justice in Washington, D.C. He subsequently returned to Oklahoma City and entered private practice. Judge Holloway was appointed to the United States Court of Appeals for the Tenth Circuit in 1968 and became Chief Judge in 1984. He is a member of Phi Beta Kappa and Phi Gamma Delta.

SENIOR JUDGE ROBERT H. McWILLIAMS

Judge McWilliams was born in Salina, Kansas, in 1916 and moved to Denver in 1927 where he has lived since. He received his A.B. and LL.B. degrees from the University of Denver. In 1971, he was awarded an Honorary Doctor of Law degree from the University.

During World War II, Judge McWilliams served in the United States Army and was with the Office of Strategic Services. He has served as a Deputy District Attorney and as a Colorado District Court Judge. In 1961, Judge McWilliams was elected to the Colorado Supreme Court where he served until he was appointed to the United States Court of Appeals for the Tenth Circuit in 1970. In 1984, he assumed senior status.

Judge McWilliams is a member of Phi Beta Kappa, Omicron Delta Kappa, Phi Delta Phi, and Kappa Sigma.

SENIOR JUDGE JAMES E. BARRETT

Judge Barrett was born in Lusk, Wyoming in 1922. He is the son of the late Frank A. Barrett, who served as Wyoming's Congressman, Governor and United States Senator. Judge Barrett attended the University of Wyoming for two years prior to his service in the Army during World War II. Following the war, he attended Saint Catherine's College at Oxford University and Catholic University of America and received his LL.B. from the University of Wyoming Law School in 1949. In 1973, he received the Distinguished Alumni Award from the University of Wyoming.

Judge Barrett was in private practice in Lusk, Wyoming for eighteen years. He also served as County and Prosecuting Attorney for Niobrara County, Town Attorney for the towns of Lusk and Manville and attorney for the Niobrara County Consolidated School District. From 1967 until 1971, Judge Barrett served as Attorney General for the State of Wyoming. In 1971, he was appointed to the United States Court of Appeals for the Tenth Circuit. In 1987, he assumed senior status.

Judge Barrett was a member of the Judicial Conference Subcommittee on Federal Jurisdiction, the United States Foreign Intelligence Surveillance Court of Review, and was a trustee of Saint Joseph's Children's Home.

SENIOR JUDGE JAMES K. LOGAN

Judge Logan was born in Quenemo, Kansas, in 1929. He received his B.A. from the University of Kansas in 1952 and was graduated *magna cum laude* from Harvard Law School in 1955. He became law clerk for United States Circuit Judge Walter Huxman and subsequently practiced with the Los Angeles law firm of Gibson, Dunn & Crutcher. Judge Logan became a professor at the University of Kansas Law School in 1957 and was selected in 1961 as Dean of that school. He served in that capacity until 1968. Since 1961, Judge Logan has been a visiting professor at Harvard Law School, the University of Texas Law School, Stanford University School of Law, and the University of

Michigan Law School. He lectures at Duke University Law School. He was a special commissioner for the United States District Court for the District of Kansas from 1964 until 1967 and was a candidate for the United States Senate in 1968.

Judge Logan is a Rhodes Scholar, a member of Phi Beta Kappa, Order of the Coif, Beta Gamma Sigma, Omicron Delta Kappa, Pi Sigma Alpha, Alpha Kappa Psi, and Phi Delta Phi, and has co-authored books and numerous articles on estate planning, administration and corporate law. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit.

A NOTE FROM THE EDITOR

This year I am excited to announce the formation of a new committee designed to assist the *Law Review* Editorial Board. The *Denver University Law Review* Alumni Advisory Board is comprised of alumni members of the *Law Review*. We thank the following members of the legal community who volunteered their time and energy for this *Survey*:

Leland P. Anderson
Herbert A. Delap
Jo Anna Goddard
Alan Hale
Jerry N. Jones
Leslie P. Kramer
Richard W. Laugesen
Marilyn McWilliams
Nancy I. Pertcheck
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Peggy Toal
Doris Truhlar
Christine Truitt
Sherri Way
Carol Welch
Thomas J. Wolf

In addition to traditional Survey topics, this edition of the *Annual Tenth Circuit Survey* contains two special features. First, a dialogue on judicial recusal between members of the *Law Review* and several Tenth Circuit judges follows the Survey on Professional Responsibility. It is my hope that this discussion provides the Tenth Circuit practitioner with a judicial perspective on recusal.

This Survey Edition also includes a detailed examination of the United States Supreme Court's controversial affirmative action decision in *Adarand Constructors, Inc. v. Pena*.[1] In *Adarand*, the Court abruptly departed from the previous standard by mandating strict scrutiny review of federal affirmative action programs. In recognition of the fact that this significant case originated in the Tenth Circuit, a review of *Adarand* begins this edition.

Kerri M. Pertcheck, Editor
THE TWENTY-SECOND ANNUAL TENTH CIRCUIT SURVEY

1. 115 S. Ct. 2097 (1995).

RAISE HIGH THE ROOF BEAM: *ADARAND CONSTRUCTORS, INC. V. PENA* AND THE NEW LEVEL OF SCRUTINY FOR FEDERAL AFFIRMATIVE ACTION

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.[1]

INTRODUCTION

The Supreme Court reviewed a significant Tenth Circuit decision during the 1994-95 survey period: *Adarand Constructors, Inc. v. Pena*.[2] *Adarand* addressed the issue of affirmative action;[3] specifically, the level of scrutiny appropriate for evaluating federal race-based programs. The Supreme Court vacated the Tenth Circuit's decision in *Adarand* and held that all racial classifications, whether imposed by federal, state, or local government, should be subject to "strict scrutiny."[4] This standard applies even if the program in question has a benign purpose[5] and requires that all government affirmative action programs[6] be narrowly tailored to serve a compelling government interest.[7]

The *Adarand* Court, however, failed to provide firm direction as to what measures government entities should take in order to serve these interests. This article traces the development of affirmative action jurisprudence and attempts to provide guidance for practitioners litigating government affirmative

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1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment, and dissenting in part).

2. 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

3. Affirmative action programs are rooted in the assumption that employers hire workers and contract for jobs within a framework reflecting long-standing patterns of discrimination and prejudice. To correct the resulting imbalances, employers must consider race or sex by endeavoring to hire and retain workers from groups which have suffered from past discrimination. Affirmative action programs are necessary in public contracting to assure that contracts are awarded to deserving parties, not merely favored ones. EQUAL RIGHTS ADVOCATES & SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS, THE AFFIRMATIVE ACTION HANDBOOK: HOW TO START AND DEFEND AFFIRMATIVE ACTION PROGRAMS 1 (Judith Kurtz et al. eds., 1992) [hereinafter THE HANDBOOK].

4. *Adarand*, 115 S. Ct. at 2113.

5. *See id.* In the context of affirmative action, a "benign" purpose refers to a remedial goal, such as attempting to remedy the effects of past discrimination, or to a non-remedial goal, where role models are provided for minorities, or to promote diversity. *Id.*

6. The law surrounding affirmative action distinguishes between programs for private entities and those implemented by government. The *Adarand* decision applies only to government employment. Courts require stricter standards for government employers than for private ones; however, private entities still need to follow guidelines in enacting an affirmative action plan. For practical guidance in this realm, see THE HANDBOOK, *supra* note 3; JAMES WALSH, MASTERING DIVERSITY: MANAGING FOR SUCCESS UNDER ADA & OTHER ANTI-DISCRIMINATION LAWS (1995).

7. *Adarand*, 115 S. Ct. at 2117.

action claims or advising government employers who wish to institute a permissible affirmative action plan in the wake of *Adarand.*

I. VOLUNTARY GOVERNMENTAL AFFIRMATIVE ACTION PLANS[8]

The Supreme Court's struggle with the heated topic of affirmative action[9] is apparent in the many plurality and majority opinions on this issue, which reflect a chronic lack of consensus within the Court. The *Adarand* decision represents a drastic change in the Court's treatment of affirmative action law.[10] In *Adarand,* the Court mandated that all racial classifications, whether imposed by federal, state, or local government, be analyzed under a strict scrutiny standard.[11] The ramifications of the decision are not yet clear. However, because all race-conscious programs must now serve a compelling governmental need, *Adarand* threatens to extinguish all but the most narrowly and carefully crafted race-based state and federal affirmative action programs.[12]

A. *The Pre-*Adarand *History of Affirmative Action*

The Court first treated the issue of affirmative action in *Regents of the University of California v. Bakke.*[13] *Bakke* involved an equal protection challenge to a state-run medical school's policy of reserving a certain number of spaces in the enrolling class for minority applicants.[14] Allan Bakke, a white

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8. Affirmative action law is divided into two sectors: court-ordered and voluntary. This article deals solely with voluntary plans. It should be noted that affirmative action is distinct from a quota system, for which it is often mistaken. Quota programs reserve a set number or percentage of positions for individuals in specific groups. The quota will be met whether or not the applicants are properly qualified. Individuals who are not a member of a specific group are ineligible to compete for reserved positions. Affirmative action plans, on the other hand, do not preclude any individual from competing for a position, but instead seek to increase the number of minority applicants through recruitment and outreach programs. These programs seek to ensure that all qualified job applicants are aware of employment possibilities. THE HANDBOOK, *supra* note 3, at 2.

9. The issue of affirmative action compels a strong emotional response in many. For viewpoints critical of affirmative action, see Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers,* 99 HARV. L. REV. 1312 (1986); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1; Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws,* 8 HARV. J.L. & PUB. POL'Y 627 (1985). For those speaking in favor of affirmative action, see T. Alexander Aleinikoff, *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060 (1991); Frances L. Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of An Identity Politician,* 59 TENN. L. REV. 593 (1992); Paul Brest, *The Supreme Court 1975 Term, Forward: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1 (1976); John H. Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974).

10. 115 S. Ct. 2097 (1995).

11. *Adarand,* 115 S. Ct. at 2113.

12. Despite Justice O'Connor's contention in *Adarand* that the Court wished to dispel the perception of strict scrutiny as "strict in theory, but fatal in fact," strict scrutiny is a formidable obstacle. *Id.* at 2117. The last time that a majority of the Court upheld a race-based classification under strict scrutiny was in 1944, in Korematsu v. United States, 323 U.S. 214 (1944). In that decision, the Court voted 6-3 to uphold an executive order, borne of a fear of sabotage, to temporarily exclude persons of Japanese ancestry from certain areas. *Id.* at 215-24.

13. 438 U.S. 265 (1978).

14. *Bakke,* 438 U.S. at 281. The admissions committee designated 16 places out of 100 for which only minority applicants could be eligible. *Id.* at 275-76.

male twice rejected by the University of California at Davis Medical School, alleged that he would have been admitted to the school under the special standards for minority admissions.[15] Justice Powell, writing for a plurality, ordered Bakke's admission to the program.[16] He rejected the university's contention that discrimination against a white majority cannot be viewed as such if it is remedial in nature.[17] He noted that classifications granting benefits on the basis of race would instill resentment in the individuals "burdened,"[18] and stressed the "inherent unfairness" of depriving "innocent persons of equal rights and opportunities."[19] The Court, however, also ruled that race could be a factor in the admissions process.[20] While emphasizing that a diverse student

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15. The university had a separate admissions committee largely composed of members of minority groups. *Id.* at 274. If, in 1973, an applicant answered "yes" to questions indicating that he wished to be considered "economically and/or educationally disadvantaged," or, in 1974, that he wished to be considered as a member of a minority group, the application was sent to a special admissions committee. *Id.* at 274-75. At this point, the application was screened to determine the validity of the claim. *Id.* If the applicant was eligible for the special admissions program, he was rated by a similar standard to the general admissions program, except that the grades of the special applicants were not required to meet the general applicants' 2.5 grade point average cutoff. *Id.* at 275. The special committee presented its top candidates to the general committee until the number of minority applicants that the faculty had agreed would be accepted were admitted. *Id.* at 274-75. During the two years for which Bakke was denied admission to the medical school, minority applicants were admitted who had significantly lower grades or Board scores than Bakke. *Id.* at 277.

16. *Id.* at 320.

17. *Id.* at 294. In so holding, Justice Powell first articulated a theme which would run through later cases and prove pivotal in *Adarand*: that affirmative action programs, although benign in purpose, have the impact of exacting discrimination against whites and must, therefore, be subject to the same standards as classifications imposing traditional discrimination.

18. *Id.* at 295 n.34.

19. *Id. Bakke* makes apparent the concept of white "entitlement." Many commentators have perceived this notion and its ramifications regarding affirmative action programs. As one commentator critically commented, "Any remedy for past discrimination must not be too costly to whites. So-called 'innocent' whites may not be made to pay the penalty for past injustices." Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1144 (1993). For another analysis of the concept of white "entitlement" in *Bakke* and other decisions, see D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 486 (1993) (stating that the constitutional question in *Bakke* was merely a ruse to strip minorities and their advocates of both the medical school's affirmative action program and the true concept of affirmative action by redefining it to mean reverse discrimination); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1767 (1993) (noting the irony of the Court's use of the Equal Protection Clause to protect benefits for whites with an eye toward their "established expectations," despite the Clause's original purpose: to secure equality for African-Americans and renounce race-based and race-conscious measures as unconstitutional).

20. *Bakke*, 438 U.S. at 296 n.36. The Court stated that race or ethnic background could be "deemed a 'plus'" in the applicant's file, just as would any other traditional factors such as "exceptional personal talents, unique work or service experience, leadership potential" or "a life spent on a farm." *Id.* at 316-17. One commentator stated:

> Justice Powell here was deeply wrong; the daily experience of being a member of a stigmatized minority is not equivalent to a summer job or an ability to play the piano . . . . Justice Powell reduced race to a plus factor in order to make it "fit in" with the existing decision-making procedures of the university. Race is brought down to the level of work experience because that is a level with which the institution is familiar; race consciousness is only acceptable if it can be envisioned as a normal "factor" akin to those used in the usual institutional procedures.

Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 942-43 (1995).

body was a sufficiently compelling goal for an institution of higher learning,[21] the Court objected to the strict allotment of spaces by race.[22] Notably, the Court also found that remedying the disabling effects of identified prior discrimination was a fitting justification for an affirmative action program, despite the fact that the university did not present this argument.[23]

Two years after the *Bakke* decision, the Court revisited the issue of race-based classifications in *Fullilove v. Klutznick*.[24] Unlike *Bakke*, *Fullilove* involved a federal program; namely, the "Minority Business Enterprise" (MBE) provision of the Public Works Employment Act of 1977. In *Fullilove*, an association of construction contractors and subcontractors instituted an action seeking a preliminary injunction to prevent enforcement of the MBE.[25] Writing for the plurality, Chief Justice Burger upheld the provision as an exercise of Congress's spending power[26] and commerce power.[27] The Court held that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress."[28]

The *Fullilove* Court found that the MBE program was "narrowly tailored" to accomplish Congress's goal of remedying past discrimination in public works projects.[29] Chief Justice Burger explicitly declined to apply a labeled standard of review, saying instead that racial classifications must receive a "most searching examination."[30] He further noted that while the Court did not adopt the standards from *Bakke*, the provision in question would survive review under either test discussed in *Bakke*.[31]

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21. The Court in *Bakke* recognized diversity as a "compelling goal," despite the fact that it did not uphold the program. *Bakke*, 438 U.S. at 311-12, 314.

22. *See id.* at 311. The university attempted to distinguish their "special admissions" program from a quota system by saying that no true number was set for minority acceptees. *Id.* at 288. The university asserted that it would not accept an unqualified applicant merely to meet a quota, nor would it cap the number of minority students by limiting the number admitted under general admission standards. *Id.* at 288 n.26. The Court called the distinction "semantic," stating that whether termed a goal or quota, the program still amounted to a line drawn on the basis of race or ethnicity. *Id.* at 289.

23. *Id.* at 307. The Court emphasized that racial and ethnic classifications must be "precisely tailored to serve a compelling government interest," the exact definition of strict scrutiny. *Id.* at 299. Four Justices in *Bakke* (Brennan, White, Marshall, & Blackmun), however, argued for a less stringent standard of review for racial classifications "designed to further remedial purposes." *Id.* at 359. These Justices suggested intermediate scrutiny as the proper test for race-conscious remedies. *Id.* at 362.

24. 448 U.S. 448 (1980). For an analysis of *Fullilove*, see Sofia Adrogue, *When Injustice Is the Game, What Is Fair Play?*, 28 HOUS. L. REV. 363, 369-76 (1991); Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1987).

25. *Fullilove*, 448 U.S. at 448, 455. The act required that, absent an administrative waiver, states use at least 10% of the federal funds granted for local public works projects to procure goods or services from minority owned businesses. *Id.* at 448.

26. *Id.* at 473-78.

27. *Id.* at 475-78.

28. *Id.* at 483. The Court further observed that Congress possesses "broad powers" to remedy the results of past discrimination. *Id.* at 478. Congress also need not compile a record or present findings; the Court was "well satisfied" that Congress had an "abundant historical basis" from which to judge the existence of a nationwide problem. *Id.*

29. *Id.* at 487-88. The program provided for a waiver and exemption and was limited in extent and duration. *Id.*

30. *Id.* at 491.

31. The program would, therefore, have been upheld under strict or intermediate review. *Id.*

Several years later, in *Wygant v. Jackson Board of Education*,[32] the Court examined the types of past discrimination that could justify an affirmative action program.[33] The Court struck down a collective bargaining agreement extending layoff protection to minority teachers, while denying the same benefit to white teachers with more seniority.[34] The plurality reached this decision by applying a strict scrutiny standard and finding that the school board's goal of providing role models for minority students was not "narrowly tailored" and did not meet a "compelling government interest."[35]

Justice O'Connor, in her concurrence in *Wygant*, agreed that remedying "societal" discrimination did not constitute a compelling state interest.[36] She then noted the detrimental effect of requiring illegal discrimination as a prerequisite to an affirmative action program.[37] Such a requirement would severely undermine government employers' incentive to voluntarily meet their civil rights obligations.[38] Finally, Justice O'Connor provided tangible guidance as to what acts of prior discrimination would be sufficient to support the enactment of an affirmative action program.[39] She rejected the school board's assertion that the difference between the number of minority students in the school and the number of minority teachers employed by the school could be evaluated for discriminatory practices.[40] Instead, she asserted that an "inference of deliberate discrimination in employment" is permissible only when the proven availability of minorities in the relevant labor pool "substantially exceeded those hired."[41] Such an inference may provide a compelling basis

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at 492. In a concurring opinion, Justices Brennan, Marshall, and Blackmun repeated their assertion in *Bakke* that intermediate scrutiny was the applicable level of review for a remedial program. *Id.* at 519. Justices Stewart and Rehnquist dissented, arguing that the set-aside program was unconstitutional. They asserted that the "Constitution is colorblind" and that the "decision is wrong for the same reason that *Plessy v. Ferguson* was wrong." *Id.* at 522-23.

32. 476 U.S. 267 (1986).

33. *Wygant*, 476 U.S. at 270. Once again, the Court failed to unite in a majority opinion. As in *Bakke*, Justice Powell authored the plurality opinion. *Id.*

34. *Id.*

35. In fact, the Court said that the role-model objective, that black students are in a better position when taught by black teachers, could actually work to legitimize discriminatory employment practices by encouraging the use of low African-American enrollment figures to justify a "corresponding" dearth of African-American teachers. The Court further stated that the role-model theory creates a situation analogous to that rejected in *Brown v. Board of Education* when "carried to its logical extreme." *Id.* at 276.

First, the Court found that remedying societal discrimination did not amount to a compelling government interest. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276-78. Instead, Justice Powell insisted that the particular institution implementing the affirmative action program must show that it committed discrimination in the past to justify the layoff inequalities. *Id.* at 274-75. Second, the Court held that the layoff plan was not narrowly tailored; less restrictive means were available to achieve the same goal, so the program could not withstand strict scrutiny. *Id.* at 280 n.6. The Court, however, carefully distinguished *Wygant* from cases which involved hirings: "though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282.

36. *Id.* (O'Connor, J., concurring).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 294.

41. *Id.*

for an employer to execute a voluntary affirmative action plan in order to remedy discernible prior employment discrimination.[42]

In *Richmond v. J.A. Croson*,[43] the Court finally achieved a majority opinion and determined that strict scrutiny provided the appropriate standard of review when analyzing state and local government programs.[44] Additionally, the Court provided further insight into the type of statistical evidence of past discrimination necessary to meet the "compelling government interest" standard.[45] The city of Richmond, Virginia adopted a Minority Business Utilization Plan requiring prime contractors to subcontract at least 30% of city construction contracts to "Minority Business Enterprises."[46] The city argued that the program was constitutional under the justifications expressed in *Fullilove*.[47] The Court held, however, that the Equal Protection Clause of the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments, without regard to the purpose of the statute.[48] Justice O'Connor, writing for the majority, distinguished *Fullilove* as a federal program, and thus exempt from strict scrutiny.[49]

Croson represented the first time that a majority of the Court agreed that a race-based affirmative action measure must be evaluated under strict scrutiny. The Court held that while states and localities may take remedial action upon a finding that their practices led to discrimination, they must also identify the discrimination with "some specificity" before adopting an affirmative action program.[50] The majority stated that the city failed to establish proof of discrimination sufficient to constitute a compelling government interest.[51] The Court found that reliance on general past discrimination did not amount to a compelling interest,[52] and rejected the city's statistical argument that while the city's population was over 50% black, minorities received only .67% of the city's construction contracts.[53] As in *Wygant*, however, the *Croson* Court was not without advice as to the type of statistical evidence relevant to a successful claim of past discrimination. It stated that disparities between minority participation in a particular industry and the percentage of minorities qualified in the skills to compete in that industry could be probative of discrimination.[54]

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42. *Id.* at 292.

43. 488 U.S. 469 (1989). For an in-depth treatment of *Croson*, see Jennifer M. Bott, *Affirmative Action from* Bakke *to* Croson: *The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845 (1990); Dianne E. Dixon, *The Dismantling of Affirmative Action Programs: Evaluating* City of Richmond v. J.A. Croson Co., 7 N.Y.L. SCH. J. HUM. RTS. 35 (1990); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990).

44. *Croson*, 488 U.S. at 499-500.

45. *Id.*

46. *Id.* at 469.

47. *Id.* at 489.

48. *Id.* at 490-91, 493-94.

49. *Id.* at 489.

50. *Id.* at 504.

51. *Id.* at 505.

52. *Id.* at 497-98.

53. *Id.* at 479-80, 499.

54. *Id.* at 501. The Court intimated that a proper statistical evaluation in this case would be a comparison of the number of MBEs in Richmond qualified to accept city subcontracting work

Justice O'Connor was careful to distinguish *Fullilove* from the similar "set-aside" program in *Croson* by drawing heavily on the "unique remedial powers of Congress."[55] She noted that Congress, unlike the states, had a specific mandate to enforce the Fourteenth Amendment.[56] This enforcement power incorporates the power to "define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[57] Thus, the Court's analysis in *Croson* turned on the nature of the governmental body enacting the regulation.

In *Croson*, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, noted that congressionally enacted racial preferences raise discrete issues,[58] implying that the standard of review for a federal program differed from that involving a state or local government. One year later, the Court gave effect to this concept in *Metro Broadcasting, Inc. v. FCC*.[59] *Metro Broadcasting* involved a challenge to a congressional mandate that the FCC give preference to minorities when awarding licenses for radio and television stations.[60] In this case, the Court applied an intermediate standard of review and held that the FCC's minority preference policy did not violate the equal protection component of the Fifth Amendment.[61] The Court found "overriding significance" in the fact that the programs were mandated by Congress.[62] Furthermore, the Court found that benign race-conscious measures required by

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with the percentage of city construction funds awarded to minority subcontractors. *Id.* at 502.

55. *Id.* at 488.

56. *Id.* at 490.

57. *Id.* The dissent in *Croson* found Richmond's set-aside program indistinguishable from the program upheld in *Fullilove*. *Id.* at 535 (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.). They argued for a more lenient standard of review, namely, the intermediate standard they had proposed in *Bakke*. *Id.* (citing *Bakke*, 438 U.S. at 359). The dissent contended that this intermediate standard was met in *Croson* by the city's twin objectives of "eradicating the effects of past discrimination" and of "preventing [its] own spending decisions from reinforcing and perpetuating the exclusionary effects" of the discrimination. *Id.* at 536-37. After considering the evidence provided to the city council and Congress's findings as outlined in *Fullilove*, the dissent, using the majority's own language, established the existence of a "'strong,' 'firm,' and 'unquestionably legitimate' basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response." *Id.* at 540.

58. *Id.* at 490.

59. 497 U.S. 547 (1990), *overruled by* 115 S. Ct. 2097 (1995). For an in-depth look at *Metro Broadcasting*, see generally Michel Rosenfeld, Metro Broadcasting v. FCC: *Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583 (1991) (discussing the difficulty of reconciling previous affirmative action cases); Patricia Williams, Metro Broadcasting v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

60. *Metro Broadcasting*, 497 U.S. at 552.

61. *Id.* at 564-65.

62. *Id.* at 563. The Court held that minority ownership policies were "substantially related" to the achievement of a legitimate government interest in broadcasting diversity. *Id.* at 566. Justice Brennan, relying on *Fullilove*, stated that the FCC policy did not constitute a quota and did not impose an undue burden on nonminorities because the program involved only a limited number of licenses. *Id.* at 598-99. Justice O'Connor, in her *Metro Broadcasting* dissent (and subsequently in *Adarand*), contradicted her contention in *Croson* that congressional programs deserve to be distinguished from those administered by states and localities. She argued that, under *Croson*, strict scrutiny must be applied to the FCC policy. *Id.* at 603 (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting). She attacked remedial policies, such as the one in question, as endorsing race-based reasoning and dividing the country into stigmatized groups, encouraging racial hostility and conflict. *Id.* at 604.

Congress were constitutionally permissible even if not "'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination."[63] This distinction was significant, as the Court ultimately recognized broadcasting diversity as a compelling non-remedial goal. Although the Court had previously recognized diversity as a compelling goal in *Bakke*, *Metro Broadcasting* was the first, and only, affirmative action case in which the court upheld a program seeking to promote a non-remedial goal.

B. *Summary of the State of Affirmative Action Law Prior to* Adarand

Before *Adarand*, the Court's focus was on the distinction between federal and state programs. The Court had never before applied strict scrutiny to an affirmative action program adopted by Congress or failed to uphold such a program. *Fullilove* and *Metro Broadcasting* controlled Congressional actions; *Croson* governed state and local programs. Federal programs received intermediate review; the Court subjected state and local programs to strict scrutiny. The Court recognized that remedying the effects of past discrimination constituted a "compelling government interest," and acknowledged that a non-remedial goal could meet that objective. The *Bakke* Court explicitly held that a diverse student body was a compelling goal for an institution of higher learning.[64] In *Metro Broadcasting*, when it upheld the FCC's goal of promoting

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63. *Id.* at 564-65.

64. The Court has never overruled this concept, and under *Bakke*, diversity remains a compelling interest in the setting of higher education. This holding, however, is in jeopardy due to recent opinions emerging from the Fourth and Fifth Circuit Courts of Appeals. In *Podberesky v. Kirwan*, the Fourth Circuit held that the University of Maryland denied a student of Hispanic and white origin equal protection of the laws by denying him consideration for a scholarship open only to African-American students. Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). The university maintained that the scholarship program was necessary to combat the enduring effects of a long history of past discrimination against African-American students. *Id.* at 152. The Fourth Circuit found evidence of present effects of past discrimination at the university insufficient to support the program. *Id.* at 153-54. In necessitating *present* effects, the circuit court is expanding the requirements; the Supreme court requires only a finding of past discrimination to justify the application of a race-based measure. *Id.* The requirement of present effects had previously been advanced by Justice Scalia in his *Croson* concurrence. *Croson*, 488 U.S. at 520. The Supreme Court denied certiorari, allowing the decision to stand, and to be the controlling standard in the Fourth Circuit.

The Fifth Circuit, in *Hopwood v. Texas*, invalidated the University of Texas' Law School admissions program, which provided for special admissions standards for minorities. Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996), *cert. denied*, No. 95-1773, 1996 WL 227009 (U.S. July 1, 1996). The court denied that *Bakke* controlled the issue, and instead relied on *Adarand*. *Id.* at 944. In doing so, the court reviewed the program under a strict scrutiny standard and held that the need for diversity in a university student body can never be a compelling reason to impose racial classifications. *Id.* at 948. The *Hopwood* court held that race can never be used as a factor in admissions, not even as the "plus" factor enunciated in *Bakke*. *Id.* While the use of race was not permitted, a university

> may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. . . . Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.

Id. at 946. The university has decided that the ruling applies not only to admissions, but to financial aid, scholarships, and fellowships. Renae Merle, *Morales: On* Hopwood, *Wait for the Court*, DAILY TEXAN, Apr. 9, 1996, at 1. On July 1, 1996, the United States Supreme Court denied cer-

broadcasting diversity, the Court recognized diversity as an important government interest.[65] The Court did not explicitly address, however, whether the concept of diversity as a constitutionally permissible goal of an affirmative action plan reaches beyond the context of the broadcasting and university settings.

II. *ADARAND CONSTRUCTORS, INC. v. PENA*[66]

A. *Facts and Procedural History*

The Small Business Act (SBA) provides government contractors with financial incentives to employ "disadvantaged business enterprises" (DBEs) as subcontractors. According to § 637(d) of the SBA, a DBE is at least 51% owned and controlled by individuals who are socially and economically disadvantaged.[67] Members of certain minority racial and ethnic groups,[68] as well as women, are presumed socially and economically disadvantaged.[69]

In accordance with the Act, the Federal Lands Highway Program (FLHP) effected the Subcontracting Compensation Clause (SCC), which provided contractors with an incentive payment of up to 1.5% of the original contract value if they hired DBE subcontractors.[70] FLHP awarded Mountain Gravel Construction Company (Mountain Gravel) a federal highway contract.[71] Adarand Constructors, Inc. (Adarand), a white-owned subcontractor, not recognized as a DBE, applied to build the guard rail portion of the project.[72] Mountain Gravel chose a subcontractor who submitted a higher bid but was a certified DBE, thereby entitling Mountain Gravel to a $10,000 incentive payment.[73]

Adarand sued the government, asserting that the FLHP's policy of offering financial incentives to contractors who hired DBE subcontractors violated the Equal Protection Clause.[74] The United States District Court for the

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tiorari, thereby declining the opportunity to reconsider the *Bakke* decision, at least for now.

65. Because the *Metro Broadcasting* Court upheld the legitimacy of the goal of broadcast diversity under the intermediate standard, it remains unsettled whether this is a "compelling goal" under strict scrutiny.

66. 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

67. 15 U.S.C. § 637(d) (1994). The act defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* § 637 (a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637 (a)(6)(A).

68. These socially and economically disadvantaged individuals include: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* § 637(d)(3)(c) (1994).

69. This presumption is rebuttable under DBE criteria. *See Adarand*, 16 F.3d at 1541.

70. *Id.* at 1540.

71. *Id.* at 1541.

72. *Id.* at 1542.

73. *Id.* at 1541-42.

74. *Id.* at 1542.

District of Colorado granted summary judgment in favor of the government, and Adarand appealed.[75]

B. *Tenth Circuit Decision*

The Tenth Circuit unanimously affirmed the lower court's decision, holding the challenged policy constitutional.[76] The court relied on *Fullilove*[77] to support its decision, citing *Fullilove* for the proposition that Congress properly acts within its "broad powers under the Commerce Clause and § 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry."[78]

The court held that, under *Fullilove*, courts "must apply a lenient standard, resembling intermediate scrutiny" to federal affirmative action programs.[79] It was careful to distinguish *Croson's* application of the "strict scrutiny" standard for state and local programs.[80]

The Court of Appeals found significance in the fact that the challenged program did not require contractors to participate in the program and did not set precise DBE goals.[81] Rather, the contractor had the "option, not the obligation" to choose a DBE subcontractor.[82] Because the "program induces, rather than compels" contractors to select DBE subcontractors, the court found that it did not violate equal protection.[83]

C. *Supreme Court Decision*[84]

1. Majority Opinion

The Supreme Court vacated the judgment and remanded the case to the Tenth Circuit.[85] Although the Court did not dismantle the challenged

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75. *Id.* at 1539, 1542. The district court rejected Adarand's argument that the program must be subjected to strict scrutiny under the standards set out in *Croson*, and held that *Metro Broadcasting* and *Fullilove* should control. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 244 (D. Colo. 1992). The court found that in *Adarand*, as in *Fullilove*, Congress had "abundant historical basis" to support the challenged program. *Id.* The district court also found the program sufficiently narrowly tailored to serve Congress's important objectives. *Id.*

76. *Adarand*, 16 F.3d at 1547.

77. *Id.* at 1543 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)); *see* discussion *supra* notes 24-31 and corresponding text.

78. *Adarand*, 16 F.3d at 1543-44.

79. *Id.* at 1544. The court recognized that *Metro Broadcasting* also called for intermediate scrutiny of federal programs. *Id.* at 1545 n.12.

80. *Id.* at 1545 ("The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities.").

81. *Id.* at 1547.

82. *Id.*

83. *Id.*

84. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

85. Justice O'Connor filed the opinion joined by Justice Kennedy; Justices Scalia and Thomas filed opinions concurring in part and concurring in the judgment; Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined; Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined; Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined.

program, the decision clearly leveled an overwhelming blow to federal affirmative action programs. The Court held that all racial classifications, whether imposed by federal, state, or local government, must be analyzed under a strict scrutiny standard.[86] In doing so, the Court relied heavily on its decision in *Richmond v. J.A. Croson*, extending the standard it adopted for states and localities to the federal government.[87]

The Court began the opinion with a review of its decisions leading up to *Adarand*. As previously discussed, the Court in *Croson*[88] held that the Fourteenth Amendment requires strict scrutiny of all raced-based action by state and local governments. While conceding that *Croson* did not determine the level of review required by the Fifth Amendment for federal race-based action, the *Adarand* Court held that certain tenets relating to this issue had been previously decided by the Court in the cases leading up to *Croson*:[89]

> First, skepticism: "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,"[90]. . . [s]econd, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,"[91]. . . third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[92]

The Court merged these three propositions and concluded that any person, regardless of race, who is exposed to inequality by a government classification based on race is entitled to have the government substantiate this classification under strict scrutiny.[93]

The Court then addressed the previous case inconsistent with the new standard enunciated in *Adarand*: *Metro Broadcasting v. FCC*.[94] Faced with a directly opposing opinion, the *Adarand* Court decided that *Metro Broadcasting's* analysis was flawed.[95] Attacking its own opinion, penned merely five years earlier, the Court found that *Metro Broadcasting* erroneously rejected *Croson's* insistence that strict scrutiny review of government classifications is necessary.[96] Furthermore, the Court faulted *Metro Broadcasting* for

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86. *Adarand*, 115 S. Ct. at 2113.

87. See *supra* notes 43-58 and accompanying text for a discussion of *Croson*.

88. 488 U.S. 469 (1989).

89. *Croson*, 488 U.S. at 493.

90. *Adarand*, 115 S. Ct. at 2111 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986)).

91. *Id.* (quoting *Croson*, 488 U.S. at 494).

92. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

93. *Id.*

94. 497 U.S. 547 (1990) (upholding two federal race-based policies against an Equal Protection challenge by stating that congressionally mandated benign classifications are subject to intermediate scrutiny), *overruled by* 115 S. Ct. 2097 (1995). For a full discussion of *Metro Broadcasting*, see *supra* notes 59-63 and accompanying text.

95. *Adarand*, 115 S. Ct. at 2111-13.

96. *Id.* at 2112 (quoting *Croson*, 488 U.S. at 493) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."). While Justice O'Connor expounds on this

rejecting the tenet that "congruence" should exist between the criteria relevant to "federal and state racial classifications."[97]

To the *Adarand* majority, *Metro Broadcasting* undermined the principle that the Fifth and Fourteenth Amendments exist to "protect persons, not groups."[98] The *Adarand* Court concluded that strict scrutiny should thus be required for all group classifications, including race, whether imposed by state, local, or federal government.[99] The Court then explicitly overruled *Metro Broadcasting* to the extent that the case is inconsistent with the *Adarand* holding.[100]

The Court in *Adarand* declared that all "federal racial classifications," like state and local classifications, "must serve a compelling government interest and must be narrowly tailored to further that interest."[101] Although the Court refused to concede that *Fullilove* called for a standard below strict scrutiny, it eliminated any potential ambiguity by stating that if *Fullilove* held those classifications to a less rigid standard, "it no longer controll[ed]."[102]

The majority maintained that the strict scrutiny standard of review guarantees that courts will consistently give racial classifications careful examination.[103] The Court tempered this, however, by asserting that it wished to eliminate the perception that "strict scrutiny is strict in theory, fatal in fact."[104] The Court concluded by remanding the case to the Tenth Circuit for further consideration, in light of the fact that *Adarand* "alters the playing field in some important respects."[105] Specifically, the Tenth Circuit had not addressed whether the interests served by the subcontracting compensation clauses were compelling and whether the program was sufficiently narrowly tailored.[106]

2. Concurring Opinions

Justice Scalia concurred in part and concurred in the judgment. He departed from the majority, however, by arguing that the government never possesses a "compelling" interest in classifying individuals on the basis of race in order to "make up" for a discriminatory past.[107]

Justice Thomas also concurred in part and concurred in the judgment. He agreed with the majority's conclusion that strict scrutiny applies to all race-

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theory at length in *Adarand*, she touches on it only briefly in *Croson*. *Croson*, 488 U.S. at 493.

97. *Adarand*, 115 S. Ct. at 2111-13.
98. *Id.* at 2112.
99. *Id.* at 2113.
100. *Id.*
101. *Id.* at 2117.
102. *Id.*
103. *Id.*
104. *Id.* (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring)).
105. *Id.* at 2118.
106. *Id.*
107. *Id.* (Scalia, J., concurring). Justice Scalia contended that a system of racial entitlement, even with noble purposes, "reinforce[s] and preserve[s] for future mischief the way of thinking that produced race slavery, race privilege, and race hatred." *Id.* at 2119.

based governmental classifications.[108] He wrote separately, however, to attack Justice Stevens's and Justice Ginsburg's dissents, which in his view maintained "a racial paternalism exception to the principle of equal protection."[109] Justice Thomas argued that laws intending to oppress a race and those intending to provide "benefits on the basis of race" are of "moral and constitutional equivalence."[110]

3. Dissenting Opinions

Justice Stevens authored a dissent, in which Justice Ginsburg joined. Justice Stevens stated that, "instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications."[111] He rejected the majority's notion that no "meaningful difference" exists between the determination to place a special burden on a minority and the determination to confer a benefit upon individual members of a minority.[112] Stevens argued that no "moral or constitutional equivalence" exists between the concepts of discrimination and affirmative action.[113] He accused the Court of adopting a policy which "would disregard the difference between a 'No Trespassing' sign and a welcome mat;" one which would fail to see the disparity between a policy that rendered "black citizens ineligible for military service" and one intended to recruit black servicemen.[114]

Justice Stevens next attacked the majority's concept of "congruence," asserting that it overlooked fundamental differences between the legislative bodies enacting the programs.[115] He argued that *Metro Broadcasting*, *Fullilove*, and *Croson* all raise crucial differences between federal and state programs,[116] and questioned the Court's silence as to the "sudden and enormous departure from the reasoning in past cases."[117]

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108. *Id.* (Thomas, J., concurring).

109. *Id.*

110. *Id.* Affirmative action programs, he averred, "stamp minorities with a badge of inferiority" and may induce them to believe "that they are 'entitled' to preferences." *Id.* Finally, he termed "discrimination based on benign prejudice . . . just as noxious as discrimination inspired by malicious prejudice." *Id.*

111. *Id.* at 2120 (Stevens, J., dissenting).

112. *Id.*

113. *Id.* He argued that the two reflect competing impulses; one seeks to foster a class structure, the other equality. *Id.*

114. *Id.* at 2121. Justice Stevens seemed to subtly ridicule the majority's contention that courts will not be able to differentiate between "invidious" and "benign" discrimination: "But the term 'affirmative action' is common and well-understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad." *Id.* He also admonished the majority's holding that remedial classifications and discrimination are equivalent and should not be upheld "in the name of 'equal protection.'" *Id.* at 2122.

115. *Id.*

116. *Id.* at 2124.

117. *Id.* at 2125. Justice Stevens further criticized the majority's failure to adhere to stare decisis in its treatment of *Fullilove* and *Metro Broadcasting*, saying that the majority ignored the power of binding precedent. *Id.* at 2131. He noted that *Metro Broadcasting* was overruled only as far as its use of intermediate scrutiny, and, therefore, its holding that diversity may constitute a sufficient government interest to warrant a nonremedial race-based program remains in force. *Id.* at 2127.

Justice Souter wrote a second dissent, and was joined by Justices Ginsburg and Breyer. Justice Souter argued that stare decisis compels adherence to *Fullilove*.[118] Additionally, he observed that the majority opinion in *Adarand* does not suggest a real change in the Court's traditional view of Congress's § 5 powers as "broad," "unique," and "unlike [those of] any state or political subdivision."[119]

Justice Ginsburg authored the third dissent, joined by Justice Breyer. She argued that since Congress was already handling the subject of affirmative action, no compelling reason existed for the Court's intervention on the issue.[120] Justice Ginsburg agreed with Justice Stevens's contention that Congress deserves great deference from the judiciary. Additionally, she recounted the long history of discrimination against racial minorities in this country.[121]

4. Analysis

Adarand radically alters the landscape of affirmative action law. Prior to this decision, the Court had never before applied strict scrutiny to a remedial race-conscious program adopted by Congress. By requiring strict scrutiny review for all racial classifications imposed by federal, state, or local governments, the decision promises to end all but the most "narrowly tailored" federal, state, and local affirmative action programs.

Perhaps the most disturbing facet of the Court's decision is the guise under which the Court imposed its mandate. The Court asserted that strict scrutiny is necessary because only under such heightened review does it become clear whether the program in question seeks to advance minorities or oppress them. In *Adarand*, the Court constructively terminated a policy designed to foster equality, while attempting to do so in a favorable light, with fairness as its guiding principle. As the dissent recognized, however, the majority's sudden concern for a lower court's inability to differentiate between good and bad intentions is little more than a transparent pretext with which to put an end to all race-based measures.

The Court erred in several other respects by vacating the Tenth Circuit's decision. First, the Court adopted the theory of "congruence," asserting that equal protection analysis should be identical under either the Fifth or the Fourteenth Amendment. In doing so, it ignored the fundamental difference between the federal government and the states; a distinction which previous Courts had outlined so laboriously.[122]

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118. *Id.* at 2132 (Souter, J., dissenting).

119. *Id.* at 2133.

120. *Id.* at 2134 (Ginsburg, J., dissenting). Specifically, Justice Ginsburg noted that she would not interfere with the programs at issue in *Adarand*, and "would leave their improvement to the political branches." *Id.* at 2136.

121. *Id.* ("Congress surely can condone that a carefully designed affirmative action program may help realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868.").

122. *Id.* at 2127 (Stevens, J., dissenting) ("Although members of today's majority trumpeted the importance of that [federal-state dichotomy] distinction in *Croson*, they now reject it in the name of 'congruence.'"). Justice Stevens makes a valid point: in *Croson*, as in *Adarand*, Justice Scalia and Chief Justice Rehnquist were aligned with Justice O'Connor, who, in authoring *Croson*,

In fact, throughout *Adarand's* majority opinion, Justice O'Connor flatly contradicts what she previously stated in *Croson*. In *Croson*, she relied upon the distinction between Congress and state governments in holding that state programs should be subject to a strict scrutiny standard: "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific Constitutional mandate to enforce the dictates of the Fourteenth Amendment."[123] Additionally, her *Croson* opinion relied heavily on Chief Justice Burger's *Fullilove* opinion, expounding at length on Congress's competence to properly employ race-conscious remedial relief.[124] In failing to distinguish the congressional program at issue in *Adarand* from the city program in *Croson*, Justice O'Connor abandons a principle fundamental to constitutional jurisprudence: the distinction between state and federal government.

Congressional programs should be treated differently than those adopted by states and localities. Congress merits appropriate deference from the judiciary as to race-based measures because of its "specifically delegated powers."[125] Congress derives its authority from several sources. First, Congress possesses "institutional competence as the National Legislature."[126] The Constitution also grants Congress powers through the Spending Clause,[127] the Commerce Clause,[128] and the enforcement clauses of the Civil War Amendments.[129] Furthermore, Congress is a co-equal branch, and the Court is bound to give Congress's decisions "great weight."[130] These powers justify judicial deference to measures adopted by Congress that are not granted to those designated by states or localities.

The Court further erred in asserting that, by overruling *Metro Broadcasting*, it was not making new law, but merely restoring the law to its former status. In *Fullilove*, prior to *Metro Broadcasting*, the Court spoke on the

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had focused on the difference between state and federal programs. Justice Rehnquist did not write a separate opinion in either case. Justice Scalia, concurring in the *Croson* judgment, wrote, "A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Croson*, 488 U.S. at 522. Kennedy, on the other hand, while concurring in the judgment, stated that congressional programs should be subject to strict scrutiny:

> The process by which a law that is an equal protection violation when it is enacted by a state becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case.

Id. at 518.

123. *Croson*, 488 U.S. at 490.

124. *Id.* at 487-88.

125. *Fullilove*, 448 U.S. at 473.

126. *Metro Broadcasting*, 497 U.S. at 563.

127. U.S. CONST. art. I, § 8; *see Fullilove*, 448 U.S. at 474.

128. Article I, Section 8, Clause 3 of the Constitution provides Congress with authority to "regulate any activity that has a 'real and substantial relation to the national interest.'" Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964).

129. These Amendments "worked a dramatic change in the balance between congressional and state power over matters of race. . . . 'They were intended to be what they really are, limitations of the powers of the States and enlargements of the power of Congress.'" *Croson*, 488 U.S. at 490 (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

130. *Fullilove*, 448 U.S. at 472.

question of the applicable standard of review for a federal affirmative action program and specifically chose not to apply strict scrutiny.

Although the *Fullilove* Court chose not to impose a label on the standard employed, it upheld a program on a standard plainly less severe than strict scrutiny;[131] in fact, Justice Burger took great pains to avoid the term.[132] By denying that *Adarand* represents a vast departure from existing law, the Court indulges in a flimsy rationalization for a result-driven opinion.

III. PRACTICAL RAMIFICATIONS OF *ADARAND*

A. *Introduction*

Adarand promises to have far-reaching repercussions. While the Clinton administration publicly lauded affirmative action in the weeks following *Adarand*,[133] the administration simultaneously called for an immediate review of all federal agencies to ensure compliance with the *Adarand* standard.[134] Deval Patrick, the Assistant Attorney General for Civil Rights, has indicated that some federal affirmative action plans "will have to end and others will have to be reformed" due to *Adarand*'s stricter standards.[135]

It is unclear whether *Adarand* threatens all federal race-based programs. Although the strict scrutiny standard will make it significantly more difficult for race-conscious programs to survive, Justice O'Connor left open a window of hope in *Adarand*. She explicitly acknowledged the need for race-conscious programs by stating that "[t]he unhappy persistence of both the practice and

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131. The *Metro Broadcasting* Court confirmed this: "A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue." *Metro Broadcasting*, 497 U.S. at 564.

132. In fact, Justice O'Connor herself explicitly recognized this fact in *Croson*: "The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review." *Croson*, 488 U.S. at 487. Justice Burger merely found that racial preferences must receive a "most searching examination." He did not name strict scrutiny; in fact, he rejected it, saying, "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*." *Fullilove*, 448 U.S. at 492.

133. "[T]he federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair." *President Clinton's Memorandum on Affirmative Action, July 19, 1995*, Daily Lab. Rep. (BNA) No. 147, at D42 (Aug. 1, 1995).

134. *Id.* For a comprehensive list of all congressional race-based programs, see *Congressional Research Service's Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals*, Daily Lab. Rep. (BNA) No. 36, at D25 (Feb. 23, 1995).

135. *Affirmative Action: Some Programs Will Fail the Adarand Test, Patrick Tells House Oversight Panel*, Daily Lab. Rep. (BNA) No. 140, at D3, 1 (July 21, 1995). The Department of Justice has been hard at work to adjust federal affirmative action programs in compliance with *Adarand*. Less than a year after *Adarand*, the Department of Justice has already published proposals to reform affirmative action in federal procurement which conform to the standards outlined in *Adarand*. *See Justice Department Proposed Reform to Affirmative Action in Federal Procurement*, Daily Lab. Rep. (BNA) No. 100, at D22 (May 23, 1996). The Justice Department has also compiled an impressive list of studies and statistics on racial discrimination of minority-owned businesses which provide evidence that federal programs are justified under the compelling interest test. *See Justice Department Appendix on the Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, Daily Lab. Rep. (BNA) No. 100, at D23 (May 23, 1996).

lingering effects of racial discrimination" in this country will sometimes justify a narrowly tailored race-based remedy.[136]

The question remains, however, as to what exactly constitutes a "compelling" governmental interest and what internal checks a program must possess to be viewed as "narrowly tailored." Although the *Adarand* Court did not provide explicit guidance, direction is available from precedent. *Croson* is perhaps the best resource, as the *Adarand* Court relied heavily upon its reasoning. Additionally, Justice O'Connor's concurrence in *Wygant* provides practical advice for public employers.[137]

B. *The "Compelling Interest" Requirement*

In order for a government affirmative action program to meet the compelling interest standard, the government employer must demonstrate that the plan addresses ongoing discrimination, or that effects of past discrimination are shown by particularized findings.[138] Statistical evidence, therefore, may be the only acceptable verification of discrimination.[139]

Clearly, generalized societal discrimination is not a sufficient justification for an affirmative action plan.[140] For example, a government employer cannot justify an affirmative action plan on the foundation that discrimination is a pervasive problem in the United States. Evidence of nationwide discrimination in a particular industry is similarly insufficient to justify a state or local program; the discrimination must be linked to the local industry.[141] In the case of a federal program, however, evidence of nationwide discrimination may still be sufficient.

An industry is not required to hire minorities in proportion to the representation of the minority in the general population.[142] Instead, the statistics must reflect the number of minorities in the relevant population with the skills required to perform the job.[143] The analysis, therefore, hinges on the disparity between the number of qualified minorities in the relevant population and the number employed by the specific government entity.[144] In certain employment contexts, such as those involving entry level positions or positions requiring little training, disparities between the number of minorities in a

136. *Adarand*, 115 S. Ct. at 2117.

137. *See* discussion *supra* notes 36-42 and accompanying text.

138. *Croson*, 488 U.S. at 504.

139. *Id.* at 501-03 (calling for statistical evidence to support discrimination in the work force).

140. *Wygant*, 476 U.S. at 276.

141. *Croson*, 488 U.S. at 504. If the program in question is enacted by a state or local government, the statistical evidence must be specific to the local industry. The *Croson* Court chastised the city for relying on congressional findings of nationwide discrimination in the industry rather than statistics reflecting the local industry. *Id.*

142. In *Croson*, evidence that while the city's population was over 50% minority, minority businesses received only 0.67% of the city's prime contracts, was not adequate in the Court's eyes to demonstrate discrimination. *Id.* at 501.

143. *Id.*

144. *Id.* at 501-02.

particular field and those in the general population may be probative of a pattern of discrimination.[145]

The requirement of a disparity between the number of qualified minorities in the relevant pool and the number of minorities hired is somewhat flawed by failing to account for one of the critical effects of discrimination. Discrimination is a pervasive problem to the extent that it virtually precludes participation of minorities in certain industries. Discrimination, therefore, can clearly still exist even if the number of qualified minority participants in an industry was proportional to the number hired. *Croson* left unanswered the question of whether a government may provide evidence that the number of minorities participating in a particular field would have been greater had it not been for historical patterns of discrimination. The trend in lower courts has been to allow reliance upon such evidence.[146]

The issue remains open as to whether affirmative action may be used for non-remedial objectives. The program at issue in *Adarand* was determined to be remedial, in that it sought to redress the effects of past discrimination, and thus did not lead the Court to address this issue. Justice Stevens, however, in his *Adarand* dissent, maintained that the concept of promoting diversity is consistent with the majority's opinion in *Adarand*.[147] While the majority overruled *Metro Broadcasting* on other grounds, the holding that diversity constituted a significant government interest remains intact.[148] Additionally, the Court in *Bakke* identified a diverse student body as a compelling interest for a university.[149] It is unclear, however, whether the concept of diversity as a compelling interest extends beyond the unique environment of a university. Because *Metro Broadcasting* was decided under the intermediate scrutiny standard, broadcast diversity was found to satisfy only an important government interest.[150] The compelling government interest in diversity outside of the university or broadcasting contexts remains unclear.

C. *The "Narrowly Tailored" Requirement*

In order to satisfy the strict scrutiny standard, the affirmative action program must also be "narrowly tailored." The Court has not set forth specific standards to advise employers how to narrowly tailor their affirmative action programs. The following factors, derived from several Supreme Court opinions, offer some assistance in assessing whether a program is "narrowly tailored."

One important aspect of a narrowly tailored program involves whether the government considered race-neutral means *before* adopting the affirmative action program.[151] Other determinants include the flexibility and duration of

145. *Id.*

146. Assistant Attorney General Walter Dellinger, *Justice Department Memorandum on Supreme Court's* Adarand *Decision*, Daily Lab. Rep. BNA) No. 125, at D33, 14 (June 29, 1995).

147. *Id.*

148. *Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting).

149. *Bakke*, 438 U.S. at 313.

150. *See* discussion *supra* note 59-65 and accompanying text.

151. *Croson*, 488 U.S. at 507. Examples of race-neutral measures suggested by the Court

the plan,[152] regular assessment and reevaluation procedures,[153] the scope of the program,[154] and the availability of waiver provisions.[155] Additionally, the reasonableness of a numerical goal in light of the number of qualified minorities in the industry is pivotal in determining whether a program meets the narrow tailoring requirement.[156] Finally, courts will consider the effect of the program on third parties.[157]

CONCLUSION

The *Adarand* decision is disturbing on a number of levels. Perhaps most distressing is the Court's dismissal of the good will and race-consciousness inherent in enacting an affirmative action program. The assertion that strict scrutiny is necessary to determine the injurious or beneficial nature of an affirmative action program undercuts the competency of Congress, as well as that of every court in the land.

Affirmative action was just one of a calculated list of political statements issued this term by the conservative Court. Like *Adarand*, the two other cases involving race and decided by the Court this term severely limited the government's ability to provide measures to promote racial equality.[158] By ignoring precedent and requiring strict scrutiny for congressionally mandated

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include "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races." *Id.* at 509-10; *see also* United States v. Paradise, 480 U.S. 149, 171 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."); *Wygant*, 476 U.S. at 280 n.6 (stating that governments must consider "lawful alternative[s] and less restrictive means" and citing the theory that the racial classification should "fit" more closely than other available measures).

152. *Paradise*, 480 U.S. at 170; *see also Fullilove*, 448 U.S. at 513 (stating that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate") (Powell, J., concurring); *Bakke*, 438 U.S. at 374 (noting that the medical school's strict allotment of 16% of the spaces in the class for minority applicants was too rigid).

153. *Fullilove*, 448 U.S. at 513.

154. The *Wygant* Court found that random inclusion of certain minority groups "further illustrates the undifferentiated nature of the plan." *Wygant*, 476 U.S. at 284, n.13. In *Croson*, the Court criticized the "gross overinclusiveness" of Richmond's racial categories. The district court took judicial notice of the fact that the vast majority of minority individuals in Richmond were African-American. Despite this, the plan included Spanish-speaking, Asian-American, Indian, Eskimo, and Aleut individuals. *Croson*, 488 U.S. at 506.

155. *See Paradise*, 480 U.S. at 171 (enumerating the availability of waiver provisions among a list of factors contributing to the narrow tailoring requirement); *Fullilove*, 448 U.S. at 488 (noting the significance of Congress's allowance for administrative waiver and exemption, given a showing that the level of minority participation cannot be reached while still maintaining the goals of the program).

156. *Paradise*, 480 U.S. at 171.

157. *Id.* The Court has historically frowned on programs which it felt placed heavy burdens on nonminorities. *See Bakke*, 438 U.S. at 310 (holding that none of the interests offered by the university could justify a plan which completely prevented nonminorities from competing for a specific number of positions); *Wygant*, 476 U.S. at 282 (holding that layoff provision imposed too great an injury to nonminorities).

158. Jeffery Rosen, *The Color-Blind Court*, NEW REPUBLIC, July 31, 1995, at 19. *Miller v. Johnson* called into question the Voting Rights Act by holding that the Fourteenth Amendment prohibits states from employing race as the "predominant purpose" in apportioning voting districts. Miller v. Johnson, 115 S. Ct. 2475 (1995). *Missouri v. Jenkins* constrained the federal courts' power to remedy the effects of school desegregation. Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

programs, the Court is expanding its own role and limiting that of Congress, its supposed "co-equal" branch.

As the Court felled the axe on affirmative action programs, it hid behind the ruse of a color-blind Constitution. As Justice Scalia trumpeted in his *Adarand* concurrence, "In the eyes of the government, we are all one race here. It is American."[159] The original intent behind this doctrine carried far more wisdom than the shallow dogma that remains today. Justice Harlan, the sole dissenter in *Plessy v. Ferguson*, felt strongly that the statute which denied African-Americans access to the same train cars that carried whites was degrading and unconstitutional.[160] He wrote:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[161]

The color-blind Constitution, once a concept embodying fairness and equality, has become yet another vehicle for oppression by a majority voice.

Lia A. Fazzone

159. *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring).
160. Plessy v. Ferguson, 163 U.S. 537, 562 (1896).
161. *Id.* at 559.

ADMINISTRATIVE LAW AND PROCEDURE

INTRODUCTION

Administrative law shields individuals from abuses of power at the hands of administrative agencies.[1] The Federal Administrative Procedures Act (APA)[2] provides a set of standards for reviewing different types of agency action.[3] A court's ability to protect individuals against agency abuses of power relates directly to the scope of review permitted by the APA, which varies depending on the type of agency action at issue.[4] The APA's standard of review for formal agency action is the "substantial evidence" standard.[5] Courts review informal agency action under the "arbitrary and capricious" standard.[6] Due to an agency's specialized knowledge, however, courts grant considerable deference to agency decisions under these standards.[7]

Part I of this Survey discusses two cases in which the Tenth Circuit applied the "arbitrary and capricious" and "substantial evidence" standards of review. In *Olenhouse v. Commodity Credit Corp.*,[8] the Tenth Circuit followed the District of Columbia Circuit Court's reasoning regarding the convergence of the substantial evidence and arbitrary and capricious standards of review.[9] The Tenth Circuit concluded that when determining factual support, both standards require "substantial evidence" to uphold an agency's decision.[10] In *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[11] the Tenth Circuit deferred a question of law involving an agency's contract

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1. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.1 (3d ed. 1991). Administrative law provides the legal principles by which agencies exercise their power. *Id.* Congress exercises control over agencies by establishing standards and procedures in an agency's enabling statute and by policing day-to-day agency action through oversight committees. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 9-9[B] (2d ed. 1992).

2. 5 U.S.C. §§ 551-559, 701-706 (1994).

3. 5 U.S.C. § 706.

4. SCHWARTZ, *supra* note 1, § 10.1, at 624 ("If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts"; conversely, if the scope is too restrictive, review becomes meaningless since "it prevents full inquiry into the question of legality.").

5. 5 U.S.C. § 706(2)(E) (stating that cases subject to §§ 556-557, which govern hearings and initial decisions, or "otherwise reviewed on the record of an agency hearing" are subject to that standard).

6. 5 U.S.C. § 706(2)(A) (providing that the reviewing court shall set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

7. SCHWARTZ, *supra* note 1, § 10.1, at 624-25 (explaining that deference to administrative expertise and calendar pressure have narrowed the scope of review by courts); *see* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (finding that agencies have been delegated authority to make policy choices and judges, "who have no constituency," must afford deference to an agency's decisions).

8. 42 F.3d 1560 (10th Cir. 1994).

9. *Olenhouse*, 42 F.3d at 1575 (citing Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, Inc., 745 F.2d 677, 683 (D.C. Cir. 1984)).

10. *Id.*

11. 61 F.3d 1479 (10th Cir. 1995).

interpretation, using the arbitrary and capricious standard.[12] In granting deference to the agency's decision, the Tenth Circuit adopted the D.C. Circuit's conclusion that the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[13] implicitly modified earlier cases that withheld deference on questions involving contract interpretations.[14]

Part II of this Survey examines the Tenth Circuit's interpretation of the social security regulations governing the adjudication of benefit disputes. In *O'Dell v. Shalala*,[15] the Tenth Circuit interpreted the "final decision," which courts review under the social security regulations, as including any new evidence that a complainant presents to the Appeals Council.[16] The court's decision clarified what constitutes the record of review, and resolved two conflicting lower court holdings.[17]

I. REVIEWING AGENCY DECISIONS

A. *Informal Agency Action and the Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review:* Olenhouse v. Commodity Credit Corp.[18]

1. Background

The Federal Administrative Procedures Act[19] (APA) establishes standards for judicial review of federal agency action.[20] The APA standards are designed to provide a check on agency authority while simultaneously ensuring that each agency is able to perform its task within the authority granted to it.[21]

Courts review formal agency action under the substantial evidence standard.[22] The Supreme Court has defined substantial evidence as "such relevant

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12. *Northwest Pipeline*, 61 F.3d at 1485. The Tenth Circuit also reviewed the Federal Energy Regulatory Commission's (FERC's) action under the substantial evidence standard pursuant to 15 U.S.C. § 717r(b) (1994) which applies to the Commission's factual decisions. *Northwest Pipeline*, 61 F.3d at 1485.

13. 467 U.S. 837 (1984).

14. *Northwest Pipeline*, 61 F.3d at 1486.

15. 44 F.3d 855 (10th Cir. 1994).

16. *O'Dell*, 44 F.3d at 859.

17. *Id.* (noting that the two opinions were "diametrically opposed").

18. 42 F.3d 1560 (10th Cir. 1994).

19. 5 U.S.C. §§ 551-559, 701-706 (1994).

20. 5 U.S.C. § 706 (1994). The judicial review provisions of the APA apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)-(a)(2). The APA contains six provisions establishing the scope of review including: (1) substantial evidence, (2) arbitrary and capricious, (3) "contrary to a constitutional right," (4) "in excess of statutory jurisdiction," (5) "failing to observe procedures required by law," and (6) "unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court." 5 U.S.C. § 706(A)-(F).

21. ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 9.2.12, at 583 (1986) (explaining that the standards of review reflect the scope of authority granted to an agency). *See generally* Phillip F. Smith, Jr., *Administrative Law Survey of the Tenth Circuit Court of Appeals*, 71 DENV. U. L. REV. 801, 815-16 (1994) (discussing the effect of the different standards of review).

22. 5 U.S.C. §§ 556-557, 706(2)(E); ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW § 9.4, at 625 (1989). Formal agency action consists of hear-

evidence as a reasonable mind might accept as adequate to support a conclusion."[23] When reviewing an agency's decision, a court examines the "record as a whole" to determine if substantial evidence supports the agency's decision.[24] The APA mandates the application of the arbitrary and capricious standard when reviewing informal agency action.[25] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[26] the Court stated that under the arbitrary and capricious standard,[27] a court must determine whether an agency has articulated a rational basis for its action.[28] Under this "narrow" standard,[29] the court may not substitute its own rationale, but must review an agency's action on the grounds articulated by the agency itself.[30] In doing so, the court must focus on the informal administrative record.[31] The arbitrary and capricious standard further requires an agency to explain how it proceeded from its findings to its subsequent action.[32] However, authorities on administrative law have typically characterized the substantial evidence standard as more demanding than the arbitrary and capricious standard, although the Supreme Court has never explicitly resolved this supposed difference.[33] Since both the arbitrary and capricious and substantial evidence standards require sufficient factual support in the record,[34] courts have referred to the tests as converging, and to any articulated distinction between them as "largely semantic."[35]

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ings subject to the APA "trial-type" provisions of §§ 556-557 of the APA. FOX, *supra* note 1, § 50 (defining a "trial-type" proceeding as an "adversarial process, intended to be similar to, but not identical with, a civil bench trial in federal court"); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding that review under the substantial evidence standard is authorized under the APA's rule-making provisions or "when the agency action is based on a public adjudicatory hearing").

23. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951) (holding that the Taft-Hartley Act required the same standard of proof as the APA, and finding that the substantial evidence standard required the court to consider evidence that "fairly detracts from [the record's] weight").

24. *Universal Camera*, 340 U.S. at 488 (acknowledging that a "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial").

25. 5 U.S.C. § 706(2)-(2)(A). *See generally* FOX, *supra* note 1, §§ 58-60 (discussing the lack of a "trial-type" hearing and informal nature of the informal agency action).

26. 401 U.S. 402 (1971).

27. *Overton Park*, 401 U.S. at 416.

28. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (citing *Overton Park*, 401 U.S. at 416). Application of the arbitrary and capricious standard requires the court to consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416.

29. *Overton Park*, 401 U.S. at 416.

30. *Motor Vehicle Mfrs.*, 463 U.S. at 50.

31. Smith, *supra* note 21, at 815-16 (discussing review under the arbitrary and capricious standard).

32. *See Motor Vehicle Mfrs.*, 463 U.S. at 50; 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.4, at 202-03 (3d ed. 1994) (discussing the "reasoned decision-making" in which the agency must engage).

33. 2 DAVIS & PIERCE, *supra* note 32, § 11.4, at 202. Since both the substantial evidence and arbitrary and capricious standards are extremely deferential, "courts have experienced difficulty applying the distinction the Court continues to draw" regarding the characterization of the arbitrary and capricious standard as the more lenient. *Id.* *See supra* text accompanying notes 26-33 (discussing the arbitrary and capricious standard).

34. BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625 (noting that courts determine factual support under both standards based on a "reasonableness review" standard).

35. 2 DAVIS & PIERCE, *supra* note 32, § 11.5, at 202-03 (citing cases referring to the tenden-

2. Tenth Circuit Opinion

a. *Facts*

In *Olenhouse v. Commodity Credit Corp.*,[36] a certified class of farmers challenged the Agricultural Stabilization and Conservation Service's (ASCS) decision to reduce wheat crop deficiency payments.[37] Due to flooding, these farmers had been unable to plant their winter wheat during the fall.[38] Concerned with the effect of late planting on deficiency payments, the farmers held a meeting with state officials.[39] The farmers left the meeting with the impression that program wheat could be planted after the designated planting season without reductions in deficiency payments, provided it was planted in a "workmanlike" manner.[40] After having planted their crops, the farmers received notice that the ASCS had reduced deficiency payments for late planted wheat.[41]

ASCS's initial decision was based on the determination that program regulations allowed reductions in deficiency payments for late planting.[42] With the exception of this late planting finding, the ASCS failed to state the rules it applied or the factors it considered in making the initial decision to reduce deficiency benefits.[43] The state ASCS committee, and subsequently the Deputy Administrator of State and County Operations, affirmed the initial ASCS decision in informal hearings.[44] The district court agreed with the administrative committees and affirmed the ASCS's decision under the arbitrary and capricious standard.[45]

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cy of the standards to converge); *see* FOX, *supra* note 1, § 76[C] (explaining then-Judge Scalia's view that there is no difference between the two tests in terms of factual support); *see also* BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625 ("The prevailing view is that judicial review . . . under a substantial evidence standard is no different than under an arbitrary and capricious standard."). Prior Tenth Circuit case law recognized that "[t]he 'substantial evidence' test has been equated with the 'arbitrary and capricious' standard of review." Colorado Interstate Gas Co. v. Federal Energy Regulatory Comm'n, 904 F.2d 1456, 1459 (10th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991).

36. 42 F.3d 1560 (10th Cir. 1994).

37. *Olenhouse*, 42 F.3d at 1564-65. ASCS reduced the payments for winter wheat as follows: 20% in January, 35% in February, and 100% in March. *Id.* at 1570. Spring wheat planted in March was reduced 30% and spring wheat planted after March was reduced 100%. *Id.* at 1570-71.

38. *Id.* at 1569.

39. *Id.* Class members participated in the 1987 Price Support and Adjustment Program for wheat which guarantees each farmer "the target price for their crop; if the ultimate market price falls below that price, farmers are entitled to'deficiency payments' to make up the difference." *Id.* at 1567. The statutes implementing the Price Support and Adjustment Program are: The Agriculture Act of 1949 §§ 101-356, 7 U.S.C. §§ 1421-1471 (1994) (creating deficiency payments); 7 U.S.C. §§ 1308 to 1308-5 (1994) (limiting deficiency payments); 7 U.S.C. §§ 1445 to 1445-3 (1994) (implementing deficiency payments).

40. *Olenhouse*, 42 F.3d at 1569.

41. *Id.* at 1564.

42. *Id.* at 1564, 1570.

43. *Id.* at 1565.

44. *Id.* at 1571.

45. *Id.* at 1564.

b. *Decision*

The Tenth Circuit held that the district court erred in choosing to apply the arbitrary and capricious standard.[46] In reversing the lower court, the Tenth Circuit noted that the district court had supplied its own rationale for the agency's decision rather than reviewing the record to determine if the agency "articulated a reasoned basis for its conclusions" as the arbitrary and capricious standard requires.[47] To determine the proper application of the arbitrary and capricious standard, the Tenth Circuit adopted then-Judge Scalia's convergence analysis.[48] Under this theory, "informal agency action will be set aside as arbitrary if it is unsupported by 'substantial evidence.'"[49] The factual support required to withstand the arbitrary and capricious analysis does not substantially differ from the factual support required to satisfy the substantial evidence standard.[50] A decision, therefore, unsupported by substantial evidence "in the APA sense" would be arbitrary.[51] Recognizing that courts have characterized the substantial evidence standard as more demanding, the Tenth Circuit stated that adopting the convergence theory did not entail substituting the arbitrary and capricious standard with the "arguably more stringent" substantial evidence standard.[52]

3. Analysis

In the context of analyzing factual support, a dual application of both the arbitrary and capricious and substantial evidence standards[53] results in "convergence theory," the ultimate test of reasonableness.[54] The Tenth Circuit, in *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[55] equated its practice of deferring to agencies on questions of law with a reasonableness test that agencies use to interpret statutes.[56] Because the convergence theory entails both the arbitrary and capricious and the substantial evidence standards, the Tenth Circuit may have implicitly equated all three standards—convergence, reasonableness, and the practice of deference—while applying them to a question of law.[57] Since Judge Scalia's theory was based

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46. *Id.* at 1580.

47. *Id.*; *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that the reviewing court may only uphold an agency's decision on its own rationale). For a discussion of the application of the arbitrary and capricious standard, see *supra* notes 26-35 and accompanying text.

48. *Olenhouse*, 42 F.3d at 1575 (citing Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, Inc., 745 F.2d 677, 683 (D.C. Cir. 1984)).

49. *Id.*

50. *Id.* (citing *Data Processing*, 745 F.2d at 683-84); *see* FOX, *supra* note 1, §76[C] (explaining Judge Scalia's view that substantial evidence is a specific application of the arbitrary and capricious standard and does not require more factual support).

51. *Olenhouse*, 42 F.3d at 1575 (quoting *Data Processing*, 745 F.2d at 684).

52. *Id.* at 1575-76.

53. *See supra* notes 48-52 and accompanying text.

54. *Data Processing*, 745 F.2d at 683-84 (citing SCHWARTZ, *supra* note 1, § 10.8); BONFIELD & ASIMOW, *supra* note 22, § 9.4, at 625.

55. 61 F.3d 1479 (10th Cir. 1995).

56. *Northwest Pipeline*, 61 F.3d at 1486 (citing Long Island Lighting Co. v. Federal Energy Regulatory Comm'n, 20 F.3d 494, 497 (D.C. Cir. 1994)).

57. *Id.* at 1487 (holding that the agency decision was "a rationally based, reasonable con-

on the standards' operation when determining questions of factual support, the extension of the convergence theory to at least some questions of law may turn "substantial evidence" into a threshold requirement to support both factual and legal determinations.[58]

Although courts have traditionally described the arbitrary and capricious standard as "more lenient" than the substantial evidence standard, it may only be "less stringent" in regard to the distinction between what evidence a court may or may not rely on when reviewing an agency's decision.[59] When reviewing an agency's informal decision under the arbitrary and capricious standard, a court may consider all of the information that was before the agency when it made its decision.[60] A review of formal agency action, on the other hand, limits the court to the closed record.[61] Consequently, the arbitrary and capricious standard appears to be more lenient only in regard to the nature of the record that a court may review to determine whether an agency's decision was rational. Both standards, however, apparently require the same quantum of evidence to support an agency's decision. Regardless of where the court finds factual support during its review of an informal decision, "substantial evidence" appears to be the minimum amount of evidence required to uphold an agency's decision under the arbitrary and capricious standard.[62]

4. Other Circuits

The Second, Seventh, and D.C. Circuits have adopted the convergence theory, and, therefore, appear to view the distinction between the arbitrary and capricious and substantial evidence standards as "largely semantic" regarding review of the factual bases of agency decisions.[63] The Second Circuit views

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struction, and is, therefore, entitled to . . . deference"). *See generally* discussion *infra* part I.B (discussing *Northwest Pipeline* and judicial review of questions of law). Note, however, that comments made prior to *Northwest Pipeline* question the propriety of equating questions of law with questions of fact. *See* SCHWARTZ, *supra* note 1, § 10.8.

58. *See Data Processing*, 745 F.2d at 683-84 (discussing the convergence of the arbitrary and capricious standard and the substantial evidence standard).

59. 2 DAVIS & PIERCE, *supra* note 32, § 11.4 ("While the Court consistently characterizes the arbitrary and capricious test as less demanding than the substantial evidence test, the Court has never explained the difference between the two."); *see* American Paper Inst. v. American Elec. Power Serv. Corp., 461 U.S. 402, 412 n.7 (1983) (describing arbitrary and capricious as the more lenient standard). The arbitrary and capricious standard does serve a purpose independent of review for factual support. *See* 2 DAVIS & PIERCE, *supra* note 32, § 11.4, at 203. The standard ensures that the agency engaged in "reasoned decision making" and included an explanation of how it reached its decision. *Id.* In a sense, this element is implied in the substantial evidence standard because the formal record will contain the basis for the agency's decision.

60. *E.g., Data Processing*, 745 F.2d at 684.

61. *See id.* This limit did not originate with the arbitrary and capricious standard, but rather in 5 U.S.C. § 553(c) (1994), which requires that "the agency . . . give interested persons an opportunity to participate in the rule making." *Id.*

62. *See supra* note 10 and accompanying text.

63. *E.g.*, Aman v. FAA, 856 F.2d 946, 950 n.3 (7th Cir. 1988) (citing other Seventh Circuit cases which found the distinction to be semantic); Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144, 1151 (7th Cir.) (holding that the distinction is largely semantic and that the criteria tend to converge), *cert. denied*, 459 U.S. 907 (1982); Associated Indus. v. United States Dep't of Labor, 487 F.2d 342, 349 (2d Cir. 1973) (stating that the "controversy is semantic in some degree"); *see also* Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal*

the significance of the substantial evidence standard as "limiting the agency to the confines of the public record."[64] Under informal action, however, the D.C. Circuit applies the arbitrary and capricious standard to the evidence before an agency.[65] Under both standards, the quanta of support needed to uphold an agency decision are identical.[66]

Judge Scalia, however, acknowledged in *Data Processing* that there are cases in which the standards do not converge.[67] An agency's action may be arbitrary if it is an "abrupt and unexplained departure from agency precedent," even though it may be supported by substantial evidence.[68] The arbitrary and capricious standard thus operates as a "catchall, picking up administrative misconduct" by enabling courts to strike down agency decisions as arbitrary where the substantial evidence test is not applicable.[69]

B. *Deference to Agencies on Questions of Law:* Northwest Pipeline Corp. v. Federal Energy Regulatory Commission[70]

1. Background

The standard of review for agency decisions has been traditionally dependent upon whether the issue was one of fact or law.[71] As experts in a regulated area, agencies were traditionally responsible for determining facts.[72] Reviewing courts, therefore, accorded substantial deference to an agency's factual decisions.[73] Conversely, courts traditionally reviewed questions of law de novo based upon courts' expertise in applying and interpreting the law.[74]

In 1984, the Court altered the traditional distinction between law and fact in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[75] In

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Rulemaking, 54 GEO. WASH. L. REV. 541, 553 (1986) (listing cases that apply the convergence theory).

64. *Associated Indus.*, 487 F.2d at 349-50.

65. *Data Processing*, 745 F.2d at 684-85; McGrath, *supra* note 63, at 555.

66. *Data Processing*, 745 F.2d at 683-84 ("[I]t is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense.").

67. *Id.* at 684-85; McGrath, *supra* note 63, at 555.

68. *Data Processing*, 745 F.2d at 683.

69. *Id.*

70. 61 F.3d 1479 (10th Cir. 1995).

71. SCHWARTZ, *supra* note 1, § 10.5, at 632; Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 396 (1995) ("Traditional common law notions guided the early period in administrative law, dividing the authority of courts and agencies along the lines of law and fact—similar to the roles played by judge (law) and jury (fact).").

72. Oldham, *supra* note 71, at 396.

73. SCHWARTZ, *supra* note 1, § 10.6.

74. *Id.* (describing the "law-fact distinction"). De novo review is defined as reviewing the matter "as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 721 (6th ed. 1990); *see also* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960) (noting that an agency's contract interpretation is subject to de novo review); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("[I]f the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

75. 467 U.S. 837 (1984); *see* Oldham, *supra* note 71, at 395 (explaining how *Chevron* "exploded the idea that courts are best situated to interpret statutes"); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*,

Chevron, the Natural Resources Defense Council challenged the EPA's interpretation of the term "stationary source" in the Clean Air Act.[76] The Court determined that the EPA's interpretation reflected a pure policy decision in an area where Congress had delegated authority to the EPA.[77] The Court's decision produced a two-part test for judicial review of an agency's statutory construction.[78]

First, courts must determine if "Congress has directly spoken to the precise question at issue."[79] Both courts and agencies must defer to clear Congressional intent.[80] Once Congress has resolved any policy disputes, any remaining issue becomes one of law.[81] By deferring to the agency's statutory interpretation, as required by *Chevron*, the Court "gives force to the principle of legislative supremacy" by requiring policy decisions to be made by the elected branches of government.[82]

Second, policy issues arise when congressional intent is unclear or ambiguous.[83] As a result, the reviewing court must apply step two of the *Chevron* test which determines "whether the agency's answer is based on a permissible construction of the statute," and thus implements the underlying policy.[84]

Since the Court decided *Chevron* in 1984, the case's impact has been enormous, as courts have applied its test in over 1,000 cases.[85] The widespread application of the *Chevron* analysis, however, has produced an

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73 TEX. L. REV. 83, 87 (1994) ("Prior to *Chevron* . . . the primary and ultimate authority for interpreting statutes resided in the judiciary.").

76. *Chevron*, 467 U.S. at 840-41. The statute at issue in *Chevron* required "permits for the construction and operation of new or modified major stationary sources." 42 U.S.C. § 7502(c)(5) (1994). Congress did not explicitly define "stationary source" in the Clean Air Act or its legislative history, but did provide that the administrator was to take into account both economic and environmental interests. 42 U.S.C. § 7502(a)(1)(A). The EPA defined "stationary source" to include all sources within the same industrial grouping, forming the bubble concept. *Chevron*, 467 U.S. at 840.

77. *Chevron*, 467 U.S. at 862-66.

78. 1 DAVIS & PIERCE, *supra* note 32, § 3.2 (discussing the *Chevron* "two-step").

79. *Chevron*, 467 U.S. at 842. The Court found the legislative history, though unclear on the precise issue, supportive of the EPA's broad discretion to implement the amendments to the Clean Air Act. *Id.* at 862.

80. *Id.* at 842-43.

81. 1 DAVIS & PIERCE, *supra* note 32, § 3.3.

82. *Id.* § 3.3, at 116. *Chevron* allows Congress to check the executive branch by insuring that Congress's intent is carried out and it encourages Congress to resolve policy disputes at the legislative stage. *Id.*; *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (reasoning that *Chevron*'s separation of powers rationale allows policy decisions to be determined by political branches rather than the unelected judiciary branch). *But see* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (arguing that *Chevron's* deference requirement is a self-imposed limit based on justiciability grounds rather than being constitutionally or statutorily required).

83. 1 DAVIS & PIERCE, *supra* note 32, § 3.3; *see* Pauly v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (noting that the "resolution of ambiguity in a statutory text is often more a question of policy than of law"); Oldham, *supra* note 71, at 393 (explaining that "*Chevron*'s explicit recognition that statutory interpretation involves significant policy choices has changed the legal landscape").

84. *Chevron*, 467 U.S. at 842-43.

85. 1 DAVIS & PIERCE, *supra* note 32, § 3.2, at 110 (stating that "*Chevron* is one of the most important decisions in the history of administrative law").

expansion beyond the "policy" and "law" distinction that the Court initially made in *Chevron*.[86] One form that this expansion takes is the interpretation of contracts by agencies.

2. Tenth Circuit Opinion

a. *Facts*

In *Northwest Pipeline Corp. v. Federal Energy Regulatory Commission*,[87] the Tenth Circuit reviewed the Federal Energy Regulatory Commission's (FERC) interpretation of a natural gas tariff.[88] The tariff applied to Northwest's "unbundled" customers.[89] In response to FERC's order, Northwest filed its tariff in 1985, initiating "open access" transportation under the Natural Gas Policy Act.[90] Section 14.8 of the Act "required each shipper to pay . . . a fuel reimbursement percentage ["FRP"] rate to compensate Northwest for the shipper's pro rata share of the system fuel."[91] Northwest calculated its unbundled customers' FRP "by dividing the total amount of system fuel by the unbundled customers' total annual transportation volumes."[92] Northwest Natural Gas Company, one of Northwest's unbundled customers, challenged the rate by claiming that Northwest had been incorrect in calculating the FRP based only on unbundled customers' transportation volume instead of the "total annual volume" that the tariff required.[93] Northwest's calculation resulted in a higher FRP rate for unbundled customers.[94] In interpreting section 14.8 of Northwest's tariff, the commission determined that "total annual volume" included both unbundled and bundled customers.[95] The commission therefore ordered Northwest to issue refunds to affected unbundled customers.[96]

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86. *See* Oldham, *supra* note 71, at 399-412 (discussing *Chevron*'s expansion to interpretation of contracts and regulations, and arguing for expansion to agency consent decrees).

87. 61 F.3d 1479 (10th Cir. 1995).

88. *Northwest Pipeline*, 61 F.3d at 1481-85.

89. *Id.* at 1482. Bundled customers are charged a single rate for both transportation and storage costs. *Id.* Unbundled customers "are charged separately for each component of the service." *Id.*

90. *Id.*

91. *Id.* System fuel is the amount of fuel lost through leaks plus the amount used to run the pipeline. *Id.* Section 14.8 of Northwest's tariff states, "Fuel use requirements shall be determined using a factor calculated by dividing the total annual fuel and lost and unaccounted-for gas for Transporter's total transmission system, by the total annual volumes, including gas used for fuel and lost and unaccounted-for gas." *Id.* (quoting Northwest Pipeline Corp., 65 F.E.R.C. ¶ 61,046, 61,428 n.2 (1993)).

92. *Id.* at 1483.

93. *Id.*

94. *Id.*

95. *Id.* at 1484. The commission concluded that "total annual volume" included both bundled and unbundled customers based on the same canons of contract interpretation that a court would employ. *Id.* at 1486.

96. *Id.* at 1484.

b. *Decision*

In reviewing FERC's interpretation of the tariff, the Tenth Circuit adopted the D.C. Circuit's rationale and concluded that *Chevron* entitles FERC's interpretation of contractual language to judicial deference.[97] The Tenth Circuit determined that *Chevron's* emphasis on deference to agency expertise "implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation."[98] Because FERC has "vast experience in the interpretation" of tariffs, the principles underlying *Chevron* "clearly dictate[d]" deference to FERC's interpretation.[99] The court concluded that FERC applied the ordinary meaning of the word "total," which allowed it to be read consistently throughout the section.[100] The Tenth Circuit held that under the adopted D.C. Circuit's interpretation of *Chevron*, FERC's interpretation was reasonable and entitled to deference even if it was different than the interpretation the court itself would have reached.[101]

3. Analysis

Although the Tenth Circuit adopted the reasoning of *Williams Natural Gas Co. v. Federal Energy Regulatory Commission*,[102] it remains unclear to what extent the court will extend deferential treatment outside the area of tariffs governed by FERC. The *Chevron* Court reasoned that policy decisions should be made at the agency level since agencies are closer to the directly elected executive and legislative branches.[103] This separation of powers distinction between policy decisions and questions of law may severely limit the courts' role as a check on the elected branches of government. Under the *Chevron* distinction, a court can only refuse to give deference to an agency's decision when that agency has disregarded the express intent of Congress. This interpretation of *Chevron* may limit a court's ability to exercise effective review, or to engage in "judicial policymaking,"[104] to situations where the court perceives a clear attempt to undermine congressional intent, deems it necessary to exercise a check on the executive and legislative branches, and feels justified in applying a heightened level of review.

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97. *Id.* at 1486 (citing Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n, 3 F.3d 1544, 1549 (D.C. Cir. 1993)).

98. *Id.* (quoting *Williams Natural Gas*, 3 F.3d at 1549 and National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)).

99. *Id.*

100. *Id.* at 1487. Northwest's interpretation requires the word "total" to take on two different meanings. *Id.* For statutory language of the applicable tariff provision, see *supra* note 91.

101. *Northwest Pipeline*, 61 F.3d at 1487.

102. 3 F.3d 1544 (D.C. Cir. 1993).

103. *Chevron*, 467 U.S. at 865-66.

104. 1 DAVIS & PIERCE, *supra* note 32, § 3.3, at 113 (stating that the courts "engage in policymaking when they decide cases brought under statutes that do not resolve the issues before the court").

4. Other Circuits

The D.C. Circuit has concluded that the Supreme Court's decision in *Chevron* diminished the lower courts' ability to exercise de novo review on questions of law involving contract interpretations.[105] According to the D.C. Circuit, *Chevron* implicitly modifies cases that have withheld deference on contract interpretation questions.[106] In *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Commission*,[107] the D.C. Circuit stated that the agency's greater expertise with the agreement supports deferential review; however, *Chevron* alone was sufficient to compel granting deference.[108]

Even when granting deference to an agency's interpretation of a contract, the reviewing court still must determine if the agency's interpretation is supported both factually and legally.[109] An agency's decision must be the result of reasoned decision-making as ascertained from the record.[110] The D.C. Circuit described three situations in which deference would be inappropriate.[111] First, where an agency's interpretation has vacillated, "granting deference might give the agency license to act arbitrarily by making inconsistent decisions without justification."[112] Second, "if the agency itself were an interested party," deference may be inappropriate.[113] Third, the court would not require deference where Congress intended courts to independently review agency decisions.[114]

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105. National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 811 F.2d 1563, 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). *Chevron* held that unless Congress directly addresses the precise issue, a court may not "impose its own construction on the statute," but must determine if "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

106. *National Fuel*, 811 F.2d at 1570. The D.C. Circuit cited Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263, 268-70 (1960), which upheld an agency's de novo review of a contract, as being modified by *Chevron*. *Id.*

107. 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987).

108. *National Fuel*, 811 F.2d at 1570; *see also Williams Natural Gas*, 3 F.3d at 1549-50 (quoting *National Fuel*, 811 F.2d at 1570) (finding that even where a settlement agreement was purely private, FERC approval is only a further factor for granting deference since "*Chevron* principles alone compel this conclusion").

109. Tarpon Transmission Co. v. Federal Energy Regulatory Comm'n, 860 F.2d 439, 442 (D.C. Cir. 1988) (quoting Vermont Dep't of Public Serv. v. Federal Energy Regulatory Comm'n, 817 F.2d 127 (D.C. Cir. 1987)); *see* Consolidated Gas Supply Corp. v. Federal Energy Regulatory Comm'n, 745 F.2d 281, 291 (4th Cir. 1984) (stating that "a court need [not] accept an agency interpretation that black means white"), *cert. denied*, 472 U.S. 1008 (1985).

110. *See* Baltimore Gas & Elec. Co. v. Federal Energy Regulatory Comm'n, 26 F.3d 1129, 1135 (D.C. Cir. 1994) (denying the Commission's interpretation); Long Island Lighting Co. v. Federal Energy Regulatory Comm'n, 20 F.3d 494, 497 (D.C. Cir. 1994) (finding that the Commission's interpretation was unreasonable); *Tarpon Transmission*, 860 F.2d at 442 (concluding that an agency's analysis was inadequate for meaningful review). *But see* Natural Gas Clearinghouse v. Federal Energy Regulatory Comm'n, 965 F.2d 1066, 1070-71 (D.C. Cir. 1992) (stating that the agency engaged in reasoned decisionmaking and upholding the agency's decision by granting it "substantial deference").

111. *National Fuel*, 811 F.2d at 1571.

112. *Id. National Fuel* only suggested a vacillation exception, it did not adopt one. *Williams Natural Gas*, 3 F.3d at 1550.

113. *National Fuel*, 811 F.2d at 1571.

114. *Id.*

In contrast to these opinions, the Fifth Circuit, in *Mid Louisiana Gas Co. v. Federal Energy Regulatory Commission*,[115] held that courts are not required to defer to agency interpretations when reviewing a settlement contract.[116] The court stated that contract construction is a question of law which courts can review "freely."[117] The court noted that when the agency's special understanding of the subject matter enhances its interpretation, there "may be room to defer to the views of the agency," but such interpretations are not conclusive.[118] In *Mid Louisiana Gas*, however, the Commission relied solely on the language of the agreement, so there was no agency interpretation to which the Fifth Circuit could afford deference.[119]

II. DEFINING THE RECORD FOR REVIEW IN SOCIAL SECURITY CASES: *O'DELL V. SHALALA*[120]

A. *Background*

A determination of social security benefits consists of four stages prior to judicial review.[121] An initial determination of a claimant's eligibility for benefits and a request for reconsideration constitute the first two stages.[122] If a claimant seeks reconsideration, the third stage consists of a de novo review of the initial agency decision at a hearing before an Administrative Law Judge (ALJ).[123] The ALJ conducts an informal review and bases her decision on the evidence presented at the hearing.[124] An ALJ's decision is binding unless a claimant proceeds to the fourth stage by requesting review at the Appeals Council (AC).[125] The AC determines, upon review, whether or not the ALJ

115. 780 F.2d 1238 (5th Cir. 1986).

116. *Mid Louisiana Gas*, 780 F.2d at 1243; *see also* Cincinnati Gas & Elec. Co. v. Federal Energy Regulatory Comm'n, 724 F.2d 550, 554 (6th Cir. 1984) (finding that questions of law do not require technical expertise and are freely reviewable by the court).

117. *Mid Louisiana Gas*, 780 F.2d at 1243.

118. *Id.*

119. *Id.*

120. 44 F.3d 855 (10th Cir. 1994).

121. 20 C.F.R. § 404.900 (1995). *See generally* John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds with One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329, 334-35 (1983) (discussing the social security claims process); Wayne A. Kalkwarf, *The Jurisdictional Dilemma in Reopening Social Security Decisions*, 23 CREIGHTON L. REV. 545 (1989-90) (discussing the review and reopening procedures for social security); F. William Hessmer IV, Notes and Comments, *Own Motion Review of Disability Benefit Awards by the Social Security Administration Appeals Council: The Improper Use of an Important Procedure*, 2 ADMIN. L.J. 141, 143 (1988) (discussing the social security adjudication process and levels of agency consideration for disability claims).

122. 20 C.F.R. § 404.900(a)(1)-(a)(2).

123. *Id.* § (a)(3); Kalkwarf, *supra* note 121, at 548.

124. Kalkwarf, *supra* note 121, at 548; *see also* 20 C.F.R. § 404.929 (1995) (describing the ALJ hearing process which allows claimant to "appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses").

125. 20 C.F.R. § 404.955 (1995); 20 C.F.R. § 404.900(a)(4); *see also* Larry M. Gropman, *Fifteenth Annual Survey of Sixth Circuit Law, Social Security*, 1994 DET. C.L. REV. 871, 873 (stating that the Appeals Council's purpose is to provide final agency review, ensuring that ALJ decisions are consistent with overall agency policy).

based her decision on substantial evidence, abused her discretion, or erred on a question of law.[126] The AC also reviews decisions involving "broad policy or procedural issue[s]" affecting the public interest.[127]

On review, the AC can consider any new evidence that is both material and relates to the period during which the ALJ made her decision.[128] The AC, however, relies heavily on the ALJ record when reviewing the ALJ's decision.[129] Once the AC reviews a case, considers the new evidence, and renders a decision, that decision is final and the next opportunity for review occurs at the federal district court level.[130] If the AC denies review by determining that the new evidence is not material, the ALJ's decision becomes final and the complainant may then seek judicial review outside of the agency.[131]

Review in federal district court is available only for "final decisions."[132] 42 U.S.C. § 405(g) provides the statutory basis for judicial review.[133] A claimant must, therefore, exhaust all possible administrative remedies prior to seeking judicial review.[134]

Courts review social security decisions under the substantial evidence standard.[135] The reviewing court determines whether substantial evidence supports the record, but it "may neither re-weigh the evidence nor substitute its judgment for that of the agency."[136] The court may also remand the case,

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126. 20 C.F.R. § 404.970(a)-(a)(3) (1995).

127. *Id.* § (a)(4).

128. *Id.* § (b). Section 404.970(b) states:

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the *entire record including the new and material evidence* . . . . It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence *currently of record.*

Id. (emphasis added). The new and material evidence must relate to this time period since the evidentiary record is closed after the ALJ decision. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 250 (1990).

129. Hessmer, *supra* note 121, at 146.

130. 20 C.F.R. § 404.981 (1995); 20 C.F.R. § 404.900(a)(5). A claim must be filed in federal court within sixty days after notice of the Appeals Council decision. 20 C.F.R. § 404.981.

131. 20 C.F.R. § 404.955(b).

132. 42 U.S.C. § 405(g) (1988 & Supp. 1993); Hessmer, *supra* note 121, at 146 (explaining that the Appeals Council decision, or the ALJ's decision if the Appeals Council denies review, constitutes the final stage of the social security adjudication process). Jurisdiction is granted regardless of the amount in controversy. 42 U.S.C. § 405(g).

133. Alan G. Skutt, Annotation, *When Is Claim Sufficiently Presented to Secretary of Health and Human Services to Permit Judicial Review Under § 405(g) of Social Security Act (42 U.S.C. § 405(g))*, 99 A.L.R. FED. 198, § 2[a], at 203 (1990).

134. Alan G. Skutt, Annotation, *Provision of 42 U.S.C. § 405(g) Making the Secretary of Health and Human Services' Findings of Fact Conclusive If Supported by Substantial Evidence As Applying to Administrative Law Judge or Social Security Council*, 90 A.L.R. FED. 280, § 2[b], at 289 (1988) (stating that failure to exhaust administrative remedies will lead to dismissal since section 405(g) only applies to "final decisions").

135. 42 U.S.C. § 405(g). The Supreme Court defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See generally* 2 HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES, §§ 672, 723, 728 (4th ed. 1991 & Supp. 1993) (discussing substantial evidence in social security cases).

136. Skutt, *supra* note 133, § 2[b], at 289. *See generally* 2 MCCORMICK, *supra* note 135, §§

for good cause, to the Commissioner for consideration of new evidence.[137] Because § 405(g) requires a court to review the "final decision," and neither § 405(g) nor the regulations define the record of the "final decision" that the district court must review, the opinions of the circuit courts differ on what constitutes the proper record of review.[138]

Prior to the Tenth Circuit's decision in *O'Dell*, two district courts within the Tenth Circuit were in conflict with regard to what record to review.[139] In *Jones v. Sullivan*,[140] the court held that when the AC denies review, the new evidence submitted to the AC for consideration becomes part of the record for review.[141] The *O'Dell* district court reached a contrary result, holding that new evidence submitted to the AC was not part of the record on review.[142] The Tenth Circuit took the opportunity to resolve the conflict when *O'Dell* came before it on appeal.[143]

B. *Tenth Circuit Opinion*

1. Facts

In *O'Dell v. Shalala*,[144] O'Dell applied for disability benefits alleging an inability to work.[145] The ALJ determined that O'Dell did not suffer from a disabling knee condition during the insured period and denied benefits.[146] On appeal to the AC, O'Dell submitted two new pieces of evidence concerning her condition.[147] The AC determined that O'Dell's "new evidence did not provide a basis for changing the ALJ's decision and declined review."[148]

672, 723, 728 (describing the application of substantial evidence during social security review).

137. 42 U.S.C. § 405(g). Section 405(g) states:

> The court may . . . for good cause shown . . . remand the case to the Secretary . . . , and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . .

Id. Remand may be allowed where there is a combination of an unrepresented claimant, failure of the ALJ to fully explore facts and leads, and brevity of the oral hearing. 2 MCCORMICK, *supra* note 135, § 754, at 331.

138. Keeton v. Department of Health and Human Servs., 21 F.3d 1064, 1066-67 (11th Cir. 1994). For a discussion of circuit court decisions defining the record of review, see *infra* notes 161-71 and accompanying text.

139. *O'Dell*, 44 F.3d at 857-58 (noting that the district court for the Western District of Oklahoma refused to consider new evidence submitted to the Appeals Council); Jones v. Sullivan, 804 F. Supp. 1398, 1404 (D. Kan. 1992) (allowing new evidence to be considered).

140. 804 F. Supp. 1398 (D. Kan. 1992).

141. *Jones*, 804 F. Supp. at 1404 (adopting the Eighth Circuit's analysis in Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992)).

142. *O'Dell*, 44 F.3d at 857-58.

143. *Id.*

144. 44 F.3d 855 (10th Cir. 1994).

145. *O'Dell*, 44 F.3d at 857.

146. *Id.*

147. *Id.* O'Dell submitted a report showing degenerative osteoarthritic changes in her knee and a physician's letter stating that O'Dell had difficulty standing and walking due to her knee condition. *Id.*

148. *Id. See generally* 20 C.F.R. § 404.970 (listing the types of cases that the Appeals Council will review and the types in which it will consider new evidence).

2. Decision

The Tenth Circuit held that the record on review includes new evidence presented to the AC where the AC declines further review of an ALJ decision.[149] After discussing other circuit courts' treatments of the issue, the Tenth Circuit based its decision to consider new evidence on several factors.[150] First, relying on 20 C.F.R. § 404.970(b), the court determined that the Secretary's regulation "gives a claimant a last opportunity to demonstrate disability before the decision becomes final."[151] Second, the court noted that the section requires the AC to "evaluate the *entire record* including the new and material evidence submitted."[152] Last, also under § 404.970(b), the AC must review the ALJ's decision if the "decision is contrary to the weight of evidence '*currently of record.*'"[153] In *O'Dell*, the court determined that the regulation appeared to incorporate the new evidence into the final record.[154] The court therefore concluded that, although the AC declined further review and upheld the ALJ's decision, thus completing the final adjudication within the agency, the Secretary's final decision included the new evidence considered by the AC.[155]

C. *Analysis*

Upon review, a court must determine whether the record supports the ALJ's decision and whether the AC's decision that the evidence was not "new and material" was correct, thereby justifying the AC's denial of further review.[156] To make this determination, a court must review both the ALJ's record and the new evidence that the AC relied upon in reaching its conclusion.

Despite the fact that considering "new evidence" on appeal is seemingly inconsistent with the notion of appellate review,[157] such consideration ensures compliance with regulations governing the adjudication process.[158] Only by examining the new evidence presented to the AC may a court determine whether the AC's decision denying review was correct.[159] The regulations

149. *O'Dell*, 44 F.3d at 859.

150. *Id.* at 858-59. The Tenth Circuit noted that the Seventh and Sixth Circuits review the ALJ's decision without considering new evidence while the Fourth, Eight, Ninth, and Eleventh Circuits include the new evidence in the final decision under review. *Id.* For a discussion of other circuit decisions, see *infra* notes 161-71 and accompanying text.

151. *O'Dell*, 44 F.3d at 859; *see* 20 C.F.R. § 404.970(b) (authorizing the Appeals Council to consider new evidence without a showing of good cause).

152. *O'Dell*, 44 F.3d at 859 (quoting 20 C.F.R. § 404.970(b)) (emphasis added). For the text of 20 C.F.R. § 404.970(b), see *supra* note 128.

153. *O'Dell*, 44 F.3d at 859 (emphasis added).

154. *Id.*

155. *Id.* Upon considering the new evidence, the Tenth Circuit affirmed the district court's decision that the Secretary's decision to deny benefits was supported by substantial evidence. *Id.* at 860.

156. *See supra* notes 128-31 and accompanying text.

157. *See infra* notes 161-69 and accompanying text.

158. *See, e.g.*, 20 C.F.R. § 404.955 (discussing the effect of the decision); 20 C.F.R. § 404.970 (describing types of cases the Appeals Council will review). By considering the "new" evidence, which in a sense is no longer "new" once the Appeals Council has considered it, courts ensure agency compliance with the regulations. *See supra* note 128 and accompanying text.

159. *See, e.g.*, 20 C.F.R. § 404.970 ("If new and material evidence is submitted, the Appeals

establish that once a court determines that the AC was correct in denying review, the ALJ's decision becomes final; as a result, a court must examine the merits of the ALJ's decision in order to assess whether that decision was justified.[160] As a result of the division of the process into two distinct segments, the court is not required to reweigh evidence, only to examine each record to ensure compliance with the regulations.

D. *Other Circuits*

Several circuits have held that the record on review must include new evidence submitted to the AC, even where the AC has denied review.[161] The Ninth Circuit argues that since the AC evaluates the new evidence in determining whether to review the ALJ's decision, courts must consider the new evidence to determine if the ALJ's decision remains supported by substantial evidence.[162] The Eleventh Circuit maintains that each appeal within the administrative process contributes to the final record.[163] When the AC denies review, therefore, the new evidence that it considered becomes part of this record.[164]

In contrast, the Sixth and Seventh Circuits have held that new evidence presented when the AC denies review may not automatically be considered by the reviewing court.[165] The Seventh Circuit summarized its position in *Eads v. Secretary of the Department of Health and Human Services*,[166] in an attempt to persuade other circuits who are debating the issue to consider its view.[167] The Seventh Circuit explained that when the AC denies review, this limits the reviewing federal court to a determination of the correctness of the

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Council *shall* consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision.") (emphasis added).

160. 20 C.F.R. § 404.955(b) (providing that an ALJ's decision is binding unless the Appeals Council denies review and a claimant seeks judicial review).

161. *See, e.g.*, Keeton v. Department of Health and Human Servs., 21 F.3d 1064, 1067 (11th Cir. 1994) (stating that new evidence first submitted to the Appeals Council is part of the record on review); Riley v. Shalala, 18 F.3d 619, 622 (8th Cir. 1994) (considering new evidence but noting that weighing evidence is a "peculiar task for a reviewing court"); Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993) (stating that when the Appeals Council examines new evidence while reviewing the ALJ's decision, the evidence is included in the record); Nelson v. Sullivan, 966 F.2d 363, 366 (8th Cir. 1992) (noting that newly submitted evidence not included in the ALJ record became part of the record when it was submitted to the Appeals Council); Wilkins v. Department of Heath and Human Servs., 953 F.2d 93, 96 (4th Cir. 1991) (holding that the Appeals Council properly incorporated new evidence into the record, which in turn must be considered when reviewing the Secretary's final decision).

162. *Ramirez*, 8 F.3d at 1452.

163. *Keeton*, 21 F.3d at 1067.

164. *Id.*

165. *See, e.g.*, Cotton v. Sullivan, 2 F.3d 692, 696 (6th Cir. 1993) (stating that claimant must demonstrate good cause justifying remand for consideration of new evidence); Micus v. Bowen, 979 F.2d 602, 606 n.1 (7th Cir. 1992) (stating that courts do not consider new evidence presented to the Appeals Council when reviewing the Secretary's final decision because the ALJ did not have access to it); Wyatt v. Secretary of Health and Human Servs., 974 F.2d 680, 685 (6th Cir. 1992) (holding that a court can remand for consideration of new evidence only on a showing that the new evidence is material).

166. 983 F.2d 815 (7th Cir. 1993).

167. *Eads*, 983 F.2d at 818.

ALJ's decision.[168] To determine whether the ALJ's decision was correct, a court may look only to evidence presented to the ALJ, not evidence submitted to the AC.[169]

The Seventh Circuit, in turn, justified its position by emphasizing that considering new evidence requires a court to "sift and weigh evidence," rather than review "evidentiary determinations," thereby altering the court's appellate function.[170] Since weighing evidence is "inconsistent with the fundamental tenets of appellate review," the Seventh Circuit argued that courts must remand pursuant to § 405(g) in order to properly establish an arena for the consideration of new evidence.[171]

CONCLUSION

The Tenth Circuit's continued trend of deference to agency decisions calls into question the ability of administrative law to protect individuals against abuses of an agency's power. Recent decisions have illustrated this trend by expanding deference to agency interpretations of contracts, and by converging the substantial evidence and the arbitrary and capricious standards. By continuing to interpret the standards of review as limiting the court's ability to question agency decisions, the Tenth Circuit has denied adequate protection to individuals.[172] The Tenth Circuit did give more credence to the protections of administrative law in the realm of social security by reviewing all of the evidence presented in the administrative agency review procedures. Since agencies have the authority to promulgate, enforce, and adjudicate rules, the level of scrutiny that courts exercise should reflect the agency's authority, thus ensuring a sufficient check on the administrative branch.

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168. *Id.* at 817.

169. *Id.*

170. *Id.* at 817-18.

171. *Id.* The minority circuits argue that the proper procedure should be to remand pursuant to § 405(g), under which the claimant must prove that her evidence is "new and material." *Cotton*, 2 F.3d at 696. However, the regulations do not require a showing of good cause, as required by § 405(g), for consideration of new evidence. *Compare* 20 C.F.R. § 404.970(b) (lacking a good cause requirement) *with* 42 U.S.C. § 405(g) (stating that a showing of good cause for evidence submitted during the administrative process would undermine the Secretary's regulations specifically allowing evidence to be submitted without such a showing).

172. *See* SCHWARTZ, *supra* note 1, § 10.1, at 624 (arguing that judicial review becomes meaningless when the standards of review are too restrictive).

ARBITRATION

INTRODUCTION

During the survey period between September 1994 and September 1995, the Tenth Circuit decided four arbitration cases. Two of these cases have fairly narrow consequences because they concern arbitration only in the securities industry. In *Metz v. Merrill Lynch*,[1] the court held that Title VII claims must be arbitrated pursuant to an arbitration clause contained in an agreement between a broker and the National Securities Dealers Association.[2] In *Kelley v. Michaels*,[3] the court extended the authority of arbitrators by allowing them to award punitive damages under a contract containing conflicting choice of law and arbitration clauses on punitive awards.[4]

The two cases involving arbitration outside the securities industry have broader implications. In *Coors Brewing Co. v. Molson Breweries*,[5] the court refined the scope of arbitration agreements by holding that "arising in connection with" language mandates arbitration of disputes sufficiently connected to a contract containing an arbitration agreement.[6] In *ARW Exploration Corp. v. Aguirre*,[7] the court held that an arbitrator may not use the alter ego principle[8] to compel nonparties to arbitrate because only the court, not the arbitrator, may compel a party to arbitrate.[9]

This Survey first presents background information on each of these recent cases. It then discusses the decisions and analyzes their ramifications. The Survey examines the holdings of these cases in light of similar decisions by other circuits and offers some explanation of the rationale behind the decisions.

I. ARBITRATION IN THE SECURITIES INDUSTRY

Arbitration, used in the securities industry for over a century,[10] has become an important part of the trade, with approximately 6,600 cases submitted to arbitration per year.[11] Arbitration resolves disputes between securities

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1. 39 F.3d 1482 (10th Cir. 1994).
2. *Metz*, 39 F.3d at 1487-88.
3. 59 F.3d 1050 (10th Cir. 1995).
4. *Kelley*, 59 F. 3d at 1055.
5. 51 F.3d 1511 (10th Cir. 1995).
6. *Molson*, 51 F.3d at 1515.
7. 45 F.3d 1455 (10th Cir. 1995).
8. *See infra* notes 160-67 and accompanying text.
9. *ARW Exploration Corp.*, 45 F.3d at 1460-61.
10. Amy Hutner, *U.S. General Accounting Office Report Re Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, *in* SECURITIES ARBITRATION 1994, at 453 (PLI Corp. L. & Prac. Course Handbook Series No. 852, 1994).
11. Martin L. Budd, *Securities Industry Arbitration—Recent Issues*, C977 ALI-ABA 205, 207 (1995).

firms, between firms and customers, and between firms and their employees.[12] While the American Arbitration Association handles eight to ten percent of the cases, the National Association of Securities Dealers (NASD) manages the majority of cases.[13]

A. *Employee Statutory Rights in the Securities Industry*

1. Background

In some instances, the increasingly broad scope of arbitration[14] intersects with a large assortment of federal statutory rights for employees.[15] For example, under Title VII, which prohibits employment discrimination and encourages equal employment opportunities,[16] an employee may pursue remedies in several forums.[17] These include state and local agencies and the federal courts.[18] Title VII and arbitration intersect because the right to a jury trial granted by Title VII does not render a claim inappropriate for arbitration.[19] The statutory right to a judicial forum clashes with contractual rights stemming from contractual language that mandates an arbitral forum.

The securities industry routinely utilizes arbitration clauses. For example, when a brokerage house employs a securities broker as a registered representative,[20] industry regulatory organizations require the broker to sign a "Uniform Application for Securities and Commodities Industry Representative and/or Agent Form."[21] The form, a private agreement between the employee and the regulatory organization, contains a clause requiring arbitration of disputes between the employee broker and the employer brokerage firm.[22] An

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12. Hutner, *supra* note 10, at 451.

13. Budd, *supra* note 11, at 207.

14. In the mid-to-late 1980s, a series of Supreme Court cases significantly expanded the scope of arbitrable disputes, including claims based on statutory rights. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (holding that a statutory claim must be arbitrated under a predispute arbitration agreement unless the agreement was the result of fraud or the arbitration would undermine the statutory right); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (stating that an agreement to arbitrate future statutory claims must be enforced under the Federal Arbitration Act, absent a clear congressional intent to the contrary, which may be inferred if the statute's underlying purpose conflicts with arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (explaining that an international agreement containing a broad arbitration clause subjects antitrust claims to arbitration).

15. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 16.5.1.1 (1994). Other statutorily-created employee rights include those granted by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988); the Employee Retirement Income Security Program Act of 1974, 29 U.S.C. §§ 1001-1461 (1988); and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988).

16. 42 U.S.C. § 2000(e) (1988).

17. *Id.* § 2000e-5(f)(3).

18. *Id.*

19. Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 638 (1994).

20. Registered representatives are firm employees who deal with customers' buy-sell orders. Hutner, *supra* note 10, at 451.

21. MACNEIL ET AL., *supra* note 15, § 13.3.3.

22. *Id.* Though brokerage firms require that brokers with the firm register with one of the regulatory organizations such as NASD, the registration applications do not fall under the Federal Arbitration Act § 1 employment exception because the applications are not employment contracts. *Id.* at § 16.5.3.1; *see also* Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991)

employee may nevertheless seek to avoid arbitration of statutory claims based on a public policy argument,[23] citing the inadequacy of arbitration to address statutory rights.[24]

A landmark arbitration case, *Gilmer v. Interstate/Johnson Lane Corp.*,[25] opened the door to mandated arbitration of statutory claims and severely curtailed the public policy argument.[26] In *Gilmer*, pursuant to an arbitration clause contained in a broker's representative application, the U.S. Supreme Court decided that a claim under the Age Discrimination in Employment Act[27] (ADEA) was subject to mandatory arbitration.[28] The Fifth Circuit extended the reach of *Gilmer* by holding that a broker's Title VII claim must be arbitrated.[29] A broad reading of *Gilmer* permits arbitration of any statutory claim when an employment contract contains an arbitration agreement.[30]

When determining whether to mandate arbitration of statutory claims, courts tend to apply *Gilmer* mechanically and compel arbitration.[31] Although

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(explaining that an arbitration agreement contained in a securities registration agreement does not fall under the FAA § 1 contract of employment exception).

23. MACNEIL ET AL., *supra* note 15, § 13.3.4.

24. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-57 (1974) (holding that Title VII claims are not suitable for arbitration). As an informal procedure, arbitration is inappropriate to deal with statutory rights due to inadequate fact finding, procedural inadequacies, and the likelihood of a decision based on the parties' agreement rather than the statute or application of industry standards rather than law. *Id. But see* Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMPLOYMENT & LAB. L. 209, 210 n.4 (1995) ("At minimum, it might be thought, the *Gardner-Denver* line is no longer relevant outside the collective bargaining context."). *See generally* MACNEIL ET AL., *supra* note 15, § 11.6 (stating that the public policy defense is most often available in a collective bargaining context).

25. 500 U.S. 20 (1991).

26. *Gilmer*, 500 U.S. at 23.

27. 29 U.S.C. §§ 621-634 (1988).

28. *Gilmer*, 500 U.S. at 27. The Court rejected the employee's broad policy argument that compulsory arbitration does not comport with the underlying purpose of the ADEA. *Id.* at 26-27. The decision also rested in part on the Federal Arbitration Act's policy favoring arbitration. *Id.* at 25 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration")). Another important aspect of *Gilmer* lies in the Court's discussion of Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Court stated that *Alexander* involved arbitration in a collective bargaining context and was not decided under the FAA. *Gilmer*, 500 U.S. at 22. By distinguishing *Alexander* in this manner, the Court created two lines of cases regarding the appropriateness of arbitrating statutory claims. For a discussion of Tenth Circuit decisions on collective bargaining arbitration, see Kerri M. Pertcheck, *Arbitration Survey*, 72 DENV. U. L. REV. 571 (1995). *See generally* Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985 (1993) (discussing the role of arbitration in the collective bargaining context).

29. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (concluding that "[b]ecause both the ADEA and Title VII are similar civil rights statutes, and both are enforced by the EEOC . . . we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration"). This case is especially relevant because of its importance to the court's decision in *Metz*, discussed *infra* notes 34-48 and accompanying text.

30. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1189 (1993). Scholars, however, express wariness regarding arbitration of all statutory claims because arbitration may resolve controversies based on nonlegal social values rather than the law. Additionally, judicial forums are more suited to choose between conflicting public values inherent in statutory claims. *Id.*

31. *Id.* at 1202; *see* Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir.

some circuits have foreclosed the arbitration of Title VII claims based on arbitration agreements in a securities registration,[32] the majority of circuits require it.[33]

2. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[34]

a. *Facts*

Kelli Lyn Metz, an employee of Merrill Lynch, registered as a broker with NASD.[35] An arbitration clause in the registration application required Metz to arbitrate all disputes or claims with Merrill Lynch.[36] Upon termination, Metz filed a district court complaint alleging Title VII violations.[37] Merrill Lynch responded with a motion to compel arbitration and stay court proceedings.[38] The district court held that the Title VII claims were not subject to compulsory arbitration.[39] Merrill Lynch's motion to reconsider was denied, and the company requested dismissal of a subsequent interlocutory

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1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

32. Farrand v. Lutheran Bhd., 993 F.2d 1253, 1255 (7th Cir. 1993) (concluding that the language of the arbitration agreement does not require the arbitration of disputes between NASD members and a registered representative of the member); Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (stating that based on the text of Title VII and congressional intent, an employee cannot be required to arbitrate prior to a judicial hearing); Swenson v. Management Recruiters Int'l, 858 F.2d 1304, 1307 (8th Cir. 1988) (explaining that Title VII promotes public interest and arbitration may hamper this effort).

33. Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992) (stating the plaintiff did not waive the right to a judicial forum since the dispute may be pursued in arbitration and if those proceedings are legally deficient, the plaintiff may move for judicial review); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992) (finding that in a private agreement containing an arbitration clause, plaintiff did not meet the burden of showing congressional intent to preclude Title VII arbitration because the purpose of Title VII is similar to that of the ADEA); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991) (explaining that an arbitration agreement contained in a securities registration agreement does not fall under the FAA § 1 contract of employment exception and must therefore stand); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (holding that Title VII claims, like ADEA claims, are subject to arbitration under the FAA).

34. 39 F.3d 1482 (10th Cir. 1994).

35. *Metz*, 39 F.3d at 1485-86. Brokerage firms normally require brokers to register with a regulatory organization. *See supra* notes 20-24 and accompanying text.

36. *Metz*, 39 F.3d at 1486. By registering with NASD, Metz agreed to abide by all NASD rules. Metz v. Merrill Lynch, No. CIV-89-1548-P, 1990 WL 68532, at *1 (W.D. Okla. 1990). The NASD Manual, ¶ 3744, states:

> It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice for a member or a person associated with a member to fail to submit a dispute for arbitration under the Code of Arbitration Procedure as required by that Code . . . .

Metz, 39 F.3d at 1488 n.6.

37. *Metz*, 39 F.3d at 1485-86. Already on probation for poor performance, Metz informed management of her pregnancy. *Id.* Her immediate supervisor told Metz that women returning from maternity leave often did not adequately perform their duties or failed to return at all. *Id.* Typically, the brokers decided how to distribute their accounts during a leave. *Id.* In this case, however, Metz's supervisor told her that he would make that decision. *Id.* Within two weeks, Metz and her supervisor argued about one of Metz's accounts. *Id.* Metz was fired shortly thereafter. *Id.* The Title VII claim alleged unlawful discrimination and discharge due to her pregnancy. *Id.*

38. *Id.*

39. *Id.*

appeal, citing multiple circuit court decisions holding that Title VII claims do not have to be arbitrated.[40]

After the bench trial resulted in a $53,747 judgment for Metz on the Title VII claim, Merrill Lynch filed a motion to vacate the judgment and sought to compel arbitration of the Title VII claim.[41] The company based the motion to vacate on a change in the law that occurred after the dismissal of the interlocutory appeal.[42] The district court denied the motion to vacate, denied a subsequent motion for reconsideration, and Merrill Lynch filed an appeal in the Tenth Circuit.[43]

b. *Decision*

Relying on the Supreme Court's enforcement of the arbitration clause in *Gilmer*, the Tenth Circuit concluded that Metz must arbitrate her Title VII claim.[44] As an alternative to her main contention that Title VII claims do not have to be arbitrated, Metz argued that FAA section 1 precluded arbitration even if the Title VII claims were subject to mandatory arbitration.[45] FAA section 1, however, does not apply to arbitration clauses contained in a registration application[46] and Metz's duty to arbitrate arose from her broker registration with NASD, not the employment contract with Merrill Lynch.[47] As a result, the Tenth Circuit concluded that Metz must arbitrate her Title VII claim.[48]

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40. *Id.*

41. *Id.*

42. *Id.* In *Alford v. Dean Witter Reynolds, Inc.*, decided after Merrill Lynch sought dismissal of the appeal, the Fifth Circuit held that Title VII claims may be subject to compulsory arbitration. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

43. *Metz*, 39 F.3d at 1486.

44. *Id.* at 1487. The court based much of its reasoning on the similar purposes of the ADEA and Title VII. "Congress closely modeled the ADEA upon Title VII and [the two] statutes are similar both in their aims and in their substantive prohibitions." *Id.* (quoting Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553-54 (10th Cir. 1988)).

45. *Id.* at 1488. FAA § 1 provides in part that "nothing herein contained shall apply to contracts of employment of . . . workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994).

46. *Metz*, 39 F.3d at 1488. The *Metz* court relied on *Gilmer*:

> [I]t would be inappropriate to address the scope of . . . [FAA] § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment . . . . The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's security registration application, which is a contract with the securities exchange, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause of § 1 of FAA is inapplicable to arbitration clauses contained in such registration application.

Gilmer, 500 U.S. at 25 n.2.

47. *Id.*

48. *Metz*, 39 F.3d at 1488. Although generally holding that Merrill Lynch has the right to compel Metz to arbitrate her Title VII claims, the court further found that in this specific instance, Merrill Lynch waived that right by failing to renew its final demand for arbitration in a timely manner. *Id.* at 1490.

3. Analysis

Regardless of the advantages of arbitration,[49] employees fear that mandatory arbitration of statutory claims forces them to relinquish their statutory rights.[50] By allowing mandatory arbitration of statutory rights, courts permit employers to condition employment on the relinquishment of these rights. Thus, through mandatory arbitration policies, business entities may escape the requirements of regulatory legislation.[51]

Attorney awareness of the potential consequences of entering into such agreements reduces the risk that an employee will inadvertently waive statutory rights. Unequal bargaining power, however, makes it difficult to address this risk regardless of the attorney's awareness. Employees have little chance of influencing boilerplate language, such as the language contained in the NASD arbitration clause. Unfortunately, the realities of the job market indicate that employees will continue to sacrifice their right to a judicial forum in order to obtain or retain employment.

4. Other Circuits[52]

The Fifth and Ninth Circuits recently addressed mandatory arbitration of Title VII claims based on arbitration agreements contained in securities registration applications.[53] Both of these cases were decided by circuit courts that previously upheld mandatory arbitration of Title VII claims.[54] The cases further develop and refine the law surrounding mandatory arbitration of employment issues.

The Fifth Circuit's decision in *Williams v. Cigna Financial Advisors*[55] differs from *Metz* in that the employee joined the brokerage firm before the NASD arbitration rules included employment disputes.[56] But because the

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49. "Speed, lower costs, informality, the ability to gain a more suitable neutral decisionmaker, and privacy are the advantages usually cited in support of arbitration. Many of arbitration's alleged advantages result from the autonomy parties gain when they decide to arbitrate rather than go to court." LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 297 (1987).

50. Patrick D. Smith, Comment, *Arbitration—The Court Opens the Door to Arbitration of Employment Disputes:* Gilmer v. Interstate/Johnson Lane Corp., 17 J. CORP. L. 865, 865 (1992); *see, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

51. MACNEIL ET AL., *supra* note 15, § 16.5.4.1. For a general discussion of considerations in employer-drafted mandatory arbitration policies, see Garry G. Mathiason & Pavneet S. Uppal, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, C902 ALI-ABA 875 (1994).

52. The "Other Circuits" sections of this Survey discusses only federal circuit court cases decided within the survey period of September 1994 to September 1995.

53. Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995); Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

54. The court in Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991), found that Title VII claims, based on their similarity to ADEA claims, are subject to arbitration under the FAA. *Id.* at 230. The court in Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932 (9th Cir. 1992), found that the plaintiff did not meet her burden of showing that Congress intended to preclude Title VII arbitration because the purpose of Title VII corresponds to that of the ADEA. *Id.* at 935.

55. 56 F.3d 656 (5th Cir. 1995).

56. *Williams*, 56 F.3d at 659. The opinion also addressed a second contention that the employee did not knowingly and voluntarily surrender his right to a judicial forum, based on the

employee signed a second registration after the amendment of the NASD securities registration, the court held that he had agreed to arbitrate employment claims.[57] By requiring the employee to arbitrate his Title VII claim, the Fifth Circuit Court extended the reach of mandatory arbitration for Title VII claims to the securities industry.

The Ninth Circuit, in contrast, restricted compulsory arbitration of Title VII claims in the securities industry in *Prudential Insurance Company of America v. Lai*.[58] The *Lai* court held that brokerage firm employees cannot be subject to mandatory arbitration of Title VII claims without a "knowing" waiver of statutory remedies.[59] The decision relied on two factors.[60] First, the court held that Congress intended that the waiver of statutory rights result only from a knowing agreement to arbitrate employment disputes.[61] In *Lai*, the registration application did not specifically describe the controversies covered under the arbitration clause.[62] As a result, the employees did not knowingly surrender statutory remedies and could not be forced to arbitrate Title VII claims.[63]

Second, the court recognized that the public policies underlying Title VII deserve at least as much recognition as the FAA's arbitration policy.[64] The court noted that arbitral forums, especially in sexual harassment cases, may not be appropriate.[65]

Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1) (1994). The Older Workers Benefit Protection Act (OWBPA) requires a written waiver of statutory rights. The court determined that the OWBPA did not apply here because it primarily involves waiver of claims and rights under the statute rather than waiver of judicial forums. *Williams*, 56 F.3d at 660.

57. *Williams*, 56 F.3d at 658.

58. 42 F.3d 1299 (9th Cir. 1994).

59. *Prudential Ins. Co.*, 42 F.3d at 1304-05.

60. *Id.* In making this decision, the court relied heavily on *Alexander*, although it is normally applied in a collective bargaining context. *See supra* note 28.

61. *Prudential Ins. Co.*, 42 F.3d at 1304. According to a House of Representatives' report, Congress intended to "encourage[] the use of alternative means of dispute resolution . . . where appropriate" and that alternative dispute resolution should "supplement, not supplant" the remedies provided by Title VII. *Id.* (quoting H.R. REP. NO. 40, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 635). In fact, Senator Dole specifically stated that arbitration should be endorsed only "where the parties knowingly and voluntarily elect to use these methods." *Id.* at 1305 (quoting 137 CONG. REC. S15,472, S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

62. *Id.* at 1302. The registration agreement stated, "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm . . . that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." *Id.* The NASD Manual, in turn, requires that "[a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code . . . ." *Id.* (quoting NASD Manual, Code of Arbitration Procedure, ¶ 3708).

63. *Id.* at 1305. In addition, the employees did not receive a copy of the NASD Manual. *Id.* at 1303. However, even if they had, the court found the language would not give them notice that they must arbitrate Title VII claims. *Id.* at 1305.

64. *Id.*

65. *Id.* "[I]n an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a [NASD arbitration] panel . . . may be especially important." *Id.* at 1305 n.4.

B. *Punitive Damages in Securities Arbitration*

1. Background

As arbitrators' authority to decide substantive disputes continues to expand, their power to award punitive damages becomes increasingly important, especially in the securities industry.[66] At one time the securities industry actually encouraged the use of arbitration, in part to avoid large jury awards.[67] Brokers now complain, however, about arbitrators' power to make punitive awards and the narrow grounds available to appeal such awards.[68]

Agreements routinely used in the securities industry often designate, through choice of law clauses, the use of New York state law. Unlike most states, New York does not allow arbitrators to grant punitive awards.[69] In the same agreement, parties may agree to use certain arbitration rules, such as those of the American Arbitration Association or NASD, which impliedly *do* permit such awards.[70] As a result, the arbitration clause may be inherently contradictory.[71] To further complicate an already complex situation, the FAA does not directly address the propriety of arbitral punitive damage awards.[72]

Until recently, to determine if a particular arbitrator had the power to award punitive damages, a court had to resolve the conflict between federal law and divergent state laws by determining whether the FAA preempts state law prohibiting punitive awards by arbitrators.[73] Lacking guidance from the Supreme Court, the Second and Seventh Circuits applied state law[74] while other circuits applied federal law.[75] The Supreme Court resolved the circuit courts' inconsistency by redefining the analysis of arbitrator-awarded punitive damages in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[76]

The *Mastrobuono* Court precluded use of the New York rule by finding that if parties agree to arbitrate punitive damages, the FAA dictates

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66. BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK app. 7 at 7-2 (1990).

67. J. Stratton Shartel, *The Time Is Right for Limits on Punitive Damages in Securities Arbitration Cases*, INSIDE LITIG., Nov. 1994, at 2, 2.

68. *Id.*

69. Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (N.Y. 1976) (stating that the arbitrator has no power to award punitive damages because it would violate public policy). The Second and Seventh Circuits applied the "New York Rule" and vacated the arbitral awards of punitive damages. Barbier v. Shearson Lehman Hutton Inc., 948 F.2d 117 (2d Cir. 1991); Fahnestock & Co. v. Waltman, 935 F.2d 512 (2d Cir. 1991); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984). Not coincidentally, the jurisdiction of these two circuits includes New York City and Chicago, major hubs for the securities industry.

70. Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 55 (1994).

71. *Id.*

72. *Id.* at 57.

73. Anthony M. Sabino, *Awarding Punitive Damages in Securities Industry Arbitration: Working for a Just Result*, 27 U. RICH. L. REV. 33, 33-34 (1992).

74. *See* Davis, *supra* note 70.

75. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994); Lee v. Chica, 983 F.2d 883 (8th Cir. 1993); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991); Raytheon Co. v. Automated Business Sys., 882 F.2d 6 (1st Cir. 1989); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Willoughby Roofing & Supply Co. v. Kajima Int'l, 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985).

76. 115 S. Ct. 1212 (1995).

enforcement of the contract *even if state law does not allow punitive damages*.[77] The customer/broker agreement in *Mastrobuono* stated that the inherently conflicting New York law and NASD rules would apply to the agreement.[78] To determine if the arbitration agreement reflected an implicit intent by the parties to include or exclude punitive damages, the choice of law and arbitration provisions first must be considered separately, and then construed as a whole.[79] Taken separately, neither clause precluded punitive damages.[80] Taken together, the provisions conflicted.[81] The Court concluded that New York law would apply to the contract in general, but not to the provisions of the arbitration clause.[82]

2. *Kelley v. Michaels*[83]

a. *Facts*

William Michaels, a broker with PaineWebber, handled two accounts for the Kelleys. The Kelleys entered into a Resource Management Account Agreement covering each account.[84] One year later, in October 1989, Michaels left

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77. *Mastrobuono*, 115 S. Ct. at 1217 (emphasis added). The FAA ensures that "private agreements are enforced according to their terms." *Id.* (citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989)).

78. *Id.* at 1214-15. Before *Mastrobuono*, New York law did not allow arbitrators to make punitive awards. *Garrity*, 353 N.E.2d at 794. NASD, however, does allow such awards. *See infra* note 107 and accompanying text.

79. *Mastrobuono*, 115 S. Ct. at 1217. The court in *Mastrobuono* interpreted the choice of law provision as a substitute for a conflict of laws analysis that otherwise would determine what law should be applied. *Id.* As such, the clause did not unequivocally preclude a punitive damages claim. *Id.* The arbitration clause, on the other hand, strongly suggested the appropriateness of punitive damages because it explicitly authorized arbitration under the NASD rules. *Id.* at 1218. The NASD Code of Arbitration Procedure, in turn, states that arbitrators may award "damages and other relief." NASD Code of Arbitration Procedure ¶ 3741(e) (1993). The court interpreted this broad provision to encompass punitive damages. *Id.* Moreover, the NASD Arbitrator's Manual states that an arbitrator may make punitive awards. *Id.*

80. *Mastrobuono*, 115 S. Ct. at 1218.

81. *Id.*

82. *Id.* The Court stated:

> [T]he best way to harmonize the choice of law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice of law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

Id. at 1219.

The Court employed fundamental contract principles when applying the second prong of the test—analyzing the meaning of the provisions taken together. The choice of law clause created ambiguity in an agreement that otherwise permits punitive damages: such ambiguities in the scope of an arbitration agreement are resolved in favor of arbitration. *Id.* at 1218 (citing *Volt Info. Sciences, Inc.*, 489 U.S. at 476); *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Additionally, common law contract principles dictate that any ambiguity be construed against the drafter. *Mastrobuono*, 115 S. Ct. at 1219. Finally, if the choice of law and arbitration clauses contradict, as asserted by Shearson-Lehman, the agreement violated another cardinal rule of contract construction requiring an interpretation that gives effect to all provisions and renders them consistent with one another. *Id.* Justice Thomas dissented, stating that the intent to preclude punitive damages was made clear through the choice of law clause because New York law explicitly prohibits arbitrators from awarding punitive damages while NASD rules merely implicitly allow such awards. *Id.* at 1223 (Thomas, J., dissenting).

83. 59 F.3d 1050 (10th Cir. 1995).

84. *Kelley*, 59 F.3d at 1051-52. Paragraph 12 of the PaineWebber agreement provided: "This

PaineWebber and joined Merrill Lynch, taking the Kelleys' accounts with him.[85] The Kelleys again signed Customer Agreements covering each account.[86] In 1991, their attorney sent Michaels a demand letter alleging churning,[87] unauthorized trading, unsuitable investments leading to portfolio losses, and needless liquidating commissions.[88] They settled with Merrill Lynch for $290,000 but the agreement specifically left open the possibility of pursuing claims against Michaels individually.[89]

The Kelleys filed a state action against Michaels alleging stockbroker fraud and federal securities violations.[90] The Kelleys dismissed the suit without prejudice after Michaels removed it to federal court.[91] The Kelleys filed a second state action which did not include the federal securities allegations.[92] When Michaels sought to compel arbitration, the Kelleys dismissed the second action without prejudice and instead filed a claim with NASD.[93] The NASD claim alleged breach of fiduciary duty, churning, unsuitable investments, and negligence. The Kelleys sought both actual and punitive damages from Michaels.[94] The arbitrators awarded the Kelleys $292,750 in actual damages and $505,217.50 in punitive damages.[95] After the Kelleys confirmed the award in federal district court, Michaels appealed.[96]

b. *Decision*

The Tenth Circuit affirmed the arbitral award of punitive damages.[97]

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agreement and its enforcement shall be construed and governed by the laws of the State of New York." *Id.* at 1052. Paragraph 15 of the agreement provided in part:

> I agree . . . that all controversies which may arise between you and me . . . concerning any transactions . . . shall be determined by arbitration. Any arbitration shall be in accordance with the rules in effect of either the New York Stock Exchange, Inc., American Stock Exchange, Inc., [or] National Association of Securities Dealers, Inc. . . .

Id.

85. *Id.*

86. *Id.* Paragraph 12 of the Merrill Lynch agreement stated in part: "This Agreement . . . will be governed by and interpreted under the laws of the State of New York." *Id.* Paragraph 11 of the agreement stated in part:

> I agree that all controversies which may arise between us . . . shall be determined by arbitration. Any arbitration under this agreement shall be conducted only before the New York Stock Exchange, Inc., the American Stock Exchange, Inc., . . . the National Association of Securities Dealers, Inc., . . . and in accordance with its arbitration rules then in force.

Id.

87. "Churning" occurs when a broker engages in transactions to generate unjustifiable commissions from the customer's loss or transaction costs. THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION § 10.10 (2d ed. 1990).

88. *Kelley*, 59 F.3d at 1052. Michaels charged for the commissions when transferring the Kelleys' accounts from PaineWebber to Merrill Lynch. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1052-53.

92. *Id.* at 1053.

93. *Id.*

94. *Id.*

95. *Id.* at 1051.

96. *Id.* at 1053.

97. *Id.* at 1050. The court rejected Michaels's arguments that: (1) the arbitrators exceeded

First, the court determined that in awarding punitive damages, the arbitration panel did not reach outside the specific claims made by the Kelleys.[98] The Kelleys' second state action clearly requested punitive damages for Michaels's conduct while at Merrill Lynch.[99]

Second, the court addressed whether the PaineWebber agreement or the Merrill Lynch agreement precluded an award of punitive damages.[100] Both agreements provided for arbitration in accordance with NASD rules, which do not preclude the possibility of punitive damages.[101] Both agreements, however, also provided for enforcement under New York state law, which does not allow arbitrators to award punitive damages. In light of the Supreme Court's holding in *Mastrobuono*, the Tenth Circuit concluded that the punitive damages award was proper.[102]

3. Analysis

Many brokerage agreements contain New York choice of law clauses.[103] As a result, *Mastrobuono* and its progeny, including *Kelley*, have far-reaching implications in the securities industry.[104] It is unlikely, however, that the decision will extend beyond the securities context because of the unique nature of securities arbitration.[105] To preclude arbitral punitive damages awards in the future, brokerage houses may attempt to draft documents more carefully, specifically precluding punitive damages awards.[106] The NASD, however, has attempted to divert this result by enacting a rule prohibiting its members from drafting agreements that preclude arbitral awards of punitive damages.[107]

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their authority because the Kelleys did not request punitive damages for Michaels's conduct while at Merrill Lynch; (2) the punitive damages award went against the choice of law clause; and (3) the award was excessive. *Id.* at 1051.

98. *Id.* at 1054. Michaels argued on appeal that because the language of the Demand for Relief did not specifically mention punitive damages for conduct while at Merrill Lynch, the arbitrators went beyond their authority. The court, in rejecting this reasoning, stated that the relief requested fairly sought punitive damages from Michaels, regardless of his place of employment. The Demand for Relief in the NASD claim, which formed the basis of the arbitrator's award, stated: "Based upon the foregoing, Claimants are entitled to the following relief: From PaineWebber and Michaels: a. Actual damages of $30,000; b. Interest as allowed by law; [and] c. Punitive damages in an amount that will deter others from doing what Respondent did to Claimants." *Id.* at 1054 n.3. The arbitration panel, paraphrasing the Demand for Relief, stated, "Claimants requested actual damages in the amount of $30,000.00, interest as allowed by law, punitive damages, legal fees, and costs against PaineWebber and Michaels." *Id.* at 1054.

99. *Id.* These allegations were incorporated into the NASD claim because the Kelleys dismissed that action in deference to the arbitration. *Id.*

100. *Id.* Michaels based his argument on the choice of law clause in the brokerage agreements: New York law does not allow arbitrators to award punitive damages. *Id.* (citing Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976)). *Mastrobuono*, directly on point, disposed of this argument. *Mastrobuono*, 115 S. Ct. 1212, 1218; *see supra* text accompanying notes 73-82.

101. *Kelley*, 59 F.3d at 1054; *see* CODE OF ARBITRATION PROCEDURE pt. 1, para. 3741 (National Association of Securities Dealers 1995).

102. *Kelley*, 59 F.3d at 1055.

103. *See infra* notes 79-82 and accompanying text.

104. Carroll E. Neeseman & Maren E. Nelson, *The Law of Securities Arbitration, in* SECURITIES ARBITRATION: 1995, at 263 (PLI Corp. L. & Prac. Course Handbook Series No. 899, 1995).

105. *Id.*

106. Isham R. Jones, III, *Exemplary Awards in Securities Arbitration: Short-Circuited Rights to Punitive Damages*, 1995 J. DISP. RESOL. 129, 152.

107. RULES OF FAIR PRACTICE Rule 21(f)(4) (National Association of Securities Dealers, Inc.

4. Other Circuits

Two other circuits, following the *Mastrobuono/Kelley* reasoning, recently addressed the power of arbitrators to award punitive damages in securities disputes. The Seventh Circuit, in *Smith Barney Inc. v. Schell,*[108] held that an arbitration agreement identical to that in *Mastrobuono* dictated reversing a district court's injunction preventing an arbitration panel from considering punitive damage claims.[109] Similarly, in *Davis v. Prudential Securities, Inc.,*[110] the Eleventh Circuit ruled that the arbitrator's authority included awarding punitive damages.[111] The arbitration clause in *Davis* was also virtually identical to that in *Mastrobuono.*[112] These cases, like *Kelley*, did little to augment the basic holding in *Mastrobuono* given the similarities of the language used in each of the four contracts.

II. SCOPE OF THE ARBITRATION AGREEMENT

A. *Background*

When construing arbitration clauses, courts often cast them as "broad" or "narrow."[113] Interpretation of the scope of an arbitration clause determines what issues will be arbitrated.[114] A broad clause[115] subjects all disputes that

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1991). The new rule applies only to agreements enacted after 1989. *Id.* at Rule (f)(5).

108. 53 F.3d 807 (7th Cir. 1995).

109. *Smith Barney Inc.*, 53 F.3d at 809.

110. 59 F.3d 1186 (11th Cir. 1995).

111. *Davis*, 59 F.3d at 1196.

112. *Id.* at 1189. In addition, the *Davis* court considered whether punitive damages awards by arbitrators violates the Due Process Clause of the Fifth and Fourteenth Amendments because arbitration lacks procedural protections and meaningful judicial review. *Id.* at 1190. The Eleventh Circuit concluded that a private arbitration contract lacks the required state action element of a due process claim. *Id.* at 1191.

113. *E.g.*, McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988).

114. The Second Circuit has remarked:

> Simply stated, a court should compel arbitration, and permit the arbitrator to decide whether the dispute falls within the clause, if the clause is 'broad.' In contrast, if the clause is 'narrow,' arbitration should not be compelled unless the court determines that the dispute falls within the clause. Specific words or phrases alone may not be determinative although words of limitation would indicate a narrower clause.

Prudential Lines v. Exxon Corp., 704 F.2d 59, 64 (2d Cir. 1983).

115. When a clause employs broad, encompassing language such as "arising out of," "relating to," or "connected with," a court should order arbitration of claims involving the formation, performance, modification, and termination of the contract. MACNEIL ET AL., *supra* note 15, at § 20.2.2.1. Courts have interpreted the following language as broad: "any and all differences, disputes or controversies arising out of," Folkways Music Publishers v. Weiss, 989 F.2d 108, 111 (2nd Cir. 1993); "any dispute," Hornbeck Offshore Corp. v. Coastal Carriers Corp., 981 F.2d 752, 754-55 (5th Cir. 1993); "any controversy arising out of the handling of any of the transactions referred to in this agreement," R.M. Perez & Assocs., Inc. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992). Standard phrases seem to employ either "arising out of" or "related to/connected with" language. "An arbitration clause covering claims 'relating to' a contract is broader than a clause covering claims 'arising out of' a contract." International Talent Group, Inc. v. Copyright Mgmt., Inc., 629 F. Supp. 587, 592 (S.D.N.Y. 1986). Language such as "arising under" necessarily limits the arbitrable disputes to those directly related to the interpretation and performance of the contract. Mediterranean Enter. v. Ssangyong Corp., 708 F.2d 1458, 1463-64 (9th Cir. 1983). "Relating to" language extends the scope of the arbitration clause to include all disputes relating to the

arise out of a contract to arbitration, while a narrow clause limits the arbitrable disputes to those specifically enumerated.[116]

When parties draft a narrow clause, they open the door to the possibility of litigation to determine if a specific dispute falls within the scope of the arbitration clause.[117] The American Arbitration Association, for this reason, does not encourage utilizing overly restrictive language.[118]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[119] the Supreme Court interpreted the scope of a broad arbitration clause to determine the arbitrability of antitrust disputes.[120] Its holding affirmed the First Circuit's determination that antitrust claims fell within the scope of the international contract at issue.[121] A later case in the Ninth Circuit extended the *Mitsubishi* holding to domestic antitrust disputes.[122]

B. Coors Brewing Co. v. Molson Breweries[123]

1. Facts

In 1985, Coors Brewing Co. (Coors) and Molson Breweries of Canada, Ltd. (Molson) entered into an agreement allowing Molson to brew and distribute Coors's products in Canada.[124] This contract gave Molson access to information such as Coors's trademarks, brewing processes, and marketing data that Molson agreed to keep confidential.[125] In 1993, Molson entered into

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parties' agreement. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir. 1987); Rhone-Poulenc Specialties Chimiques v. SCM Corp., 769 F.2d 1569, 1571 (Fed. Cir. 1985). The distinction between the disputes covered by the two different types of broad phrases, "arising under" and "relating to/connected with," rests on whether arbitral disputes involve the parties' contract itself or the relationship that arises from their contract.

116. McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988) The court construed as narrow the following clause:

> If the Company should disagree with any Owner's computation of the amount of the required indemnity payment or refund . . . or if any Owner should disagree with such good faith determination of the Company that there is substantial risk, then the Company and the Owner shall appoint an independent tax counsel to resolve the dispute and, if the parties cannot agree to the appointment of such counsel, said independent tax counsel shall be appointed by the American Arbitration Association.

Id.; *see also* MACNEIL ET AL., *supra* note 15, § 20.2.3.1.

117. COMMERCIAL ARBITRATION FOR THE 1990S, at 142 (Richard J. Medalie ed., 1991) [hereinafter COMMERCIAL ARBITRATION].

118. *Id.* at 143.

119. 473 U.S. 614 (1985).

120. *Mitsubishi*, 473 U.S. at 617. The clause stated, "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration . . . ." *Id.*

121. *Id.* at 628-40. The First Circuit had concluded that the antitrust claims closely related to the contract since they stemmed from specific provisions in the contract. *Mitsubishi*, 723 F.2d at 159-61. The antitrust claims resulted from Mitsubishi's concerns about trademark, reputation, and goodwill. Because the contract addressed each of these factors, the arbitration clause applied to the antitrust claims. *Id.*

122. Nghiem v. NEC Elecs., 25 F.3d 1437 (9th Cir. 1994).

123. 51 F.3d 1511 (10th Cir. 1995).

124. *Coors Brewing Co.*, 51 F.3d at 1512. The agreement contained a broad arbitration clause stating, "Any dispute arising in connection with the implementation, interpretation or enforcement of this Agreement" shall be arbitrated. *Id.* at 1513.

125. *Id.*

a partnership with Miller Brewing Company (Miller), a competitor of Coors, and gave Miller a seat on the Molson board of directors.[126]

Coors filed two separate actions against Molson:[127] one to arbitrate various contract claims stemming from breach of confidentiality, and the second to litigate various antitrust claims.[128] Molson moved to stay the antitrust proceedings pending arbitration of the contract claims.[129] The district court denied the motion, and Molson sought expedited appeal on the grounds that "Coors ha[d] dressed up its contract claims in antitrust clothes" to avoid the arbitration clause in their agreement.[130] Coors responded that the antitrust and contract claims were distinct, and that Coors should be able to pursue an antitrust suit unrelated to the contract.[131]

Molson contended that the Supreme Court's decision in *Mitsubishi* indicated that even if the arbitration clause did not specifically address antitrust claims, antitrust disputes within the scope of the contract may be arbitrated.[132] Coors argued that *Mitsubishi* did not apply because: (1) the scope of the arbitration clause in *Mitsubishi* was broad while the scope of the Molson/Coors clause was narrow; and (2) even if antitrust claims generally fall under the scope of the Molson/Coors agreement, Coors's specific antitrust claims fell outside the scope of the contract and thus, were not subject to the arbitration clause.[133]

2. Decision

The Tenth Circuit held that antitrust claims unrelated to the contract may be litigated.[134] Specifically, it found that the antitrust claims regarding market concentration did not relate to the licensing agreement and may be litigated.[135] Antitrust claims regarding confidentiality and proprietary information, however, did relate to the contract and, therefore, must be arbitrated.[136] In reaching this decision, the court rejected Coors's unsupported contention that the arbitration clause was "narrow" and instead determined that the arbitration clause extended to the antitrust disputes within the scope of the agreement.[137]

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126. *Id.*

127. *Id.* In particular, Coors alleged that the Miller-Molson relationship restrained trade and lessened competition in the United States and North American beer markets. Second, Coors alleged that, as a result of Miller's seat on the Molson board, Miller would have access to confidential Coors's information. Finally, Coors alleged, also as a result of Miller's seat on the Molson board, that Miller could influence the distribution and marketing of Coors's products in Canada. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Coors claimed it had two distinct interests: protecting its rights under the contract and protecting its interest in competition in the North American beer market. It argued that the first category of interests fell under the arbitration clause while the second did not. *Id.*

132. *Id.* at 1514.

133. *Id.* at 1515.

134. *Id.* at 1516.

135. *Id.* at 1517.

136. *Id.* at 1517-18.

137. *Id.* at 1515. In reaching this conclusion, the court relied in part on the all-inclusive nature of the contract terms "implementation" and "enforcement." *Id.* By using the talasmanic word

Next, basing its analysis on *Mitsubishi*, the court examined the individual antitrust claims to determine which, if any, fell within the scope of the arbitration agreement.[138] The court ruled that Coors could litigate only those antitrust claims that lacked a reasonable factual connection to the contract and must arbitrate those antitrust claims that were sufficiently connected to the contract.[139]

C. *Analysis*

When litigating the scope of an arbitration clause, lawyers should recognize that arbitration cannot be avoided by "labelling."[140] As the Second Circuit put it, "In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted."[141] To avoid litigation, the attorney and client should pay close attention to the specific language of the contract.

As with any contract, the exact wording of an arbitration clause should be the result of close consultation between attorney and client. Lawyers should also draw on their own experiences, as well as that of others, to anticipate the disputes that are likely to occur in the course of a legal relationship.[142] In addition to these resources, lawyers may base arbitration clauses on existing contracts, gaining the experience of previous drafters. However, attorneys should take care to address the unique aspects of each situation.[143]

"narrow," Coors attempted to limit the scope of disputes subject to arbitration under the agreement but did not provide any support for this claim. *Id. But see* JEFFREY BARIST, COMMERCIAL ARBITRATION LAW AND CLAUSES: A DRAFTER'S GUIDE § 3.02[B] (1994) (stating that a narrow clause might read "[a]ny dispute, controversy, or claim arising under this contract shall be finally settled by arbitration").

138. *Coors Brewing Co.*, 51 F.3d at 1515. *Mitsubishi* held that only antitrust claims touching specified provisions of the agreement fell within the scope of the contract and therefore within the agreement's arbitration clause. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 159-61 (1st Cir. 1983), *aff'd in part, rev'd in part*, 473 U.S. 614 (1985). The arbitration clause in the *Coors Brewing Co.* agreement provided that "all disputes, controversies or differences which may arise . . . out of or in relation to [specific parts of the contract]" shall be decided by arbitration. *Coors Brewing Co.*, 51 F.3d at 1515.

139. *Coors Brewing Co.*, 51 F.3d at 1516. In other words, the claims that did not relate to the continuing contractual relationship between Coors and Molson could be litigated. *Id.* at 1517. In particular, Coors's claims about market concentration could be litigated while its claims regarding confidential and proprietary information could not be arbitrated. *Id.*

140. For example, Molson claimed that Coors attempted to avoid arbitration by labelling contractual claims as antitrust claims. *Id.* at 1513.

141. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987).

142. For example, discussing the quality and quantity of possible disputes with litigators in the field often provides contract drafters with special "hindsight." COMMERCIAL ARBITRATION, *supra* note 117, at 143-44.

143. Some of the factors which should bear on this analysis include the characteristics of the case, attributes of the parties, features of the environment, and the presence of settlement barriers. EDWARD A. DAUER, MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE § 7.03 (1994).

D. *Other Circuits*

A recent Second Circuit case, *Collins & Aikman Products Co. v. Building Systems*[144] addressed the scope of an arbitration agreement using both "arising out of" and "relating to" language.[145] The court, applying the "piecemeal principle,"[146] analyzed which claims raised arbitrable issues under the broad arbitration clause.[147] It found a claim for tortious interference with an employment contract not arbitrable because it did not "arise under" or "relate to" the agreement that contained the arbitration clause.[148] The court held that a tort claim for trade libel fell within the scope of a broad arbitration clause, however, because it was sufficiently related to the agreement.[149]

A Ninth Circuit case, *Tracer Research Corp. v. National Environmental Services Co.*,[150] involved an arbitration agreement containing "arising out of" language.[151] The court held that a misappropriation of trade secrets claim was not arbitrable, reasoning that the misappropriation constituted a wrong, independent from the licensing and nondisclosure agreement, even though the claim would not have arisen without the agreement.[152]

III. ARBITRATOR'S JURISDICTION OVER THE PERSON

A. *Background*

1. Determining If the Party Agreed to Arbitrate

Just as the terms of the contract control the scope of arbitration,[153] they also control who must arbitrate. Courts normally use state law contract principles to decide whether the parties agreed to arbitrate a specific dispute.[154]

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144. 58 F.3d 16 (2d Cir. 1995).

145. *Collins & Aikman Prods. Co.*, 58 F.3d at 18. The arbitration clause specifically stated, "Any claim arising out of or relating to this agreement shall be settled by arbitration." *Id.*

146. "The preeminent concern of Congress in passing the [Arbitration] Act was to enforce private agreements . . . and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Id.* at 20 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

147. *Id.*

148. *Id.* at 22. "[T]he employment contracts were third party contracts with no logical connection to the . . . agreements containing the arbitration clauses." *Id.*

149. *Id.* at 23. In summary, the court concluded:

> [I]f the arbitration clause is broad, there arises a presumption of arbitrability; if, however, the dispute is in respect of a matter that, on its face, is clearly collateral to the contract, then a court should test the presumption by reviewing the allegations underlying the dispute and by asking whether the claim alleged implicates issues of contract construction or the parties' rights and obligations under it. If the answer is yes, then the collateral dispute falls within the scope of the arbitration agreement; claims that present no question involving the construction of the contract, and no questions in respect of the parties' rights and obligations under it, are beyond the scope of the arbitration agreement.

Id.

150. 42 F.3d 1292 (9th Cir. 1994).

151. *Tracer Research Corp.*, 42 F.3d at 1295.

152. *Id.*

153. *See supra* part II.

154. First Options v. Kaplan, 115 S. Ct. 1920, 1924 (1995) (stating, however, that an important qualification is that courts cannot assume an agreement to arbitrate absent clear and unmistak-

In determining whether arbitration is required, the court ascertains whether the party has a duty to arbitrate the dispute.[155] Generally, absent an arbitration agreement, a party cannot be forced to submit a dispute to arbitration.[156] The court has the exclusive right to interpret the arbitration agreement to determine who is subject to arbitration, unless the parties agree otherwise.[157] If a court does not make its own determination that a party must arbitrate, but accepts the arbitrator's decision binding the party to arbitrate, the court will remand the case on appeal so that it can make its own finding.[158] In contrast, once the court has made a threshold determination about arbitrability, it cannot evaluate the arbitrator's decisions regarding the substantive merits of the case itself.[159]

2. The Alter Ego Doctrine

Under certain circumstances, even a nonsignatory to an agreement may be bound by that agreement.[160] For example, a court may pierce a corporate veil by applying the alter ego doctrine in order to reach a nonsignatory and force them to arbitrate a dispute.[161]

A litigant may demonstrate the alter ego doctrine by showing that a shareholder, overlooking their separate entities, used the corporation as an instrumentality to conduct his own personal affairs.[162] The alter ego doctrine stems not from an individual's actions but from misuse of the corporate form by its owners.[163] The advantages of limited personal liability for corporate shareholders encourages individuals to invest, because the "corporate veil" protects

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able evidence that an agreement was made).

155. AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986) (citing United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

156. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); *AT&T Technologies, Inc.*, 475 U.S. at 648 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

157. *AT&T Technologies, Inc.*, 475 U.S. at 649 (citing *United Steelworkers*, 363 U.S. at 582-83). *Contra* Ralph Andrews Prod., Inc. v. Writers Guild of Am., 938 F.2d 128, 130 (9th Cir. 1991) (stating that parties may agree to submit to the arbitrator the question of arbitrability and consent to grant the arbitrator that authority may be implied from the parties' conduct).

158. *See* American Bell, Inc. v. Federation of Tel. Workers, 736 F.2d 879, 886-87 (3d Cir. 1984) (remanding to the district court the question whether a party should be subject to arbitration under veil-piercing principle).

159. Foster v. Turley, 808 F.2d 38, 42-43 (10th Cir. 1986) ("[T]he court is not authorized to decide the merits of an issue committed by the parties to arbitration.").

160. *See* BARIST, *supra* note 137, § 4.03.

161. *Id.* For example, nonsignatory agents, including partners and employees may be bound to arbitrate. *See also* MACNEIL ET AL., *supra* note 15, § 18.3.1.

162. *See* DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685-87 (4th Cir. 1976) (stating that factors to consider in applying alter ego theory are: gross undercapitalization, failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact the corporation is merely a facade for the operations of the dominant stockholder). *See generally* MARTIN M. WEINSTEIN & JAMES J. DOHENY, MERTENS LAW OF FEDERAL INCOME TAXATION § 54A.13.50 (Supp. 1995).

163. Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978), *aff'd*, 633 F.2d 209 (3d Cir. 1980).

an investor so that risk is borne by the corporate entity, not the individual shareholder.[164] As a result, individuals may be tempted to form sham corporations to avoid obligations such as arbitration.

Determining whether the corporate veil should be pierced depends largely on the specific facts of a case.[165] The federal common-law alter ego doctrine is based on a two-part test.[166] Not every disregard of separateness justifies piercing the corporate veil. The corporation also must be a sham.[167]

B. ARW Exploration Corp. v. Aguirre[168]

1. Facts

Spyridon Armenis was the president and sole shareholder of ARW Exploration Corp. (ARW).[169] Twenty individual investors (plaintiffs) purchased interests in oil and gas ventures promoted by ARW.[170] Each of the plaintiffs entered into at least one of six joint venture agreements.[171] Five of the agreements contained an arbitration clause and were signed by Armenis in his capacity as ARW president.[172] The sixth agreement, however, did not contain an arbitration agreement, and was signed by Armenis as an individual rather than as a representative of ARW.[173]

The plaintiffs moved to compel ARW to arbitrate disputes connected with the six agreements, and also sought, through a third-party complaint, to require Armenis to arbitrate in an individual capacity.[174] The Oklahoma district court initially dismissed the third-party complaint.[175] However, the court later

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164. EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 20:01 (1986). In this way, personal assets of an individual shareholder cannot be reached if the corporation is liable. *Id.*

165. *Id.* § 20:02.

166. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) (stating that the test consists of (1) determining whether the separate personalities and assets of the corporation and individual are blurred from unity of interest and lack of respect given to the separate entities, and (2) deciding whether the sanction of the corporate fiction would promote fraud, injustice, or evasion of legal obligations). Specific factors in the first prong of the test are:

> (1) whether a corporation is operated as a separate entity; (2) comingling of funds and other assets; (3) failure to maintain adequate corporate records or minutes; (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of the corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and (8) diversion of the corporation's funds or assets to noncorporate uses.

Id. at 1052 n.6 (quoting United States v. Van Diviner, 822 F.2d 960, 965 (10th Cir. 1987)).

The second prong of the test requires inequitable behavior such as fraud, injustice, or unfairness. *Greater Kansas Roofing*, 2 F.3d at 1052; *see also* Doyn Aircraft v. Wylie, 443 F.2d 579 (10th Cir. 1971) (stating that when identities of the corporation and the individual merge and separation would lead to inequitable result, veil should be pierced).

167. Kaplan v. First Options, 19 F.3d 1503, 1520-21 (3d Cir. 1994).

168. 45 F.3d 1455 (10th Cir. 1995).

169. *ARW Exploration Corp.*, 45 F.3d at 1457.

170. *Id.*

171. *Id.*

172. *Id.* at 1458.

173. *Id.*

174. *Id.* at 1457.

175. *Id.*

consolidated the case with ARW's claim for injunctive relief, and transferred it to an Oklahoma federal district court.[176] After oral argument, the Oklahoma court ordered arbitration of all claims against ARW, as well as against Armenis individually.[177] During the subsequent arbitration, the arbitrator found that Armenis used ARW as an alter ego, and therefore decided in favor of the plaintiffs.[178] On appeal, Armenis contended that the district court, not the arbitrator, first must pierce the ARW corporate veil and determine that Armenis is an alter ego of ARW before he can be compelled to arbitrate as an individual.[179]

2. Decision

Although addressing the alter ego issue in its confirmation order, the district court essentially accepted the arbitrator's factual findings that Armenis used ARW as his alter ego.[180] The Tenth Circuit held that the responsibility for determining whether a party may be compelled to arbitrate belongs to the court, not the arbitrator.[181] The Tenth Circuit held that the district court must apply principles of corporate law, including the corporate veil doctrine, to determine whether Armenis should be forced to arbitrate individually.[182]

C. *Analysis*

ARW represented the first time the Tenth Circuit has applied the alter ego doctrine in the arbitration context. The court followed existing circuit precedent with regard to both corporate[183] and arbitration law.[184]

An attorney may assist a client to avoid arbitration imposed by the alter ego doctrine because many of the factors in the first prong of the test, maintenance of separate entities, can be controlled through careful planning and implementation of corporate structure and procedures. The second prong, inequitable behavior, is more difficult to control. The client perpetrating a fraud, for example, will likely manipulate otherwise adequate procedures. The best avenue for the attorney in this situation may consist of counseling the client on possible risks incurred from unscrupulous behavior.

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176. *Id.*
177. *Id.*
178. *Id.* at 1461.
179. *Id.* at 1458.
180. *Id.* at 1461.
181. *Id.* The district court erroneously concluded that it lacked the authority to overturn the arbitrator's finding that Armenis used ARW fraudulently and therefore must arbitrate individually. *Id.* This error resulted from mischaracterizing the rule that a district court cannot evaluate the substantive decisions of the arbitrator. *Id.*
182. *Id.* at 1460.
183. *Id.* at 1460-61 (citing Frank v. U.S. West, 3 F.3d 1357 (10th Cir. 1993); Quarles v. Fuqua Indus., 504 F.2d 1358 (10th Cir. 1974)).
184. *Id.* at 1461 (citing Foster v. Turley, 808 F.2d 38 (10th Cir. 1986)). However, the particular combination of issues in *ARW*—applying the alter ego principle in the arbitration context—had not been addressed previously by the Tenth Circuit.

D. *Other Circuits*

Other circuits did not address the alter ego concept in the arbitration context during the survey period. Though beyond the time period of this survey, the Second Circuit, with little discussion of the arbitrator's authority, remanded a case in which the district court held that the arbitrator, not the court, should determine if two companies were alter egos.[185]

CONCLUSION

The decisions discussed in this Survey illustrate the increasing use of arbitration in different contexts. *In Metz*, the court did not establish new precedent but rather refined previous trends. For better or worse, it further extended the reach of arbitration into the statutory arena. In *Kelley*, the court also cultivated existing precedent by further defining the scope of arbitrators' power. By giving more power to the arbitrator, *Kelly*, like *Metz*, extended arbitration. *Coors*, while not fostering the application of arbitration into new areas, refined the interpretation of arbitration clauses, emphasizing the importance of precise drafting. In contrast to these three cases that advance the application of arbitration, *ARW* reinforces the limitation on the power of an arbitrator to compel a party to arbitrate. As the use of alternative dispute resolution continues to evolve, the courts and the legislature must work to define its role as a substitute for adjudication.

Lisa M. Horvath

185. Doctor's Assocs., Inc. v. Distajo, Nos. 94-9207, 9293, 9209, 7183, 1995 WL 540584, at *3 (2d Cir. 1995).

BALLOT ACCESS LAWS

INTRODUCTION

The United States Constitution expressly grants to states the authority to conduct and regulate elections for public officials.[1] State election codes may define the time, place, and manner of holding elections, as well as requirements for voting and the selection of candidates.[2] While the Supreme Court has recognized the need for such regulation to effectively implement the democratic process,[3] constitutional tensions arise when such regulations invade the rights of voters. The Supreme Court's review of state election laws, specifically ballot access laws,[4] has received harsh criticism[5] for failing to employ a consistent standard of review.[6] In 1983, however, the Court set out to end the confusion with its decision in *Anderson v. Celebrezze*.[7] In *Anderson*, the Court announced that the proper approach for determining the level of scrutiny in ballot access cases is a balancing of interests test.[8]

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1. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4, cl. 1. *See generally* Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 90-103 (1994) (providing a thorough discussion of the constitutional framework of election laws).

2. Storer v. Brown, 415 U.S. 724, 730 (1974).

3. *Id.* ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

4. "Ballot access laws" refer to those requirements that a candidate must satisfy in order to have his/her name printed on an election ballot (e.g., a showing of some degree of public support through nominating petitions signed by voters). *See* Jacqueline Ricciani, Burdick v. Takuski: *The* Anderson *Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949, 950-57 (1994).

5. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 849 (12th ed. 1993) ("[T]hese cases . . . show an especially pervasive degree of uncertainty and instability regarding the appropriate level of scrutiny."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-20, at 1106 (2d ed. 1988) (characterizing the Court's inconsistency as "striking" and "positively delphic"); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 898-919 (1994) (describing frequent shifts in the Court's focus throughout the cases); Zywicki, *supra* note 1, at 88-89 (lambasting the Supreme Court's opinions so viciously as to imply utter incompetence in this area). *But cf.* Ricciani, *supra* note 4, at 956 ("In deciding the first ballot access cases, the Court formulated an analytical framework that survived for fifteen years.").

6. Burdick v. Takushi, 504 U.S. 428 (1992) (initial balancing test determines level of scrutiny); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (vague, but resembling rational basis); Anderson v. Celebrezze, 460 U.S. 780 (1983) (balancing of interests); Clements v. Fashing, 457 U.S. 957 (1982) (combination balancing test and rational basis); American Party v. White, 415 U.S. 767 (1974) and Storer v. Brown, 415 U.S. 724 (1974) (purported strict scrutiny, but actually a mix of strict and minimal scrutiny, according to TRIBE, *supra* note 5, at 1107); Lubin v. Panish, 415 U.S. 709 (1974) (strict scrutiny); Bullock v. Carter, 405 U.S. 134 (1972) (strict scrutiny); Jenness v. Fortson, 403 U.S. 431 (1971) (rational basis); Williams v. Rhodes, 393 U.S. 23 (1968) (strict scrutiny).

7. Anderson v. Celebrezze, 460 U.S. 780 (1983). The Court granted certiorari to resolve "conflict among the Circuits on an important question of constitutional law." *Id.* at 786.

8. *Id.* at 789. For a discussion of the balancing test, see *infra* note 49.

The *Anderson* test, as refined in *Burdick v. Takushi*,[9] now stands as the definitive standard for evaluating any constitutional challenge to a state election scheme.[10] The Tenth Circuit has applied the balancing test in cases challenging petition signature requirements,[11] early filing deadlines,[12] and most recently, Oklahoma's ban on write-in voting.[13]

This Survey focuses on the elements and structure of the *Anderson/Burdick* balancing test and then critiques the Tenth Circuit's application of the test in *Coalition for Free and Open Elections v. McElderry*,[14] the only ballot access case decided in the Tenth Circuit during the survey period—September 1994 through September 1995. Part I introduces the constitutional rights at issue in these cases, followed by an overview of the developmental history of the current test. Part II discusses the Tenth Circuit's handling of ballot access cases since *Anderson*, then critically analyzes the *Coalition* decision.

I. BACKGROUND

A. *Rights Implicated by Election Regulations*

While no fundamental right to candidacy exists,[15] the Supreme Court has recognized an overlap between the availability of candidates in an election and the rights of voters to select a candidate of their choice.[16] Ballot access laws, by their very nature, restrict voter choice by screening out those potential candidates who do not satisfy the requirements.[17] Restricting voter choice

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9. 504 U.S. 428 (1992).

10. *Burdick*, 504 U.S. at 438 ("The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*."); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995) ("The appropriate standard governing constitutional challenges to specific provisions of state election laws begins with the balancing test that the Supreme Court first set forth in *Anderson v. Celebrezze*."); *see also* David Perney, *The Dimensions of the Right to Vote: The Write-in Vote, Donald Duck, and Voting Booth Speech Written-off*, 58 MO. L. REV. 945, 953-54 (1993) (citing to the method of analysis used in *Anderson*).

11. Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 741 (10th Cir. 1988) (upholding requirement that petitions for recognition of a political party bear the signatures of registered voters equal to at least five percent of the total votes cast in the previous general election for governor or president).

12. Hagelin For President Comm. v. Graves, 25 F.3d 956, 957 (10th Cir. 1994) (upholding requirement that independent candidates file their nominating petitions 91 days before the general election).

13. Coalition for Free and Open Elections v. McElderry, 48 F.3d 493 (10th Cir. 1995) (upholding Oklahoma's refusal to honor, or even count, votes for candidates not appearing on the printed ballot).

14. 48 F.3d 493 (10th Cir. 1995).

15. Clements v. Fashing, 457 U.S. 957, 963 (1982); Thournir v. Meyer, 909 F.2d 408, 412 (10th Cir. 1990); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.32(a) (5th ed. 1995).

16. *See e.g.*, Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("Election laws will invariably impose some burden upon individual voters."); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."); Bullock v. Carter, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."); *see* Ricciani, *supra* note 4, at 955.

17. Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 743 (10th Cir. 1988)

encroaches on two fundamental rights implicated by the First Amendment,[18] the right to cast an effective vote, and the right of freedom of political association.[19] In addition, the Equal Protection Clause of the Fourteenth Amendment[20] becomes an issue in these cases when the laws create impermissible classifications as to who may qualify for candidacy.[21]

Since voting rights are deemed fundamental under the United States Constitution,[22] strong arguments exist that laws affecting them should be subjected to strict scrutiny.[23] In fact, the Supreme Court has applied strict scrutiny in many cases to strike down state ballot access laws.[24] The Constitution also gives the states broad authority to regulate elections, however,[25] and resolving the conflict between these competing constitutional privileges has proven to be a thorn in the Court's side for nearly twenty-five years.[26]

B. *The Search for a Standard of Review*

1. Troublesome Beginnings

Prior to 1968, ballot access regulations were considered non-justiciable political questions[27] within the exclusive domain of the states.[28] Indeed, the Supreme Court characterized voting rights issues as a "political thicket"[29] into which it seldom ventured. When it did decide these cases, the Court afforded

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(quoting Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)) ("State statutes that restrict 'the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively.'").

18. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The First Amendment was applied to the states through the Fourteenth Amendment. *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 115 S.Ct. 2440, 2444 (1995).

19. *E.g. Anderson*, 460 U.S. at 782; Williams v. Rhodes, 393 U.S. 23, 30 (1968); NOWAK & ROTUNDA, *supra* note 15, § 14.32(a), at 832.

20. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

21. NOWAK & ROTUNDA, *supra* note 15, § 14.31(a), at 866-68, § 14.32(a), at 881-82; TRIBE, *supra* note 5, § 13-19, at 1098.

22. Reynolds v. Sims, 377 U.S. 533, 554-56 (1964); Perney, *supra* note 10, at 952-53. *But see* Pope v. Williams, 193 U.S. 621, 632-33 (1904) (declaring that a right to vote is not guaranteed by the federal Constitution, but instead is a privilege conferred and controlled by the state).

23. *E.g., Clements*, 457 U.S. at 977 n.2 (Brennan, J., dissenting); *Bullock*, 405 U.S. at 144. *But cf. Anderson*, 460 U.S. at 788 ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates.").

Strict scrutiny refers to the high standard of review imposed by courts in cases involving fundamental rights. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (referring specifically to legislation that restricts political processes). In order to survive strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Burdick*, 504 U.S. at 433.

24. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Lubin v. Panish, 415 U.S. 709, 715-18 (1974); Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); *Bullock*, 405 U.S. at 143-44; *Williams*, 393 U.S. at 31-32.

25. *See supra* notes 1-2 and accompanying text.

26. *See* Brownstein, *supra* note 5, at 914-19; Perney, *supra* note 10, at 953; Zywicki, *supra* note 1, at 108. Between *Williams v. Rhodes* in 1968 and *Burdick v. Takushi* in 1992, the Supreme Court applied the gamut of scrutiny levels, including some hybrids. *See supra* note 6.

27. Zywicki, *supra* note 1, at 108-09.

28. *Id.* at 90-107.

29. Colegrove v. Green, 328 U.S. 549, 556 (1946).

great deference to the state legislatures' judgments in addressing various political goals related to elections.[30] In 1968, however, a new era in ballot access jurisprudence began with *Williams v. Rhodes*,[31] and the thorny nature of the Court's plunge into the political thicket emerged almost immediately.[32]

Williams involved a challenge to Ohio's stringent requirements for candidates of new political parties to gain access to a presidential ballot.[33] Specifically at issue was the high number of signatures required. Ohio required that a new party submit a nominating petition containing signatures of qualified electors totaling 15% of the ballots cast in the preceding gubernatorial election.[34] The Court examined this regulation, and the election code as a whole, in terms of impact on Ohio voters' First and Fourteenth Amendment rights, and found the burden so onerous as to be unconstitutional.[35] Since fundamental rights were at stake, the majority subjected the laws to strict scrutiny.[36]

Only three years after the Supreme Court's strict defense of First and Fourteenth Amendment rights in *Williams*, however, the Court dramatically retreated to applying no articulated standard at all.[37] *Jenness v. Fortson*[38] involved a class action suit by voters and prospective candidates attacking the Georgia election code for its signature requirement.[39] The majority, in a relatively short opinion, merely reviewed the *Williams* reasoning,[40] then distinguished Georgia's code from Ohio's laws.[41] The Court concluded that "Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo."[42] On this basis alone—that is, without applying any analysis for rational basis or heightened scrutiny—the Court found Georgia's election scheme acceptable.[43]

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30. Zywicki, *supra* note 1, at 109 ("When the Court reviewed electoral issues, . . . it applied rational basis scrutiny in deferring to the judgements of the states as to the balance of competing political goals.").

31. 393 U.S. 23 (1968).

32. Zywicki, *supra* note 1, at 109-13.

33. *Williams*, 393 U.S. at 24-27. The case involved George Wallace, the American Independent Party's candidate for President in 1968.

34. *Id.* In 1968, this amount equaled 433,100. *Id.* at 24-26. In addition, Ohio required that the petition be filed 90 days before the state primaries. Ohio additionally then imposed impossible conditions upon the primary of a new party. *Id.* at 26 n.1, 35-38 (Douglas, J., concurring), 66 n.7 (Warren, J., dissenting).

35. *Id.* at 25. The Supreme Court determined the impact on candidates and voters by looking at this provision within the context of other Ohio ballot access laws. "The detailed provisions of other Ohio election laws result in the imposition of substantial additional burdens . . . . Together these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." *Id.*

36. *Id.* at 31 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) ("[O]nly a compelling state interest . . . can justify limiting First Amendment freedoms.").

37. TRIBE, *supra* note 5, § 13-20, at 1105 ("In [*Jenness*], the Court dramatically reversed field . . . . Although it did not explicitly indicate what standard of review it employed, it appeared that the Court subjected the Georgia laws to only minimal scrutiny.").

38. 403 U.S. 431 (1971).

39. *Jenness*, 403 U.S. at 432-33. Georgia law provides that an independent candidate may have his name printed on the ballot by filing a nominating petition signed by "a number of electors of not less than five per cent of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking." GA. CODE ANN. § 34-1010(b) (1970).

40. *Jenness*, 403 U.S. at 434-37.

41. *Id.* at 438-41.

42. *Id.* at 438.

43. *Id.* at 440 ("We can find in this system nothing that abridges the rights of free speech

2. Settling on a Compromise

With *Williams* and *Jenness* setting the polar extremes of scrutiny for subsequent ballot access cases, the Supreme Court spent the following two and a half decades stumbling between standards of review.[44] In 1983, in *Anderson v. Celebrezze*,[45] the Court began to regain its balance.

John Anderson sought to run for president as an independent candidate in the 1980 November election.[46] He was denied access to the printed ballot in Ohio because he failed to submit his nomination petition by the March 20 deadline.[47] The *Anderson* Court did not talk about "scrutiny" or "levels of review."[48] Instead, the Court announced a balancing of interests test as the appropriate analytical process for ballot access questions. A court must determine the extent of the injury to the plaintiffs' rights and then weigh that injury against the interests proffered by the state as justification for the burden imposed.[49] The court must also consider to what degree the burden is necessary to achieve the state's objectives.[50]

In addition to this careful articulation of the now-preferred approach, the Court also clarified that its main concern in ballot access cases is the First Amendment rights of the voters.[51] The strength of the *Anderson* decision lies in the Court's recognition of the friction between voters' rights and the need for state regulation of elections.[52] The Court's reasoning cut to the heart of

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and association secured by the First and Fourteenth Amendments. The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better.").

44. For levels of scrutiny in cases during this time period, see *supra* note 6. Even after *Anderson* announced a balancing test, the Court again waffled three years later in Munro v. Socialist Workers Party, 479 U.S. 189 (1986). Instead of weighing the competing interests, the standard put forth in *Anderson*, the majority simply compared the Washington statute to other regulations that had been upheld in previous cases. *Id.* at 196-99. The Court held that, since the effect of the law on constitutional rights was "slight when compared to the restrictions . . . upheld in *Jenness* and *American Party*," there was no constitutional violation. *Id.* at 199. It was not until 1992 that the Court firmly adopted the *Anderson* standard. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

45. 460 U.S. 780 (1983).

46. *Anderson*, 460 U.S. at 782.

47. *Id.* at 783. The deadline that year fell 229 days in advance of the general election.

48. *See id.* at 789 (stating that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions") (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

49. The Court outlined the balancing test as follows:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

50. *Id.*

51. *Id.* at 782 ("The question presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters."); *id.* at 806 ("We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to [support him].").

52. *See* Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993) ("*Anderson* . . . recognize[s] the precious nature of the individual and state rights at issue and the delicate balancing

the inherent difficulty in election ballot law: constitutional infringement in these cases is a matter of degree.[53] Thus, the Court first determined the extent of the asserted injury,[54] then compared this injury to the legitimacy and strength of each of the state's interests.[55]

3. Refining the *Anderson* Approach

In *Burdick v. Takushi*,[56] the Supreme Court affirmed a Ninth Circuit decision upholding Hawaii's ban on write-in voting.[57] The Court applied and further expanded the *Anderson* test. Whereas the *Anderson* court only evaluated the specific law challenged,[58] the *Burdick* Court examined the entire state ballot access scheme to determine the extent of the hardship on the petitioner-voter's rights.[59] The Court established a standard of review for judging whether a state's interest justifies the burdens it imposes.[60] If the "extent of the burden" portion of the test reveals that the law imposes severe restrictions on voters' rights, then the "regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"[61] However, if the law imposes "reasonable, nondiscriminatory restrictions" on voters' protected rights, the law need only be reasonably related to a legitimate state interest.[62]

After defining the state's burden, the reviewing court must examine the state's asserted justifications for constraining voting rights.[63] The *Burdick* Court takes this second part of the analysis a step further than *Anderson*. If a court finds the state's reasons for the election laws strong enough to survive the scrutiny, meaning the overall ballot access scheme passes constitutional muster, then the challenged law is presumed valid.[64]

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required to achieve electoral harmony."); *see also supra* notes 2-3, 15-19, and accompanying text.

53. "The inquiry is whether the challenged restriction *unfairly or unnecessarily* burdens 'the availability of political opportunity'" and, as such, focuses on "the *degree to which* the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Anderson*, 460 U.S. at 793 (emphasis added) (citations omitted); *see also* Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994) (remarking that according to *Anderson*, "[t]he issue is the severity of the handicap").

54. *Anderson*, 460 U.S. at 790-95 (discussing the impact of Ohio's ballot access laws on independent-minded voters, ultimately depriving everyone of valuable political discourse).

55. *Id.* at 796-805 (examining and rejecting three proffered justifications: voter education; equal treatment of candidates; and political stability).

56. 504 U.S. 428 (1992).

57. *Burdick*, 504 U.S. at 441. Hawaiian election law made no provision for the casting and counting of write-in votes. A voter, not wishing to vote for the one candidate running in his legislative district, filed suit. *Id.* at 430.

58. *Anderson*, 460 U.S. at 790-94 (examining the impact of the early deadline for filing nominating petitions).

59. *Burdick*, 504 U.S. at 434-39 (incorporating the Court's occasional practice of considering ballot access provisions within the larger picture of accompanying election laws).

60. *Id.* at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

61. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

62. *Id.* at 434, 440 (citing *Anderson*).

63. *Id.* at 439.

64. *Id.* at 441 (holding that Hawaii's policy of not tallying write-in votes was constitutional).

C. *Present State of the Law*

In recent years, the Supreme Court has given increased consideration to the legitimacy of states' interests in regulating elections,[65] retreating from the strict scrutiny of earlier cases.[66] The *Anderson* decision appears to represent a settling of the Court's own collective mind concerning the preferred approach for these cases.[67] Even though the voters' rights in *Anderson* were given high regard, the Court applied rational basis scrutiny to the state action.[68]

Write-in voting, the issue in the *Burdick* case,[69] has long been considered an indispensable avenue of political expression.[70] In upholding as constitutional Hawaii's complete ban on write-in voting,[71] the *Burdick* majority seized the opportunity to clarify its position on the relationship between the right to vote and First Amendment rights of political expression.[72] The Court explained that a voter's right to self-expression through the ballot is not absolute.[73] Instead, the Court defined the right to vote as "the right to participate in an electoral process," not as a forum for voicing generalized dissention from it.[74] In other words, the Court considers voting a fundamental right, but not all forms of its exercise merit First Amendment protection.

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65. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992); Tashjian v. Republican Party, 479 U.S. 208 (1986); Munro v. Socialist Workers Party, 479 U.S. 189 (1986); *see also* Hagelin for President Comm. v. Graves, 25 F.3d 956, 959 (10th Cir. 1994) (citing *Burdick, supra*) ("[T]he states retain the power to regulate elections, and their election laws invariably will impose some burden on voters.").

66. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). The Tenth Circuit discussed this shift in Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740 (10th Cir. 1988). The Court noted:

> In [*Illinois State Bd. of Elections*], the Court, in evaluating an equal protection challenge to a ballot access restriction, did require the state to establish a compelling interest and to use the least drastic means to achieve its goal. However, other and more recent Supreme Court cases have neither demanded a compelling state interest nor insisted that the state demonstrate it has achieved this end by the least restrictive means available.

Id. at 743 (citations omitted).

67. The four dissenting justices did not object to the analytical process used in the case; rather, their point of disagreement was simply that Ohio's filing deadline was judged too harshly. *Anderson*, 460 U.S. at 812 (Rehnquist, J., dissenting). In fact, the *Anderson* test was applied in *Burdick* with Justice White writing the majority opinion (Justice White having been among the dissenters in *Anderson*). *Burdick*, 504 U.S. at 430; *see also* GUNTHER, *supra* note 5, at 854 n.8.

68. The Court identified the burden to rights as "significant," yet proceeded to strike down Ohio's March filing deadline for independent candidate petitions because the law was not rationally related to the state's asserted interests. *Anderson*, 460 U.S. at 795-806.

69. *Burdick*, 504 U.S. at 430.

70. For discussions about the prominent role of write-in voting in American political history, see Elizabeth E. Deighton, Burdick v. Takushi: *Hawaii's Ban on Write-In Voting Is Constitutional*, 23 GOLDEN GATE U. L. REV. 701, 703-04 (1993); Jeanne M. Kaiser, *Constitutional Law—First Amendment—No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-In Voting Bans in* Burdick v. Takushi, 15 W. NEW ENG. L. REV. 129, 129-31, 147-52 (1993); Michele Logan, *The Right to Write-In: Voting Rights and the First Amendment*, 44 HASTINGS L.J. 727, 732-36 (1993).

71. *Burdick*, 504 U.S. at 430.

72. *Id.* at 433.

73. *Id.*

74. *Id.* at 441.

While *Anderson* set forth the analysis to be used in ballot access/voting rights cases, *Burdick* established the standard of review.[75] It is still possible that a state election law will be subjected to strict scrutiny; whether strict or minimal, however, the Court systematically determines the level of scrutiny in the first part of the balancing test.[76]

D. *Conclusion*

The current trend in Supreme Court ballot access cases departs from the strict defense of First Amendment rights that characterized earlier cases.[77] The *Anderson/Burdick* approach represents the Court's resumption of its appropriate judicial role—respecting both state autonomy and individual liberties.[78] The Court of the current era hesitates to invade the sphere of state control over state affairs.[79] Thus, state election laws are likely to be upheld unless they place severe restrictions on voters and cannot be justified by compelling state interests.[80]

II. TENTH CIRCUIT TREATMENT SINCE *ANDERSON*

A. *Background*

The Tenth Circuit Court of Appeals has handed down a number of decisions following the *Anderson* and *Burdick* methodology.[81] The cases prior to the survey period were well reasoned, adhering strictly to the newly articulated test.[82] Each case opinion described the formula, evaluated the law's burden on protected rights, and then examined the legitimacy and strength of the state's interests furthered by the law.[83] In 1995, however, the Tenth Circuit professed to apply the *Anderson/Burdick* test, yet clearly strayed from that pattern of analysis.

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75. "Despite its explicit endorsement of the *Anderson* approach, the *Burdick* Court also reaffirmed a single modification, that election laws which place 'severe' burdens upon constitutional rights are subject to strict scrutiny . . . ." McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995).

76. *Id.* at 1220-21.

77. For cases demonstrating this progression, see *supra* notes 65-66 and accompanying text.

78. *See* Zywicki, *supra* note 1, at 87-107; *supra* note 52 and accompanying text.

79. *Burdick*, 504 U.S. at 433 (commenting that subjecting every voting regulation to strict scrutiny would essentially "tie the hands of States" in their efforts to run efficient elections); Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (recognizing that states must retain power to regulate their own elections).

80. *Burdick*, 504 U.S. at 434.

81. Hagelin for President Comm. v. Graves, 25 F.3d 956, 959 (10th Cir. 1994); Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 743 (10th Cir. 1988); Populist Party v. Herschler, 746 F.2d 656, 659 (10th Cir. 1984); Blomquist v. Thomson, 739 F.2d 525, 527 (10th Cir. 1984).

82. *See supra* note 81.

83. A summary of the holdings of these cases would not be useful, since each is unique to the specific law challenged and the overall election scheme of the state within which it operates. Each challenge is evaluated on a case-by-case basis depending on many factors. The point is simply that the balancing test was applied consistently by the Tenth Circuit throughout this line of cases.

B. Coalition for Free and Open Elections v. McElderry[84]

1. Facts

A coalition of voters and minor party candidates brought suit against the Oklahoma State Election Board, challenging Oklahoma's total ban on write-in voting in presidential and vice-presidential elections.[85] The coalition framed the issues according to *Burdick*, arguing that the ban violated the First and Fourteenth Amendments when considered in conjunction with the state's other ballot access laws.[86]

2. Decision

The Tenth Circuit, purporting to apply the *Anderson* model, held that Oklahoma's overall ballot access scheme was constitutional and that the ban on write-in voting was, therefore, presumed valid under *Burdick*.[87] The court only feigned adherence to the *Anderson/Burdick* approach, however, because it did not in fact follow the three-part pattern. Instead, the court rearranged the order of tasks and created a new final step.[88]

C. *Analysis*

In the *Coalition* opinion, the Tenth Circuit began with an outline of Oklahoma's ballot access scheme as a whole.[89] This survey took place in the abstract, without consideration of the scheme's impact on voters' rights.[90] Next, the court recited the test and guidelines from the *Anderson* and *Burdick* cases.[91] In briefly summarizing this approach, however, the court reversed the order of the steps.[92] Instead of determining the extent of the laws' burden on voters in order to establish the appropriate standard of review, the court considered the state's interests first, without articulating the standard upon which

84. 48 F.3d 493 (10th Cir. 1995).

85. *Coalition*, 48 F.3d at 495.

86. "Appellants reason that the constitutionality of a ban on write-in voting cannot be judged in a vacuum, and that the more restrictive a State's other means of ballot access are, the more critically such a ban must be viewed." *Id.*; *see* Burdick v. Takushi, 504 U.S. 428, 434-49 (1992). Oklahoma requires that in order for a "nonrecognized party elector" to gain access to the printed ballot in a general election, the candidate must submit a petition of support by July 15, containing signatures equal to at least three percent of the total votes cast in the last presidential election. *Coalition*, 48 F.3d at 496.

87. *Coalition*, 48 F.3d at 499.

88. *Id.* at 496-97; *see infra* note 98 and accompanying text.

89. *Coalition*, 48 F.3d at 495-96 (Ebel, J.).

90. *Id.* The whole reason for examining the state's other election laws is to put the challenged law into context, in order to evaluate the actual and total burden on voters' rights. *Burdick*, 504 U.S. at 436-47 (noting that Hawaii's "system . . . provides for easy access to the ballot," and concluding that "any burden imposed by Hawaii's write-in vote prohibition is a very limited one").

91. *Coalition*, 48 F.3d at 496-97.

92. "Accordingly, a court must first review the State's overall ballot access scheme, weighing the State's interests in ballot access restrictions against the burdens those restrictions impose on voters' interests." *Id.* at 497. This re-prioritizes the state's interests to be considered first, which directly contradicts the order of steps quoted from *Anderson* in the immediately preceding paragraph of the opinion. *Id.* at 496.

it relied.[93] The Tenth Circuit then noted the *Burdick* Court's presumption of validity when an overall scheme passes constitutional muster.[94] The court erroneously perceived this presumption to be the second step in the *Burdick* structure.[95] The court summarized the approach as a two-part test requiring an initial review of the legitimacy of the ballot access laws and then a determination of whether the resulting presumption should be overcome.[96]

In this prefatory summary, the appellate court did not mention any examination of the magnitude of the injury to protected rights, the determination of which *should* define the level of scrutiny for the subsequent state justifications proffered by a state.[97] Instead, the *Coalition* court collapsed the two stages into one and proceeded to invent its own second step.[98]

The court's reasoning began with section I, titled "Oklahoma's Ballot Access Laws."[99] In this section, the court reviewed its earlier holding in *Rainbow Coalition v. Oklahoma State Election Board*[100] and found the requirements of the case at bar less severe than those previously upheld.[101] The court gave no consideration to the extent of the burden imposed by the regulation on voters' rights.[102] Based solely on this comparison to a previous case

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93. *Id.* at 497. When a ballot access law comes under attack, a court must review the law to determine whether it places an unreasonable restriction on the plaintiff's rights. The level of scrutiny that the court will apply to its review of the law depends on the severity of the restriction. *See Burdick*, 504 U.S. at 434. Thus, determining the extent of the burden and the resulting standard of review must necessarily take place first, or else the examination of state justifications will have no basis.

94. *Coalition*, 48 F.3d at 497.

95. *Id.* ("Thus, a court must determine, secondly, if the competing interests are such that this presumption should be overcome.").

96. The *Coalition* court's restatement of the *Anderson/Burdick* balancing test:

> Following this two-step process outlined in *Burdick*, we first review the legitimacy of Oklahoma's ballot access laws for Presidential electors and conclude in Part I that, as in *Burdick*, those laws "pass constitutional muster." In Part II, we then address whether the resulting presumption that Oklahoma's ban on write-in voting is valid should be overcome, and conclude that the presumption prevails in this case.

Id.

97. *Burdick*, 504 U.S. at 434.

98. Part A of the *Burdick* opinion assesses the impact of Hawaii's ballot access laws on the petitioner-voter's rights and finds the burden to be light. Part B then weighs Hawaii's interests asserted to justify the burden imposed. The presumption of validity for the law in question arises because the law is part of a total package that has just been deemed acceptable. There is no Part C in which the *Burdick* Court conducts a second round of balancing to rebut the presumption.

99. *Coalition*, 48 F.3d at 497. Given the actual format of the *Burdick* analysis, perhaps a more appropriate title might have been "The Extent of the Burden Imposed by 'Oklahoma's Ballot Access Laws' on Voters' Rights." *See Burdick*, 504 U.S. at 434-37.

100. 844 F.2d 740 (10th Cir. 1988) (holding that a five percent signature requirement and a May 31 filing deadline for gaining access to the ballot as a recognized party were constitutional).

101. *Coalition*, 48 F.3d at 498. Oklahoma provides four avenues for an elector to gain access to the printed ballot in a presidential election: (1) as an elector for a recognized political party; (2) as an uncommitted elector; (3) as an elector for an independent candidate; or (4) as an elector for an unrecognized political party. *Id.* at 495-96. Even though the *Rainbow* court only addressed the constitutionality of the first alternative, the court in *Coalition* felt that the case was instructional in evaluating the remaining three alternatives. *Id.* at 498.

102. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (requiring that a court "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate").

involving a different challenged provision,[103] the court declared the laws at issue "constitutional."[104] The court omitted the second stage of *Burdick*, apparently forgetting that even light burdens must be justified by legitimate, reasonably related state interests.[105]

Section I of the opinion concludes by stating that the particular ballot access laws at issue "impose only reasonable burdens on Appellants' First and Fourteenth Amendment rights."[106] The positioning of this statement renders it moot, however, since it immediately follows two express findings that the laws were constitutional.[107] Rather than conducting any balancing at all, the court leapt to the conclusion that light burdens indicate constitutionally acceptable regulations.

Section II of the opinion begins with yet a third pronouncement that Oklahoma's ballot access laws are constitutional and then presumes the validity of the ban on write-in voting, citing *Burdick*.[108] The next paragraph in the opinion purported to examine the state interests in by the ban,[109] but in fact merely recited the alleged interests without addressing the issues of legitimacy and reasonableness.

Finally, the Tenth Circuit addressed the appellants' contentions.[110] The court considered their arguments in the rebuttal phase of its modified version of the *Burdick* analysis.[111] All three arguments failed, and the presumption of

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103. *See supra* note 101.

104. "Thus, we find that the July 15 deadline for the signature petitions of nonrecognized party electors, like the May 31 deadline for recognized party electors upheld in *Rainbow*, 'passes constitutional muster'. . . . " *Coalition*, 48 F.3d at 498. "Because the 3% [signature] requirement is less burdensome than the 5% requirement we upheld in *Rainbow*, we find the 3% requirement constitutional as well." *Id.*

105. *Burdick*, 504 U.S. at 439-40.

106. *Coalition*, 48 F.3d at 498-99.

107. *See supra* note 92.

108. *Coalition*, 48 F.3d at 499.

109. The state offered the following interests to justify its ban on write-in voting: (1) "discouraging unrestrained factionalism"; (2) "limiting the general election to recognized parties and to those parties and candidates that are well supported"; (3) "focusing the voters on major issues and candidates"; (4) "conserving state resources" by not having to resort to hand-counting of ballots; and (5) voter education. *Id.* Although the court never expressly declared these interests legitimate, it implicitly did so by finding that they "still outweigh the voters' diminished interest in write-in voting." *Id.* at 501.

110. *Id.* at 499-501. Appellants argued that the *Burdick* presumption should not apply because Oklahoma's ballot access requirements were more onerous than Hawaii's. The court's response to this point demonstrates how truly circular its reasoning was:

> For *Burdick's* presumption not to attach, Appellants would have to show not just that Oklahoma's ballot access laws are more restrictive than Hawaii's, but that Oklahoma's ballot access laws are so restrictive as to burden impermissibly voters' constitutional rights—a proposition that we have already concluded is not the case.

Id. at 500.

111. "To overcome Oklahoma's asserted interests and *Burdick's* rebuttable presumption that Oklahoma's ban on write-in voting is valid, Appellants challenge *Burdick's* applicability on three grounds." *Id.* at 499. In addition to asserting that Oklahoma's laws were more onerous than Hawaii's, appellants also argued two more points: (1) since *Burdick* involved a state election, its presumption should not be applied to the presidential and vice-presidential elections at issue in this case; and (2) a state has less interest in a presidential election than it does in a state or local election and thus should not be allowed to maintain the same stringent ballot access requirements. *Id.*

validity stood.[112] The Tenth Circuit Court of Appeals declared Oklahoma's total ban on write-in voting constitutional.[113]

D. *Other Circuits*

A review of the Second, Fourth, Ninth, and Eleventh Circuits reveals widespread application of the *Anderson/Burdick* balancing approach in ballot access cases.[114] These circuits have not only relied on the test, but have done so with meticulous accuracy as to its structure.[115]

E. *Conclusion*

Despite *Coalition's* analytical shortcomings, its principles align with the Supreme Court's current posture on ballot access and voting rights issues.[116] Elections provide methods for selecting representatives, not platforms for voicing dissention.[117] Under this premise, only those practices contributing to that end are considered defensible.[118] Write-in voting, in particular, is not an effective means of furthering this process.[119] In light of *Coalition* and Tenth Circuit cases cited earlier, the court seems to grasp, in a general sense, the philosophical tenets of the Supreme Court's position. The practitioner, however, should not assume that all the circuit judges will implement the balancing test as it is presented in *Anderson* and *Burdick*.

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112. *Id.* at 499-501.

113. *Id.* at 495.

114. *See* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995); Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994); Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994); Duke v. Smith, 13 F.3d 388, 394 (11th Cir. 1994); Greidinger v. Davis, 988 F.2d 1344, 1352 (4th Cir. 1993); Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992).

115. The Tenth Circuit in *Coalition* evaluated the case under the subheadings "I. Oklahoma's Ballot Access Laws" and "II. Ban on Write-In Votes," indicating its misunderstanding of the proper analysis. *Coalition*, 48 F.3d at 497, 499. On the other hand, the cases cited *supra* note 114 indicate clear understandings of the method. For instance, the court in *Schulz* divided its opinion as follows: "1. Assessing the burden"; "2. Assessing the state's interest"; and "3. Assessing the means employed." *Schulz*, 44 F.3d at 56-58. *Fulani's* subtitles are even more precise: "A. Character and Magnitude of the Asserted Injury"; "B. The Precise Interests Put Forward by the State"; and "C. Necessity of the Provision to Advancing the State's Interests." *Fulani*, 973 F.2d at 1544-47.

116. The *Coalition* court, quoting from *Burdick*, points out that the purpose of elections is "'to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels.'" *Coalition*, 48 F.3d at 501.

117. *Id.*

118. Given the improbability of write-in voting producing a competitive candidate in a national election, demand for the right "amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot." *Burdick*, 504 U.S. at 441. Furthermore, "reasonable regulations advancing the primary function of the election process will be upheld." *Coalition*, 48 F.3d at 501.

119. *Coalition*, 48 F.3d at 501 ("In the context of a Presidential election, the function of actually getting a candidate elected is only nominally advanced by the use of write-in voting . . . .").

CONCLUSION

The trend in ballot access cases suggests that courts should give attention to both individual and state interests but should not intervene unless the state's laws are both onerous and unnecessary.[120] The right to vote in an election no longer qualifies as an exercise of protected speech.[121] Rather, courts perceive voting as the opportunity to participate in one's government and protect the right only on that ground. Write-in voting, as an exercise of political expression, is especially vulnerable since it does not effectively further the objectives of the election process. Thus, claims of injury to First or Fourteenth Amendment rights may, but will not automatically, merit strict scrutiny.[122]

Darla L. Shaffer

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120. Professor Laurence Tribe summarizes the jurisprudence:

> Whatever its doctrinal roots, there is a principle to be distilled from the Court's approach in the ballot access cases: in order to keep ballots manageable and protect the integrity of the electoral process, states may condition access to the ballot upon the demonstration of a "significant, measurable quantum of community support," but cannot require so large or so early a demonstration of support that minority parties or independent candidates have no real chance of obtaining ballot positions.

TRIBE, *supra* note 5, § 13-20, at 1110-11.

121. Plaintiffs continue to demand strict scrutiny when challenging ballot access and voting restrictions, and the courts consistently chide that heightened scrutiny is not necessarily appropriate. *See, e.g.*, *Burdick*, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."); *Rainbow Coalition*, 844 F.2d at 742 ("Plaintiffs begin their argument on this point by contending that we must apply strict scrutiny to state statutes restricting the ballot access of minority parties. We are unable to agree.").

122. "The Supreme Court has recently made clear that while voting enjoys constitutional protection, every law that imposes a burden on the right to vote need not be subject to strict scrutiny." Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994).

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.

DISABILITY LAW

INTRODUCTION

Disability laws seek to incorporate persons with disabilities in the mainstream of American society. The Americans with Disabilities Act of 1990 (ADA)[1] is the most widely-recognized and sweeping disability law promulgated by Congress. While it represents a common avenue for disability suits, other interesting issues arise under the Individuals with Disabilities Education Act (IDEA).[2] IDEA requires that states provide a "free appropriate public education" (FAPE)[3] to all children with disabilities. Part I of this Survey addresses the only IDEA case decided in the Tenth Circuit during the 1994-95 Survey period. *Murray v. Montrose County School District*[4] examined IDEA's "least restrictive environment" mandate and its effect on placing children with disabilities in neighborhood schools.[5] The *Murray* court concluded that, by failing to specifically require placement in neighborhood schools, IDEA regulations create a preference, rather than a presumption, that children with disabilities attend either a school as close to their home as possible or the school they would attend if not disabled.[6]

Part II analyzes the ADA, which expands the requirements of the Rehabilitation Act[7] to nearly all areas of the economy. Congress intended the ADA to not only bring persons with disabilities into the mainstream of American life, but also "to facilitate the transition of eight million Americans with disabilities from the . . . welfare system into the labor market."[8] During the survey period, the Tenth Circuit decided three significant ADA cases which clarify the requirements of a prima facie ADA case.[9] Basically, the Tenth Circuit requires an individual who asserts disability based upon a substantial limitation in working to submit evidence demonstrating disqualification from "'a class of

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1. 42 U.S.C. §§ 12101-12213 (1988 & Supp. V 1993).

2. 20 U.S.C. §§ 1400-1485 (1994) (formerly the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975)).

3. For a definition of free appropriate public education, see *infra* note 28 and accompanying text.

4. 51 F.3d 921 (10th Cir.), *cert. denied*, 116 S. Ct. 278 (1995).

5. *Murray*, 51 F.3d at 928-30.

6. *Id.* at 929.

7. 29 U.S.C. § 794 (1994).

8. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 393 (1995); Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 46 (1992) ("The practical effect of the ADA's employment provisions—assuming they are enforced adequately—could be to enable over eight million workers with disabilities to enter the work force, thereby removing those individuals from government subsidy rolls and empowering them to become contributing, taxpaying members of society.").

9. Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995); White v. York Int'l, 45 F.3d 357 (10th Cir. 1995); Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995).

jobs or a broad range of jobs in various classes.'"[10] Furthermore, the plaintiff bears the burden of proving that reasonable and available accommodations exist, and that she is otherwise capable of performing a job to qualify for relief under the ADA.[11] Taken together, these opinions clarify the burden of proof placed on plaintiffs. They also, however, erect substantial barriers to gainful employment for persons with disabilities.

I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT: IDEA

A. *Background*

Historically, the educational system segregated children with disabilities by excluding them from public schools and placing them in separate schools and classrooms.[12] Although the landmark 1954 decision of *Brown v. Board of Education*[13] established that all schoolchildren have a right to an equal education despite their race,[14] the Supreme Court never interpreted *Brown* to encompass the educational rights of children with disabilities.[15] In fact, the Court has never found that segregating children with disabilities from other children at school violates either equal protection or due process guarantees.[16] Nor has the Court construed the Constitution as requiring that states provide the "least restrictive environment" when educating children with disabilities.[17] Instead, the legislature extended the equal protection and due process provisions in *Brown* to children with disabilities via federal statutes,[18] including the Rehabilitation Act of 1973,[19] the Education for All Handicapped Children Act of 1975 (now part of IDEA),[20] and the ADA.[21]

This section specifically addresses the sole Tenth Circuit decision interpreting IDEA during the survey period, *Murray v. Montrose County School*

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10. *See Bolton*, 36 F.3d at 944 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1995)).

11. For a discussion of the requirements of the ADA, see *infra* notes 192-217 and accompanying text.

12. Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 603-05 (1995).

13. 347 U.S. 483 (1954).

14. *Brown*, 347 U.S. at 493.

15. Melvin, *supra* note 12, at 612.

16. *Id.*

17. *Id.* The term "least restrictive environment" was adopted by regulations under § 504 of the Rehabilitation Act of 1973 and IDEA. *Compare* 34 C.F.R. § 104.34 (1996) (requiring recipients of funds under § 504 to mainstream handicapped persons "to the maximum extent appropriate") *with* 34 C.F.R. § 300.550-.556 (1995) (discussing the mainstreaming requirements mandated by IDEA). "The term 'least restrictive environment' is often referred to as the 'mainstreaming' mandate." Melvin, *supra* note 12, at 671 n.99.

18. Melvin, *supra* note 12, at 612.

19. 29 U.S.C. § 794 (1994). Section 794(a) provides:

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency or by the United States Postal Service.

Id. § 794(a).

20. Pub. L. No. 94-142, 89 Stat. 773 (1975) (amending the Education of the Handicapped Act, codified with subsequent amendments at 20 U.S.C. §§ 1400-1485 (1994)).

21. 42 U.S.C. §§ 12101-12213 (1988 & Supp. V 1993).

District.[22] The *Murray* decision primarily addresses whether the "least restrictive environment" (LRE) mandate of IDEA presumes that the education of children with disabilities take place in their neighborhood schools.[23]

1. The Least Restrictive Environment

IDEA applies only to children with educational disabilities,[24] and includes an exhaustive list of recognized educational disabilities.[25] Children with such disabilities share a need for special education services, including instruction specifically designed to meet their unique needs.[26] IDEA does not require education in a regular classroom, recognizing that special education may take place in a variety of locations, including the home, hospital, institution, or other setting.[27]

IDEA specifies, however, that states must provide children with disabilities a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE).[28] This provision requires that state education agencies ensure, to the "maximum extent appropriate," that they educate disabled children with nondisabled children.[29] Placement in special classes or separate facilities should occur only when the disability's severity does not permit education in regular classes with the use of supplementary aids and services.[30]

Ideally, inclusion[31] provides that students with disabilities, regardless of

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22. 51 F.3d 921 (10th Cir.), *cert. denied*, 116 S. Ct. 278 (1995).

23. *Murray*, 51 F.3d at 928. The LRE mandate is required by IDEA's implementing regulations. 34 C.F.R. §§ 300.550-.556 (1995).

24. *See, e.g.*, Doe v. Board of Educ., 753 F. Supp. 65 (D. Conn. 1991) (finding that a boy with behavioral problems was not emotionally disturbed under IDEA because his difficulties did not adversely affect his educational performance); Hiller v. Board of Educ., 743 F. Supp. 958 (N.D.N.Y. 1990) (holding that a boy's learning difficulties were not educationally disabling).

25. The list includes children "with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A) (1994).

26. *Id.* § 1401(a)(16).

27. *Id.*

28. *Id.* § 1401(a)(18). The Act defines free appropriate public education as "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section [1414(a)(5)].

Id.

29. *Id.* § 1412(5)(B); 34 C.F.R. § 300.550(b)(1) (1995); Martha M. McCarthy, Commentary, *Inclusion of Children with Disabilities: Is It Required?*, 95 EDUC. L. REP. 823, 823-24 (1995).

30. 34 C.F.R. § 300.550(b)(2).

31. Although the terms "inclusion" and "mainstreaming" are often used synonymously, they are not the same. McCarthy, *supra* note 29, at 824. "Mainstreaming" refers to the participation of disabled children in some activities with nondisabled children. These activities usually include nonacademic classes such as physical education, music, assemblies, and lunch, with instructional support. *Id.*; Allan G. Osborne, Commentary, *The IDEA's Least Restrictive Environment Mandate: A New Era*, 88 EDUC. L. REP. 541, 542 (1994). "Inclusion," a term of art not found within the

severity, participate in a regular classroom with children of their same age and grade, while receiving needed educational support within that classroom.[32] IDEA creates a presumption of integration,[33] allowing schools to remove a child from her regular classroom only when absolutely necessary.[34]

IDEA soundly supports the principle that schools educate children with disabilities in the least restrictive environment appropriate to meet their needs, even though the term "least restrictive environment" does not appear on the face of the act.[35] The LRE mandate acknowledges that some students need a more restrictive environment than others, and, therefore, compliance does not always result in "mainstreaming."[36] Regulations promulgated pursuant to IDEA require that public agencies supply a variety of alternative placement options that provide necessary special education and related services to children with disabilities.[37]

2. The Standard for IDEA Compliance: *Board of Education v. Rowley*[38]

Although the Supreme Court has never ruled directly on the LRE doctrine, in *Board of Education v. Rowley,* the Court established both the substantive standard for compliance with IDEA's FAPE requirement and the proper scope of review for IDEA cases.[39] Circuit courts continue to struggle with the question of whether the FAPE requirement encompasses the LRE mandate, or if the two depict separate constructs requiring different review criteria. The tension created by this issue has resulted in a circuit split regarding the appropriate standard of review for IDEA cases.[40]

Rowley limited the standard of review to two inquiries: first, whether the state complied with IDEA's procedures, and secondly, whether the individualized educational program (IEP)[41] provided reasonable educational benefits to the child.[42] Furthermore, under *Rowley,* a court should determine only whether these two basic requirements are met, leaving questions of educational

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text of IDEA, refers to placing students in regular classrooms with educational support. McCarthy, *supra* note 29, at 824.

32. McCarthy, *supra* note 29, at 824.

33. Osborne, *supra* note 31, at 547.

34. 34 C.F.R. § 300.550(b)(2).

35. The term "least restrictive environment" does appear in the regulations promulgated under the Act. *Id.* §§ 300.550-.556; Melvin, *supra* note 12, at 621.

36. Osborne, *supra* note 31, at 542.

37. 34 C.F.R. § 300.551.

38. 458 U.S. 176 (1982).

39. *Rowley,* 458 U.S. at 209-10 (supporting the school district's decision not to require a sign language interpreter because the statute requires only access to the educational process); Melvin, *supra* note 12, at 626.

40. For a discussion of the position of other circuits, see *infra* notes 44-45, 90-98 and accompanying text.

41. IDEA's IEP is "a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals and evaluation criteria and procedures to determine whether the child has met those goals." Association for Community Living v. Romer, 992 F.2d 1040, 1043 (10th Cir. 1993); *see* 20 U.S.C. § 1401(a)(20) (1994).

42. *Rowley,* 458 U.S. at 206-07.

methodology and policy to the states.[43] In essence, this deferential approach precludes courts from second-guessing the decisions of school districts.

While some circuits extend *Rowley's* two-part FAPE inquiry to placement cases,[44] other circuits decline to do so, noting that such decisions are better left to educational professionals.[45] Findings by courts that refuse to extend *Rowley* recognize a distinction between decisions involving the use of a particular educational methodology and those involving a child's placement.[46] Decisions extending *Rowley*, by contrast, focus on the practical difficulty in distinguishing the two issues, because decisions concerning an educational environment may affect an educational outcome.[47] If considered a question of methodology, *Rowley* limits judicial review of placement decisions in LRE cases. Unfortunately, this approach leaves placement decisions in the hands of

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43. Melvin, *supra* note 12, at 628-29. The act leaves primary responsibility for determining the educational method most suitable to the child's needs to the state and local educational agencies. *Rowley*, 458 U.S. at 207.

44. Melvin, *supra* note 12, at 629, 662-66; *see* Briggs v. Board of Educ., 882 F.2d 688, 691-92 (2d Cir. 1989) (purporting to follow the test established by the Supreme Court in *Rowley*, but holding that the proper test is whether placement recommended by the school district is reasonably calculated to provide an educational benefit). While following the "reasonably calculated" test, other circuit courts give great deference to the decisions of school districts. *See, e.g.*, Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178, 1183 (9th Cir. 1984) (characterizing the placement decision as one of educational policy and holding that transferring a child to a more restrictive setting was permissible provided the transfer was reasonably calculated to provide a free appropriate education).

45. *See* Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983) (distinguishing *Rowley* on the basis that the appropriateness of a disabled child's education is different from the issue of whether the child has been placed in compliance with the LRE mandate). *Roncker* adopted a feasibility test for use when a segregated facility is considered superior to a nonsegregated facility. *Id.* at 1063. The test requires a court to determine if the services that make the segregated facility superior could feasibly be provided in the nonsegregated facility. *Id.* If educating the child in the nonsegregated setting is feasible, segregation is inappropriate. *Id.* The Fourth and Eighth Circuits adopted the *Roncker* test. *See* Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 879 (4th Cir. 1989); A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987).

The Fifth Circuit concluded that the *Rowley* test was inappropriate for LRE cases and explicitly rejected *Roncker*, finding it too intrusive into the educational policy decisions of local school districts. *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1046 (5th Cir. 1989). *Daniel* advanced its own two-part test, first asking if education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily. *Id.* at 1048. If it cannot, and the school intends to provide special education or remove the child from the regular classroom, the court next asks if the school has mainstreamed the child to the maximum extent appropriate. *Id.* at 1050. This approach has been adopted by the Third and Eleventh Circuits. Oberti v. Board of Educ., 995 F.2d 1204, 1215 (3d Cir. 1993); Greer v. Rome Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991).

The Ninth Circuit adopted yet another balancing test, this one involving four factors courts should consider when making placement decisions. *See* Sacramento Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir.), *cert. denied*, 114 S. Ct. 2679 (1994). The four factors include: (1) the educational benefits available in the regular classroom as compared to the special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the child with a disability on the teacher and other children; and (4) the cost of mainstreaming. *Id.*

For an in-depth treatment of these tests, see Melvin, *supra* note 12, at 630-42.

46. Ralph E. Julnes, Commentary, *The New* Holland *and Other Tests for Resolving LRE Disputes*, 91 EDUC. L. REP. 789, 792 (1994).

47. *Id.*

school officials who must consider factors extrinsic to a specific child's right to an education in the least restrictive environment.

B. Murray v. Montrose County School District[48]

1. Facts

In *Murray*, a 12-year-old boy with multiple disabilities lived approximately five blocks from his neighborhood school.[49] Pursuant to statute,[50] in April and October of 1988, a multi-disciplinary staffing team of school district professionals convened to formulate the requirements of Murray's special education program.[51] Working with input from Murray's parents, the staffing team developed an educational plan designed to meet the child's special needs.[52] At that time, the group determined that the district could meet Murray's educational goals at his neighborhood school, Olathe Elementary.[53]

Because Murray did not progress as expected, the staffing team reviewed his IEP in January 1990.[54] To address the district's concerns, the team modified Murray's curriculum and increased special education services.[55] In July 1990, Murray underwent surgery which entailed spending six weeks in a cast. As a result, his progress regressed in some areas, and he failed to complete his IEP.[56] At a meeting in August 1990, members of the staffing team suggested Murray move to another school better suited to the needs of students with multiple disabilities.[57] Because Murray's parents strongly preferred that he remain at his local school, they failed to reach a consensus with the staffing team about proper placement.[58] Consequently, the district's Director of Special Education made an executive decision to move the child[59] and informed the Murrays by letter of their right to challenge the decision in a due process hearing.[60] The staffing team reconvened in March 1991, but made no further progress.[61]

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48. 51 F.3d 921 (10th Cir.), *cert. denied*, 116 S. Ct. 278 (1995).

49. Murray's various disabilities resulted from cerebral palsy. *Id.* at 922. According to the administrative law judge, his condition caused spastic quadriplegia and severe mobility and coordination deficits, impaired vision due to an inability to focus his eyes together, difficulty climbing stairs and writing, and speech impairments. *Id.* at 923 n.1.

50. 20 U.S.C. §§ 1401(a)(18), 1414(a)(5) (1994).

51. *Murray*, 51 F.3d at 923.

52. *Id.*

53. *Id.*

54. *Id.* at 924.

55. *Id.*

56. *Id.* The record does not address the nature or the extent of Murray's regression.

57. *Id.* At the time of review, Murray was in the second grade, but functioning intellectually at a kindergarten level in some areas and at a first grade level in others. *Id.* Murray's strengths were social skills and interaction. *Id.*

58. *Id.* Staffing team members, including Olathe's psychologist, resource teacher, principal, and Murray's classroom teacher, recommended moving Murray. *Id.* His parents, occupational therapist, physical therapist, and speech therapist opposed the move. *Id.*

59. *Id.* at 924 n.6.

60. *Id.* at 924.

61. *Id.* at 925.

At the due process hearing,[62] the hearing officer determined that the neighborhood school provided Murray with an appropriate education, and the district appealed.[63] The administrative law judge reversed the hearing officer's decision, finding that Murray had not achieved "any meaningful educational progress" at his neighborhood school, and holding that a transfer was appropriate.[64] As provided by statute,[65] the Murrays filed a complaint in district court.[66] The school district moved for summary judgment, which the court granted and the Murrays appealed.[67]

Throughout the due process hearing, the litigation, and the appeals procedures, Murray remained at his neighborhood school.[68] The district re-evaluated his special education program in November 1993, and agreed that it could implement his revised IEP without moving him to a different school.[69]

2. Decision

Noting that the Supreme Court had not addressed how lower courts should evaluate satisfaction of the LRE mandate and acknowledging the emerging standards adopted by other circuits, the Tenth Circuit specifically declined to adopt a standard of review for LRE cases.[70] Instead, the court determined that a single legal issue controlled the outcome of this case: whether the LRE mandate of section 1412(5)(b) includes a presumption favoring the neighborhood school with its supplementary aids and services.[71]

In a de novo hearing on the issue,[72] the court of appeals held that IDEA's LRE mandate presents no presumption of neighborhood schooling.[73] The decision indicated that the plain meaning of the term "regular educational environment" does not imply neighborhood schools.[74] Furthermore, according to the Tenth Circuit, the requirement of mainstreaming disabled children to the maximum extent possible fails to indicate a location in which that inclusion must take place.[75] Thus, while IDEA provides that the "educational placement of each child with a disability [shall be] as close as possible to the

62. *Id.*; *see* 20 U.S.C. § 1415(B)(2) (1994).
63. *Murray*, 51 F.3d at 925.
64. *Id.*
65. 20 U.S.C. § 1415(e)(2).
66. *Murray*, 51 F.3d at 925.
67. *Id.* The school district originally moved for full summary judgment. *Id.* When the court denied the motion, however, the district asked that the court either dismiss the complaint in part or grant a partial summary judgment. *Id.*
68. *Id.* Murray's continued presence at the neighborhood school was part of the "stay put" provision of IDEA, which requires that students stay where they were at the time the conflict arose rather than being moved while litigation is in process. 20 U.S.C. § 1415(e)(3)(A).
69. *Murray*, 51 F.3d at 925.
70. *Id.* at 926-27. For a discussion of the split in the circuits, see *supra* notes 44-45, *infra* notes 90-98 and accompanying text.
71. *Murray*, 51 F.3d at 928.
72. De novo hearings are held at the appellate level without relying on the decisions made at the lower level. BLACK'S LAW DICTIONARY 721 (6th ed. 1990).
73. *Murray*, 51 F.3d at 930.
74. *Id.* at 928.
75. *Id.* at 929.

child's home,"[76] such language at most denotes a preference, not a requirement, that education take place in a neighborhood school.[77]

The court, looking to the plain meaning of the statute, reasoned that while IDEA clearly requires inclusion of children with disabilities in the regular education process, it does not address the appropriateness of removing a child with disabilities from a neighborhood school.[78] The court specifically rejected the Murrays' arguments that "'regular educational environment' implicitly includes neighborhood schools, that 'special classes' means non-regular classes, and that 'separate schooling' means non-neighborhood schools."[79]

C. *Analysis*

The difficulty in interpreting IDEA cases stems from the somewhat contradictory goals of the Act.[80] IDEA requires that children with disabilities receive different treatment via an individualized education designed to meet their unique needs.[81] At the same time, the Act advances a strong preference for integration, emphasizing the commonalities disabled children share with other children.[82]

The manner in which states must implement IDEA provisions remains a source of confusion. The LRE mandate is silent as to which schools enable a child to receive a FAPE, and thus does not expressly require that disabled students be placed in neighborhood schools.[83] The regulations do, however, require placement "as close as possible to the child's home,"[84] and, unless another arrangement is necessary, "in the school that he or she would attend if nondisabled."[85] Under IDEA, the school district must provide children with disabilities an appropriate education. A district, however, need not place these children in neighborhood schools if it can provide a free appropriate public education elsewhere.[86] To efficiently use resources, a district may exercise discretion and concentrate services at particular schools to address students' specific needs and disabilities.[87]

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76. 34 C.F.R. § 300.552(a)(3) (1995).

77. *Murray*, 51 F.3d at 929.

78. The salient portion of IDEA examined by the *Murray* court reads:

> [T]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . .

20 U.S.C. § 1412(5)(B).

79. *Murray*, 51 F.3d at 928-29.

80. Melvin, *supra* note 12, at 643.

81. 20 U.S.C. §§ 1401(a)(20), 1414(a)(5).

82. *Id.* § 1412(5)(B); Melvin, *supra* note 12, at 643.

83. Osborne, *supra* note 31, at 543.

84. 34 C.F.R. § 300.552(a)(3).

85. *Id.* § 300.552(c).

86. *See Murray*, 51 F.3d at 929 (holding that a district may place a student in a school other than the neighborhood one when the student's IEP so recommends).

87. *See, e.g.*, Barnett v. Fairfax County Sch. Bd., 927 F.2d 146, 151-52 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (noting that centralization of a cued speech program is appropriate under the act).

The regulations, as interpreted by the Tenth Circuit's holding in *Murray*, imply that districts should educate disabled students in their neighborhood schools unless the student's IEP recommends otherwise.[88] If a district can best satisfy an IEP through placement at a location other than the neighborhood school, proximity to a child's home becomes less important[89] even though such a decision might perpetuate segregation.

D. *Other Circuits*

Courts have consistently upheld school districts' practice of centralizing special education services, thereby allowing placement of children with disabilities away from neighborhood schools.[90] At least three cases addressing the issue of placement in neighborhood schools, including *Murray*, support a school district's prerogative to place children with disabilities in schools other than those they would attend if not disabled.[91]

The Fourth Circuit, in *Barnett v. Fairfax County School Board*, approved a centralized cued speech program even though it required a hearing-impaired student to attend school several miles from his home.[92] The court, recognizing the limited resources available to schools and noting that the successfully mainstreamed student participated in extracurricular activities and earned satisfactory grades,[93] acknowledged that the centralized program better served the needs of all students.[94] Likewise, the Eighth Circuit also concluded that a school district need not modify a neighborhood school for a student using a wheelchair because another building in the district was accessible.[95]

On the other hand, the Third Circuit noted in *Oberti v. Board of Education* that federal regulations requiring states to place disabled children "as close as possible to the child's home" create a presumption favoring placement in neighborhood schools.[96] *Oberti*, however, involved removal of a disabled child from a regular classroom to a self-contained classroom for children with disabilities, not removal from a neighborhood school.[97] The Tenth Circuit in *Murray* soundly rejected the Third Circuit's approach, noting that even *Oberti* qualified the presumption by stating that placement in a neighborhood school may not be feasible; if it is not, placement should occur as close to home as

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88. *Murray*, 51 F.3d at 929.
89. *Id.*
90. Osborne, *supra* note 31, at 543.
91. *Murray*, 51 F.2d 921; *Barnett*, 927 F.2d 146; Schuldt v. Mankato Indep. Sch. Dist., 937 F.2d 1357 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992).
92. *Barnett*, 927 F.2d at 149.
93. *Id.*
94. *Id.* at 149-50.
95. *Schuldt*, 937 F.2d at 1358-59 (noting that the school district met the requirement of providing the student with a free appropriate public education).
96. Oberti v. Board of Educ., 995 F.2d 1204, 1224 n.31 (3d Cir. 1993). The school district challenged a decision prohibiting it from placing a disabled child in a special education program outside the school district. *Id.* at 1206-07. The court held the school district failed to meet its burden of showing compliance with IDEA's LRE mandate. *Id.* at 1207.
97. *Id.*

possible.[98] Given these decisions, the ability of children with disabilities to attend school in their own neighborhoods with their peers and siblings remains fully within the discretion of school districts.

II. AMERICANS WITH DISABILITIES ACT: ADA

A. *Background*

The ADA, the most widely recognized and far-reaching antidiscrimination statute, prohibits discrimination against persons with disabilities in nearly all areas of the public and private sector.[99] The ADA expands the scope of the Rehabilitation Act of 1973,[100] which applied only to entities that received federal aid. The ADA prohibits discriminatory conduct by those who do not receive federal financial assistance as well.[101] Congress closely related the two acts, as evidenced by the legislature's clear intention that the relevant case law and regulations developed under the Rehabilitation Act generally apply to the ADA.[102]

A prima facie case under the ADA requires that a plaintiff establish she: (1) is disabled within the definition adopted by the ADA; (2) is "otherwise qualified," meaning that she can perform the essential functions of the position with or without reasonable accommodation; and (3) was discriminated against on the basis of her disability.[103]

The Tenth Circuit decided three employment cases brought under the ADA during the survey period, each of which addressed issues regarding the definition of terms and elements of proof required in ADA cases. *Bolton v. Scrivner, Inc.*[104] examined the definition of an "individual with a disability" in the "major life activity" of working, and clarified the required proof that one is "substantially limited" in her ability to work. Likewise, *White v. York International*[105] and *Milton v. Scrivner, Inc.*[106] considered the definition of a "qualified individual with a disability," addressed the plaintiff's burden to provide evidence of "reasonable accommodation," and adopted a two-step process by which courts may qualify a person under the ADA.[107] Together, these three cases refine the elements a prevailing plaintiff must demonstrate under the ADA.

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98. *Murray*, 51 F.3d at 929 n.13 (quoting *Oberti*, 995 F.3d at 1224 n.31).
99. 42 U.S.C. §§ 12101-12213 (1988 & Supp. V 1993).
100. 29 U.S.C. § 794 (1994). For the statutory language of section 794(a), see *supra* note 19.
101. 42 U.S.C. §§ 12101-12213.
102. 29 C.F.R. app. § 1630.2(g) (1995) (citing S. REP. NO. 116, 101st Cong., 1st Sess. 21 (1989); H.R. REP. NO. 485 pt. 3, 101st Cong., 2d Sess. 27 (1990)); *see also* School Bd. v. Arline, 480 U.S. 273, 279 (1987) (treating Rehabilitation Act regulations promulgated by the Department of Health and Human Services as "an important source of guidance on the meaning of § 504" of the Rehabilitation Act) (quoting Alexander v. Choate, 469 U.S. 287 (1985)).
103. *See* Mason v. Frank, 32 F.3d 315, 318-19 (8th Cir. 1994); Tyndall v. National Educ. Ctrs., 31 F.3d 209, 212 (4th Cir. 1994); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994).
104. 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995).
105. 45 F.3d 357 (10th Cir. 1995).
106. 53 F.3d 1118 (10th Cir. 1995).
107. *White*, 45 F.3d at 360-63; *Milton*, 53 F.3d at 1123-25.

B. *Individual with a Disability*

The ADA covers individuals with a "a physical or mental impairment that 'substantially limits' one or more 'major life activit[ies].'"[108] Courts analyze three factors to determine whether an impairment substantially limits a major life activity: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of . . . the impairment."[109]

Although claims based on Title I of the ADA invariably involve an employee's actual or perceived ability to work, the statutory definition of "disabled" also applies to persons with impairments which restrict activity in other areas of life.[110] Recognizing the inherent complexity of defining "work," the Equal Employment Opportunity Commission (EEOC) treats working separately from other major life activities.[111] EEOC regulations consider whether major life activities other than work are substantially limited by the impairment. Whether the impairment substantially limits working is considered only if another area is not substantially affected.[112] Regulations note three additional factors, which courts "may" consider when addressing whether one is substantially limited in her ability to work: (1) the geographical area to which the individual has access; (2) the class of jobs from which the individual has been disqualified; and (3) the broad range of jobs from which the individual has been disqualified because of her impairment.[113]

Courts have consistently held that the inability to perform a certain job with a particular employer does not constitute a substantial limitation.[114]

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108. Under the ADA, an individual with a disability is one who has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) is regarded as having such an impairment." 42 U.S.C. § 12102(2). Major life activities include physical tasks such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1995). The ADA does not define major life activities, but adopts the definition contained in EEOC regulations. *Id.*; *see* 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title I of the ADA). The ADA regulations adopt the definition found in the Rehabilitation Act regulations, 34 C.F.R. § 104.3(j)(2)(ii) (1995). 29 C.F.R. app. § 1630.2(i). Major life activities also include sitting, standing, lifting and reaching, *id.*, as well as thinking, concentrating, interacting with others, and reading. Michael Faillace, *Title I of the Americans with Disabilities Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Case Law under the ADA, and 1973 Rehabilitation Act, and Practical Recommendations, in* 24TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 490 (Litig. & Admin. Prac. Course Handbook Series No. H4-5219 1995).

109. 29 C.F.R. § 1630.2(j)(2).

110. Faillace, *supra* note 108, at 498.

111. *Id.*

112. *See* 42 U.S.C. § 12116 (1994) (requiring the EEOC to issue regulations to implement Title I of the ADA).

113. The regulations provide that substantial limitation with respect to working includes significant restriction "in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (1995). In contrast, the "substantial limitation" in other life activities involves either the inability to perform a major life activity or severe restriction on the ability to perform a major life activity as compared to the general population. *Id.* § 1630.2(1)(i)-(ii).

114. *See, e.g.*, Heilweil v. Mount Sinai Hosp., 32 F.3d 718, 724 (2d Cir. 1994), *cert. denied*,

Furthermore, evidence of a disability requires more than an employer's mere perception that an impairment limits an individual's ability to perform only one job.[115] Rather, a claimant must prove exclusion from many jobs, not just the job the claimant had at the time of the discrimination.[116]

1. *Bolton v. Scrivner, Inc.*[117]

a. *Facts*

Bolton suffered a work-related injury to his knee that required him to take a leave of absence from his job as an order selector at Scrivner's grocery warehouse.[118] Following his leave, the company doctor examined Bolton and concluded that he could not perform his previous job.[119] Scrivner therefore refused to rehire Bolton as an order selector.[120] Bolton filed suit, alleging discrimination on the basis of disability under the ADA, claiming substantial limitation in the major life activity of working.[121]

b. *Decision*

The district court granted Scrivner's motion for summary judgment, holding that Bolton was not an individual with a disability as defined by the ADA.[122] The Tenth Circuit affirmed, finding that although Bolton could not work as an order selector, his ability to work was not substantially limited.[123]

Bolton clarifies the definition of disability as it relates to the specific major life activity of working.[124] Bolton argued that his injury significantly

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115 S. Ct. 1095 (1995) (finding that an asthmatic blood bank administrator was not substantially limited in working because, while she experienced difficulty breathing in the blood bank, her ability to work in other areas of the hospital was not impaired); Byrne v. Board of Educ., 979 F.2d 560, 565-66 (7th Cir. 1992) (holding that, under the Rehabilitation Act, a teacher who was precluded from teaching in a school because of allergies was not handicapped solely because of her inability to work in a particular position for a particular employer).

115. Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992).

116. *Id.* Relevant factors to consider include:

> (A) [t]he geographical area to which the individual has access;
>
> (B) the job from which the individual has been disqualified because of the impairment, and the number and types of jobs using similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not using similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Bolton, 36 F.3d at 943 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)).

117. 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995).

118. *Bolton*, 36 F.3d at 941.

119. *Id.*

120. *Id.*

121. *Id.* Bolton also claimed discrimination on the basis of age under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994). *Bolton*, 36 F.3d at 941. The court held that Bolton failed to meet his burden of proof on the ADEA claim. *Id.* at 944.

122. *Bolton*, 36 F.3d at 941.

123. *Id.* at 941, 944.

124. *Id.* at 942-43. A secondary issue in *Bolton* concerned the application of definitions promulgated under the Rehabilitation Act to ADA cases. *Id.* at 942. Bolton argued that the district

restricted him in working, as defined by *Welsh v. City of Tulsa*[125] and ADA regulations.[126] He presented evidence of his inability to return to his position as a grocery selector without reasonable accommodation.[127] The Tenth Circuit applied the six factors listed in the ADA regulations which help clarify "substantial limitation" in the context of work.[128] Although Bolton presented evidence that addressed the severity, duration, and impact of his impairment, he failed to establish that the impairment significantly restricted his ability to perform either a particular class of jobs or a broad range of jobs in various classes.[129] The court asserted that, to substantiate his claim, Bolton should have shown evidence as to his "vocational training, the geographical area to which he has access, [and] the number and type of jobs demanding similar training from which Bolton" was also disqualified.[130]

2. Analysis: Individual with a Disability

While *Bolton* dealt with a claimant alleging disability only in working, the court did not clarify whether its ruling applies to claimants who assert disability in other major life activities. A broad reading of *Bolton* would encourage courts to apply the six-factor analysis to all cases, regardless of the alleged disability. In all likelihood, such a reading would result in fewer ADA claims surviving summary judgment proceedings. A more narrow interpretation, consistent with EEOC regulations, would require evidence of all six factors only in cases where a plaintiff alleges disability in working.

In either case, to prevail under *Bolton*, a plaintiff must show more than a mere inability to perform one job. Instead, a plaintiff must prove that the severity of her impairment significantly impacts her ability to work in a class of jobs or broad range of jobs in various classes in a particular geographical area.

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court applied an improper definition of disability in granting Scrivner's motion for summary judgment. *Id.* The court, comparing the definitions and effecting Congress's intent that Rehabilitation Act case law be generally applied to ADA cases, found that the ADA and the Rehabilitation Act define disability in substantially the same terms. *Id.* at 942-43. Furthermore, the court held that these principles were consistent with the applicable ADA regulation. *Id.* at 943; *see* 29 C.F.R. § 1630.2(j)(3)(i) (defining disability for the ADA). Thus, the court held the application of Rehabilitation Act terms and case law to ADA cases appropriate. *Bolton*, 36 F.3d at 943.

125. 977 F.2d 1415, 1417, 1419 (10th Cir. 1992). The *Welsh* court stated that "[w]hile the [Rehabilitation Act] regulations define a major life activity to include working, this does not necessarily mean working at the job of one's choice." *Welsh*, 977 F.2d at 1417. The *Welsh* court held that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the [Rehabilitation] Act." *Id.* at 1419.

126. *Bolton*, 36 F.3d at 942; *supra* notes 114, 117.

127. *Bolton*, 36 F.3d at 943-44. Bolton presented evidence including: two medical opinions which stated that he could not return to his previous or other employment; a notice from the Oklahoma Employment Opportunity Commission awarding unemployment benefits on the basis of medical information regarding his limited ability to stand, walk, and lift overhead; and an opinion from the Oklahoma Worker's Compensation Court which found he was "temporarily totally disabled" and sustained a "permanent partial disability" to his left foot. *Id.*

128. *Id.* at 943 (citing 29 C.F.R. §§ 1630.2(j)(2), (j)(3)(ii)); *supra* text accompanying notes 108, 114.

129. *Bolton*, 36 F.3d at 944 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

130. *Id. Contra* Delida Costin, Bolton v. Scrivner, Inc., *36 F.3d 939 (10th Cir. 1994)*, 4 B.U. PUB. INT. L.J. 488, 491 (1995) (concluding that the *Bolton* decision does not explain what evidence would have sufficiently met the required factors).

Although the Tenth Circuit held that the evidence presented by Bolton failed to meet this standard,[131] it did not give specific guidance regarding what type of evidence might be dispositive. Rather, the court implied that additional information relating specifically to training and other vocational factors, including the number and types of jobs for which an impairment disqualifies a plaintiff, may help establish the element of substantial limitation in working.[132]

The court implied that Bolton should have presented evidence of his exclusion from a class of jobs or broad range of jobs in various classes in his geographical area in order to avoid dismissal via summary judgment. An expert in vocational rehabilitation may be required to provide this information on behalf of ADA plaintiffs in similar cases.[133]

3. Other Circuits

Other circuits that use the six-factor analysis have consistently held that a claimant must demonstrate an inability to perform a variety of jobs to make a prima facie case.[134] For example, the Second Circuit held that an individual deemed unfit for the position of police officer due to the individual's poor judgment, irresponsible behavior, and poor impulse control was not substantially limited in working.[135] Likewise, the Fifth Circuit affirmed a decision holding that a person with a knee problem who could not perform jobs requiring him to climb a telephone pole, but who could perform other activities, was not substantially limited in working and was therefore not handicapped under the Rehabilitation Act.[136] While the Tenth Circuit in *Welsh* held that working at the job of one's choice is not a major life activity,[137] the Sixth Circuit has held that substantial limitation in working does not require complete inability to work.[138]

C. *Qualified Individual with a Disability*

Like its precursor, the Rehabilitation Act, the ADA provides protection for "otherwise qualified" individuals with disabilities.[139] The Supreme Court, in

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131. *See supra* notes 129-30 and accompanying text (discussing Bolton's failure to survive Scrivner's motion for summary judgment).

132. *Bolton*, 36 F.3d at 944.

133. *See id.* (describing the types of evidence Bolton might have produced).

134. *See infra* notes 135-38 and accompanying text.

135. Daly v. Koch, 892 F.2d 212, 215 (2d Cir. 1989).

136. Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328, 1343 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988) (unpublished opinion).

137. *Welsh*, 977 F.2d at 1417 (holding that a firefighter with decreased sensation in two fingers was not substantially limited in major life activities and therefore not "handicapped" under the law).

138. Everette v. Runyon, 911 F. Supp. 180, 183 (E.D.N.C. 1995) (noting that a person completely unable to work, and therefore not "otherwise qualified," cannot claim discrimination based on a disability).

139. *Compare* "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (the Rehabilitation Act) *with* 42 U.S.C. § 12111(8) (the ADA)

one of the first Rehabilitation Act cases, *Southeastern Community College v. Davis*,[140] narrowly interpreted the qualification requirement, finding that an otherwise qualified individual must meet all of a program's requirements despite her handicap.[141] This decision required that claimants demonstrate an ability to participate fully despite their disability before becoming entitled to an accommodation.[142] Paradoxically, such a showing negates the need for an accommodation.[143] This view gradually changed as the Court considered whether reasonable accommodations would help make a disabled person otherwise qualified.[144] The Court's basic struggle, which continues today, is to determine which comes first, consideration of accommodation or the determination of qualification.

School Board of Nassau County v. Arline[145] expanded the definition of a qualified individual to include consideration of an individual's ability to perform essential job functions.[146] This change led to the current requirement that a claimant establish herself as a qualified individual by presenting evidence of her ability to perform the essential functions in question.[147] So, while the ADA defines "qualified individual with a disability" separately from "essential functions" and "reasonable accommodations," in practice the two prongs form a single inquiry.[148]

Arline recognized a two-part analysis for determining qualification in Rehabilitation Act cases.[149] The first inquiry advanced in *Arline*, and later adopted by the ADA, asks whether an individual can perform the essential functions of her job.[150] If the individual cannot perform the essential functions solely because of her disability,[151] a court advances to the second inquiry, whether reasonable accommodations would enable her to do so.[152]

(stating that an otherwise qualified individual with a disability can perform the essential functions of a job with or without reasonable accommodation).

140. 442 U.S. 397 (1979).

141. *Davis*, 442 U.S. at 406 (holding that a nursing program need not make accommodations which would fundamentally alter the nature of the program). Disability rights advocates and commentators widely criticized the *Davis* decision. *See, e.g.*, Epstein, *supra* note 8, at 411-12.

142. Sarah O. Sparboe, Comment, *Must Bar Examiners Accommodate the Disabled in the Administration of Bar Exams?*, 30 WAKE FOREST L. REV. 391, 394 (1995).

143. *Id.*

144. *Id.* Courts can no longer literally apply the *Davis* standard that an otherwise qualified individual is one who can satisfy the job requirements in spite of a disability, but must now contend with the "rather mushy" question of "whether a reasonable accommodation could satisfy the interests of the employer and individual with a disability." Brennan v. Stewart, 834 F.2d 1248, 1261-62 (5th Cir. 1988); Eric W. Richardson, *Who Is a Qualified Individual Under the Americans with Disabilities Act*, 64 U. CIN. L. REV. 189, 205 (1995).

145. 480 U.S. 273 (1987).

146. *Arline*, 480 U.S. at 288; Richardson, *supra* note 144, at 204-05.

147. 42 U.S.C. § 12111(8) (1994); 29 C.F.R. § 1630.2(m) (1995).

148. Richardson, *supra* note 144, at 191 n.18.

149. *Arline*, 480 U.S. at 287-88.

150. *White*, 45 F.3d at 361-62. The ADA does not require an employer to fundamentally alter the nature of the job. *Id.*

151. In summary judgment proceedings, a plaintiff must establish that the answer to the first inquiry creates a material question of fact.

152. *White*, 45 F.3d at 361-62.

A court must identify the essential functions of a job before comparing an individual's qualifications for a particular job with the job's requirements.[153] In making this determination, the ADA requires the court to consider the employer's judgment, written job descriptions, and whether employees in the position actually perform the identified functions.[154]

Generally, courts defer to an employer's assessment of essential functions even though the ADA does not consider such evidence conclusive.[155] The need to distinguish between the type, amount, and manner in which work is done exemplifies the complexity of the ADA. Since an employer possesses greater expertise in determining the skills necessary to successfully complete a particular job, a court will not usually second-guess production standards that establish quality or quantity of work.[156] Clearly, ADA regulations do not require employers to lower production standards in order to accommodate persons with disabilities.[157]

Unlike the deferential treatment accorded employers in the determination of the essential functions of a job, Congress did not intend for courts to defer to an employer's judgment regarding the manner in which employees accomplish their work. Few employers possess the skill necessary to identify alternative ways of completing tasks.[158] Despite this, the ADA permits an employer to re-evaluate and restructure jobs and to add or change tasks at its discretion,[159] even though such changes may result in workers with disabilities

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153. Essential functions include tasks that are more than marginal to the job. 29 C.F.R. § 1630.2(n)(1). "Marginal functions," while not defined by EEOC regulations, include job duties that are neither fundamental nor essential to the position. *See id.* For example, a company's chief executive officer (CEO) is typically presumed to be able to drive to work or business meetings; however, driving is not considered an essential function of a CEO's position. Richardson, *supra* note 144, at 192 n.30.

154. 29 C.F.R. § 1630.2(n)(3).

155. Lucinda A. Castellano, *Surviving Summary Judgment in the ADA Employment Case—Part II*, 24 COLO. LAW. 1785, 1785 (1995); 29 C.F.R. § 1630.2(n)(3)(i); *see also* Ackerman v. Western Elec. Co., 860 F.2d 1514, 1519 (9th Cir. 1988) (finding that, although certain types of heavy work were an essential function of the plaintiff's job group, those functions were nonessential to any particular individual's performance of one job); Henchey v. Town of N. Greenbush, 831 F. Supp. 960, 966 (N.D.N.Y. 1993) (finding that where discrepancies exist between the job description and actual job duties, the job description is not conclusive).

156. *Milton*, 53 F.3d at 1123; Castellano, *supra* note 155, at 1785; *see also* D. Todd Arney, *Survey of the Americans with Disabilities Act, Title I: With the Final Regulations In, Are the Criticisms Out?*, 31 WASHBURN L.J. 522, 535 (1992) (discussing lingering problems with the ADA).

157. *Milton*, 53 F.3d at 1124.

158. Castellano is careful to note that:

> [i]n its deliberations on the ADA, Congress defeated an amendment that would have created a presumption in favor of the employer's judgment regarding essential functions of the job. Such deference to the employer's judgment was rejected because of the belief that although employers are used to certain ways of performing job functions, they may not have considered other ways a result might be accomplished.

Castellano, *supra* note 155, at 1785 n.15 (citing H.R. JUD. REP., 101st Cong., 2d Sess. 136, *reprinted in* The Legislative History of the Americans with Disabilities Act. 1990, LRP Pub. at 584 (1990)).

159. The ADA does not specifically state that an employer may change job functions at its discretion. The courts, however, rely heavily on an employer's judgment in determining what functions are essential and generally will not second guess the employer's statements. *See, e.g.*, John A. Conway, Comment, *The Americans with Disabilities Act: New Challenges in Airline Hiring Practices*, 59 J. AIR L. & COM. 945, 963 (1994) ("Because courts are required to defer to

being unable to perform the revised job with its new tasks.

Once a court establishes the tasks essential to a job's function, it must determine if the plaintiff can perform those tasks without reasonable accommodations. If she cannot, the court must consider the availability of reasonable accommodations including modification of existing facilities, work schedules, equipment, job restructuring, or any other change that would allow a disabled employee to perform a job's essential tasks.[160] The ADA compels only accommodations that will enable a disabled employee to perform the essential functions of a job[161] and not those that will impose an "undue hardship" on the business.[162]

A plaintiff must produce evidence at trial sufficient to make an initial showing regarding the availability of accommodations.[163] Once a plaintiff makes this showing, the burden shifts to the defendant, who must present evidence of its inability to accommodate.[164] This burden, if met by the defendant, then shifts back to the plaintiff, who must rebut the defendant's contention with suggestions for possible accommodations.[165] The courts give little guidance, however, to the type of evidence a plaintiff must present to meet her burden.

1. *White v. York International*[166]

a. *Facts*

York initially hired White as a unit assembler and, seven years later, transferred him to the position of machine operator.[167] Both jobs required

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employers' job requirements if the description represents an accurate portrayal of the essential functions, the ADA encourages employers to develop written descriptions."). *But see* Sue A. Krenek, Note, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 1981 (1994) ("Although courts have tried to defer to an employer's decision about what constitutes the essential functions of a job, the employer's determination has not always been accepted uncritically.") (footnotes omitted).

160. *See* 29 C.F.R. §§ 1630.2(o)(2)-(3).

161. This limitation does not appear in the ADA but has been the subject of cases brought under the Rehabilitation Act. *See, e.g., Arline*, 480 U.S. at 288; Treadwell v. Alexander, 707 F.2d 473, 477-78 (11th Cir. 1983); Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981).

162. The ADA defines undue hardship as "significant difficulty or expense." 42 U.S.C. § 12111(10)(A). The following six factors may be used to determine if a particular reasonable accommodation may be refused because it causes undue hardship: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility; (3) the overall financial resources of the covered entity; (4) the type of operation(s) of the covered entity; (5) the impact of the accommodation upon the operation of the facility; and (6) the number of employees or applicants the accommodation will potentially benefit. R. Bales, *Libertarianism, Environmentalism and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DET. C.L. REV. 1163, 1181-84. The first four factors are listed in the ADA itself; the EEOC regulations add the fifth factor; and the final factor is suggested by the ADA's legislative history. *Id.*

163. *White*, 45 F.3d at 361.

164. *Id.*

165. *Id.* (citing *Prewitt*, 662 F.2d at 308).

166. 45 F.3d 357 (10th Cir. 1995).

167. *White*, 45 F.3d at 358-59.

lifting and continuous standing.[168] Following his transfer to the machine operator position, White sustained a non-work-related injury to his right ankle.[169] He underwent an ankle fusion, which resulted in a twelve-month medical leave of absence.[170] White's physician released him to return to work with restrictions including "work as tolerated, no standing for longer than four hours, and no lifting more than fifteen pounds."[171]

York requested an independent medical evaluation, which determined that White could not return to work due to incomplete fusion of his ankle.[172] Shortly thereafter, York terminated White by letter, citing White's year-long absence, and further stating that the company was unaware of any accommodations it could reasonably make that would allow White to perform his job in light of his medical limitations.[173]

White sued York both on the basis of discrimination under the ADA and an Oklahoma antidiscrimination law.[174] The district court granted York's motion for summary judgment, finding that even if White met the definition of an individual with a disability (a factual issue not determined by the court), no evidence supported the allegation that he could perform the essential functions of his position with reasonable accommodations.[175] Thus, White failed to establish that he was a qualified individual with a disability.[176]

b. *Decision*

In a de novo hearing on the issue, the Tenth Circuit adopted the two-part analysis articulated by the Supreme Court in *Arline* to determine qualification under the ADA.[177] After determining that White could not perform his job's essential functions, the court turned to the issue of reasonable accommodations.[178] The court concluded that White failed to carry his burden of proof by not providing information regarding the availability of specific accommodations which would allow him to continue his employment with York.[179]

2. *Milton v. Scrivner, Inc.*[180]

a. *Facts*

Scrivner employed both plaintiffs as grocery selectors.[181] Both received

168. *Id.* at 359.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 359-60.
177. *Id.* at 361-62.
178. *Id.* at 362.
179. *Id.*
180. 53 F.3d 1118 (10th Cir. 1995).
181. *Milton*, 53 F.3d at 1120.

injuries during the course of their job duties.[182] Following the plaintiffs' injuries, Scrivner increased the productivity level required of employees.[183] When the plaintiffs could not meet the new production standards, Scrivner discharged them, and they sued under state and federal antidiscrimination laws.[184]

Specifically, the plaintiffs claimed that Scrivner discriminated against them in violation of the ADA, an Oklahoma statute prohibiting wrongful termination, provisions of the collective bargaining agreement between the union and Scrivner, and other assorted state and federal statutes prohibiting unlawful discrimination.[185] Ultimately, resolution of all claims hinged on a determination of the alleged disability discrimination.[186] The district court concluded that the state law claims were preempted and that the plaintiffs were not eligible for relief under the ADA.[187]

b. *Decision*

The Tenth Circuit affirmed the district court's summary judgment order based upon the claimants' failure to establish their status as otherwise qualified individuals with disabilities.[188] In its decision, the court applied the *Arline* analysis for determining qualification under ADA.[189] As described in *White*, the burden rested with the employees to show the availability of reasonable accommodations.[190] Because the plaintiffs provided no evidence that reasonable accommodation was possible, the court upheld the defendant's motion for summary judgment.[191]

3. Analysis: Qualified Individual with a Disability

Because the Tenth Circuit acknowledged that the definition of a qualified individual with a disability embodies the concepts of essential functions and reasonable accommodations,[192] a plaintiff seeking to establish that she is qualified under the ADA bears a tremendous burden. First, she must show that she can perform the essential job functions with or without accommodation.[193] If she requires accommodation, she must then demonstrate that specific, available accommodations exist.[194] Finally, she must prove that the proposed accommodations are reasonable.[195]

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182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 1121.
189. *Id.* at 1123.
190. *Id.*
191. *Id.* at 1124.
192. *Id.* at 1123.
193. *Id.*
194. *Id.*
195. *Id.* at 1124-25.

In light of *White* and *Milton*, it appears that the court will accept an employer's description of essential tasks unless a plaintiff proves that the tasks are unrelated to a business necessity.[196] Therefore, a claimant who disagrees with an employer's assertion of essential functions must, at a minimum, present specific evidence rebutting the essential nature of the tasks.[197] At its discretion, however, an employer can establish or change the content, nature, or functions of a job, as seen in *Milton*.[198] There, the court found that the employer's decision to change its business to increase profits was permissible under the ADA, even though the court never determined the essential functions of the job in question.[199]

EEOC guidelines apparently require that an employer initiate an informal process to identify specific accommodations once it becomes aware of the need.[200] The *White* court, however, interpreted the regulations as triggering the interactive process only if an employee is otherwise qualified.[201] Therefore, an employer must make a threshold determination regarding qualification before engaging in a dialogue regarding accommodation,[202] much like the controversial Supreme Court decision in *Davis*.[203]

In the Tenth Circuit, before an employer need consider making accommodations, an employee must first establish the availability of specific accommodations.[204] Although the court clearly places the burden on a plaintiff to show that reasonable accommodations exist, it fails to clarify the specific type of evidence required for such a showing.[205] For example, although White maintained that York could modify White's former job or reassign him to another position, the court flatly rejected these suggestions as insufficient[206]—even though EEOC regulations identify both as potential accommodations.[207]

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196. *White*, 45 F.3d at 362; *Milton*, 53 F.3d at 1124.

197. *Milton*, 53 F.3d at 1124.

198. *Id.*

199. *Id.* Likewise, the defendants in *White* contended that the job required the ability to lift more than fifteen pounds and stand more than four hours at time. *White*, 45 F.3d at 362. The plaintiff presented no evidence to the contrary, and did not contest the employer's assertion that it could not eliminate the job requirements without fundamentally changing the nature of the job. *Id.* Because no rebuttal evidence was presented, the court accepted the employer's description of lifting and standing requirements as essential. *Id.*

200. *White*, 45 F.3d at 363.

201. *Id.*

202. *Id.*

203. *See supra* notes 141-44 and accompanying text.

204. *White*, 45 F.3d at 360-61.

205. *Milton*, 53 F.3d at 1124. The Tenth Circuit declined to address whether the unsupported personal conclusions regarding accommodations are sufficient to make a facial showing. *Id.*

206. *White*, 45 F.3d at 362; *see also* Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994) (finding that diabetic plaintiffs who required an accommodation because they posed a substantial risk without the accommodation, were not "otherwise qualified"); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126-27 (11th Cir. 1993) (holding that firefighters' suggested elimination of the "no beard" rule was an unreasonable accommodation). *But see* Wood v. Omaha Sch. Dist., 985 F.2d 437, 438-39 (8th Cir. 1993) (stating that diabetic plaintiffs met their burden of asserting reasonable accommodation by proposing they conduct self-administered blood tests and carry snacks).

207. 29 C.F.R. app. § 1630.2(o). Clearly, accommodation through job restructuring does not require an employer to reallocate essential job functions, because such functions are the very ones

The *Milton* decision goes even further, placing a greater burden on a plaintiff to also show that the suggested accommodations are reasonable.[208] For instance, the court found the plaintiffs' suggestions, which included lower required production, a lessened workload, or possible transfer within the company, unreasonable.[209] Though the court specifically held that the alteration or reduction of the workload was unreasonable for the defendant in *Milton*, it further suggested that reallocation of job duties or reassignment are per se unreasonable.[210]

These Tenth Circuit decisions, in practical terms, grant employers complete discretion to determine the availability of an accommodation and, in the opinion of at least one commentator, "return the system to pre-ADA days when an employer's fair, biased, or simply uninformed judgment on accommodation was the final word."[211] Based upon the uniqueness of disability claims,[212] and the requirement that employers provide reasonable accommodation, some argue that courts should place higher burdens on employers.[213] This approach would ensure that, when making qualification determinations, employers fully consider a disabled individual's abilities, rather than her limitations.[214] Since many employees with disabilities lack knowledge of how they could accomplish their job performance through alternative means,[215] placing the burden on them effectively serves to defeat a claim at its onset.[216] By failing to require that employers prove a plaintiff unqualified, or that reasonable accommodations would cause undue hardship, the Tenth Circuit prevents persons with disabilities from reaching their full potential in the workforce.[217]

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that the individual holding the job would have to perform with or without reasonable accommodation. *See* Buko v. American Medical Lab. Co., 830 F. Supp. 899, 905 (E.D. Va. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994) (unpublished opinion). Generally, existing employees may be accommodated by transfer or reassignment; however, an employer should consider reassignment only when accommodation of the current position poses an undue hardship. Reassignment need not be limited to a position of the same grade as the employee's current position, but may be to a lower position if no equivalent job is available. *Id.* § 1630.2(o). Reassignment to an equivalent position in terms of pay, status, responsibility, and other conditions of employment represents reasonable accommodation. *Id.*

208. 29 C.F.R. app. § 1630.2(o); *Milton*, 53 F.3d at 1124.

209. *Milton*, 53 F.3d at 1124.

210. *Id.* "An employer is not required by the ADA to reallocate job duties [or] change the essential functions of a job." *Id.*; 29 C.F.R. app. § 1630.2(o).

211. Castellano, *supra* note 155, at 1786.

212. Lianne C. Knych, Note, *Assessing the Application of* McDonnell Douglas *to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515, 1535-36 (1995). Unlike other forms of employment discrimination, i.e. race and gender, which are not based on a rational relationship between the discrimination and the ability to perform the job, the ADA recognizes that disability may actually affect job performance. *Id.*

213. *Id.* at 1546.

214. *Id.* at 1545 n.157.

215. Castellano, *supra* note 155, at 1786.

216. *See* Knych, *supra* note 212, at 1538. "[A] disabled plaintiff faces a virtually insurmountable barrier under the *McDonnell Douglas* test because its allocation of the burden of proof is too rigid." *Id.*

217. *Id.* at 1546.

4. Other Circuits

Because the Supreme Court has offered little guidance, circuit courts inconsistently allocate the burden of proof in employment discrimination cases brought under both the Rehabilitation Act and the ADA.[218] Regulations imply that employers should be responsible for initiating inquiries into availability of reasonable accommodations,[219] yet courts do not universally require employers to carry this burden.[220] For example, the Ninth Circuit places the initial burden of raising the accommodation issue on the employer, characterizing the plaintiff's burden as one of coming forward to rebut an employer's showing that no reasonable accommodation is available.[221]

The Second Circuit in *Gilbert v. Frank*,[222] however, found that since the term "otherwise qualified" by definition includes the concept of reasonable accommodation, a plaintiff's prima facie burden includes showing that she can perform the job's essential functions in spite of her handicap, with or without accommodation.[223] The *Gilbert* court indicated that the burden was not heavy, as it only requires that a plaintiff produce evidence regarding her capabilities as well as some suggestions for reasonable modification from the employer.[224] Once a plaintiff meets this initial showing, her employer must prove the accommodation impossible.[225] The *Gilbert* court, acknowledging the goals of the Rehabilitation Act and the greater access to information regarding the feasibility of various modifications, ultimately allocated the burden of proof to the employer on the issue of reasonable accommodation.[226]

CONCLUSION

Some believe that courts in future ADA cases will adopt the view of the Illinois court that decided the first ADA case.[227] The Illinois District Court in *EEOC v. AIC Sec. Investigation Ltd.*[228] indicated only marginal concern about how an employee performs a job, but placed primary emphasis on the completion of the job tasks.[229] Should courts adopt such an approach,

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218. *Id.* at 1541.

219. 29 C.F.R. app. § 1630.9. EEOC guidelines contemplate that an employer will determine the essential functions of a job, consult with the individual to identify potential barriers and accommodations, and, considering the individual's preference, select the best accommodation. In cases in which the accommodation is not obvious, the employer should consider a defined decision-making process. 29 C.F.R. app. § 1603.9; Castellano, *supra* note 155, at 1786.

220. To prevail, an employee must show that the handicap can be accommodated or that the employer denied employment based on reasons not related to the job. Richardson, *supra* note 144, at 198-99.

221. *See* Mantolete v. Bolger, 767 F.2d 1416, 1424 (9th Cir. 1985) (stating that the "burden of persuasion in proving the inability to accommodate always remains on the employer").

222. 949 F.2d 637 (2d Cir. 1991).

223. *Gilbert*, 949 F.2d at 642.

224. *Id.*

225. *Id.*

226. Castellano, *supra* note 155, at 1786.

227. EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp 1060 (N.D. Ill. 1993); Louis Pechman, *Coping with Mental Disabilities in the Workplace*, 67 N.Y. ST. B.J. 22, 24 (1995).

228. 820 F. Supp. 1060 (N.D. Ill. 1993).

229. *AIC*, 820 F. Supp. at 1064; *cf.* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538,

employment opportunities for individuals with disabilities will substantially increase.

Disability laws, purporting to address the issue of segregation of persons with disabilities, strive to provide opportunities for those individuals to fully participate in the mainstream of the American economy. Yet, on the whole, these laws have done little to encourage integration. Ostensibly, the least restrictive environment requirement of IDEA means that schools should educate children with disabilities with their nondisabled peers. Yet, across the country, school districts continue to exclude students with disabilities from the regular classroom and segregate them from their peers, siblings, and neighborhoods.[230] Like prior cases in other circuits, *Murray* continues the tradition of segregation by placing greater emphasis on the rights of school districts rather than on the rights of children.

Likewise, Congress took strong action toward eliminating segregation by passing the ADA and adopting as its statutory purpose a "clear" mandate to end all forms of segregation in employment, access to governmental services, communications, and public accommodations.[231] Unfortunately, recent decisions in the Tenth Circuit erect barriers which make implementation of this promise difficult, if not impossible to achieve.

Stephanie Jae Stevenson

545 (7th Cir. 1995) ("An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.").

230. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 394 (1991).

231. *Id.* at 398; *see* 42 U.S.C. § 12101(b)(1)-(2) (1988 & Supp. V 1993).

EMPLOYMENT LAW: SEXUAL HARASSMENT

Come, come, you wasp, i' faith, you are too angry.
- Petruchio
If I be waspish, best beware my sting.
- Katharina[1]

INTRODUCTION

Sexual harassment claims stir up a range of emotions and create some of the most contentious and impassioned lawsuits in our justice system. Statistics gauging the extent of the problem vary widely,[2] but one thing is clear: no one is immune to accusation. Allegations of sexual harassment have found their way into the United States Senate,[3] congressional hearings for Supreme Court nominees,[4] and even the office of the President of the United States.[5]

The Supreme Court has recognized a claim of sexual harassment under Title VII,[6] but has left many important issues to the circuits. This Survey reviews four Tenth Circuit decisions addressing Title VII sexual harassment claims handed down from September 30, 1994, through September 30, 1995.[7] These four cases address three recurrent issues in Title VII jurisprudence. After Part I provides a general background, Part II of this Survey examines the principles upon which a court will hold both employers and their employees liable for established sexual harassment claims. Part III looks at the

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1. WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 2, sc. 1.

2. Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 449 n.3 (1994) (comparing an article in *The Journal of Psychology* estimating that between 42% and 90% of women have been sexually harassed in the workplace, to a poll conducted by the Roper Org., Inc. indicating that most Americans believe that sexual harassment in the workplace is not a problem).

3. Katharine Q. Seely, *Tearful Packwood Resigns*, DENV. POST, Sept. 8, 1995, at A1 (detailing Sen. Packwood's resignation from the U.S. Senate after an ethics committee investigation of numerous sexual harassment charges).

4. 137 CONG. REC. S14,951-01 (daily ed. Oct. 22, 1991) (statement of Sen. Deconcini) (referring to Professor Anita Hill's charges of sexual harassment against then Judge Clarence Thomas as extremely serious and speculating that both of them would be scarred for life).

5. Michael Isikoff et al., *Clinton Hires Lawyer as Sexual Harassment Suit Is Threatened*, WASH. POST, May 4, 1994, at A1.

6. *See* Harris v. Forklift Sys., 114 S. Ct. 367, 370 (1993) (analyzing the requirements for a hostile work environment claim); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (affirming that sexual harassment constitutes unlawful sex discrimination).

7. In addition to the four cases covered in this Survey, the Tenth Circuit heard two other cases involving sexual harassment claims. *See* Cox v. Phelps Dodge Corp., 43 F.3d 1345 (10th Cir. 1994) (involving a claim for sexual harassment that was dismissed on mootness grounds); Noland v. McAdoo, 39 F.3d 269 (10th Cir. 1994) (addressing a sexual harassment claim asserted under 42 U.S.C. § 1983). Constitutional claims under § 1983 for sexual harassment are beyond the scope of this Survey. For an excellent article discussing this type of claim, see George Likourezos, *Sexual Harassment by a Public Official Gives Rise to a Section 1983 Claim: A Legal Argument*, 6 HASTINGS WOMEN'S L.J. 93 (1995).

definition of a "hostile" work environment. Finally, Part IV explores the doctrine of "appropriate remedial action" by which employers can negate liability.

I. GENERAL BACKGROUND

Title VII of the Civil Rights Act of 1964 proscribes sexual harassment as a form of gender discrimination in employment.[8] As originally drafted, Title VII's discrimination prohibitions did not include a reference to gender.[9] After a rather peculiar debate in the House, however, an amendment to include the word "sex" among the list of protected classes passed by a narrow margin,[10] thus it became illegal for employers to discriminate on the basis of sex. By 1976, courts began recognizing sexual harassment as a form of gender discrimination under Title VII.[11]

Equal Employment Opportunity Commission (EEOC) guidelines define sexual harassment generally as unwelcome sexual conduct that: (1) is a term or condition of employment; (2) affects employment decisions about the target individual; or (3) unreasonably interferes with the individual's job performance.[12] Two types of sexual harassment claim developed in the case law. The first type, "quid pro quo" harassment,[13] occurs when an employer demands sexual favors in exchange for job benefits.[14]

A second type of harassment, "hostile work environment," also developed in case law.[15] In 1986, the Supreme Court recognized this form of harassment in *Meritor Savings Bank v. Vinson*.[16] To prevail under *Meritor*, a plaintiff must show that gender related conduct (harassment) was severe or pervasive and altered the conditions of employment, thereby creating an abusive working environment.[17]

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8. 42 U.S.C. § 2000e-2(a)(1) (1994); *Meritor*, 477 U.S. at 66.

9. Dawn M. Buff, Note, *Beyond the Court's Standard Response: Creating an Effective Test for Determining Hostile Work Environment Harassment Under Title VII*, 24 STETSON L. REV. 719, 724 (1995).

10. *Id.* at 725-26 (stating that the amendment passed by a margin of 168 to 133, and noting that the amendment's sponsor spoke of a woman's right to a husband to justify the bill, but failed to give any reason why ending employment discrimination might meet that end).

11. *See* Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976) ("[R]etaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII."). Professor Catharine MacKinnon has explained the link between harassing behavior and discriminatory behavior. CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979) (detailing the theoretical basis for treating sexual harassment as a form of sexual discrimination warranting protection under Title VII).

12. 29 C.F.R. § 1604.11(a) (1995).

13. Buff, *supra* note 9, at 727-28 (stating that quid pro quo harassment occurs when an "employee is fired, demoted, or otherwise denied employment benefits for refusing sexual advances").

14. *Williams*, 413 F. Supp. at 657.

15. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (stating that a hostile environment, standing alone, can constitute a violation of Title VII).

16. 477 U.S. 57 (1986).

17. *Meritor*, 477 U.S. at 67. For a discussion of the application of the hostile work environment test, see *infra* part III.

II. HOW AND AGAINST WHOM DOES TITLE VII LIABILITY ATTACH?

A. *Background*

The inquiry into liability cuts to the core of a sexual harassment claim. Without legal principles upon which to base the liability of an employer or employee, the substantive issues are meaningless.[18] Title VII explicitly prohibits discrimination in the workplace based on sex and allows monetary damages and injunctive relief.[19] It does not, however, specify exactly who may be sued.[20] Two questions arise in this dilemma.[21] First, under what circumstances will courts hold employers vicariously liable for the acts of their employees? Second, will courts hold the harassing employees personally liable? For claims of quid pro quo sexual harassment, courts have generally held employers strictly liable for the acts of their supervisory employees.[22] Courts have not, however, established clear or uniform guidelines for imposing employer liability in hostile work environment claims.[23] The Supreme Court addressed this issue in *Meritor Savings Bank v. Vinson*,[24] but declined, on the facts

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18. *See* Hannah K. Vorwerk et al., Special Project, *Current Issues in Sexual Harassment Law*, 48 VAND. L. REV. 1009, 1105 n.10 (1995). As counsel for the respondent in *Meritor*, Patricia Barry and Catharine MacKinnon argued that liability "is not an abstract contest over whether sexual harassment is sex discrimination, which is undisputed . . . . [Rather] it is a concrete conflict over whether sexual harassment will be treated as if it is sex discrimination: whether the employer will be responsible so that its victims receive relief." *Id.* (quoting Respondent's Brief at 26, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979)).

19. 42 U.S.C. § 2000e-5(g) (1988); *see* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 572 (1994) (noting that Title VII expressly provides both injunctive relief and damages for victims). The 1991 Amendments to the Civil Rights Act of 1964 create a right to recover compensatory and punitive damages for certain violations of Title VII. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1488 (1994). In *Landgraf*, the Supreme Court held that these amendments would not apply retroactively. *Id.* at 1508. Therefore, only Title VII claimants alleging conduct occurring after the enactment of the amendments may recover these types of damages. *Id.* The Tenth Circuit acknowledged this Supreme Court ruling in Manard v. Fort Howard Corp., 47 F.3d 1067, 1067 (10th Cir. 1995) (denying money damages to the plaintiff because the action arose prior to the 1991 amendments).

20. Goldberg, *supra* note 19, at 572.

21. *See, e.g.*, *Meritor*, 477 U.S. at 70-71 (discussing the circumstances under which employers will be liable for sexual harassment perpetrated by their employees); Paroline v. Unisys Corp., 879 F.2d 100, 104 (6th Cir. 1986) (analyzing the conditions under which individual employees may be sued for sexual harassment under Title VII). A third question regarding liability concerns whether employers may be liable when third parties, such as clients or customers, harass employees. For a thorough discussion of this doctrine, see David S. Warner, Note, *Third-Party Sexual Harassment in the Workplace: An Examination of Client Control*, 12 HOFSTRA LAB. L.J. 361 (1995); Peter J. Honigsberg et al., *When the Client Harasses the Attorney—Recognizing Third Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. REV. 715 (1994); *see also* 29 C.F.R. § 1604.11(e) (1995) (stating that employers "may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace").

22. *See Meritor*, 477 U.S. at 70-71 (noting that "courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions"); Peter M. Panken et al., *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, *in* C874 ALI-ABA 386, 392 (1993) (discussing the Supreme Court's decision in *Meritor*).

23. Rachel E. Lutner, Note, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 589 (stating that reliance on agency law has not resulted in the establishment of a clear standard).

24. 477 U.S. 57 (1986).

presented, to make a definitive rule regarding employer liability.[25] In *Meritor*, the Court refused to impose strict liability on an employer on the facts presented.[26] The Court agreed with EEOC guidelines that Congress intended for courts to utilize agency principles in determining employer liability.[27] Conversely, the Court noted that under agency principles the district court erred in requiring actual notice before imposing liability; conversely, the court of appeals erred in finding strict liability.[28] The Court thus remanded the issue of liability to the trial court for a determination in light of agency principles.[29]

In subsequent decisions, the circuit courts have looked to section 219 of the *Restatement (Second) of Agency*.[30] Under the *Restatement*, employers may be liable for acts of their employees in one of three scenarios: where the employee (1) acted within the scope of his or her employment; (2) has apparent authority and purports to act or speak on the employer's behalf or is aided by the agency in accomplishing the sexual harassment; or (3) commits sexual harassment with respect to which the employer was negligent or reckless.[31]

Application of this test has brought widely divergent results among the circuits.[32] Courts addressing the issue of a hostile work environment created by a non-supervisory co-worker, however, usually require that the employer knew or should have known of the harassment and did not take proper remedial action.[33]

Title VII does not directly address whether the alleged harassers may be personally sued.[34] In addition, the EEOC has not promulgated guidelines on this issue.[35] Though the circuits are split, a majority will not allow defendants to be sued in their personal capacities.[36] The Tenth Circuit, in *Sauers v. Salt*

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25. *Meritor*, 477 U.S. at 72.

26. *Id.*

27. *Id.* The Court's agreement with EEOC guidelines did not seem to rise to the level of a direct holding that courts employ specific agency principles in addressing liability. *Id.* To explain his reasoning for applying agency principles from the *Restatement* to sexual harassment claims, Justice Rehnquist noted that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

28. *Id.* Rather than issue a specific holding as to the standard of liability to be used, the Court merely held that standards at both extremes were inappropriate. *Id.*

29. *Id.* at 73.

30. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 (10th Cir. 1987) (stating that liability attaches to an employer for an employee's tort while acting in the scope of employment).

31. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958); Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777, 783 (10th Cir. 1995) (setting out principles of agency law from the *Restatement* to guide the liability analysis).

32. *See* Lutner, *supra* note 23, at 599 (canvassing the circuits and finding negligence, foreseeability, scope of employment, and other tests used in interpreting *Meritor*).

33. *See, e.g.*, Lipsett v. University of P.R. 864 F.2d 881, 901 (1st Cir. 1988) (requiring notice before an employer may be liable for sexual harassment under Title IX); Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986) (directing that an employer will not be liable unless the employer knew or should have known of the harassment and did not take prompt remedial action); *see also* 29 C.F.R. § 1604.11(d) (1995) (describing guidelines for sex discrimination).

34. *See* 42 U.S.C. § 2000e(b) (1988); Ball v. Renner, 54 F.3d 664, 666 (10th Cir. 1995) (noting Title VII's silence on the issue of individual liability).

35. *See* 29 C.F.R. § 1604.11 (1995) (establishing guidelines for sex discrimination but failing to discuss whether individuals may be held liable).

36. *Compare* Sheridan v. E.I. duPont de Nemours & Co., 74 F.3d 1439, 1443 (3d Cir. 1996)

Lake County,[37] held that Title VII does not allow individual capacity suits.[38] The court's recent reading of *Sauers* in *Ball v. Renner*,[39] however, indicates that perhaps the Tenth Circuit has not entirely settled the question.[40]

Recently, the Supreme Court denied certiorari on Fifth and Ninth Circuit cases that squarely addressed the issue of individual liability under Title VII.[41] In both cases, the circuit court had held that there was no such individual liability under Title VII.[42] Thus, individual employee liability remains a live issue among the circuits, including the Tenth Circuit, until such time as the Supreme Court addresses it.

B. *Tenth Circuit Decisions*

1. *Hirase-Doi v. U.S. West Communications, Inc.*[43]

a. *Facts*

The plaintiff alleged that Kenneth Coleman, a directory assistance operator for U.S. West, had, in the span of his first four months on the job, made sexually offensive remarks and requests for sex to as many as eleven different female co-workers, including his female supervisor and the plaintiff.[44] Some of the women reported Coleman's behavior to his supervisor and a union representative; others did not.[45] Plaintiff Hirase-Doi, a co-worker of Coleman's, observed the harassment of other women and was herself subjected to sexually offensive remarks, both written and verbal.[46] Coleman also

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(following the weight of authority in the circuits that employees may not be sued under Title VII); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.) (agreeing with the Ninth Circuit that Congress obviously included agents under Title VII in order to ensure respondeat superior liability), *cert. denied*, 116 S. Ct. 569 (1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.) (concluding that Title VII does not allow liability for the actions of employees unless they meet the statutory definition of "employer"), *cert. denied*, 115 S. Ct. 574 (1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (finding that Title VII provides a remedy against employers, not individual employees); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (stating that the statutory scheme of Title VII indicates that Congress did not intend personal liability), *cert. denied*, 114 S. Ct. 1049 (1994); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (proclaiming that plaintiffs must properly recover through the employer, not the employee) *with* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding that a supervisory individual may qualify as an "employer" under Title VII) *and* Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that a plaintiff may properly seek recovery against individuals under Title VII).

37. 1 F.3d 1122 (10th Cir. 1993).

38. *See infra* note 78.

39. 54 F.3d 664 (10th Cir. 1995).

40. For a discussion of the *Ball* opinion and its implications, see *infra* notes 59-100 and accompanying text.

41. *See Grant*, 21 F.3d at 653; *Miller*, 991 F.2d at 587.

42. *See Grant*, 21 F.3d at 653 (finding no personal liability under Title VII); *Miller*, 991 F.2d at 587 (holding that supervisors could not be sued personally under Title VII).

43. 61 F.3d 777 (10th Cir. 1995).

44. *Hirase-Doi*, 61 F.3d at 780-81.

45. *Id.* at 781. One of the women asked Coleman to stop; another told Hirase-Doi, but not the supervisor, about Coleman's behavior; and a third simply avoided Coleman. *Id.* One of the incidents involving a non-plaintiff included an attempt to kiss her and touch her breast. *Id.*

46. *Id.*

attempted to touch Hirase-Doi's breast.[47] Hirase-Doi reported Coleman's behavior to a union vice-president, a procedure specified in the U.S. West employee policy manual.[48] Some time after the report, Coleman "grabbed [Hirase-]Doi between her legs."[49] She reported the incident on July 15, which resulted in Coleman's prompt suspension, followed by his resignation.[50] The district court granted summary judgment to U.S. West, finding that Coleman had not acted within the scope of his employment.[51] The court reasoned that Coleman was a co-worker and not in a management or supervisory position. Therefore, U.S. West could only be liable if it knew or should have known of the situation and failed to remedy it.[52]

b. *Decision*

The Tenth Circuit reversed, finding a genuine issue of material fact as to whether U.S. West knew or should have known about Coleman's alleged conduct.[53] In analyzing the liability issue, the court reaffirmed its earlier holding in *Hicks v. Gates Rubber Co.*,[54] in which it applied agency principles[55] from the *Restatement (Second) of Agency*.[56] Under one element of the *Hicks* test, liability attaches to an employer for any tort committed by an employee in which the employer was negligent or reckless.[57] The Tenth Circuit found that a reasonable finder of fact might conclude that U.S. West knew or should have known of Coleman's alleged conduct based on: (1) the reports of two women to Coleman's supervisor; (2) the report of another woman to her union representative; (3) allegations that the supervisor herself was harassed; (4) the overall pervasiveness of complaints regarding Coleman; and (5) Hirase-Doi's report to the union vice-president.[58]

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47. *Id.*

48. *Id.* at 785. U.S. West argued that the union representative did not pass on the information; therefore, it could not be liable unless an agency relationship existed between U.S. West and the union. *Id.* The court, however, found that U.S. West's inclusion of the union in the policy manual constituted the apparent authority necessary to create an agency relationship. *Id.*

49. *Id.* at 781.

50. *Id.*

51. *Id.*

52. *Id.* at 781-82.

53. *Id.* at 784. The plaintiff did not dispute that Coleman had *not* acted within the scope of his employment or purported to act as an agent of U.S. West. *Id.* at 783. The court also addressed the issue, not reached by the district court, of the existence of a hostile work environment. *See* discussion *infra* notes 142-60 and accompanying text.

54. 833 F.2d 1406 (10th Cir. 1987).

55. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

56. *Hirase-Doi*, 61 F.3d at 783. The court opened its discussion of the use of agency principles by referring to the Supreme Court's language in *Meritor*. *Id.*

57. *Id.*

58. *Id.* at 785-86. The case was therefore remanded to determine whether U.S. West knew or should have known about the harassment. *Id.*

2. *Ball v. Renner*[59]

a. *Facts*

In a second case addressing liability under Title VII, *Ball v. Renner*, the Tenth Circuit directly addressed the issue of an employee's personal liability.[60] Sharon Ball, a former police dispatcher for the Cheyenne Police Department, brought a claim of hostile work environment sexual harassment against both Sergeant David Renner and the City of Cheyenne, Wyoming.[61] Ball presented evidence of harassment by Renner,[62] as well as substantial evidence suggesting that Renner had supervisory authority over her.[63] The district court entered summary judgment for both defendants.[64] The district court granted summary judgment for Renner individually because the plaintiff failed to name him in her EEOC complaint and because Renner was not an "employer" within the meaning of Title VII.[65] Ball appealed only that part of the order dismissing her complaint against Renner individually.[66]

b. *Decision*

Ultimately, the Tenth Circuit decided that Renner was not individually liable because he was not Ball's supervisor.[67] The court did not resolve the question of individual liability for supervisors, but analyzed both sides of the question, indicating agreement with courts finding that liability attaches to individual supervisors.[68]

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59. 54 F.3d 664 (10th Cir. 1995).

60. *Ball*, 54 F.3d at 664.

61. *Id.*

62. *Id.* at 665. Ball alleged that Renner had followed her home from work in the middle of the night numerous times, had twice accosted her in a dark closet, and had "placed his crotch on [her] right leg just below the knee." *Id.*

63. *Id.* at 668. Ball's affidavit asserted that:

> 5. Through my training and my experience, it was my understanding that, as a dispatcher and a communication coordinator, my direct supervisor on night shift was the patrol sergeant on duty . . . .
>
> 6. It was my understanding that, due to the fact that the patrol sergeant on duty was the only available person above me in the chain-of-command, the patrol sergeant on duty was in charge of the radio room.
>
> 7. The patrol sergeant on duty has supervisory authority over all dispatchers including the dispatch supervisor.
>
> 8. As the communications coordinator on duty and being in control of the radio room, the patrol sergeant on duty could, in fact, send me home if he believed it was necessary.
>
> 9. As the communications coordinator on duty, my chain-of-command was through the patrol sergeant and this was made clear to me through my training.
>
> 10. As commissioned supervisor, the patrol sergeant on duty had authority over all civilian personnel.
>
> 11. In the Spring of 1991, Sgt. David Renner was assigned to night shift as a patrol sergeant on duty and had supervisory authority over me.

Id.

64. *Id.* at 664. The opinion did not discuss the grounds for the district court's grant of summary judgment for defendant, the City of Cheyenne, because plaintiff did not appeal this issue. *Id.*

65. *Id.* at 664-65.

66. *Id.* at 664.

67. *Id.* at 668.

68. *Id.* at 667 (stating that it "makes good sense" to limit liability to those who "wield em-

At the outset, the Tenth Circuit acknowledged that Title VII itself is silent on the question of employee liability.[69] Title VII refers to legal action against "employers"; the definition of "employers" includes agents.[70]

In determining the meaning attached to the word "agent," the court identified two discrete theories of interpretation.[71] The first broadly construes the word "agent" to increase the number of potential defendants, and imposes liability on discriminatory supervisors along with their employers.[72] The second approach views "agent" in a way that imputes an employee's discriminatory conduct to his employer through the doctrine of respondeat superior.[73] Judge Shadur,[74] a visiting judge writing for the panel, opined that the first approach was far more rational.[75] The second approach, in his view, created a redundancy and was analytically flawed.[76]

The court noted that opinions diverge about whether employees may be held personally liable under Title VII.[77] According to Judge Shadur, Tenth Circuit cases treating personal liability did not present a clear picture.[78] Those

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ployer-like authority").

69. *Id.* at 666.

70. *Id.*; *see* 42 U.S.C. § 2000e(b) (1988) (defining the term employer as "a person engaged in an industry affecting commerce . . . *and any agent of such a person*") (emphasis added).

71. *Ball*, 54 F.3d at 666.

72. *Id.*

73. *Id.*

74. Senior District Judge, sitting by assignment. *Id.* at 664.

75. *Id.* at 667 (stating that "making the responsible agent a statutory 'employer' . . . is eminently sensible as a matter of statutory structure and logical analysis").

76. *Id.* (explaining that interpretation of the word "agent" as applying respondeat superior principles to ensure employer liability "makes little sense in analytical terms"). "[An] employer can act only through its agents in any event (what other meaning can be given to the concept that Mammoth Enterprises, Inc., has engaged in employment discrimination?" *Id.*

77. *Id.* at 666-67.

78. *Id.* at 667. One Tenth Circuit case, *Sauers v. Salt Lake County*, held that agents for employers could be sued only in their official capacity, precluding personal liability. *Sauers*, 1 F.3d 1122, 1125 (10th Cir. 1993). Another, *Brownlee v. Lear Siegler Mgmt. Servs. Corp.*, indicated that agents for employers could be personally liable for age discrimination. *Brownlee*, 15 F.3d 976, 978 (10th Cir.), *cert. denied*, 114 S. Ct. 2743 (1994).

Judge Shadur described Tenth Circuit precedent regarding individual Title VII liability as unclear. *Ball*, 54 F.3d at 666-67. District courts in the Tenth Circuit, however, often cite *Sauers* as squarely holding that individuals may not be personally sued under Title VII. *See, e.g.*, Davidson v. MAC Equip., Inc., 878 F. Supp. 186, 188 (D. Kan. 1995) ("The Tenth Circuit has squarely held that individual capacity suits are inappropriate under Title VII."); Redpath v. City of Overland Park, 857 F. Supp. 1448, 1456 (D. Kan. 1994) (referring to a "square holding" in the Tenth Circuit of no personal liability under Title VII). It is questionable, particularly in light of the *Ball* opinion, whether or not these courts have identified the "square" holding of *Sauers*. In *Sauers*, the specific issue was whether the plaintiff's amended complaint, properly naming the county rather than the county attorney as defendant, related back to the original filing. *Sauers*, 1 F.3d at 1125. The court cited an Eleventh Circuit case for the proposition that Title VII suits may proceed against individuals only in their official capacities and not personally. *Id.* (citing Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991)). In this context, the court held that naming Ted Cannon individually in the first filing was tantamount to naming the County as a defendant. *Id.* Therefore, Sauers's claim was not time-barred. *Id.*

circuits finding personal liability under Title VII restricted such liability to supervisory personnel,[79] an approach that the court found sensible.[80]

The Tenth Circuit characterized Ball's evidence regarding Renner's supervisory capacity as too generalized.[81] The court reasoned that Renner, a co-worker, could not be liable under any theory of personal liability.[82] Because the facts of this case did not squarely present the question of the personal liability of supervisors, the court deliberately and explicitly left the question unresolved.[83]

C. *Analysis*

Technically, the Supreme Court has not spoken definitively to the issue of employer liability for either supervisors or co-workers under Title VII. In *Meritor*, the Court held that for hostile work environment claims, employers would be neither always strictly liable nor always insulated from liability by absence of notice.[84] Both *Hirase-Doi* and *Ball* reflect an expansion of federal protection for victims of sexual harassment, but a narrow definition of supervisory capacity might severely limit those to whom the court will extend liability.

In *Hirase-Doi*, the Tenth Circuit followed the Supreme Court's suggestion in *Meritor* to apply agency principles.[85] The Tenth Circuit confirmed that agency principles (specifically, the "knew or should have known" standard) govern the question of employer liability for acts of co-workers in hostile work environment claims.[86] The court applied these principles even though *Meritor* involved a harassment claim against a supervisory employee, and *Hirase-Doi* involved a claim against a co-worker.[87]

The Supreme Court also has not addressed the issue of individual liability under Title VII. The Tenth Circuit clearly will not impose individual liability when the harasser is only a co-worker of the plaintiff.[88] Several district courts in the Tenth Circuit have interpreted *Sauers* as firmly holding that individuals may not be personally sued for Title VII violations.[89] *Ball*, however,

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79. *Ball*, 54 F.3d at 667 (noting that all courts imposing personal liability distinguish between co-workers and supervisors and limit liability to those who wield "employer-like authority").

80. *Id.*

81. *Id.* at 668; *see supra* note 63 (specifying Ball's evidence of Renner's supervisory capacity).

82. *Ball*, 54 F.3d at 668 (stating that nothing "demonstrate[s] the existence of employer-like power in Renner").

83. *Id.* at 667. Note that Ball, a police dispatcher for the City of Cheyenne, was a public employee. Had she brought her claim for sexual harassment under 42 U.S.C. § 1983, Renner could clearly have been sued in his personal capacity. *See* 42 U.S.C. § 1983 (1988); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989) (holding that sexual harassment by public employees violates the Equal Protection Clause of the Fourteenth Amendment).

84. *Meritor*, 477 U.S. at 72.

85. *Hirase-Doi*, 61 F.3d at 783.

86. *Id.* at 781.

87. *Id.*

88. *Ball*, 54 F.3d at 667 (limiting liability to those who wield employer-like authority).

89. *See, e.g.*, *Davidson*, 878 F. Supp. at 188 (describing a square holding against personal

describes the question of personal liability in the Tenth Circuit as open and unresolved.[90] Although the *Ball* court does not reach the question of personal liability under Title VII for supervisors, its dicta specifically eschews the reasoning of courts which do not extend personal liability to supervisors.[91] The court implies that it may impose personal liability on supervisors in the future. Note, however, that the court rejected a fair amount of evidence that Renner acted as Ball's supervisor.[92] Thus, *Ball* establishes a high threshold of proof for demonstrating supervisory capacity.

The Tenth Circuit may remain open to arguments regarding personal liability under Title VII. A literal reading of Title VII's language supports a finding of individual liability.[93] The Ninth Circuit, however, found that by using the word "agent" in the statute, Congress plainly intended to create respondeat superior liability for employers.[94] The Ninth Circuit also reasoned that because Title VII does not cover small employers, Congress could not have intended to treat individuals differently from small employers.[95] Policy arguments against personal liability include an alleged "chilling effect" on employees[96] and economic inefficiency.[97] On the other hand, the broad objectives of Title VII, to eradicate discrimination and provide redress for victims, militate in favor of imposing personal liability.[98] Individual liability may further congressional goals of deterrence.[99] Also, plaintiffs may have no other recourse if an employer is bankrupt or is not found liable under agency theories.[100]

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liability); *see supra* note 78.

90. *Ball*, 54 F.3d at 667-68. The court compares *Brownlee* to *Sauers* to demonstrate that confusion exists regarding individual liability. *Id.* at 667. This is a peculiar reference by the court, as *Brownlee* is an age discrimination suit brought under ADEA, not Title VII, and merely alludes to the possibility of personal liability under ADEA. *Brownlee*, 15 F.3d at 978.

91. *See Ball*, 54 F.3d at 666-67; *supra* text accompanying note 76.

92. *See supra* note 63 (detailing the evidence).

93. *See* Goldberg, *supra* note 19, at 575. As Goldberg points out, liability turns on who is an employer. *Id.* Goldberg defines an employer as a person engaged in industry and agents of such a person. *Id.* Therefore, it would follow that agents may be held liable. *Id.*

94. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (concluding that the "obvious purpose of [including 'agent' in the definition of employer] was to incorporate respondeat superior liability into the statute"), *cert. denied*, 114 S. Ct. 1049 (1994).

95. *Id.*

96. *See* Goldberg, *supra* note 19, at 590.

97. *Id.* at 591.

98. *Id.* at 580-81.

99. *Id.* at 590.

100. *Id.* at 591. An extreme example of the legal quagmire plaintiffs may face regarding liability is found in the case of Gary v. Long, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995). In *Gary*, the court accepted as true, for purposes of summary judgment, that the plaintiff was subjected to severe harassment over a period of two to three years culminating in a rape. *Id.* at 1393-94. Because of the employer's well-established grievance procedures, the court rejected all theories of employer liability through agency principles. *Id.* at 1398. The D.C. Circuit did not hold the harasser liable because it adhered to the "respondeat superior" interpretation for personal liability of agents. *Id.* at 1399; *see* discussion *supra* part II.B.2.b. The court denied the plaintiff any recovery under Title VII. *Gary*, 59 F.3d at 1400.

D. *Other Circuits*

Some circuits interpret *Meritor* in conjunction with Title VII to impose strict liability in hostile work environment claims.[101] Others, before imposing employer liability, require a finding that the employer had actual or constructive notice and failed to remedy the situation.[102]

The Fourth and Sixth Circuits have imposed individual liability under Title VII.[103] In contrast, the Third, Ninth, and D.C. Circuits have refused to impose individual liability.[104] In addition, the Fifth Circuit held that only supervisors in charge of staffing and assignments may be held liable.[105] In circuits which have not decided this issue, the decisions of the district courts have been inconsistent.[106]

III. DEFINING THE HOSTILE WORK ENVIRONMENT

A. *Background*

The Eleventh Circuit first acknowledged a hostile work environment claim in 1982 in *Henson v. City of Dundee.*[107] Although the analysis in *Henson* closely mirrored the established "quid pro quo" analysis, the new theory did not require the plaintiff to show loss of a tangible job benefit such as firing or demotion.[108] Thus, the court required that the harassing conduct be gender-motivated and affect a "term, condition or privilege" of a victim's employment.[109] The *Henson* court borrowed language from a Title VII racial discrimination case to assert that an employee's psychological well-being is a "term, condition or privilege" of employment.[110]

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson,*[111] affirming that non-economic, hostile work environment claims are actionable

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101. *See* Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985) (stating that "sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors").

102. *See* Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986) (requiring "that the employer knew or should have known of the harassment in question and failed to take prompt remedial action"), *cert. denied*, 479 U.S. 1065 (1987); Vorwerk et al., *supra* note 18, at 1061.

103. *See* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986).

104. *See* Sheridan v. E.I. duPont de Nemours & Co., 74 F.3d 1439, 1443 (3d Cir. 1996); *Gary*, 59 F.3d at 1399; *Miller*, 991 F.2d at 587.

105. *See* Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986).

106. *See Ball*, 54 F.3d at 667.

107. 682 F.2d 897, 901 (11th Cir. 1982).

108. *Henson*, 682 F.2d at 902.

109. *Id.* The court in *Henson* listed five elements necessary for a hostile work environment claim: (1) the employee is a member of a protected class; (2) the employee did not invite the harassment; (3) the employee was harassed because of [his or] her sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) a respondeat superior relationship existed between the employer and employee. *Id.* at 903-05.

110. *Id.* at 901 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

111. 477 U.S. 57 (1986).

under Title VII.[112] *Meritor* noted with approval both the EEOC guidelines and *Henson* in affirming this cause of action.[113] While *Henson* listed five elements necessary to establish a claim of hostile work environment discrimination,[114] the Court in *Meritor* did nothing to establish or clarify the standards for evaluating this claim.[115] The Court did state that the conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[116] Subsequently, the circuits have disagreed on exactly what constitutes a hostile work environment.[117]

In 1993, the Supreme Court again addressed the issue of hostile work environment sexual harassment in *Harris v. Forklift Systems, Inc.*[118] In *Harris*, the Court specifically held that actual psychological injury was not required. Justice O'Connor purported to strike a middle path between merely offensive conduct and conduct resulting in a discernable psychological injury.[119] The Court articulated a two-part, objective/subjective test, requiring courts to determine whether a reasonable person would perceive the environment to be hostile and whether the plaintiff actually perceived it as such.[120] Following *Harris*, the circuits returned to the difficult task of defining a hostile work environment.

B. *Tenth Circuit Decisions*

1. *Gross v. Burggraf Construction Co.*[121]

a. *Facts*

Patricia Gross worked as a water truck driver for Burggraf Construction, a road construction company, for two May-to-October seasons in 1989 and 1990.[122] In September of 1993, she filed a Title VII gender discrimination claim alleging ten instances of harassing conduct by her supervisor.[123] The alleged conduct included calling Gross a "cunt," asking a male employee over a CB radio within Gross's hearing, "'Mark, sometimes, don't you just want to smash a woman in the face?'" as well as a series of vulgar criticisms of

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112. *Meritor*, 477 U.S. at 67-68.

113. *Id.* at 65-67.

114. *See supra* note 109.

115. *See* Buff, *supra* note 9 (noting that while *Meritor* is the source of the oft-quoted language that conduct must be "sufficiently severe or pervasive" to alter working conditions, the Court neglected to define a clear test for hostile work environment harassment).

116. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904) (bracketed text in original).

117. *Compare* Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991) (stating that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation") *with* Brooms v. Regal Tube Co., 881 F.2d 412, 418 (7th Cir. 1989) (requiring conduct to be both pervasive and psychologically debilitating).

118. 114 S. Ct. 367 (1993).

119. *Harris*, 114 S. Ct. at 370.

120. *Id.*

121. 53 F.3d 1531 (10th Cir. 1995).

122. *Gross*, 53 F.3d at 1535. Gross did not dispute that at the end of each season she was laid off for lack of further work. *Id.*

123. *Id.* at 1535-36.

Gross's work.[124] The district court granted summary judgment to Burggraf, and Gross appealed.[125]

b. *Decision*

In analyzing the claim, the Tenth Circuit acknowledged the objective/subjective test set forth in *Harris*,[126] but then focused on prior Tenth Circuit decisions to resolve the issue.[127] The first case that the court examined held that harassment occurring only because of an employee's gender may be actionable under Title VII.[128] The second case explained that regardless of the unpleasantness of the workplace, no sex discrimination occurs unless the harassing conduct is based on gender.[129] Interestingly, the court analyzed the merits of Gross's claim by first "examin[ing] her work environment" with specific reference to the construction industry.[130] The court stated, "In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior."[131] The court, quoting a Sixth Circuit decision, said that standards for harassment will vary depending upon the nature of the work environment.[132] "[I]n some workplaces . . . [s]exual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this."[133]

The Tenth Circuit then explained that *Bolden v. PRC, Inc.*,[134] a Title VII racial discrimination case, contained the controlling test for gender discrimination.[135] To prevail under the *Bolden* test, as set forth in *Gross*, a plaintiff must prove that the "alleged conduct was: (1) pervasive or severe enough to alter the terms, conditions or privileges of employment; and (2) whether the admissible evidence demonstrates that the words used were gender based or stemmed from sexual animus."[136]

The court refused to consider Gross's supervisor's use of the word "cunt" because of hearsay concerns.[137] Furthermore, the court dismissed all of the

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124. *Id.* at 1536 (detailing each specific allegation).
125. *Id.*
126. *Id.* at 1537.
127. *Id.*
128. *Id.* (citing Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987)).
129. *Id.* (citing Stahl v. Sun Microsystems, Inc., 19 F.3d 533, 538 (10th Cir. 1994)).
130. *Id.*
131. *Id.* Deposition testimony from Gross indicated that she also used profanity on the job. *Id.* at 1538.
132. *Id.* (citing Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987)).
133. *Id.* (quoting *Rabidue*, 584 F. Supp. at 430).
134. 43 F.3d 545 (10th Cir. 1994).
135. *Gross*, 53 F.3d at 1539.
136. *Id.*
137. *Id.* at 1539-42. Gross submitted testimony that she had been told by co-worker Ed Durfee that her boss, George Anderson, had said to him, "I hate that fucking cunt." *Id.* at 1539 (internal quotations omitted). Gross offered no exception to the hearsay rule in support of admission of this evidence and the court found no applicable exception. *Id.* at 1541-42. Gross also offered testimony of a co-worker that someone had told him that Anderson had called Gross a cunt. *Id.* at 1539-40. The court rejected Gross's unexplained assertion that as an admission by a party

alleged instances of verbal harassment as "crude and rough comments used by a construction boss in reprimanding or motivating his employees."[138] The court described the terms used, such as "dumb," "ass," and other epithets, as being gender-neutral.[139] With regard to the supervisor's remark about wanting to smash a woman in the face, the court held, citing *Meritor*, that this single incident would not sufficiently affect the conditions of Gross's employment to sustain a Title VII claim.[140]

2. *Hirase-Doi v. U.S. West Communications, Inc.*[141]

a. *Facts*

Hirase-Doi and her co-worker, Coleman, were directory assistance operators at U.S. West.[142] Hirase-Doi alleged that her co-worker, Coleman, harassed her by making verbal and written offensive remarks, attempting to touch her breast, and grabbing her between the legs.[143] She also alleged that Coleman harassed other women at the company.[144] The district court granted summary judgment for the defendant because it found that Coleman had not acted within the scope of his employment and there was no viable evidence that the company knew or should have known of the harassment.[145] Thus, the district court never reached the issue of whether a hostile work environment existed at U.S. West.[146]

b. *Decision*

On appeal, U.S. West raised the issue of hostile work environment as an alternative basis for affirming the district court's grant of summary judgment.[147] In analyzing this issue, the Tenth Circuit first addressed U.S. West's contention that Hirase-Doi could not use Coleman's alleged harassment of others as evidence of a hostile work environment for Hirase-Doi.[148] Citing their decision in *Hicks v. Gates Rubber Co.*,[149] the court found that Hirase-Doi could indeed use this evidence to bolster her claim.[150]

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opponent, this statement was an exception to the hearsay rule. *Id.* at 1542.

138. *Id.* at 1547.

139. *Id.* at 1543.

140. *Id.* at 1542-43.

141. 61 F.3d 777 (10th Cir. 1995).

142. *Hirase-Doi*, 61 F.3d at 780. For a discussion setting forth the facts of *Hirase-Doi*, see *supra* notes 43-52 and accompanying text.

143. *Hirase-Doi*, 61 F.3d at 781.

144. *Id.* (describing the actual incidents of harassment directed at other women).

145. *Id.*

146. *Id.* at 782.

147. *Id.*

148. *Id.*

149. 833 F.2d 1406 (10th Cir. 1987).

150. *Hirase-Doi*, 61 F.3d at 782 (citing *Hicks*, 833 F.2d at 1415-16). Hirase-Doi could only use evidence of Coleman's harassment of others of which she was aware during the time she was subjected to harassment by Coleman. *Id.* This requirement satisfied the subjective prong of the *Harris* test. *Id.*

The court applied the two-part objective/subjective test from *Harris v. Forklift Systems*,[151] emphasizing that Hirase-Doi must have been aware of the harassment of others in order to use it in her claim.[152] The Tenth Circuit found that the alleged harassment of Hirase-Doi, coupled with the alleged harassment of others, were sufficient for her claim to survive U.S. West's motion for summary judgment.[153] In addition, the court stated that the evidence of harassment of Hirase-Doi alone would have sufficed to preclude summary judgment on the issue of a hostile work environment.[154]

C. *Analysis*

In defining hostile work environment, the Tenth Circuit adheres to the two-part objective/subjective test set out in *Harris*. The Tenth Circuit will also consider, however, the nature of the industry in which the plaintiff works. Discrimination actionable under Title VII must be "gender-based." This "gender-based" requirement may mean that no claim will lie if men are also subjected to harassment in an industry, like construction, where higher levels of abuse may pervade the workplace.[155]

This lenient standard may give considerable latitude to companies in certain industries. Under the *Bolden* test, courts may only consider gender-specific remarks. In *Gross*, the Tenth Circuit found that the women were not subjected to gender-specific vulgarities and the gender-neutral terms used were acceptable in the construction industry context. This holding raises two issues. First, to support the notion that a higher degree of abuse was acceptable in the context of Gross's facts, the court cites *Rabidue v. Osceola Refining Co.*,[156] in which even gender-specific harassment—sexual jokes and girlie magazines—was deemed tolerable in that specific work environment. Thus, the court in *Gross* appears to be setting the stage for companies to argue that because sexual harassment is common and ostensibly accepted in certain industries, proving interference with work may be more difficult for employees.[157] Ironically, as a result, where an industry as a whole has exhibited a

151. 114 S. Ct. 367 (1993).

152. *Hirase-Doi*, 61 F.3d at 782.

153. *Id.* at 783.

154. *Id.* at 782-83.

155. Adjusting the view of reasonable behavior in accordance with what is tolerated in the particular environment raises several intriguing questions. What data will the court use to evaluate a work environment and determine whether higher levels of abuse are reasonable? In *Gross*, the court reproduced deposition testimony indicating that the plaintiff had herself used profanity and possibly told "off-color" jokes to support its broader conclusions about the construction industry. *Gross*, 53 F.3d at 1537-38. Additionally, what constitutes a work environment? Will the court look at entire industries, such as construction, or might certain companies be able to demonstrate this type of environment and qualify for different treatment? May large companies argue that the work environment in the mail room is different from that in executive offices?

156. 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

157. The EEOC has issued policy guidance indicating that it agrees with the dissent in *Rabidue* that a traditionally abusive work environment will rarely be relevant. Jollee Faber, *Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment*, 2 UCLA WOMEN'S L.J. 85, 133-34 (1992). The policy guidance goes on to assert that

historical pattern of discrimination through harassment, the companies within that industry may enjoy relative immunity from Title VII claims.

Second, the court did not consider whether the plaintiff was subjected to a high level of abuse, gender-neutral or otherwise, because of her sex. The Tenth Circuit has previously held that harassing behavior under Title VII need not be overtly sexual in nature.[158] In *Gross* the court did note that numerous vulgar epithets directed at a woman because of her gender could establish a claim under Title VII.[159] The total number of incidents in *Gross*, including the gender-neutral remarks, may not have been sufficient to alter the plaintiff's working environment; however, the court considered only the gender-specific remark and did not analyze the possibility that the gender-neutral remarks were directed towards women with greater frequency because of their gender. The *Bolden* test, requiring "a steady barrage of opprobrious racial [or sexual] comments,"[160] does not capture the notion of a particular gender singled out for "generic" abuse.

In *Hirase-Doi*, the plaintiff alleged sufficient evidence of harassment to survive summary judgment. The court reaffirmed that a plaintiff may use harassment of others to bolster a Title VII claim, but pointed out that Hirase-Doi alleged sufficient evidence of harassment against herself. Thus, the court left open the possibility of proving a hostile work environment entirely upon showing pervasive harassment of others of which she was aware. This type of claim, of course, would represent a significant expansion of the hostile work environment claim.

D. *Other Circuits*

Most circuits agree that conduct need not be "overtly sexual" to support a hostile work environment claim.[161] This is true despite language in the EEOC guidelines that harassing conduct includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[162] In contrast, some circuits have held that evidence of conduct that is not overtly sexual may not be as persuasive.[163]

Title VII's exact purpose is to prevent the behavior common in these types of environments. *Id.* For a detailed and informative indictment of the reasoning in *Rabidue*, see Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1193-234 (1990).

158. Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). In *Hicks*, the harassing behavior, while not overtly sexual, was physically aggressive. *Id.* at 1415.

159. *Gross*, 53 F.3d at 1539 (citing Burns v. McGregor Elec. Indus., 989 F.2d 959, 965 (8th Cir. 1993)). *Gross* indicates that harassment "'that would not occur but for the sex of the employee . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.'" *Id.* at 1537 (quoting *Hicks*, 833 F.2d at 1415). EEOC policy guidance specifically cites *Hicks* for the proposition that "sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability." Faber, *supra* note 157.

160. *Gross*, 53 F.3d at 1539.

161. *See, e.g.*, Cram v. Lamson & Sessions Co., 49 F.3d 466, 474 (8th Cir. 1995); Intlekofer v. Turnage, 973 F.2d 773, 775 (9th Cir. 1992); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988); Bell v. Crackin' Good Bakers, Inc., 777 F.2d 1497, 1503 (11th Cir. 1985).

162. 29 C.F.R. § 1604.11(a) (1995).

163. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 (5th Cir.

Few courts have directly addressed whether a plaintiff may use evidence of the harassment of others in the workplace to bolster a hostile work environment claim. In *Vinson v. Taylor*,[164] however, the District of Columbia Circuit stated that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive."[165]

IV. WHAT CONSTITUTES APPROPRIATE REMEDIAL ACTION?

A. *Background*

Generally, for a court to impose employer liability in a hostile work environment claim, the plaintiff must prove that the employer knew or should have known about the conduct and failed to take appropriate remedial action.[166] Most circuits have held that remedial action must be "reasonably likely" or "calculated" to stop the harassment.[167] Courts differ widely as to what types of employer actions satisfy this requirement. For example, the Fourth Circuit has found sufficient an employer's written notice to the alleged harasser to refrain from offensive conduct or contact with the alleged victim.[168] Yet, the Sixth Circuit has imposed liability on an employer who had a policy against sexual harassment and conducted an internal investigation because the court found the procedures did not function effectively.[169]

The Supreme Court, in *Meritor Savings Bank v. Vinson*,[170] noted that the "mere existence of a grievance procedure and a policy against discrimination, coupled with [the victim's] failure to invoke that procedure," will not insulate an employer from liability.[171] The Court required thorough procedures designed to encourage victims to come forward.[172] Many of the cases

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1995) (dismissing plaintiff's hostile work environment claim and noting that "no physical or sexual advances were made" toward plaintiff); Dey v. Colt Constr. Co., 28 F.3d 1446, 1456 (7th Cir. 1994) (concluding that incidents of harassment were extremely offensive and noting that they were overtly sexual, but not requiring them to be).

164. 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

165. *Vinson*, 753 F.2d at 146.

166. 29 C.F.R. § 1604.11(d) (1995) (stating that an employer is liable for sexual harassment where it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action"). *See generally* Jana H. Carey & Theresa C. Mannion, *New Developments in the Law of Sexual Harassment from* Meritor *to* Harris, Karibian *and* Steiner, *in* SEXUAL HARASSMENT LITIGATION 1995 (PLI Litig. & Admin. Prac. Course Handbook Series No. 524, 1995).

167. *See, e.g.*, Bouton v. BMW of N. Am., 29 F.3d 103, 110 (3d Cir. 1994) (holding that "an effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment"); Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 64 (2d Cir. 1992) (requiring remedial procedures to be more than a mere sham or pretext); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (setting forth the court's belief that remedies should be "reasonably calculated to end the harassment").

168. Swentek v. USAir, 830 F.2d 552, 558 (4th Cir. 1987).

169. Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987) (finding inefficient procedures where accused harasser was a first level supervisor responsible for rectifying harassment).

170. 477 U.S. 57 (1986).

171. *Meritor*, 477 U.S. at 72.

172. *Id.* at 72-73. The Court found that *Meritor*'s procedures were severely lacking and not

addressing remedial action center around the nature and effectiveness of an employer's discrimination policy.[173] Transfer of either the victim or the harasser to another department or location often constitutes proper remedial action.[174]

B. Buchanan v. Sherrill[175]

1. Facts

Shoney's restaurant, one of the defendants, employed Juanita Buchanan as a waitress from October of 1989 until September of 1990, when she took a leave of absence after falling at work in June of 1990.[176] After returning to work in May of 1991, Buchanan complained that she was sexually harassed and received poor treatment because of her worker's compensation claim.[177] Additionally, an African-American cook at the restaurant accused Buchanan of directing a racial slur toward him.[178] Because of these complaints, the management transferred Buchanan to another location.[179] She declined the transfer and resigned in August of 1991 bringing, among other claims, a Title VII sexual harassment claim.[180] The district court granted summary judgment for the defendant on the Title VII claim.[181]

2. Decision

On appeal, the Tenth Circuit conducted an extremely brief analysis of the Title VII issue and failed to detail any evidence of harassment.[182] The court found that the plaintiff's transfer ended the alleged harassment.[183] It concluded that the transfer was reasonably likely to prevent further harassment; therefore, the defendant engaged in appropriate remedial action and no liability

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well-designed to encourage victims to come forward. *Id.*

173. *See generally* Nancy Abell & Marcia N. Jackson, *Sexual Harassment Investigation—Cues, Clues and How-To's, in* NEW FRONTIERS OF SEXUAL HARASSMENT LITIGATION 1995 (PLI Litig. & Admin. Prac. Course Handbook Series No. 533, 1995) (discussing cases dealing with employer remedial measures).

174. For a list of cases where transfer constituted "proper remedial action", see *supra* note 172; *see also* Gary v. Long, 59 F.3d 1391, 1398-99 (D.C. Cir. 1995) (explaining that alleged victim transferred at her request); *Bouton*, 29 F.3d at 108 (noting that the alleged victim was promptly transferred to another supervisor); Saxton v. AT&T, 10 F.3d 526, 535-36 (7th Cir. 1993) (stating that the alleged harasser was promptly transferred, eliminating contact with alleged victim); Nash v. Electrospace Sys., 9 F.3d 401, 404 (5th Cir. 1993) (finding that without corroborating evidence of harassment, alleged victim was transferred to another department with no loss of pay or benefits); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (stating that the transfer of alleged victim was proper where the victim was only on temporary assignment).

175. 51 F.3d 227 (10th Cir. 1995). Named defendant Penny Sherrill was an owner of the holding company for Shoney's, Inc., also named as a defendant. *Buchanan*, 51 F.3d at 227.

176. *Id.* at 229.

177. *Id.*

178. *Id.*

179. *Id.* It appears from the court's opinion that Shoney's considered both Buchanan's complaints and the complaints of the African-American cook in making the transfer decision. *Id.*

180. *Id.*

181. *Id.* at 228.

182. *Id.* at 229 (stating that the evidence of harassment was irrelevant in view of the remedial action taken by defendant).

183. *Id.*

could attach.[184] In reaching this conclusion, the court relied upon *Saxton v. AT&T*,[185] in which the Seventh Circuit held that transfer of the alleged harasser constituted proper remedial action.[186] The court added that Buchanan offered no evidence that the harassment would continue at the new location.[187]

C. *Analysis*

The court's opinion did not describe the evidence offered in support of the plaintiff's Title VII claim. The court may have found the evidence lacking or credited the testimony concerning the plaintiff's racial slur. In any event, the court did not hesitate to find the plaintiff's transfer to be a satisfactory remedy to the situation. The Seventh Circuit's decision in *Saxton*[188] is unpersuasive because it involved transferring the alleged perpetrator, not the victim.[189] The Seventh Circuit acknowledged the importance of this distinction, finding that victim transfer may indeed be an inadequate remedial measure if the transfer reduces the victims privileges in any way.[190]

The Tenth Circuit found the transfer adequate, regardless of whether Buchanan was indeed a victim of sexual harassment. The court focused on the plaintiff's refusal to leave the objectionable workplace, but did not consider whether the new location presented problems for her. At least two problems with the new location could exist. First, the opinion does not report whether Buchanan's transfer required her to move or greatly increase her commute.[191] Second, the court made no mention of the need for an employer to investigate whether its employee was sexually harassing the plaintiff.[192] If no internal investigation whatsoever is required of employers when employees claim sexual harassment, can employees reliably assume that a new location will be free from harassing behavior? An employer's failure to investigate claims of

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184. *Id.*

185. 10 F.3d 526 (7th Cir. 1993).

186. *Saxton*, 10 F.3d at 535-36.

187. *Buchanan*, 51 F.3d at 229. The constructive retaliatory discharge claim failed as well. *Id.* Under Oklahoma law, a constructive discharge arises when employers deliberately create or permit working conditions that a reasonable person would find so intolerable as to compel resignation. *Id.* Here, because the plaintiff rejected the offer to transfer out of the offensive workplace, the court concluded that a reasonable person would not find resignation her only option. *Id.* From the court's perspective, this lack of evidence caused her Title VII and state claims to fail. *Id.*

188. *Id.*

189. *See Saxton*, 10 F.3d at 535.

190. Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990). According to *Guess*,

> [a] remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim's wage or other remuneration, increases the disamenities [sic] of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.

Id.

191. It is possible that either no hardship to the plaintiff existed or that she failed to plead facts to support hardship.

192. The court may have assumed that the fact of transfer indicated that some type of investigation took place. However, the court said absolutely nothing about the need for, much less the adequacy of, such an investigation.

sexual harassment increases the possibility that harassers, whether themselves transferred or left in place while victims are transferred, will continue their illegal behavior.[193] There is much at stake concerning both alleged victims and accused harassers. A 1994 California court awarded a plaintiff almost $10,000,000 in a case where an employer failed to conduct a thorough investigation,[194] and a 1988 New Mexico decision awarded $1,000,000 to a discharged and falsely-accused co-worker.[195]

D. *Other Circuits*

Promptly transferring either the alleged victim or the alleged perpetrator generally operates to shield an employer from Title VII liability.[196] In the Fifth Circuit, transferring the victim was sufficient when the employer investigated the allegations and could not corroborate them.[197] However, the Fifth Circuit requires some investigation of the complaint; transfer of the victim alone will not always suffice.[198] The Third and Sixth Circuits have both held that prompt transfer of the victim will prevent liability.[199] In the District of Columbia Circuit, transfer of the victim at her request as part of the grievance procedure was sufficient.[200] Finally, in the Ninth Circuit, transfer of the victim to a new shift was inadequate, and the court suggested that either transfer or outright termination of the harasser was warranted.[201]

CONCLUSION

Agency principles from the *Restatement (Second)* determine employer liability for a hostile work environment created by a non-supervisory co-worker. Personal liability of supervisors for a hostile work environment under Title VII may be an open question. The Tenth Circuit suggests that the reasoning of

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193. The determination of whether an employer has engaged in appropriate remedial action assumes that illegal and otherwise actionable behavior has, in fact, occurred. Thus, this concept amounts to a legal defense which allows employers to escape liability for proven sexual harassment. Ostensibly, the reason we allow employers to escape liability for proven sexual harassment is to encourage good faith efforts to rid the workplace of a hostile sexual environment. *See* Samuel E. McCargo, *Responding to the Hostile Sexual Environment: Cure or Legal Defense?*, 74 MICH. B.J. 1168, 1168-72 (1995) (explaining that the doctrine of appropriate remedial action is a legal defense and questioning the capabilities of employers to remedy hostile sexual environments).

194. Abell & Jackson, *supra* note 173 (describing Weeks v. Baker & McKenzie, No. 943043, 1994 WL 774633 (Cal. Super. Ct. Nov. 28, 1994) (not certified for publication)).

195. *Id.* (describing Kestenbaum v. Pennzoil Co., 766 P.2d 280 (N.M. 1988), *cert. denied*, 490 U.S. 1109 (1989)).

196. *See, e.g.*, Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 108 (3d Cir. 1994) (finding that prompt transfer shields an employer from liability).

197. Nash v. Electrospace Sys., 9 F.3d 401, 404 (5th Cir. 1993).

198. Waltman v. International Paper Co., 875 F.2d 468, 479-80 (5th Cir. 1989).

199. *Bouton*, 29 F.3d at 108; Kent County Sheriff's Ass'n v. County of Kent, 826 F.2d 1485, 1495 (6th Cir. 1987).

200. *Gary*, 59 F.3d at 1398-99. The court was impressed with the thoroughness and effectiveness of the company's grievance procedures in finding the employer not liable. *Id.* at 1399. There was no discussion of whether a victim transfer would have been a satisfactory remedial action if it had not come at the request of the victim. *Id.*

201. Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995).

other circuits upholding supervisor liability is sound. Plaintiffs may not, however, personally sue co-workers for sexual harassment.

Plaintiffs may find it more difficult to sustain hostile work environment claims brought against defendants in an industry historically perceived as tolerating a higher degree of vulgarity and abuse. Plaintiffs may bolster a hostile work environment claim with evidence of harassment against others of which they were aware. Furthermore, the court leaves open the possibility that a plaintiff might sustain a hostile work environment claim entirely upon showing the harassment of others of which she was aware. Finally, the Tenth Circuit will likely consider that prompt transfer of the victim constitutes remedial action sufficient to negate employer liability.

The past year's decisions have brought a mixed-bag for plaintiffs and defendants in the Tenth Circuit. The range of incidents plaintiffs may use to support a hostile work environment claim widened, while the nature of allowable incidents narrowed.[202] The court made it easier to impute liability to employers when co-workers harass fellow employees. These employers, however, may ultimately escape liability if they take proper remedial action. The court shows a willingness to allow employers to exercise discretion in this regard.

Allison H. Lee

202. The narrowing occurs either by virtue of looser standards for certain industries or as a result of a refusal to consider "gender-neutral" remarks.

ENVIRONMENTAL LAW

INTRODUCTION

The Tenth Circuit handed down several important decisions in the field of environmental law between September 1994 and September 1995.[1] This Survey focuses on two substantial decisions on environmental law issues. The first case, *United States v. Colorado & Eastern Railroad*,[2] discussed the complex, and as yet unsettled, distinction between cost recovery and contribution as governed by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[3] Secondly, *Laguna Gatuna, Inc. v. Browner*,[4] a case of first impression in the Tenth Circuit, treated the issue of pre-enforcement judicial review of a Clean Water Act (CWA)[5] compliance order issued by the Environmental Protection Agency (EPA).[6]

Part I of this Survey discusses the *Colorado & Eastern* decision in light of the statutory and case law that preceded it. Part II examines *Laguna Gatuna*. Finally, this Survey argues that these two decisions have affected environmental law inconsistently, even though both case opinions attempt to follow congressional intent. On the one hand, the Tenth Circuit eroded the structure of CERCLA with its holding in *Colorado & Eastern*, and created substantial legal uncertainty in future cost recovery and contribution actions. On the other hand, the Tenth Circuit's holding in *Laguna Gatuna* provides needed legal certainty by barring pre-enforcement judicial review of EPA compliance orders under the CWA.

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1. Other Tenth Circuit decisions in the survey period relating to environmental law but not discussed include: Leadville Corp. v. United States Fidelity & Guar. Co., 55 F.3d 537 (10th Cir. 1995) (affirming dismissal of an indemnity claim for failure to abide by notice provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability insurance policy); Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522 (10th Cir. 1995) (interpreting a pollution exclusion clause); Pueblo of Scandia v. United States, 50 F.3d 856 (10th Cir. 1995) (reversing and remanding summary judgment against a Native American claim for bad faith failure to preserve Forest Service land used for cultural and religious purposes as required by the National Historic Preservation Act); Red Panther Chem. Co. v. Insurance Co. of N. Am., 43 F.3d 514 (10th Cir. 1994) (resolving an interpretation dispute regarding an insurance policy excluding pollution); Brever v. Rockwell Int'l Corp., 40 F.3d 1119 (10th Cir. 1994) (reversing dismissal of a federal whistleblowing claim stemming from the FBI investigation of the Rocky Flats Superfund site in Colorado).

2. 50 F.3d 1530 (10th Cir. 1995).

3. 42 U.S.C. §§ 9601-9675 (1994).

4. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

5. 33 U.S.C. §§ 1251-1387 (1994).

6. *Laguna Gatuna*, 58 F.3d at 564.

I. COST RECOVERY VS. CONTRIBUTION UNDER CERCLA: *UNITED STATES V. COLORADO & EASTERN RAILROAD*[7]

A. *Background*

1. Statutory Background

CERCLA is arguably one of the most significant environmental statutes in existence.[8] Its comprehensive structure allows the federal government to take control of an environmentally dangerous site; clean it or require the potentially responsible parties (PRPs) to clean it; and, under CERCLA's cost recovery provisions, hold each PRP responsible for the cleanup costs.[9] Under both court-imposed and statutory joint and several liability,[10] a party may be held liable in a cost recovery action for the full cost of a site's remediation, regardless of the party's culpability or the amount of contamination the party actually contributed.[11]

In 1986, Congress added the Superfund Amendments and Reauthorization Act (SARA)[12] to CERCLA. These new provisions codified a remedy which already had been made available to PRPs by the courts: a right to contribution from other PRPs for a completed cleanup.[13] Furthermore, SARA also provided a "contribution bar" for PRPs that settle with the EPA, at least for the "matters addressed" in their consent decree.[14] As a result, CERCLA's complex and controversial structure juxtaposed two extremes: protection contribution from claims for settlors and joint and several liability for nonsettlors. These sharply contrasting options provide substantial incentive for PRPs to

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7. 50 F.3d 1530 (10th Cir. 1995).

8. *See* Michael V. Sucaet, *Contribution Protection Under CERCLA: What Have You Settled and Not Settled?*, 40 WAYNE L. REV. 1477, 1479 (1994).

9. 42 U.S.C. §§ 9601(9), 9607(a) (1994); Sucaet, *supra* note 8, at 1479; Gregory J. Walch, Note, Burlington Northern Railroad v. Time Oil: *Contribution Protection Under the 1986 Superfund Amendments*, 22 ENVTL. L. 757, 758 (1992).

10. *Colorado & Eastern*, 50 F.3d at 1535. For a sampling of various court interpretations of joint and several liability under CERCLA, see County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991); United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). *See generally* Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995). For a discussion of statutorily imposed joint and several liability, see Sucaet, *supra* note 8, at 1481-83.

11. *Colorado & Eastern*, 50 F.3d at 1535; Allen Samelson, *"Whose Liability Is This Anyway?": The Allowability of Environmental Clean-up Costs Potentially Attributable to Other Responsible Parties*, 24 PUB. CONT. L.J. 293, 304 (1995).

12. Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1994)); *see* Karen L. DeMeo, Note, *Is CERCLA Working? An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493, 494-95 (1994).

13. 42 U.S.C. § 9613(f). Courts were concerned about the inequity of holding a single defendant liable for the cost of an entire site cleanup with no way to recoup expenditures from other PRPs. *Id.* Courts therefore implied a right of contribution between PRPs in CERCLA cases before Congress actually codified the right in SARA. *Colorado & Eastern*, 50 F.3d at 1535.

14. SARA states, "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding *matters addressed* in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). A consent decree is a cleanup agreement entered in a federal district court settling remedial action issues with the PRP. *Id.* § 9622(d)(1)(A)-(C).

settle with the EPA as early as possible in the overall cleanup process.[15] By entering into a protective consent decree with the EPA quickly, a PRP can indemnify itself from further liability.[16] Absent a settlement, a PRP may find itself financially responsible for all costs of cleanup which are uncollected or uncollectible by the EPA.[17]

The distinction between cost recovery and contribution is complex.[18] Cost recovery actions reimburse those who cleanup a CERCLA site for costs associated with the cleanup.[19] Courts hold defendants in cost recovery suits jointly, severally, and strictly liable.[20] Contribution actions, however, apportion liability between guilty parties.[21] Defendants subject to joint and several liable may, in contribution actions, invoke defenses such as equity and divisibility to divert some or all of their liability.[22] Additionally, the statute of limitations differs for each action.[23]

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15. DeMeo, *supra* note 12, at 500-03; Sucaet, *supra* note 8, at 1484-85.

16. 42 U.S.C. §§ 9613(f)(2), 9622(d)(1)(A)-(C).

17. *Id.*; *see also* Sucaet, *supra* note 8, at 1484-86.

18. For examples of cases in which courts have addressed the differences between two methods of recovery, see United Technologies Corp. v. Browning-Ferris Indus., 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994); *County Line Inv. Co.*, 933 F.2d 1508; Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1269 (E.D. Va. 1992).

19. Section 9607(a)(4)(B) provides the statutory basis for cost recovery by a party that has already financially contributed to a cleanup. It states that another PRP shall be liable for "any other necessary costs of response incurred by *any other person*." 42 U.S.C. § 9607(a)(4)(B) (emphasis added); *see also* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir. 1990) (addressing the ability of appellants to obtain cost recovery), *cert. denied*, 499 U.S. 937 (1991); Walch, *supra* note 9, at 758. Under § 9607, the EPA can initiate a cleanup and then seek recovery from a later-identified PRP. Sucaet, *supra* note 8, at 1479.

20. *Colorado & Eastern*, 50 F.3d at 1535. A PRP liable in a cost recovery action can, on its own initiative, find and sue other PRPs under a contribution theory to recoup any portion of the cleanup costs that it alleges were another PRP's responsibility. *Id.* A cost recovery action is riskier for a PRP than a contribution action, because cost recovery is a matter of strict liability. *Id.* If other PRPs have settled and properly worded their consent decrees, a PRP may not be able to recover from them. 42 U.S.C. § 9613(f)(2).

21. 42 U.S.C. § 9613(f); *Colorado & Eastern*, 50 F.3d at 1536.

22. Oswald, *supra* note 10, at 334-42. CERCLA's contribution provisions instruct that "the court may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). The Tenth Circuit has pointed to the use of the "Gore Factors" proposed by Senator Albert Gore as a moderate approach. *Colorado & Eastern*, 50 F.3d at 1536 n.5. The Gore Factors are:

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.

Id. (quoting Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992)). On the other hand, the Second Restatement of Torts offers a bright-line test allowing apportionment only when a court may adequately determine the divisibility of the harm. RESTATEMENT (SECOND) OF TORTS § 433A (1965).

23. 42 U.S.C. § 9613(g)(2)-(3). Parties have six years in which to file a cost recovery action but only three years to file a contribution action. *Id.*

2. Case Law Background

Since CERCLA's enactment, courts have struggled with interpreting and applying it. Specifically, courts approach the cost recovery and contribution provisions of CERCLA inconsistently.[24] Some courts have held that only innocent parties may sue under a theory of cost recovery, limiting lawsuits between PRPs to contribution actions.[25] Other courts, however, have held that any party that actually cleaned up a private or governmental site may bring a cost recovery action against a PRP.[26] Under this approach, PRPs not participating in a site's cleanup may only pursue contribution actions against other PRPs.[27] Most courts agree, however, that consent decrees may bar subsequent contribution actions against the settling party, depending on the factual situation.[28] Courts consider a consent decree's wording[29] as well as other factors[30] in determining which "matters" it "addresses."[31]

B. United States v. Colorado & Eastern Railroad[32]

1. Facts

The Colorado & Eastern Railroad Company (CERC), its holding company, and its former president and sole shareholder (collectively "the CERC parties") owned land purchased from Farmland Industries.[33] Both the CERC parties and Farmland bought the land after substantial initial contamination had occurred.[34] Upon discovering the contamination and performing a remedial

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24. DeMeo, *supra* note 12, at 496; Sucaet, *supra* note 8, at 1489; Walch, *supra* note 9, at 760.

25. For examples of cases in which PRPs were limited to contribution actions, see *United Technologies Corp.* 33 F.3d at 101-03; *Akzo Coatings, Inc.*, 30 F.3d at 763; *County Line Inv. Co.*, 933 F.2d at 1515-17; *General Elec. Co.*, 920 F.2d at 1417-21.

26. *See, e.g., Chesapeake & Potomac Tel. Co.*, 814 F. Supp. at 1277.

27. *See United Technologies Corp.*, 33 F.3d at 103.

28. *Akzo Coatings, Inc.*, 30 F.3d at 766; DeMeo, *supra* note 12, at 512-17; Sucaet, *supra* note 8, at 1492-99; Walch, *supra* note 9, at 759-61.

29. *Akzo Coatings, Inc.*, 30 F.3d at 765 ("Our starting point, naturally, is the consent decree itself."); Sucaet, *supra* note 8, at 1490-91.

30. Courts are inconsistent in both their delineation of these factors and in an overall conceptual approach to their determination:

> Other courts have suggested that the 'matters addressed' by a consent decree be determined with reference to the particular location, time frame, hazardous substances, and clean-up costs covered by the agreement . . . . [But] this [list] should not be treated as an exhaustive list of appropriate considerations, for the relevance of each factor will vary with the facts of the case.

Akzo Coatings, Inc., 30 F.3d at 766 (citations omitted). The statute is silent on how we are to determine what particular "matters" a consent decree addresses. Some courts have used balancing tests. "Other courts have concluded that [the contribution bar provision] was intended to encourage settlement while providing settling PRPs with a measure of finality in return for their willingness to settle." *Colorado & Eastern*, 50 F.3d at 1537 (citations omitted). The court later noted that it was taking "a fact-specific approach." *Id.* at 1538; *see also* Sucaet, *supra* note 8, at 1493-94 (explaining that courts have used "fact driven test[s]," "flexible and fact based approach[es]," and tests involving "equitable apportionment of costs").

31. 42 U.S.C. § 9613(f)(2).

32. 50 F.3d 1530 (10th Cir. 1995).

33. *Colorado & Eastern*, 50 F.3d at 1532-33.

34. *Id.* at 1532. Both pesticides and metals were found in the soil at the site. *Id.*

investigation and feasibility study, the EPA sued Farmland, the CERC parties, and other PRPs for response costs and future cleanup costs.[35] Farmland and another party, McKesson Corporation, entered into a consent decree with the EPA, in which they agreed to pay $700,000 and clean the entire site—including the CERC parties' land.[36]

Farmland and McKesson cleaned up the site at a total cost of over $15 million.[37] Two months before completion of the cleanup, the CERC parties entered into a consent decree with the EPA, paying $100,000 to the EPA and acquiring absolution of further liability to the EPA.[38] The CERC parties later defaulted on their consent decree with the EPA.[39]

Farmland alleged that almost $1.5 million of its cleanup costs were a direct result of the CERC parties' actions and cross-claimed in the EPA action under a theory of cost recovery.[40] The district court awarded Farmland over $734,000.[41]

2. Decision

The CERC parties appealed the district court's decision, which was based on a cost recovery theory.[42] The Tenth Circuit held that actions between PRPs are claims for contribution and not for cost recovery, regardless of how they are worded.[43] The court found enough validity in Farmland's claim for contribution to survive summary judgment and therefore remanded the case for further proceedings consistent with a contribution action.[44]

C. *Analysis*

The *Colorado & Eastern* court based its holding on two primary issues: cost recovery versus contribution, and indemnification due to matters addressed in the consent decree.[45] The facial distinction between what constitutes a cost recovery claim as compared to a contribution claim under CERCLA can be easily determined. Courts find it more difficult to articulate who may use which claim, and the degree to which causation may enter into each theory is even more difficult to articulate, and, unfortunately, courts have not provided a consistent answer.[46]

The *Colorado & Eastern* court attempted to explain clearly the difference between a cost recovery action and a contribution action.[47] Specifically, it

35. *Id.* at 1533.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 1534.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See supra* notes 24-27 and accompanying text.
47. *Colorado & Eastern*, 50 F.3d at 1535.

sought to identify which types of parties could recover under each action.[48] First, citing one of its own cases and several cases from other jurisdictions, the Tenth Circuit established that cost recovery actions are governed by both strict liability and joint and several liability.[49] Then, after analyzing the contribution provisions of CERCLA, the court concluded that "any claim that would reapportion costs between [PRPs] is the quintessential claim for contribution."[50] Finally, noting that Farmland sought reapportionment, the court limited Farmland to a contribution action, and further stated that the district court's allowance of a cost recovery claim under the facts of the case constituted error.[51]

The second major issue the court addressed was the CERC parties' claim of immunity as a result of its judicially approved consent decree with the EPA.[52] A consent decree indemnifies a PRP from contribution actions only if the consent decree expressly addresses matters forming the basis of the contribution actions.[53] In determining what constitutes such a "matter addressed," the court noted that some courts use balancing tests and that others use settlement incentives.[54] Taking a "fact-specific approach," the court concluded that Farmland could not have expected contribution indemnification because of the late execution of the CERC parties' consent decree and the relatively small settlement involved.[55] The CERC parties could have specifically placed language in the decree providing indemnification, but as they failed to do so, they must pay their share of the cleanup costs.[56] Furthermore, the CERC parties' default on the consent decree through nonpayment did not affect CERCLA's contribution protections.[57]

Ultimately, based on the foregoing analysis, the court concluded that any action for reapportionment of costs between PRPs constitutes a contribution action.[58] Additionally, the court held that a judicially approved consent decree will not automatically indemnify the settlor unless it specifically includes indemnification.[59]

D. *Other Circuits*

Ironically, the various attempts made by other circuits to uphold and enforce CERCLA have undermined the statute's effectiveness. Though many district courts have ruled on these issues,[60] decisions by the two circuits that

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48. *Id.*
49. *Id.* (citing Farmland Indus. v. Morrison-Quirk Grain, 987 F.2d 1335 (8th Cir. 1993); *County Line Inv. Co.*, 933 F.2d at 1508; *Chem-Dyne Corp.*, 572 F. Supp. at 802).
50. *Id.* at 1536.
51. *Id.*
52. *Id.*
53. *Id.* at 1537.
54. *Id.* For a discussion of the various factors that courts employ, see *supra* note 30.
55. *See Colorado & Eastern*, 50 F.3d at 1538.
56. *See id.* at 1537-38.
57. *Id.* at 1538.
58. *Id.* at 1539.
59. *Id.*
60. *See, e.g.*, United States v. SCA Serv., Inc., 865 F. Supp. 533, 546 (N.D. Ind. 1994) (holding that hazardous waste site owner who cleaned up site pursuant to consent decree had

have taken a stance fail to paint a complete picture. In *United Technologies Corp. v. Browning-Ferris Industries*,[61] the court relied on the canons of statutory construction, legislative intent, and statutory history to limit only PRPs to contribution actions.[62] In the First Circuit, therefore, both the EPA and innocent parties may bring cost recovery actions for their respective response costs. All other claims must be for contribution among the guilty parties.

Similarly, in *Akzo Coatings, Inc. v. Aigner Corp.*,[63] the Seventh Circuit held that any suit between PRPs must be based on contribution.[64] In deciding whether the consent decree barred the action in that case, the court referred to "both the reasonable expectations of the signatories and the equitable apportionment of costs."[65]

Thus, though not fully settled, the views of both the First and Seventh Circuits are on par with those of the Tenth. The trend indicates that courts will limit all PRPs to contribution actions to recover their costs. Furthermore, the EPA will always possess the power to use CERCLA's cost recovery provisions to recoup costs of site cleanup. In the First Circuit, innocent parties who clean up a site may also sue under the cost recovery provision.[66] In the remaining circuits, whether or not such an innocent actor may maintain a cost recovery action remains unclear.

The additional "matters addressed" controversy surrounding settlement serves to intensify an already complex conceptual conundrum.[67] Though the Tenth Circuit seems firm in its stance toward barring contribution actions via express provisions in consent decrees, other circuits employ various, somewhat more nebulous approaches.[68] Furthermore, because the statute of limitations differs for each action, a party who has missed the deadline for a contribution

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pursued a cost recovery as opposed to contribution action); General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 478 (M.D. Ga. 1993) (stating that a consent decree did not bar contribution action against signatory under the facts presented therein); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1138 (D. R.I. 1992) (holding that de minimus settlors were not subject to contribution actions by other PRPs); United States v. Asarco, Inc., 814 F. Supp. 951, 957 (D. Colo. 1993) (holding that contribution provision in consent decree absolving party of liability to government barred contribution action by another codefendant); Transtech Indus. v. A & Z Septic Clean, 798 F. Supp. 1079, 1090 (D. N.J. 1992) (stating that settlement with government for its costs did not bar actions for contribution), *appeal dismissed*, 5 F.3d 51 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994); United States v. Alexander, 771 F. Supp. 830, 841 (S.D. Tex. 1991), *vacated*, 981 F.2d 250 (5th Cir. 1993) (explaining that de minimus settlors were not subject to contribution actions and that Rule 11 sanctions could be leveled against parties who brought contribution actions against them).

61. 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

62. *See United Technologies Corp.*, 33 F.3d at 99-100.

63. 30 F.3d 761 (7th Cir. 1994).

64. *Akzo Coatings, Inc.*, 30 F.3d at 764-65.

65. *Id.* at 766.

66. *See United Technologies Corp.*, 33 F.3d at 96.

67. In fact, just filing a CERCLA contribution action in some jurisdictions could be considered dangerous. At least two district courts have sanctioned or threatened to sanction PRPs under FED. R. CIV. P. 11 for filing contribution actions against settling parties. *See Avnet*, 825 F. Supp. at 1142-43; *Alexander*, 771 F. Supp. at 841; DeMeo, *supra* note 12, at 525 n.155.

68. For a discussion of the various approaches taken by courts, see *supra* note 30.

claim will likely attempt to characterize its action as one for cost recovery, thereby adding to the confusion.[69]

As a result of these inconsistent holdings, PRPs, as well as other parties required to assist in a cleanup of a CERCLA site, will be subject to substantial uncertainty with regard to their respective liability for cleanup-associated costs. Furthermore, parties will be reluctant to settle if they cannot be assured indemnity from further liability. These varied holdings frustrate the very structure of CERCLA. Instead of encouraging quick settlements, parties will probably wait until other PRPs are identified before seriously considering a settlement. By holding out until the last minute, PRPs will be better able to gauge their potential exposure based on the number, solvency, and other attributes of additional exposed PRPs.

II. AVAILABILITY OF PRE-ENFORCEMENT JUDICIAL REVIEW OF AN EPA COMPLIANCE ORDER UNDER THE CLEAN WATER ACT: *LAGUNA GATUNA, INC. V. BROWNER*[70]

A. *Background*

1. Statutory Background

The Federal Water Pollution and Control Act, commonly referred to as the Clean Water Act (CWA), broadly aims to preserve the quality of the United States' waters.[71] Its provisions impose responsibilities on entities whose actions may harm water[72] and provide the federal government enforcement authority to stop acts harmful to the integrity of the water.[73] The CWA's expansive jurisdictional provisions encompass bodies of water ranging from navigable waterways to "wet meadows."[74] Two enforcement methods specifically afforded to the EPA are the power to bring a civil suit against an offender and the power to issue a compliance order.[75] Should the EPA unilaterally find that a violator has failed to obey a compliance order, it may elect to bring suit to enforce its order,[76] but it incurs no obligation.[77]

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69. *See supra* note 23 and accompanying text.

70. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

71. 33 U.S.C. § 1251(a) (1994) ("The objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

72. 33 U.S.C. §§ 1311(a), 1344(a), 1344(f)(2) (1994) (requiring permit for "discharge of dredged or fill material into the navigable waters"); Edward A. Kazmarek & W. Scott Laseter, *Environmental Law, 1992 Eleventh Circuit Survey*, 44 MERCER L. REV. 1187, 1194-95 (1993).

73. 33 U.S.C. § 1319(a)(3) (1994) (requiring the EPA to "issue an order requiring . . . [compliance] or . . . [to] bring a civil action"); 33 U.S.C. § 1319(b) (authorizing a "civil action for appropriate relief, including a permanent or temporary injunction").

74. 40 C.F.R. § 122.2 (1995). As a result, the parties that may be subject to a CWA action can be similarly diverse.

75. 33 U.S.C § 1319(a)(6)(b); Andrew I. Davis, Comment, *Judicial Review of Environmental Compliance Orders*, 24 ENVTL. L. 189, 189-90 (1994). A compliance order must be served on the violator, must explain the nature of the violation, and must specifically provide a deadline for completion. 33 U.S.C. § 1319(a)(5)(A).

76. 33 U.S.C § 1319(b). For a general discussion of how a potential defendant responds to an impending suit, see Symposium, *Responding to a Government Environmental Investigation: Shaping the Defense*, 34 ARIZ. L. REV. 509 (1992).

77. 33 U.S.C. § 1319(b). Courts have unanimously interpreted this provision to preclude

Administrative orders issued by federal agencies (such as EPA compliance orders) are governed by both the agency's enabling legislation and the Administrative Procedure Act (APA).[78] Under the APA, a final agency action is generally presumed reviewable provided the party bringing the action has standing and meets other prudential requirements such as ripeness.[79] The APA rarely allows de novo review and normally commands a higher standard for judicial review of administrative orders.[80]

2. Case Law Background

Courts must presume that final agency actions are reviewable.[81] This presumption is rebuttable by strong, persuasive, or clear and convincing evidence of legislative intent to preclude judicial review.[82] Despite this apparently narrow exception allowing preclusion of review, courts which have heard cases asking for judicial review of compliance orders prior to EPA enforcement have unanimously refused review.[83] Because of this interpretation of the EPA's permissible enforcement provision, parties who receive compliance orders find themselves in a difficult dilemma. A party served with a compliance order must either comply or risk incurring penalties if it fails to comply. The party may not invoke judicial review until the EPA seeks enforcement.[84]

Three cases provide a foundation for analysis: *Southern Pines Associations v. United States*,[85] *Rueth v. EPA*,[86] and *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*.[87] *Southern Pines* involved an EPA compliance order prohibiting Southern Pines from dumping in

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judicial review of the compliance order before the EPA seeks enforcement. *See infra* notes 120-28 and accompanying text.

Many commentators believe that precluding pre-enforcement judicial review of EPA compliance orders is not only unfair, but in conflict with both current Supreme Court precedent and express congressional intent (notwithstanding the cases discussed *infra*). For a thorough and cogent argument of why pre-enforcement judicial review should be allowed, see Davis, *supra* note 75.

78. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1994) [hereinafter APA]; David M. Moore, Comment, *Pre-enforcement Review of Administrative Orders to Abate Environmental Hazards*, 9 PACE ENVTL. L. REV. 675, 680 (1992).

79. APA §§ 702, 704; JOHN H. REESE, ADMINISTRATIVE LAW 533-34 (1995); Davis, *supra* note 75, at 194-95; Moore, *supra* note 78, at 681.

80. APA § 706; *see* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 543-44 (1992). The primary standard for review is whether an agency acted arbitrarily or capriciously, but other sources of jurisdiction exist including federal questions, ultra vires actions, etc. *Id.*

81. APA § 702; Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). For an in-depth analysis and critique of environmental statutes and their judicial review, see Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 ECOLOGY L.Q. 379 (1993).

82. *See* APA §§ 701(a)(1), 706; Davis, *supra* note 75, at 196-97; Moore, *supra* note 78, at 684-85.

83. *See* Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1426-27 (6th Cir.), *cert. denied*, 115 S. Ct. 316 (1994); Rueth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993); Southern Pines Assocs. v. United States, 912 F.2d 713, 715 (4th Cir. 1990); Davis, *supra* note 75, at 190; Moore, *supra* note 78, at 690-96 (addressing reviewability under CERCLA).

84. *See infra* note 120 and accompanying text.

85. 912 F.2d 713 (4th Cir. 1990).

86. 13 F.3d 227 (7th Cir. 1993).

87. 20 F.3d 1418 (4th Cir. 1990), *cert. denied*, 115 S. Ct. 316 (1994).

certain Virginia wetlands.[88] Southern Pines had previously filed an action for both declaratory and injunctive relief, seeking to avoid compliance on the grounds that the EPA lacked jurisdiction over the dumping site.[89] The district court dismissed for lack of jurisdiction, and the Fourth Circuit affirmed.[90]

To reach its decision, the court examined the legislative history of the CWA[91] and pointed out the similarities in structure[92] and enforcement provisions[93] that the CWA shares with the Clean Air Act (CAA)[94] and CERCLA.[95] The court concluded that Congress envisioned an EPA that could respond to environmental crises quickly and efficiently without being subject to immediate, debilitating, and time-consuming litigation.[96] Therefore, the EPA compliance orders governed by the CWA (and likely the CAA and CERCLA) were not intended to receive judicial review.[97]

In *Rueth*, the second leading case in this area, the EPA issued a compliance order to cease dumping into a wetland, and to begin restoration of the area.[98] Rueth filed an action for injunctive relief and a declaratory judgment, alleging that the EPA did not have jurisdiction over the wetland at issue.[99] The district court dismissed for its own lack of jurisdiction.[100] The Seventh Circuit affirmed, concluding that EPA compliance orders are not reviewable until the agency seeks to enforce them.[101] The circuit court adopted the reasoning of the district court and indicated that the CWA expressly provides for judicial review at the enforcement stage, thereby precluding review before that time.[102]

A third significant case involving pre-enforcement judicial review of an EPA compliance order, *Southern Ohio Coal*,[103] successfully challenged an EPA threat to issue a compliance order in district court.[104] On appeal, the Sixth Circuit reversed, agreeing with the holdings of both *Southern Pines* and *Rueth* by stating that Congress had not intended to allow judicial review of EPA compliance orders.[105]

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88. *Southern Pines*, 912 F.2d at 714.

89. *Id.* Southern Pines advanced an additional theory in support of its claim, alleging that the EPA's order constituted an actual controversy under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1994). *Id.*

90. *Southern Pines*, 912 F.2d at 717.

91. *Id.* at 716.

92. *Id.*

93. *Id.*

94. 42 U.S.C. §§ 7401-7642 (1994).

95. 42 U.S.C. §§ 9601-9675 (1994). Courts have viewed the CAA and CERCLA as sharing similar legislative histories with regard to legislative intent towards judicial reviewability of EPA compliance orders. *Laguna Gatuna*, 58 F.3d at 565; *Southern Ohio Coal*, 20 F.3d at 1426; *Southern Pines*, 912 F.2d at 716.

96. *Southern Pines*, 912 F.2d at 716.

97. *Id.*

98. *Rueth*, 13 F.3d at 228.

99. *Id.*

100. *Id.*

101. *Id.* at 230-31.

102. *Id.* at 229 (citing Rueth Dev. Co. v. EPA, No. CIV.A.H91-152, 1992 WL 560944, at *5 (N.D. Ind. Nov. 24, 1992)).

103. 20 F.3d 1418 (4th Cir. 1990), *cert. denied*, 115 S. Ct. 316 (1994).

104. *Southern Ohio Coal*, 20 F.3d at 1422.

105. *Id.* at 1426. The *Southern Ohio Coal* court endorsed both the Fourth and Seventh

B. Laguna Gatuna, Inc. v. Browner[106]

1. Facts

In 1987, Laguna Gatuna's "predecessor in interest" asked the EPA if a sinkhole on its land was considered water subject to EPA jurisdiction.[107] The EPA responded in the negative.[108] In 1991, the EPA discovered dead migratory birds in the vicinity of the sinkhole and issued a compliance order the following year, which prohibited Laguna Gatuna from further dumping into the sinkhole.[109] Laguna Gatuna complied with the order.[110]

2. Decision

After Laguna Gatuna sought declaratory relief in federal district court asserting that the EPA did not have jurisdiction to issue the compliance order, the court dismissed the action for lack of jurisdiction.[111] On appeal, the Tenth Circuit affirmed the trial court's dismissal on the same ground.[112]

C. *Analysis*

The Tenth Circuit found that the issue of pre-enforcement judicial reviewability of EPA compliance orders under the CWA was one of first impression in the circuit.[113] It qualified this statement, however, by indicating that other circuits had uniformly dealt with the issue and that it would follow their

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Circuit's holdings, even though both circuits used different rationales to reach their respective conclusions. *Compare Southern Pines*, 912 F.2d at 715 (using statutory structure and legislative history and intent to reach its holding) *with Rueth*, 13 F.3d at 229-31 (analyzing both legislative intent and the express wording of the CWA to make its decision) *and* Hoffman Group, Inc. v. EPA, 902 F.2d 567, 569 (7th Cir. 1990) (relying on CWA statutory language to reach its holding).

The *Southern Ohio Coal* court further stated, "Congress provided one forum in which to address all issues, including constitutional challenges, raised by the issuance of a[n EPA] compliance order: an enforcement proceeding." *Southern Ohio Coal*, 20 F.3d at 1426. Therefore, judicial review of an order after an enforcement proceeding is constitutionally mandated. Until the enforcement proceeding actually occurs, however, review is neither available nor constitutionally required. *Id.* at 1427.

106. 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996).

107. *Laguna Gatuna*, 58 F.3d at 565.

108. *Id.* The Code of Federal Regulations includes in its definition of "waters of the United States":

> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters . . . .
>
> . . . .
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2 (1995). Wetlands are further defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." *Id.*

109. *Laguna Gatuna*, 58 F.3d at 565.

110. *Id.*

111. *Id.*

112. *Id.* at 564, 566.

113. *Id.* at 565.

lead.[114] The court then dismissed the arguments put forth by Laguna Gatuna.[115]

In reaching its decision, the court followed the reasoning of the three leading cases discussed above.[116] In short order, it cited *Southern Pines, Rueth,* and *Southern Ohio Coal,* and presented a brief summary of each case's facts, holding, and rationale.[117] Concluding that the reasoning from these other jurisdictions was sound, the *Laguna Gatuna* court announced that it would follow them.[118]

Thus, the Tenth Circuit established that pre-enforcement judicial review of an EPA compliance order under the CWA is unavailable on two bases: legislative intent and the constitutional requirement that judicial review occur after a party seeks actual enforcement of a compliance order.[119]

D. *Other Circuits*

As discussed previously, the Fourth, Sixth, Seventh, and Tenth Circuits have all prohibited pre-enforcement judicial review of EPA compliance orders under the CWA.[120] The remaining circuits have not yet addressed this issue as it relates to the CWA.[121] It appears, though, that given the three leading

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114. *Id.* The court cited *Southern Ohio Coal,* 20 F.3d 1418; *Rueth,* 13 F.3d 227; and *Southern Pines,* 912 F.2d 713 as persuasive authority for its dismissal for want of jurisdiction. *Laguna Gatuna,* 58 F.3d at 565.

115. *Laguna Gatuna,* 58 F.3d at 565. Laguna Gatuna unsuccessfully argued that *Rueth, Southern Ohio Coal,* and *Southern Pines* were distinguishable. Laguna cited Riverside Irrigation Dist. v. Stipo, 658 F.2d 762 (10th Cir. 1981) as binding authority, but the court found the case to be factually distinguishable. *Laguna Gatuna,* 58 F.3d at 565. Laguna Gatuna also failed to convince the court that parties should not be forced to expose themselves to fines or penalties to receive judicial review. *Id.* Even though Laguna Gatuna put forth such a "strong due process argument[]," the court indicated that preclusion of judicial review of an EPA compliance order nonetheless passed constitutional muster. *Id.* at 565.

In its petition for certiorari, Laguna Gatuna attempted to distinguish its facts, insisting that the sinkhole was not a playa lake, was hydrologically isolated, and could not fall within the definition of "waters of the U.S." Petition for Writ of Certiorari at 5, Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995) (No. 95-465), *cert. denied,* 116 S. Ct. 771 (1996). Laguna Gatuna's attorney insisted that although the area received abnormally high rainfall the year the dead birds were found, water never stood in the sinkhole. Telephone interview with Todd Welch, Attorney for Petitioner, Mountain States Legal Foundation (Dec. 3, 1995). He asserted, therefore, that the sinkhole could not be defined as water of the U.S. *Id.* Furthermore, Laguna Gatuna's counsel argued that any discharges emanating from the sinkhole were ten times cleaner than natural discharges. *Id.*

116. *Laguna Gatuna,* 58 F.3d at 565-66.

117. *Id.*

118. *Id.* at 566.

119. The court did not expressly state that pre-enforcement judicial review of an EPA order under the CAA or CERCLA is not available, but the similarities of the three statutes indicate that the legislative intent argument holds for all three statutes. *See* discussion *supra,* text accompanying notes 92-96. The constitutional due process argument, presumably, rings true for all three statutes.

120. *Southern Pines,* 912 F.2d 713; *Southern Ohio Oil,* 20 F.3d 1418; *Rueth,* 13 F.3d 227; *Laguna Gatuna,* 58 F.3d 564.

121. Two district courts have also issued opinions consistent with the conclusions of the four circuits discussed above. *See* Child v. United States, 851 F. Supp. 1527, 1536 (D. Utah 1994) (concluding that the "CWA precludes review of . . . pre-enforcement action[s]"); Howell v. United States Army Corps of Engineers, 794 F. Supp. 1072, 1074-75 (D.N.M. 1992) (applying *Southern Pines* even though the acting entity under the CWA was the Army Corps of Engineers rather than

cases as well as *Laguna Gatuna* this issue is now settled.

The Third Circuit, in *Getty Oil Co. v. Ruckelshaus,*[122] supported this trend. It held that, within the context of the CAA, pre-enforcement judicial review of an EPA compliance order is specifically precluded by the statute itself.[123] Also within the context of the CAA, the Eighth Circuit addressed the issue in *Lloyd A. Fry Roofing Co. v. EPA.*[124] *Lloyd A. Fry* upheld the district court's finding of want of jurisdiction.[125] The CAA's legislative history indicated a pre-enforcement bar against judicial review notwithstanding the absence of an express prohibition.[126] The court stated that such review would be inconsistent with the CAA's enforcement provisions.[127]

The prevailing trend therefore establishes that an EPA compliance order is not subject to judicial review until after an enforcement action has begun. Parties who receive compliance orders must either comply or risk incurring penalties that the party may not challenge unless and until the EPA decides it wishes to enforce its order.[128]

CONCLUSION

These two cases represent two drastically different approaches that courts may take when interpreting environmental statutes. On one hand, the Tenth Circuit has caused substantial uncertainty with its interpretation of CERCLA's cost recovery and contribution provisions. By addressing the questions presented in *Colorado & Eastern* narrowly, the partial answers provided not only differ from the law of other circuits, but give rise to more questions that will surely require answers in the future. Until the court addresses these questions, parties potentially involved in CERCLA situations will be subject to substantial risk and uncertainty.

On the other hand, *Laguna Gatuna,* has helped to increase certainty and consistency by adding to a legal foundation shared by environmental law and administrative law. By following three other circuits in its holding and dismissing constitutional due process arguments, the Tenth Circuit has endorsed Congress's apparent intent that pre-enforcement judicial review of an EPA compliance order shall not occur.

Cameron R. Getto

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the EPA).

122. 467 F.2d 349 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973).
123. *Getty Oil Co.,* 467 F.2d at 356.
124. 554 F.2d 885 (8th Cir. 1977).
125. *Lloyd A. Fry,* 554 F.2d at 892.
126. *Id.* at 890.
127. *Id.* at 890-91.
128. *See supra* note 77.

HEALTH LAW

INTRODUCTION

In the absence of a national health care plan, it is not surprising that the states play a crucial role in certain areas of health care. Although the federal government has preempted state regulation of ERISA health insurance plans, the states retain a significant amount of control. Three Tenth Circuit Court of Appeals cases discussed below illustrate this phenomenon.

The first case, *Hern v. Beye*,[1] addressed state funding of abortions for women dependent on Medicaid. In *Hern*, the State of Colorado, in contravention of the current Hyde Amendment, refused to fund abortions in cases of rape or incest. The court held that if Colorado chose to accept federal Medicaid funds, it could not refuse to comply with the federal mandate.[2]

The second and third cases, decided simultaneously, together address two key provisions of the Emergency Medical Treatment and Active Labor Act (EMTALA).[3] In *Repp v. Anadarko Municipal Hospital*,[4] the court defined "appropriate medical screening."[5] In *Urban v. King*,[6] it qualified EMTALA's requirement that a hospital stabilize emergency medical conditions before transferring a patient. Together, these cases help realize congressional intent by preventing EMTALA from acting as a national malpractice statute.

I. FEDERAL-STATE CONFLICT OF LAWS

A. *Background*

1. Federal Funding for Abortions: Medicaid and the Hyde Amendment

Title XIX of the Social Security Act created the Medicaid Program in 1965.[7] This cooperative program allows a state to electively participate in the Medicaid program provided the state meets specific requirements.[8] Once these requirements are met, participating states receive federal matching funds to provide medical care for qualified individuals. Under Title XIX, states must furnish categories of care deemed "mandatory."[9] Although Title XIX's

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1. 57 F.3d 906 (10th Cir.), *cert. denied*, 116 S. Ct. 569 (1995).
2. *Hern*, 57 F.3d at 913; *see also* Jane L. v. Bangerter, 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) (finding unconstitutional a Utah statute challenging the validity of abortion rights defined under Roe v. Wade, 410 U.S. 113 (1973)). *Jane L.* is discussed in the Civil Rights section of this Survey Issue at pp. 688-91.
3. 42 U.S.C. § 1395dd (1994).
4. 43 F.3d 519 (10th Cir. 1994).
5. *Repp*, 43 F.3d at 522.
6. 43 F.3d 523 (10th Cir. 1994).
7. Social Security Act, 42 U.S.C. § 1396 (1994).
8. *Id.*
9. Mandatory care categories include "inpatient hospital services . . . ; outpatient hospital

preamble requires states to provide "necessary medical services," it does not define what specific procedures fall within these mandatory categories.[10] States, however, are not limited to the provision of these mandatory services and may, at their election, provide additional medical care.[11]

Congress has not defined "medically necessary," but since 1976 has prohibited or limited Medicaid funding for abortions.[12] Each annual renewal of the Hyde Amendment specifies which types of abortions Medicaid will fund.[13] Congress attaches these specifications to appropriation bills for the Department of Health and Human Services.[14] In the past, Hyde Amendments restricted Medicaid funding to those abortions necessary to save the life of the mother.[15] President Clinton succeeded in lifting the virtual ban on federally funded abortions only to the extent that the 1994 Hyde Amendment allowed Medicaid funding for abortions in cases of rape or incest, as well as to save the life of the mother.[16]

In *Maher v. Roe*, the Supreme Court settled the issue of whether the government may refuse to fund abortions.[17] In *Maher*, the Court upheld a Connecticut regulation that provided funding for childbirth, but limited state Medicaid benefits for first-trimester abortions to those diagnosed as "medically necessary."[18] The Court concluded that a state can favor childbirth over abortion provided the regulation does not constitute a governmental restriction on access to abortions.[19]

Three years later, in *Harris v. McRae*,[20] the Supreme Court held that states participating in the Medicaid program need not fund abortions for which the Hyde Amendment restricts federal funds.[21] Furthermore, the Court held that the Hyde Amendment's funding restrictions do not violate a woman's

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services . . . ; other laboratory and X-ray services; nursing facility services . . . ; early and periodic screening, diagnostic and treatment services [for minors]; family planning services . . . ; physicians' services furnished by a physician." 42 U.S.C. § 1396d(a)(1)-(5).

10. *Id.*

11. *Id.* § 1396d(a)(25).

12. Stephen C. Ferlman, *Does the Illinois Medicaid Program Meet Title XIX's Requirement That States Provide "Medically Necessary" Services?*, 28 SOC. SECURITY REPORTING SERV. 708 (1990).

13. Harris v. McRae, 448 U.S. 297, 317 (1980).

14. The original Hyde Amendment was enacted with Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976). The amendments are named for Henry Hyde, who is now the chair of the House Judiciary Committee and is staunchly anti-choice. Carla M. DaLuz & Pamela C. Weckerly, *Will the New Republican Majority in Congress Wage Old Battles Against Women*, 5 UCLA WOMEN'S L.J. 501, 507 (1995) (examining how the 104th Congress may restrict access to abortion, impact the Family and Medical Leave Act, alter military policies toward gay men and lesbians, and affect welfare reform). The U.S. Supreme Court has upheld Congress's right to limit Medicaid funding for abortions. *Harris*, 448 U.S. at 317.

15. DaLuz & Weckerly, *supra* note 14, at 512.

16. *Id.*

17. 432 U.S. 464 (1977).

18. *Maher*, 432 U.S. at 466, 480 (using a physician's certification to define "medically necessary").

19. *Id.* at 475-76. The *Maher* Court also rejected the argument that the Connecticut regulation violated the equal protection component of the Fifth Amendment on the basis that indigence is not a recognized suspect classification. *Id.* at 470-71.

20. 448 U.S. 297, *appeal dismissed sub nom.* Buckley v. McRae, 433 U.S. 916 (1980).

21. *Harris*, 448 U.S. at 309-11.

liberty interest under the Due Process Clause of the Fifth Amendment, nor her right to equal protection of the laws.[22] No constitutional provision requires that states fund all legally available medical services.[23] Thus, the Court determined that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category."[24] Hence the Hyde Amendment bears a rational relationship to the legitimate state interest of "protecting the potential life of the fetus."[25]

The *McRae* decision has prompted strong reaction from legal scholars, many of whom criticize it for its narrow constitutional tailoring of the Hyde Amendment.[26] The foregoing cases provided the backdrop for the Tenth Circuit's decision on the ability of the states to restrict abortion funds beyond the limits of the Hyde Amendment.

2. Colorado's Constitutional and Statutory Ban on State-Funded Abortions

Colorado, one of many states with pro-life legislatures, viewed the 1994 Hyde Amendment as an infringement on state authority.[27] In April 1994, state officials vowed to defy a federal order instructing them to comply with the new funding guidelines, and instead swore to uphold the state constitution as

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22. *Id.*
23. *Id.* at 326.
24. *Id.* at 316.
25. *Id.* at 324 (utilizing the minimum rationality standard of state action review).
26. There are two primary criticisms of the standards applied in *McRae*. First, the Court refused to identify pregnancy as a gender issue, subject to suspect classification. *See generally* Ruth Colker, *Equality Theory and Reproductive Freedom*, 3 TEX. J. WOMEN & L. 99 (1994) (arguing that reproductive freedom should be a gender, not a privacy, issue because privacy does not focus on the economic inequities faced by disadvantaged women); *see also* Julie F. Kay, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349, 385 (1994) (proposing equal protection for gender as a suspect class); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 618 (1990) (noting that abortion statutes are inherently discriminatory, as they uniquely burden women). At least one commentator argues that the Hyde Amendment impacts women of color so disproportionately that a strict scrutiny standard should be applied. David R. Baron, *The Racially Disparate Impact of Restrictions on the Public Funding of Abortion: An Analysis of Current Equal Protection Doctrine*, 13 B.C. THIRD WORLD L.J. 1 (1993). Second, by asserting that indigent women have the same right to obtain an abortion as any other woman, the Court disregards the economic reality of pregnant Medicaid recipients. *See* Colker, *supra*, at 1435; Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference and Abortion*, 73 N.C. L. REV. 1323, 1434-41 (1995); Kay, *supra*, at 351.

At least one state court has agreed with the commentators. In Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986), the court noted the paradox for a pregnant Medicaid recipient: she is financially destitute by definition, and if she accepts an unreported personal loan to pay for an abortion, she jeopardizes her benefits. "[T]he state has boxed her into accepting the pregnancy and carrying the fetus to term, notwithstanding the sometimes substantial impairment to her health." This reality, the court observed, forced some women to "resort[] to desperate and dangerous acts of self-abortion, criminal activity and illegal abortions in order to exercise their constitutional rights." *Id.* at 154.

27. Robert H. Freilich et al., *The Supreme Court and State and Local Government: Small Change for a Changing Court*, 26 URB. LAW. 623, 635 (1994). Similar state restrictions of the Hyde Amendment were attacked in Arkansas, Louisiana, Michigan, Montana, North Dakota, and Pennsylvania. *Id.*

amended by Colorado voters.[28] The amendment in question added the following language to the Colorado Constitution:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.[29]

Hern v. Beye[30] was the first federal ruling addressing state funding restrictions which contravened the 1994 Hyde Amendment. Judge Nottingham of the U.S. District Court for the District of Colorado enjoined Colorado from enforcing the constitutional amendment.[31]

The Tenth Circuit had twice before addressed state regulations that were more restrictive than federal rules for Medicaid-funded abortions. In *D.R. v. Mitchell*,[32] the plaintiff challenged a Utah statute limiting state funding of abortions to those necessary to save the life of the mother. The Tenth Circuit focused on the fact that Congress passed different versions of the Hyde Amendment from 1978 to 1981, and changed restrictions on federally funded abortions each year.[33] The court found that Utah's statute required more restrictive funding than the Hyde Amendment in three of the four years examined.[34] The appellant, an unmarried pregnant female, claimed that these restrictions violated the Supremacy Clause of the U.S. Constitution by failing to comply with relevant federal funding statutes.[35] Because the plaintiff in *D.R.* lacked standing, the Tenth Circuit did not reach the specific issue of whether the Supremacy Clause applied.[36]

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28. Bill Scanlon, *State Officials Reject Federal Abortion Order; Colorado Joins Other States in Refusing to Pay for Abortions in Cases of Rape, Incest*, ROCKY MTN. NEWS, Apr. 2, 1994, at A20 (refusing to comply with the Hyde Amendment's "request") ("'Colorado is not going to comply with the request,' Dr. David West, manager of health and medical services at the Colorado Department of Social Services, said Friday.").

29. COLO. CONST. art. V, § 50. The constitutional mandate is codified at COLO. REV. STAT. §§ 26-4-105.5 (repealed 1991), 26-4-512, 26-15-104.5 (1989), and 10 COLO. CODE REGS. § 2505-10(8.733) (1977) (emphasis in original).

30. No. CIV.A. 93-N-2350, 1994 WL 192366 (D. Colo. May 12, 1994), *aff'd*, 57 F.3d 906 (10th Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

31. *Hern*, 1994 WL 192366, at *1.

32. 645 F.2d 852 (10th Cir. 1981).

33. *D.R.*, 645 F.2d at 853.

34. *Id.*

35. D.R. also claimed that the Utah statute violated her equal protection and privacy rights under the U.S. Constitution. *Id.*

36. *Id.* at 854 (holding that a plaintiff who had not been certified as a member of a class did not have standing to sue for the failure of the state to comply with the federal law during the three years in question when the plaintiff fell into the year in which the state statute was *less* restrictive). The court noted that the Supreme Court had expressly passed over the Supremacy Clause issue. *Id.* at 853. The Supreme Court "expressly did not determine whether 'a participating State may not, consistent with Title XIX, withhold funding for those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.'" *Id.* (quoting Williams v. Zbaraz, 448 U.S. 358, 364 n.5 (1980)). When faced with *Hern v. Beye*, a case where the Tenth

Restrictive regulations arose again in *Planned Parenthood Ass'n v. Dandoy*.[37] In *Dandoy*, the Tenth Circuit addressed whether the State of Utah could refuse to reimburse a certified Medicaid provider who, without parental consent, gave family planning advice to Medicaid-qualified unmarried minors.[38] Title XIX provided funding for "family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies."[39] The defendant, the executive director of the Utah State Department of Health, based her official refusal to reimburse the plaintiff on a Utah statute with parental consent provisions that conflicted with the federal statute.[40] The court noted that "'the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.'"[41] Utah's more restrictive terms were inconsistent, the court explained, because a state which chooses to participate in a federal program voluntarily relinquishes its right to enforce a conflicting state regulation or statute.[42]

B. Hern v. Beye[43]

1. Facts

The plaintiffs, who included a doctor and three facilities that provided abortions, sued to enjoin the Colorado Department of Social Services from enforcing the portions of the Colorado Constitution, statutes, and regulations which forbade Colorado to fund abortions except when necessary to save the life of the mother.[44] The State Department of Social Services claimed that a state choosing to participate in Medicaid is not required to fund an abortion for which federal funds are available.[45] The state asked the court to find that the language of the Hyde Amendment is merely permissive, *allowing* but not *requiring* participating states to fund abortions due to rape or incest.[46] At issue was whether Colorado's funding restrictions contravened Title XIX and its

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Circuit certainly could have invoked the Supremacy Clause, the court chose instead to define Colorado's spending limits in terms of an inappropriate refusal to fund a medically necessary procedure as defined by the current Hyde Amendment. *See infra* text accompanying notes 43-75.

37. 810 F.2d 984 (10th Cir. 1987).

38. *Dandoy*, 810 F.2d at 986.

39. *Id.* (quoting 42 U.S.C. § 1396d(a)(4)(C)). The language of that section is still effective. 42 U.S.C. § 1396d(a)(4)(C) (1988).

40. *Dandoy*, 810 F.2d at 986.

41. *Id.* at 988 (quoting King v. Smith, 392 U.S. 309, 333 n.34 (1968)).

42. *Id.* The court also noted that federal funds are a "rather large carrot" to accomplish federal goals. *Id.*

43. 57 F.3d 906 (10th Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

44. *Hern*, 57 F.3d at 907 (involving COLO. CONST. art. V, § 50, COLO. REV. STAT. §§ 26-4-105.5, 26-4-512, 26-15-104.5 and 10 COLO. CODE REGS. § 2505-10 (8.733)).

45. *Id.* at 908.

46. *Id.* The preamble to the Hyde Amendment merely imposed its goals "as far as practicable under the conditions in such state." 42 U.S.C. § 1396.

regulations.[47] The district court held that because Colorado participates in the Medicaid program, the state must fund abortions in cases of rape or incest for Medicaid-eligible women.[48]

2. Decision

On appeal, the Tenth Circuit affirmed the district court's decision.[49] Consistent with the Supreme Court's holding in *Planned Parenthood v. Casey*,[50] the Tenth Circuit stated that protecting "the life of the fetus that may become a child" and encouraging childbirth are legitimate state interests.[51] Once a state chooses to participate in the optional Medicaid program, however, it must comply with the provisions of Title XIX.[52] Because Colorado participated in Medicaid,[53] the only relevant issue was whether Colorado's refusal to fund abortions in cases of rape or incest contravened the requirements of Title XIX and the accompanying regulations.[54]

While a state need not fund all medical services under the "mandatory coverage" categories,[55] the court noted that a state's discretion is limited if it bases the restriction on the "*degree* of medical necessity."[56] Concluding that Colorado's restrictive abortion funding "impermissibly discriminate[d] in its coverage of abortions on the basis of a patient's diagnosis and condition,"[57] the court found that limiting Medicaid funded abortions to life-threatening cases "violate[d] the purpose of the Act and discriminate[d] in a proscribed fashion."[58]

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47. *Hern*, 57 F.3d at 909.

48. The District Court held, in part:

> [The State Department of Social Services] is enjoined, so long as the State of Colorado accepts federal funds under the Medicaid Act, from enforcing the provisions of Article V, Section 50 of the Colorado Constitution. Defendant is further enjoined from enforcing Colo. Rev. Stat. §§ 26-4-105.5, 26-4-512, or 26-15-104.5, or any rules and regulations implementing these statutes, insofar as those statutes or rules are more restrictive than the terms of the current Hyde Amendment. . . . Defendant is free to follow Colo. Rev. Stat. § 26-4-105 by "complying with federal requirements for a program of medical assistance necessary for the state of Colorado [sic] to qualify for federal funds under Title XIX of the social security act," as amended by the current Hyde Amendment.

Hern, 1994 WL 192366, at *2.

49. *Hern*, 57 F.3d at 909.

50. 505 U.S. 833 (1992) (recognizing an individual's constitutional right to choose a pre-viability abortion, the state's power to restrict post-viability abortions, and the state's important interests in protecting the health of the woman and the potential life of the fetus).

51. *Hern*, 57 F.3d at 913 (quoting *Casey*, 505 U.S. at 846 and Beal v. Doe, 432 U.S. 438, 445 (1977)).

52. *Id.* at 909, 913 (finding that Colorado must distribute funds "on the terms established by Congress").

53. *Id.* Participation is enabled through the Colorado Medical Assistance Act, COLO. REV. STAT. §§ 26-4-101 to -704 (1990 & Supp. 1994).

54. *Hern*, 57 F.3d at 909.

55. The court noted that abortion falls under several of the mandatory coverage categories, including inpatient and outpatient hospital services, 42 U.S.C. § 1396d(a)(1) and (a)(2)(A), family planning services, 42 U.S.C. § 1396d(a)(4)(C), and physicians' services furnished by a physician, 42 U.S.C. § 1396d(a)(5)(A). *Hern*, 57 F.3d at 910.

56. *Hern*, 57 F.3d at 910 (citing 42 C.F.R. § 440.230(d) (1995)) (emphasis added).

57. *Id.*

58. *Id.* (citing Preterm, Inc. v. Dukakis, 591 F.2d 121, 126 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979)) (finding the categorical refusal to fund only a specific, medically necessary procedure

Participating states may deny funding for medically necessary procedures "pursuant to a generally applicable funding restriction or utilization control procedure," according to the court,[59] but "a state law that categorically denies coverage for a specific, medically necessary procedure except in those rare instances when the patient's life is at stake is not a 'reasonable standard[] . . . consistent with the objectives of [the Act] . . . .'"[60] Since Colorado accepts Medicaid funds, "it must do so on the terms established by Congress."[61]

C. *Analysis*

The Tenth Circuit found that Colorado's refusal to fund abortions in accordance with the Hyde Amendment was an unacceptable "limit based on the patient's degree of medical necessity," rather than a Supremacy Clause violation.[62] In discussing "medical necessity," the court distinguished between "permissible discrimination based on degree of need and . . . forbidden discrimination based on medical condition."[63] *Hern* raises several questions, however, when viewed in conjunction with a contemporaneous Tenth Circuit abortion decision.

The Tenth Circuit held in *Jane L. v. Bangerter*[64] that a state's post-*Casey* interest in protecting the life of a post-viability fetus does not justify jeopardizing a mother's health for the sake of the fetus.[65] "The importance of maternal health is a unifying thread that runs from *Roe* to *Thornburgh* and then to *Casey*."[66] *Jane L.* and *Hern* together posit the question whether a state may permissibly refuse to fund a therapeutic abortion if the state funds abortions at all. *Hern* creates a paradox: courts prohibit states from discriminating based on the diagnosis or condition of a patient,[67] yet the Hyde Amendment discriminates in this proscribed manner when it funds abortions in cases of rape or incest, but not other medically necessary abortions.

Hern also raises the issue of whether, in the absence of a Hyde Amendment definition of the medical necessity and funding requirements of certain

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to be unreasonably inconsistent with Title XIX objectives).

59. *Id* at 911. Cited examples include: a reasonable definition and application of a funding denial for "experimental" procedures, *id.* (citing Miller v. Whitburn, 10 F.3d 1315, 1320-21 (7th Cir. 1993)), limits of 12 annual inpatient days and 18 annual outpatient hospital visits, *id.* (citing Charleston Memorial Hosp. v. Conrad, 693 F.2d 324, 330 (4th Cir. 1982)), or a limit of three physician visits per month. *Id.* (citing Curtis v. Taylor, 625 F.2d 645, 651-53 (5th Cir. 1980)). The court noted that the limit of 12 inpatient days met the needs of 88% of Medicaid recipients, the 18 outpatient visits met the needs of 99%, and the three physician visits per month had met the needs of 96.1% of recipients in the year preceding *Curtis*. *Id.*

60. *Id.* (citing 42 U.S.C. § 1396a(a)(17)) (citation omitted).

61. *Id.* at 913.

62. *Id.* at 910.

63. *Id.* (quoting *Preterm*, 591 F.2d at 126).

64. Jane L. v. Bangerter, 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).

65. *Id.* at 1504.

66. *Id.*

67. *Hern*, 57 F.3d at 910.

abortions, states may refuse to fund abortions, whether therapeutic or nontherapeutic.[68] The court noted that

> Title XIX "confers broad discretion on the States to adopt standards for determining the extent of medical assistance" offered in their Medicaid programs. . . . In addition, federal Medicaid regulations expressly permit participating states to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures."[69]

The Tenth Circuit has stated unequivocally that a mother's life may not be jeopardized for the sake of the fetus.[70] However, the court may allow states to characterize refusal to fund abortions, particularly nontherapeutic abortions, under some neutrally worded rubric (i.e., "outpatient elective surgical procedures") that qualifies as a utilization control procedure.

D. *Other Circuits*

All federal courts that have addressed the *Hern* issue have held that states may not act more restrictively than the Hyde Amendment's provisions. The circuits are split, however, with regard to the rationale for that result.[71] Some courts rely upon the Supremacy Clause, while others apply the "medical necessity" test.

The Third and the Eighth Circuits have invoked the Supremacy Clause. In *Elizabeth Blackwell Health Center for Women v. Knoll*,[72] the Third Circuit determined that a state's reporting and physician notification requirements in rape and incest cases may not be more restrictive than the Hyde Amendment requirements.[73] The court stated that "[t]he Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law . . . and compels compliance by participants in Title XIX federal aid programs with federal law and regulations."[74] The Eighth Circuit held that

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68. *Id.*

69. *Id.* (quoting *Beal*, 432 U.S. at 444, and 42 C.F.R. § 440.230(d)).

70. *See supra* text accompanying notes 63-65.

71. District courts are similarly split, with some invoking the Supremacy Clause and some applying the "medical necessity test." Three courts have invoked the Supremacy Clause. Fargo Women's Health Org. v. Wessman, Civ. No. A3-94-36, 1995 WL 465830 (D.N.D. 1995); Planned Parenthood v. Wright, No. 94 C 6886, 1994 WL 750638 (N.D. Ill. 1994); Planned Parenthood Affiliates of Michigan v. Engler, 860 F. Supp. 406 (W.D. Mich. 1994). One court used the "medical necessity" test. Planned Parenthood of Missoula v. Blouke, 850 F. Supp. 137 (D. Mont. 1994). One court held that the state may not fund in contravention of Title XIX "[i]n accordance with the overwhelming weight of authority," without either invoking the Supremacy Clause or the "medically necessary" test. Stangler v. Shalala, No. 94-4221-CV-C-5, 1994 WL 764104, at *5 (W.D. Mo. 1994). Finally, one court refused a request for pre-enforcement review and dismissed for lack of jurisdiction. Kentucky Cabinet for Human Resources v. Shalala, No. 94-47, 1995 WL 465673, at *6 (E.D. Ky. 1995).

72. 61 F.3d 170 (3d Cir. 1995).

73. *Elizabeth Blackwell*, 61 F.3d at 172. Specifically, the Pennsylvania statute had no waiver provision, while the Hyde Amendment did.

74. *Id.* at 178 (citations omitted). *Elizabeth Blackwell* reaffirmed the Third Circuit's earlier decision in Roe v. Casey, 623 F.2d 829, 836-37 (3d Cir. 1980), which held that states must fund abortions for those categories of pregnancies for which the Hyde Amendment allows funding.

"the Arkansas state constitutional amendment and the Nebraska state regulation prohibiting the use of public funds for abortions except to save the life of the mother violate the federal Medicaid statute, as amended by the 1994 Hyde Amendment, and are therefore invalid under the supremacy clause."[75]

The Fifth Circuit, like the Tenth, applied the "medical necessity" test in *Hope Medical Group for Women v. Edwards*.[76] That court found a Louisiana statute

> violate[d] the requirements of Title XIX because it categorically prohibit[ed] funding for abortions in cases of rape or incest without regard to whether the procedures might be medically necessary. The defendants offer[ed] no medical basis for restricting abortions to life and death situations, nor d[id] they contest the plaintiffs' position that abortions in rape and incest cases are often medically necessary.[77]

II. EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT (EMTALA)

A. *Background*

1. EMTALA Generally

Congress enacted the Emergency Medical Treatment and Active Labor Act (EMTALA) as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).[78] Commonly known as the "emergency room antidumping statute,"[79] EMTALA's purpose is to assure that staffs of the nation's emergency rooms accord all patients the same quality of screening, regardless of their ability to pay.[80] Congress limited EMTALA's scope to hospitals which receive Medicare or Medicaid payments.[81]

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75. Little Rock Family Planning Servs. v. Dalton, 60 F.3d 497, 503 (8th Cir. 1995).

76. 63 F.3d 418 (5th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3518 (U.S. Jan. 16, 1996) (No. 95-1164).

77. *Hope Medical Group*, 63 F.3d at 428. Louisiana asked the Supreme Court to stay the district court's decision in Hope Medical Group for Women v. Edwards, 860 F. Supp. 1149 (E.D. La. 1994), which required the state to either fund abortions in rape or incest cases, in contravention of a Louisiana statute, or forego the receipt of federal funds. Edwards v. Hope Medical Group for Women, 115 S. Ct. 1, 1 (1994). In denying the motion, Justice Scalia stated that under the appropriate standard of review:

> The only issue potentially worthy of certiorari is the premise underlying the District Court's decision: that Title XIX requires States participating in the Medicaid program to fund abortions (at least "medically necessary" ones) unless federal funding for those procedures is proscribed by the Hyde Amendments. The Courts of Appeals to address this question have uniformly supported that premise. . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless and until a conflict in the Circuits appears.

Id. at 2 (citations omitted).

78. 42 U.S.C. § 1395dd (1994).

79. Timothy H. Bosler & Patrick M. Davis, *Is EMTALA a Defanged Cobra?*, 51 J. MO. B. 165, 165 (1995).

80. John R. Penhallegon, *What's Happening in . . . Medical Malpractice*, 62 DEF. COUNS. J. 426, 428 (1995).

81. Bosler & Davis, *supra* note 79, at 165.

2. EMTALA's "Appropriate Medical Screening Requirement"

EMTALA mandates that anyone who enters an emergency room in need of care receive an "appropriate medical screening."[82] If the hospital's staff identifies an "emergency medical condition,"[83] it may not transfer the patient until stabilized.[84] Among other terms, the act does not expressly define "appropriate medical screening."

Courts do not limit the application of EMTALA to the indigent or uninsured.[85] The Tenth Circuit, in accord with other circuits,[86] has held that "[t]he fact that Congress, or some of its members, viewed COBRA as a so-called 'anti-dumping' bill, i.e., a bill designed to prohibit hospitals from 'dumping' poor or uninsured patients in need of emergency care, does not subtract from its broad term 'any individual.'"[87]

Although courts have expanded EMTALA to apply to anyone who goes to an emergency room in need of care, and not merely the indigent, courts are

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82. 42 U.S.C. § 1395dd(a). That section provides:

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

Id.

83. "Emergency medical condition" is defined as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
>
> (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part; or
>
> (B) with respect to a pregnant women [sic] who is having contractions—
>
> (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
>
> (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

42 U.S.C. § 1395dd(e)(1).

84. 42 U.S.C.§ 1395dd(c). The definition section of § 1395 provides:

> The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

42 U.S.C. § 1395dd(e)(3)(B). The section also defines "transfer" as "the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital. " 42 U.S.C. § 1395dd(e)(4).

85. Bosler & Davis, *supra* note 79, at 166.

86. In *Collins v. DePaul Hosp.*, the Tenth Circuit cited the decisions of Gatewood v. Washington Healthcare Corp., 933 F.2d 1037 (D.C. Cir. 1991), and Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266 (6th Cir. 1990). Collins v. DePaul Hosp., 963 F.2d 303, 308 (10th Cir. 1992).

87. *Collins*, 963 F.2d at 308 (quoting 42 U.S.C. § 1395dd(a)). For the statutory language, see *supra* note 81.

cognizant that Congress enacted the legislation primarily to prevent hospitals from dumping unwanted patients, and to penalize hospitals that do engage in dumping—*not* to create a federal malpractice standard.[88] In *Delaney v. Cade*,[89] the Tenth Circuit held that "the Act does not create a private cause of action against physicians."[90] More significantly, the court held in *Collins v. DePaul Hospital*[91] that a patient admitted to the hospital's intensive care unit (ICU) for treatment of head injuries could not bring an EMTALA claim on the basis that the hospital did not appropriately screen for his injured hip.[92] The court stated that "[a]fter the hospital made its screening examination of Collins, it is quite obvious that it determined that *an* 'emergency medical condition' did exist."[93] The court then stated that 42 U.S.C. § 1395dd(a) "is not intended 'to ensure each emergency room patient a correct diagnosis, but rather to ensure that each is accorded the same level of treatment regularly provided to patients in similar medical circumstances.'"[94] Therefore, a plaintiff's EMTALA claim that a medical screening examination was "inappropriate" may not succeed if the hospital demonstrates that the examination resulted in a diagnosis—even if problems remain undiagnosed or if the diagnosis was wrong. The Tenth Circuit has stressed that when doctors screen negligently, the appropriate remedy is a state medical malpractice suit.[95]

3. EMTALA's Requirement That Emergency Rooms Properly Stabilize Patients Before Transfer

EMTALA claims also require a determination of whether the hospital properly stabilized the patient before transfer. As noted previously, "transfer" includes the discharge of a patient.[96] EMTALA provides that stabilization occurs if "no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the

88. Penhallegon, *supra* note 80, at 428-29.

89. 986 F.2d 387 (10th Cir. 1993).

90. *Delaney*, 986 F.2d at 388. In *Delaney*, the patient was the victim of an automobile accident and the symptoms included complaints of chest pains. *Id.* She was transferred without diagnosis of the source of the pain, and subsequently required surgery to repair a transected aorta which had clotted. *Id.* at 388-89. The patient was permanently paralyzed, and alleged that delay in transferring her to a facility equipped to treat her contributed to the degree of her impairment. *Id.* at 389. The *Delaney* court relied upon the Fourth Circuit's opinion in Baber v. Hospital Corp., 977 F.2d 872 (4th Cir. 1992), which held that "the enforcement section of § 1395dd only allowed the Secretary of Health and Human Services to act against a doctor to prevent participation in Medicare programs and to seek sanctions in the form of civil monetary penalties." *Delaney*, 986 F.3d at 393 (citing *Baber*, 977 F.2d at 876-78). The Tenth Circuit further noted that preclusion of a cause of action against the physician is in line with the legislative history of the Act. *Id.* (citing *Baber*, 977 F.2d at 876-78).

91. 963 F.2d 303 (10th Cir. 1992).

92. *Collins*, 963 F.2d at 306-07. The court said, "The stated reason in 42 U.S.C. § 1395dd(a) for requiring a participating hospital to provide an 'appropriate medical screening examination' of one suffering from injuries who presents himself at a hospital is to determine whether an 'emergency medical condition exists.' Nothing more, nothing less." *Id.*

93. *Id.* at 307 (emphasis added).

94. *Id.* (quoting *Gatewood*, 933 F.2d at 1041).

95. *Id.* at 308 (noting that the appropriate forum for a medical malpractice action was state court, a recourse the plaintiff had pursued "and lost").

96. 42 U.S.C. § 1395dd(e)(4).

individual from a facility."[97] The Tenth Circuit acknowledged in *Delaney* that a patient is stable at the time of discharge when there is no acute distress, no indication of a worsening condition, and no apparent life-threatening risk.[98] Additionally, when a patient refuses to consent to treatment, a hospital has no further obligation under EMTALA.[99]

To prevail under EMTALA, the plaintiff must establish either that the hospital failed to provide an appropriate medical screening or that the patient was transferred prior to stabilization, but not both.[100] EMTALA, therefore, imposes strict liability on hospitals, "subject [only] to those defenses available in the Act."[101] Thus, the burden is on the hospital to establish, by a preponderance of the evidence, that it did not violate the requirements of EMTALA.[102]

B. *Tenth Circuit Decisions*

1. *Repp v. Anadarko Municipal Hospital*[103]

a. *Facts*

Mr. Repp, complaining of a rash, visited a physician who diagnosed shingles and prescribed medication.[104] Later that day, Mr. Repp visited the emergency room at Anadarko Municipal Hospital complaining of pain throughout his left arm.[105] Two nurses examined Repp and recorded his vital

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97. 42 U.S.C. § 1395dd(e)(3)(B).

98. *Delaney*, 986 F.2d at 392 (quoting *Cleland*, 917 F.2d at 271).

99. Stevison v. Enid Health Sys., Inc., 920 F.2d 710, 713 (10th Cir. 1990) (citing 42 U.S.C. § 1395dd(b)(2)).

100. Abercrombie v. Osteopathic Hosp. Founders Ass'n, 950 F.2d 676, 680 (10th Cir. 1991). The *Abercrombie* court held that it was harmless error that the jury instructions seemed to infer that the jury must find both in order for the plaintiffs to prevail. *Id.* The court noted that in response to two special interrogatories, the jury responded that they found that the defendant hospital had provided an appropriate medical screening, and that they did not find that the deceased had been transferred in an unstable condition. *Id.* at 681-82.

101. *Stevison*, 920 F.2d at 713. "Section 1395dd(a) contains mandatory language. Under the statute, the hospital must provide for medical screening if a request is made." *Id.* (citing Reid v. Indianapolis Osteopathic Medical Hosp., 709 F. Supp. 853, 855 (S.D. Ind. 1989)); *see also Abercrombie*, 950 F.2d at 680-81 (noting that while the word "negligently" appears in the part of EMTALA addressing civil monetary fines, it is not in the part of the act which provides for civil enforcement by an injured plaintiff). The court found the omission significant, noted that Congress could have said "negligently" in the civil enforcement provision, but did not, and stated that the court would not opt to rewrite the section. *Id.* at 681. The *Abercrombie* court further noted that the word "negligently" does not appear in either § 1395dd(a) or (c), which provide for an appropriate medical screening and stabilization before transfer. *Id.* Acknowledging the statute's "mandatory language" as enunciated in *Stevison*, the *Abercrombie* court held that "these two requirements impose a 'strict liability' on a hospital which violates those requirements." *Id.*

102. *See Abercrombie*, 950 F.2d at 681 (using the preponderance of the evidence standard for both appropriate medical screening and stabilization before transfer); *Stevison*, 920 F.2d at 713 (holding that once plaintiff demonstrated she had requested a medical screening, she met the burden, and that the burden then shifted to the defendant hospital to prove that the request for treatment had been withdrawn, a showing which would defeat a claim that a hospital failed to stabilize a patient prior to transfer).

103. 43 F.3d 519 (10th Cir. 1994).

104. *Repp*, 43 F.3d at 521.

105. *Id.*

signs.[106] Mrs. Repp informed the nurses that her husband had a history of cardiac bypass surgery.[107] Upon telephone consultation, the outpatient treating physician prescribed two medications administered in the emergency room by injection.[108] The emergency room staff released Repp, who died that night in his sleep of cardiopulmonary arrest due to coronary artery disease.[109] The plaintiffs, Mrs. Repp and the couple's children, alleged that Repp did not receive an "appropriate medical screening" in violation of 42 U.S.C. § 1395dd(a).[110] They further alleged that the defendant hospital failed to properly stabilize Repp prior to his discharge, in violation of 42 U.S.C. §§ 1395dd(b) and (c).[111] The district court dismissed the malpractice cause of action against the individual physician.[112] The only issue on appeal was whether the emergency room failed to provide an "appropriate medical screening" in violation of EMTALA, 42 U.S.C. § 1395dd(a).[113]

b. *Decision*

The Tenth Circuit affirmed the district court's dismissal of the plaintiff's case. In doing so, the court interpreted the term "appropriate medical screening."[114] The plaintiffs contended that the word "appropriate" required "hospitals to provide a uniform minimum level of care to each patient seeking emergency room care."[115] The defendants, in turn, reasoned that a substantive reading of "appropriate" would convert EMTALA into a national malpractice statute, in contravention of Congressional intent.[116] Noting that "the Act 'is neither a malpractice nor a negligence statute,'"[117] the court stated that "section 1395dd(a) precludes the adoption of a standard tantamount to a federal malpractice statute."[118] Rather, § 1395dd(a) requires that an appropriate medical screening examination be "within the capability of the hospital's emergency department."[119] Thus, the court stated, the section "does not require a hospital to provide a medical screening in the abstract," but, rather "the statute's requirement is hospital-specific, varying with the specific circumstances of each provider."[120] The decision stated that:

> [A] hospital defines which procedures are within its capabilities when it establishes a standard screening policy for patients entering the

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106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* The doctor asserted that he could not be sued as an individual physician under the EMTALA. *Id.* The lower court relied on *Delaney* in granting his motion to dismiss. *Id.*
113. *Id.*
114. *Id.* at 522. For statutory language, see *supra* note 82.
115. *Repp*, 43 F.3d at 522.
116. *Id.*
117. *Id.* (quoting Urban v. King, 43 F.3d 523, 525 (10th Cir. 1994)). For a discussion of this case, see *infra* notes 130-52 and accompanying text.
118. *Id.*
119. *Id.*
120. *Id.*

> emergency room. Indeed, hospitals, and not reviewing courts, are in the best position to assess their own capabilities. Thus, a hospital violates section 1395dd(a) when it does not follow its own standard procedures.[121]

Slight or de minimus variations by a hospital from its standard screening procedures do not violate hospital policy.[122]

In dicta, the court noted *Baber v. Hospital Corp. of America*,[123] a Fourth Circuit decision in which that court refused to "foreclose the possibility that a future court faced with such a situation may decide that the hospital's standard was so low that it amounted to no 'appropriate medical screening.'"[124] The Tenth Circuit stated that its holding in *Repp* "clearly rejects the possibility left open by the Fourth Circuit in *Baber*. A court should ask only whether the hospital adhered to its own procedures, not whether the procedures were adequate if followed."[125]

The court found the Anadarko Hospital's policy required its emergency room staff to compile a history for each patient including pre-existing conditions, medication, and allergies.[126] The court also found that the hospital's nurses knew Repp had a history of heart disease and that he was taking Zantac and Phenaphen.[127] The plaintiffs argued that the hospital failed to take a complete medical history and the nurses did not ask for a complete list of medications.[128] The court determined these were "minimal variations from the hospital's emergency room policy" and they "did not amount to a violation of the hospital's standard screening procedures."[129]

2. *Urban v. King*[130]

a. *Facts*

Urban, diagnosed as having a high-risk pregnancy because she was carrying twins, underwent periodic stress tests.[131] Urban's physician, Dr. King, referred her to the Central Kansas Medical Center where she received a nonreactive stress test which indicated no fetal movement, fetal heart tones in the 150s, and normal maternal vital signs.[132] Upon consultation with a physician, the nurse who administered the test instructed Urban to return the next morning for another stress test.[133] She left the hospital at about 8 P.M. and returned the next morning, when the biophysical profile indicated that neither

121. *Id.* (footnotes omitted).
122. *Id.* at 523.
123. 977 F.2d 872 (4th Cir. 1992).
124. *Repp*, 43 F.3d at 522 n.4 (quoting *Baber*, 977 F.2d at 879 n.7).
125. *Id.*
126. *Id.* at 523.
127. *Id.*
128. *Id.*
129. *Id.*
130. 43 F.3d 523 (10th Cir. 1994).
131. *Urban*, 43 F.3d at 524.
132. *Id.*
133. *Id.*

fetus was moving or breathing, and one fetus had no fetal heart tone.[134] A Caesarean section resulted with one twin stillborn, and the other suffering brain damage.[135] Urban and her husband alleged that the medical center violated EMTALA[136] by releasing ("transferring") Urban when an unstabilized emergency medical condition existed.[137] The district court granted the medical center's motion for summary judgment and the plaintiffs appealed.[138]

b. *Decision*

The Tenth Circuit affirmed the district court's decision. The issue on appeal was whether the defendant medical center released Urban with an emergency medical condition which should have been stabilized under EMTALA.[139] The court stated the statute requires *actual knowledge* of an unstabilized emergency medical condition if a plaintiff is to prove liability.[140] "The hospital cannot be held to stabilize an emergency situation without knowing an emergency exists . . . . A facial reading of section 1395dd(e)(1) requires some manifestation of acute symptoms so the hospital would know of the condition."[141]

Under § 1395dd(e)(1)(A), the court found that an "emergency medical condition" did not manifest itself in Urban's case because she was not in pain and demonstrated no severe symptoms at the time the hospital released her from the emergency room.[142] The court distinguished *Abercrombie v. Osteopathic Hospital Founders Ass'n*[143] from *Urban*, because the former "did not address whether the hospital could be in violation of section 1395dd(c) if it did not have the knowledge of the [patient's] emergency medical condition."[144] Thus, the court stated, "The statute's stabilization and transfer requirements do not apply until the hospital determines the individual has an emergency medical condition."[145]

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134. *Id.* at 524-25.
135. *Id.* at 525.
136. The language of the Act on which the court relied provides:
> (c) Restricting transfers until individual stabilized
> (1) Rule
> If an individual at a hospital has an emergency medical condition which has not been stabilized . . . , the hospital may not transfer the individual unless—
> (A)(i) the individual . . . after being informed . . . in writing requests transfer to another medical facility,
> . . . .
> (iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person . . . has signed a certification . . . after a physician . . . countersigns the certification . . . .

Id. at 524 n.1 (quoting 42 U.S.C. § 1395dd(c)).
137. *Id.* at 525.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 525-26.
142. *Id.* at 526.
143. 950 F.2d 676 (10th Cir. 1991).
144. *Urban*, 43 F.3d at 526.
145. *Id.*

The Tenth Circuit found further support for its holding in § 1395dd(c), which applies only after the requirements of § 1395dd(b) are satisfied.[146] The latter section provides that a hospital must comply with the § 1395dd(c) stabilization requirements if it "determines that the individual has an emergency medical condition."[147] Thus, "[t]he statute's stabilization and transfer requirements do not apply until the hospital determines the individual has an emergency medical condition."[148] In arriving at its holding, the Tenth Circuit refused to read the language of § 1395dd(c) in isolation of the other sections of the statute as the Urbans urged.[149]

The court further rejected the plaintiffs' assertion that holding hospitals to an "actual knowledge" standard would result in a deliberate failure to diagnose at all, in order to avoid EMTALA liability.[150] Section 1395dd(a), which requires that the hospital conduct an appropriate medical screening, should preclude such a result.[151] Furthermore, the court noted that if a hospital conducts an appropriate screening and fails to diagnose, the plaintiff would have a state malpractice claim.[152]

C. *Analysis*

When the Tenth Circuit stated in *Repp* that "a hospital violates § 1395dd(a) when it does not follow its own standard procedures,"[153] it cited authority which also determined that a plaintiff must show her treatment was different from that of other patients,[154] or that the medical workers' motives were "inappropriate."[155] Because the burden of proof should be on the defendant in these cases, a rejection of the premise that the plaintiff must show disparate treatment is appropriate. The Tenth Circuit's standard does not require the plaintiff to prove "bad motive" in order to prevail, but requires only a showing that the hospital did not follow its own procedures. The fact that the Tenth Circuit has rejected the Fourth Circuit's determination that low standards may not constitute "appropriate medical screening" means that state tort actions are the only assurance that hospitals will promulgate and adhere to adequate procedures for emergency rooms.

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146. *Id.*
147. *Id.* (quoting 42 U.S.C. § 1395dd(b)).
148. *Id.* (finding that the hospital's lack of actual knowledge of the emergency medical condition absolved it of liability in conjunction with § 1395dd(b)).
149. *Id.* (citing King v. St. Vincent's Hosp., 502 U.S. 215, 219 (1991)). The court agreed with the Urbans that reading the EMTALA sections in isolation of each other, the facts that (1) Urban went to a hospital, (2) there was an emergency condition, (3) she was not stabilized, and (4) she was transferred in contravention of § 1395dd(c)(1)(A)(i)-(iii), would lead to a ruling in the plaintiffs' favor. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Repp*, 43 F.3d at 522.
154. *Id.* at 522 n.6 (citing Williams v. Birkeness, 34 F.3d 695, 697 (8th Cir. 1994)).
155. *Id.* (citing Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266, 272 (6th Cir. 1990)).

Urban relies on a hospital to admit to "actual knowledge" of an emergency condition in order for a court to find that a hospital violated § 1395dd(c) by transferring an unstabilized patient. The *Urban* court stated hospitals are not likely to abuse the "actual knowledge" standard because of the screening requirements of § 1395dd(a).[156] But in almost the same breath, the court stripped the screening requirements to a more-than-minimal violation of the hospital's own operating procedures.[157] Because hospitals determine what constitutes adequate procedures, they will weigh low standards for EMTALA claims so as to avoid liability under the Tenth Circuit, yet not admit to such a low standard of care that they will be vulnerable to potential state malpractice suits.

D. *Other Circuits*

1. Appropriate Medical Screening

In defining "appropriate medical screening," circuit courts split on the question of whether a plaintiff must prove an improper motive or nonmedical reason for a hospital's disparate treatment. The Sixth Circuit required an improper motive showing in *Cleland v. Bronson Health Care Group.*[158] *Cleland* involved a fifteen-year-old with cramps and vomiting, who was misdiagnosed with the flu and died due to complications resulting from his undiagnosed intestinal disorder.[159] In holding for the hospital, this oft-cited opinion stated that:

> "Appropriate" is one of the most wonderful weasel words in the dictionary, and a great aid to the resolution of disputed issues in the drafting of legislation. Who, after all, can be found to stand up for "inappropriate" treatment or actions of any sort? Under the circumstances of the act, "appropriate" can be taken to mean care similar to care that would have been provided to any other patient, or at least not known by the providers to be insufficient or below their own standards . . . . "[A]ppropriate" must . . . be interpreted to refer to the motives with which the hospital acts. If it acts in the same manner as it would have for the usual paying patient, then the screening provided is "appropriate" within the meaning of the statute.[160]

The primary case rejecting *Cleland's* improper motive requirement is the District of Columbia Circuit's decision in *Gatewood v. Washington Healthcare Corp.*[161] In *Gatewood,* the hospital misdiagnosed and discharged a man who

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156. *Urban,* 43 F.3d at 526.

157. *Repp* was decided on Dec. 19, 1994; *Urban* was decided on Dec. 20, 1994; and *Repp* cites *Urban* as authority.

158. 917 F.2d 266 (6th Cir. 1990).

159. *Cleland,* 917 F.2d at 268.

160. *Id.* at 271-72 (noting that reasons, other than indigence, for which an emergency room might give less than standard care include "prejudice against the race, sex, or ethnic group of the patient; distaste for the patient's condition (e.g., AIDS patients); personal dislike or antagonism between the medical personnel and the patient; disapproval of the patient's occupation; or political or cultural opposition").

161. 933 F.2d 1037 (D.C. Cir. 1991).

complained of pain radiating down his left arm and into his chest and who died the next morning of a heart attack.[162] The D.C. Circuit stated that:

> [A] hospital fulfills the "appropriate medical screening" requirement when it conforms in its treatment of a particular patient to its standard screening procedures . . . . The motive for such departure is not important to this analysis, which applies whenever and for whatever reason a patient is denied the same level of care provided others and guaranteed him or her by subsection 1395dd(a).[163]

The Fourth Circuit explicitly adopted the District of Columbia Circuit's standard in *Power v. Arlington Hospital Ass'n*.[164] The Fourth Circuit noted that EMTALA applies to "anyone," and stated if plaintiffs had the burden of proving an improper motive, it would be "virtually impossible" for them to prevail.[165] The court required the plaintiff, however, to make a threshold showing of differential treatment.[166] To rebut that showing, a hospital may show either that the patient in fact received the same treatment as other patients or, in the alternative, that a physician did not order or perform a test or procedure because, as a matter of medical judgment, she did not feel it was necessary or reasonable.[167] The court also noted that, in accordance with *Baber*, a hospital is required to have screening procedures and that failure to have them could constitute a per se violation of EMTALA.[168]

The Tenth Circuit, in *Repp*, found itself in accord with the District of Columbia and Fourth Circuits when it held that "a hospital violates section 1395dd(a) when it does not follow its own standard procedures."[169] The Tenth Circuit, however, expressly rejected the Fourth Circuit's determination that excessively low standards could expose the hospital to liability.[170]

The Ninth Circuit did apply the Fourth Circuit's minimum standards rule. In *Eberhardt v. City of Los Angeles*,[171] the Ninth Circuit stated that courts have unanimously held the test applied to screening standards to be an objective determination that the procedure was the same received by other patients,

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162. *Gatewood*, 933 F.2d at 1039.

163. *Id.* at 1041.

164. 42 F.3d 851, 857 (4th Cir. 1994) (citing Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538, 544 (E.D.N.C. 1991) and Deberry v. Sherman Hosp. Ass'n, 769 F. Supp. 1030, 1034 (N.D. Ill. 1991) as also adopting *Gatewood*'s rejection of an improper motive requirement).

165. *Id.* at 857-58.

166. *Id.* at 858.

167. *Id.*

168. *Id.* at 858 n.4.

169. *Power* predates *Repp* by one week.

170. *Repp*, 43 F.3d at 522 n.4. The Fourth Circuit stated:

> Some commentators have criticized defining "appropriate" in terms of the hospital's medical screening standard because hospitals could theoretically avoid liability by providing very cursory and substandard screenings to all patients, which might enable the doctor to ignore an emergency medical condition. . . . Even though we do not believe it is likely that a hospital would endanger all of its patients by establishing such a cursory standard, theoretically it is possible. Our holding, however, does not foreclose the possibility that a future court faced with such a situation may decide that the hospital's standard was so low that it amounted to no "appropriate medical screening". . . .

Baber, 977 F.2d at 879 n.7 (citations omitted).

171. 62 F.3d 1253 (9th Cir. 1995).

and *not* whether the medical profession would deem the procedure as adequate.[172] The court noted that EMTALA's statutory language precluded a "national standard of care in screening patients,"[173] but held a hospital nonetheless has a duty under EMTALA to screen at more than a minimal level, which would be inappropriate.[174]

The Eighth Circuit held, in *Williams v. Birkeness*[175] that "appropriate" means "uniform treatment rather than correct diagnosis,"[176] *and* that the burden is on the plaintiff to prove disparate treatment.[177] Likewise, the Eleventh Circuit held the plaintiff must prove that the hospital administered substandard screening procedures to an indigent patient vis à vis a paying patient.[178]

2. Proper Stabilization Before Transfer

With regard to stabilization before transfer, the Tenth Circuit agrees with other circuits that a plaintiff must show that the emergency room staff had actual knowledge of an unstabilized emergency medical condition. Courts often cite *Cleland* for the proposition that "[i]f the emergency nature of the condition is not *detected*, the hospital cannot be charged with failure to stabilize a *known* emergency condition."[179] *Cleland* defines "the vague phrase 'emergency medical condition'"[180] as "a condition within the actual knowledge of the doctors on duty or those doctors that would have been provided to any paying patient."[181]

The Fourth Circuit's opinion in *Baber* agreed with *Cleland* that actual knowledge must exist. The *Baber* opinion stated that to prevail on a claim that a hospital violated EMTALA's transfer provisions, the plaintiff must show that (1) there was an emergency medical condition; (2) there was actual knowledge by hospital staff of that condition; (3) the patient was transferred without stabilization; and (4) there was no patient consent to such transfer, nor were certification and transfer procedures followed.[182] The District of Columbia Circuit also held that absent the diagnosis of an emergency medical condition, EMTALA's stabilization and transfer requirements do not apply.[183]

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172. *Eberhardt*, 62 F.3d at 1258.
173. *Id.*
174. *Id.* (citing *Baber*, 977 F.2d at 879 n.7).
175. 34 F.3d 695 (8th Cir. 1994).
176. *Williams*, 34 F.3d at 697.
177. *Id.* Disparate treatment is an "essential element" of the claim. Absent evidence presented by the plaintiffs, the defendant need not "disprove the . . . claim by showing all patients were treated the same." *Id.*
178. Holcomb v. Monahan, 30 F.3d 116, 117 (11th Cir. 1994).
179. *Cleland*, 917 F.2d at 271 (emphasis added); *see, e.g.*, Gossling v. Hays Medical Ctr., 1995 WL 254269, at *9 (D. Kan. 1995); Richmond v. Community Hosp., 885 F. Supp. 875, 881 (W.D. Va. 1995).
180. *Cleland*, 917 F.2d at 268.
181. *Id.* at 269.
182. *Baber*, 977 F.2d 883.
183. *Gatewood*, 933 F.2d at 1041.

CONCLUSION

Current case law indicates that plaintiffs must rely on state law for access to quality health care. *Hern* requires Colorado to fund abortions in accordance with the Hyde Amendment, but the benefit is illusory because of the extremely low number of women affected. Further, in the absence of the Hyde Amendment and its dictates of medically necessary categories of abortions, a state may define medical necessity. Judicial relief in this area appears to be limited to arguments that states make an arbitrary and discriminatory distinction in the context of funding therapeutic abortions, between indigent women who are the victims of rape or incest, and other indigent women who become pregnant.

Repp and *Urban* do not radically depart from other circuits; most courts agree that EMTALA only restricts patient dumping, and is not a national malpractice statute. *Repp* goes the furthest in allowing hospitals total discretion in setting their own standards. Patients must rely on accreditation standards for licensing emergency rooms to be assured that an adequate standard of care is provided. Ultimately, state courts, through medical malpractice actions, must ensure acceptable standards and levels of care.

Terry J. Wechsler

IMMIGRATION LAW

INTRODUCTION

The Tenth Circuit Court of Appeals decided several cases involving immigration law during the 1994-95 survey period.[1] Because the Tenth Circuit serves as the first level of judicial review of administrative decisions concerning asylum and deportation,[2] many cases presented to the court were little more than judicial confirmation of administrative decisions. The Tenth Circuit did, however, decide several noteworthy cases as well as a few issues of first impression.

After a brief discussion in Part I of the background of the interlocking statutory components of United States immigration law, Part II of this Survey examines suspension of deportation and the standard of proof that an alien must meet to remain in this country. This year, the court continued its trend of narrow construction of the elements of discretionary relief. As a result, few aliens met the required standard.

Part III discusses the court's interpretation of statutes providing for asylum and withholding of deportation. Both the discretionary grant of asylum and the nondiscretionary withholding of deportation hinge on the applicant's ability to articulate an objective fear of persecution. As in the cases involving suspension of deportation, the court strictly followed the statutory standard, denying applications based on general political upheaval and subjective fear of persecution. In a matter of first impression, the court was asked to determine the burdens of proof and production that both the applicant and the Immigration and Naturalization Service (INS) must meet throughout the review process. A vehement dissent suggests that American courts have not seen the last of this issue.

Part IV examines a case involving the constitutional implications of the immigration process as it applies to aliens who marry United States citizens. The Tenth Circuit rejected a novel constitutional attack aimed at invalidating an amendment to the immigration laws designed to flush out fraudulent marriages. Finally, Part V examines an issue of growing importance in immigration law: the fate of naturalized citizens convicted of felony offenses. These cases involve prisoners seeking to compel deportation as well as those wishing to prevent deportation, and the effect of an aggravated felony conviction on the deportation process.

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1. The survey period covers decisions handed down between September 1, 1994, and August 31, 1995.

2. 8 U.S.C. § 1105a(a)(2) (1994). Upon review, the administrative determination is subject only to procedural protections of due process. Courtney E. Pellegrino, Comment, *A Generously Fluctuating Scale of Rights: Resident Aliens and First Amendment Free Speech Protections*, 46 SMU L. REV. 225, 229 (1992).

I. GENERAL BACKGROUND

The term "immigration" refers to the movement of people from one country to another.[3] Laws controlling entry into the United States are almost exclusively the product of the twentieth century.[4] The earliest such restriction, however, came about as a result of the depression of the 1870s and a concurrent increase in racial animosity toward Asian nationals.[5]

The statutes and decisions that constitute substantive immigration law form only a part of the unique framework used to regulate immigration.[6] In the United States, executive and departmental orders, executive proclamations, and treaties also affect immigration.[7] This Survey focuses on the substantive statutes, as interpreted and applied by the Tenth Circuit Court of Appeals. Relevant orders, proclamations, and treaties will be addressed, but only in the context of cases presented to the Tenth Circuit during the 1994-95 survey period.

The Immigration and Nationality Act of 1952 (INA)[8] provided the first comprehensive scheme of immigration control in the United States.[9] Congress has amended the INA five times,[10] and current national immigration policy is the product of over 150 years of cultural and societal development.[11]

Immigration remains a complicated area of the law, comprised of many elements.[12] Congress promulgates the controlling statutes,[13] as in other areas

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3. RICHARD A. BOSWELL & GILBERT P. CARRASCO, IMMIGRATION AND NATIONALITY LAW 4 (1991).

4. Joseph Minsky et al., *Introductory Overview of Immigration Law and Practice*, C394 ALI-ABA 1, 7-11 (1989).

5. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 1-2 (1992). Congress enacted two statutes governing immigration prior to 1875. *Id.* The Alien Act authorized the President to deport "dangerous" aliens. Ch. 58, 1 Stat. 570, 571 (1798) (expired 1800). *Id.* In 1862, Congress passed a law prohibiting the import of Chinese slave laborers. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, 12 Stat. 340 (1862) (repealed 1974); *see* FRAGOMEN & BELL, *supra*, at 1-2. To a great extent, this racial animosity continues today. For example, one commentator referred to immigration reform as the "snake oil" of the 1994 California state elections. Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 492 (1995).

6. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 383 (1981).

7. *Id.* By definition, international law concerns only the principles and rules of conduct between nations. David D. Jividen, Comment, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943, 945 (1986). Therefore, although many treaties and agreements between nations establish refugee rights, it is incorrect to analyze international refugee rights in the context of rights within sovereign nations. *Id.*

8. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1525 (1994)).

9. The INA served to collect the numerous, scattered statutory provisions already on the books. Minsky et al., *supra* note 4, at 9. The INA made no substantive changes other than the creation of new, ideological bases for exclusion. *Id.* President Truman vetoed the bill because of the exclusion provisions, but Congress overrode the veto. *Id.*

10. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1966); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1978); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1981); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991).

11. HUTCHINSON, *supra* note 6, at 3.

12. BOSWELL & CARRASCO, *supra* note 3, at 7.

of law, but four agencies of the executive branch are responsible for enforcement of immigration laws: the Department of Justice (DOJ); the Department of State; the Department of Labor; and the Public Health Service.[14] This Survey limits its discussion to the role of the INS, an agency within the DOJ,[15] in the enforcement of immigration laws. Although the other agencies mentioned play an important part in the overall functioning of immigration procedure in the United States, they are beyond the focus of the Tenth Circuit decisions in this Survey.[16]

The INS is divided into four geographic regions providing administrative direction to the district offices.[17] The regional directors' functions are primarily managerial, with the INS Commissioner being responsible for determining policy and overall management of the agency.[18] The Executive Office for Immigration Review (EOIR), the agency that presides over deportation hearings, exclusion hearings, and other related matters at the administrative level, is divided into two levels.[19] Immigration Judges (IJs) preside over hearings, take evidence, and determine deportability of alien applicants,[20] while the Board of Immigration Appeals (BIA) exercises appellate review of the IJ decisions.[21]

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13. In forging a nation almost entirely from immigrants and first- or second-generation nationals, the founding fathers might have been expected to explicitly address immigration issues. The Constitution, however, is silent on these subjects. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 1 (2d ed. 1991); *see also* Katherine Tonnas, Comment, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295, 295 (1993) (discussing George Washington's view of America as an "asylum for the unfortunate of other countries" and Thomas Jefferson's affirmation of the "hospitality . . . extended to our fathers arriving in this land"). Although Congress has no explicit power to regulate immigration, the Supreme Court has held that the regulation of immigration falls within Congress's Commerce Clause authority over the flow of commerce across national borders. *See* Passenger Cases, 48 U.S. (7 How.) 283, 288 (1849); Head Money Cases, 112 U.S. 580, 600 (1884). The Court has also read Congress's Article I, § 8 power "to establish a uniform Rule of Naturalization" to include immigration. Pellegrino, *supra* note 2, at 228-29. In addition, the Court has held that immigration is a political question; therefore, congressional determinations regarding the exclusion of aliens and the conditions placed upon entry of aliens are not subject to judicial review. *Id.*

14. BOSWELL & CARRASCO, *supra* note 3, at 7.

15. *Id.*

16. For a brief description of the agencies within each governmental branch responsible for enforcement of immigration laws, see Minsky et al., *supra* note 4, at 11-14.

17. *Id.* at 11. The district offices receive applications and petitions for immigration benefits, enforce immigration laws, and institute deportation and exclusion proceedings when necessary. *Id.*

18. *Id.*

19. Noel A. Ferris, *Developments in Procedures Before the Executive Office for Immigration Review*, *in* BASIC IMMIGRATION LAW 1993, at 213, 213 (PLI Litig. & Admin. Prac. Course Handbook Series No. 466, 1993).

20. *Id.* The decision of the IJ, whether oral or written, includes a review of the evidence, a statement of factual findings supporting deportability, and a discussion of any discretionary relief requested by the alien. Samuel A. Yee, Survey, *Final Exit or Administrative Exhaustion? The Deported Alien's Catch-22*, 8 ADMIN. L.J. AM. U. 605, 614 (1994).

21. *See generally* Ferris, *supra* note 19. The deportation order is automatically stayed pending full disposition by the BIA. Yee, *supra* note 20, at 616.

II. SUSPENSION OF DEPORTATION

A. *Background*

When the INS learns of a deportable alien[22] within the borders of the United States, the agency initiates deportation proceedings by issuing an order to show cause (OSC), which requires the alien to "show cause" as to why she should not be deported.[23] Pending the outcome of the deportation hearing, the INS may take the alien into custody and either continue to hold her in custody or release her under bond or on conditional parole.[24] The Attorney General then has discretion to revoke the bond or parole.[25] Suspension of deportation,[26] a discretionary grant by the United States Attorney General, represents one form of relief an alien can request.[27] Such a grant requires the applicant to show that, although she may be deportable under immigration laws: (1) the alien has been physically present in the United States for a continuous period of not less than seven years; (2) the alien can offer evidence that during that entire time she has been, and currently is, a person of good moral character; and (3) the alien or the alien's spouse, parent, or child who is a United States citizen would suffer extreme hardship as a result of the deportation.[28] An

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22. 8 U.S.C. § 1251 (1994). The INA enumerates 33 grounds for deporting resident aliens. Because these grounds may be applied retroactively, an alien is, in effect, "perpetually subject to expulsion." Denyse Sabagh, *Deportation, Exclusion, Discretionary Relief, and Waivers*, C505 ALI-ABA 337, 345 (1990). In addition, delay will not prevent the INS from bringing charges at any time; there is no statute of limitations for deportation. *Id.*

23. 8 U.S.C. § 1252b(a)(1) (1994). The OSC notifies the alien of the deportation proceedings and describes the grounds and factual allegations on which the proceedings are based. Sabagh, *supra* note 22, at 346.

24. 8 U.S.C. § 1252(a)(1) (1994).

25. *Id.* Historically, deportation proceedings began with an alien's arrest. Since changes in INS procedures in 1956, however, they are more commonly initiated with the order, or motion, to show cause. Yee, *supra* note 20, at 610.

Immigration laws now expressly provide for in absentia proceedings when an alien fails to appear for a hearing. 8 U.S.C. § 1252b(c); 8 C.F.R. § 3.26(a)-(b) (1995). A deportation order will be issued if the INS establishes by "clear, unequivocal, and convincing" evidence that written notice of the hearing was provided and that the alien is deportable. 8 U.S.C. § 1152b(c)(1). Provided that the notice was valid, review of an in absentia order is limited to whether the INS met its burden and the reason for the alien's failure to appear. *See* Ferris, *supra* note 19.

26. 8 U.S.C. § 1254(a) (1994).

27. The following applicants are, however, specifically excluded from eligibility for suspension of deportation:

> (1) [A]liens who entered the United States as crew members after June 30, 1964; (2) alien foreign medical graduates admitted in J nonimmigrant status, whether or not they are subject to the two-year foreign residence requirement imposed on some J nonimmigrants; (3) other J nonimmigrants who are subject to the two-year foreign residence requirement and have not received a waiver of it or fulfilled it; and (4) aliens who are deportable under [8 U.S.C. § 1251](a)(4)(D) as persons who participated in Nazi-directed persecution during World War II.

FRAGOMEN & BELL, *supra* note 5, at 7-73. A J nonimmigrant is an alien holder of a temporary visa to enter the United States for scholastic reasons (i.e., a "student visa"). 8 U.S.C. § 1101(a)(15)(J) (1994).

28. Under the provisions of § 1254(a)(2), if an alien is deportable under § 1251(a)(2) (criminal offenses), § 1251(a)(3) (failure to register and falsification of documents), or § 1251(a)(4) (security and related grounds), the criteria for suspension of deportation are stringent. The applicant must show: (1) continuous physical presence in the United States for not less than 10 years immediately following commission of the act or assumption of the status which constitutes the grounds

alien must demonstrate evidence of all three elements to qualify for suspension of deportation.[29]

An alien requesting a suspension of deportation often faces difficult evidentiary problems.[30] Continuous physical presence may be impossible to document because of the transient lifestyle of many aliens.[31] Also, as the following case illustrates, proving extreme hardship often presents a formidable barrier.[32] In determining "extreme hardship," the INS considers factors such as the alien's familial connections, medical problems, and the presence or absence of abuse or fraud in the applicant's immigration history.[33] The INS may also consider economic conditions in the alien's country of origin; however, the relative weakness of the "home country's" economy will not suffice.[34] Finally, even if the alien meets the required elements, the Attorney General has discretion to grant or refuse adjustment of status to that of a permanent resident.[35]

B. Amaya v. INS[36]

1. Facts

The United States deported Amaya from the United States on June 10, 1985.[37] She subsequently re-entered the United States without inspection, and on December 20, 1991, the INS again initiated deportation proceedings against

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for deportation; (2) good moral character; and (3) hardship. 8 U.S.C. § 1254(a)(2). If the alien is deportable for another reason—e.g., entry without inspection, being excludable at the time of entry, violating nonimmigrant status, alien smuggling, or becoming a public charge within five years of entry—the alien may be able to apply for suspension of deportation under the relatively looser standards of § 1254(a)(1). FRAGOMEN & BELL, *supra* note 5, at 7-72.

29. 8 U.S.C. § 1254(a)(1). Some have criticized this standard as "practically impossible" to meet. Friedler, *supra* note 5, at 494.

30. Materials are available to assist an attorney in pursuing withholding of deportation claims. *See, e.g.*, Minsky et al., *supra* note 4, at 25-29 (offering pragmatic advice for proceeding with a matter before the INS). Other sources offer suggestions for gathering important evidentiary documentation. *See, e.g.*, Arthur C. Helton, *Gaining Status for Your Client Under the Immigration Reform and Control Act of 1986, in* COPING WITH THE NEW IMMIGRATION LAW 123 (PLI Litig. & Admin. Prac. Course Handbook Series No. 329, 1987) (discussing the unique evidentiary problems facing aliens). For guidelines on bolstering weak cases, see generally Margaret C. Makar & Philip M. Alterman, *Suspension of Deportation, in* DEPORTATION DEFENSE (Continuing Legal Educ. of Colo., Inc., 1994) and MATERIALS ON SUSPENSION OF DEPORTATION 17-39 (National Lawyers' Guild, Nat'l Convention Seminar, 1986).

31. The migratory lifestyles of many immigrant farm workers illustrates this problem. Although they may have been in the United States for the required time period, many migrant farm workers can not offer proof of continuous presence. To address the problems of these workers, Congress created a legalization program for "special agricultural workers" (SAWs) and an admissions program for "replenishment agricultural workers" (RAWs). 8 U.S.C. §§ 1160, 1161 (1994); ALEINIKOFF & MARTIN, *supra* note 13, at 685-88.

32. Friedler, *supra* note 5, at 494.

33. FRAGOMEN & BELL, *supra* note 5, at 7-74.

34. *Id.*

35. 8 U.S.C. § 1254.

36. 36 F.3d 992 (10th Cir. 1994).

37. *Amaya*, 36 F.3d at 993.

her.[38] At a hearing on June 30, 1992, she conceded her deportability, but requested a suspension of deportation.[39]

The IJ found that, although Amaya had been continuously physically present within the United States for seven years, she had failed to show either good moral character or extreme hardship.[40] Because Amaya had pleaded guilty to welfare fraud during the seven-year period, the IJ concluded she did not establish good moral character.[41] Amaya argued that deportation would result in decreased educational opportunities for her citizen children.[42] The IJ ruled this did not qualify as extreme hardship,[43] and the BIA affirmed.[44]

2. Decision

The Tenth Circuit affirmed the decision on narrow grounds.[45] The court agreed that decreased educational opportunities did not constitute extreme hardship.[46] The court chose to confine its ruling to that issue, however, without discussing whether a welfare fraud conviction precludes an applicant from asserting good moral character.[47] Since suspension of deportation requires an applicant to affirmatively prove all of the criteria, Amaya's failure to meet the extreme hardship prong disqualified her from consideration for the requested relief, regardless of her moral character.[48]

C. *Analysis*

Applicants who have established sufficient ties to their community within the United States and who prove themselves a positive attribute to that community may qualify for suspension of deportation.[49] Because of the discretionary nature of the relief, the Supreme Court has referred to it as "administrative grace."[50] The statute providing this relief employs specific criteria for evaluating the applicant and, absent a showing of all requisite elements, the discretionary relief will not be granted.

D. *Other Circuits*

Several other circuit courts of appeals ruled on applications for suspension of deportation in the past year. In many instances, the other circuit courts also relied heavily on the judgment of the agency when determining eligibility of

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 994.
42. *Id.*
43. *Id.*
44. *Id.* at 994-95.
45. *Id.* at 995.
46. *Id.*
47. *Id.*
48. *Id.*
49. ALEINIKOFF & MARTIN, *supra* note 13, at 618.
50. United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

an applicant, ruling that the BIA had not abused its discretion in denying relief.[51] In addition, the Eighth and Ninth Circuits squarely confronted the issue the Tenth Circuit sidestepped.[52] Both circuits held that evidence of fraud precludes an applicant from showing good moral character, thus statutorily barring the applicant from suspension of deportation.[53]

In far more cases, however, appellate courts in other circuits found that the agency had abused its discretion, and remanded the cases to the agency for reconsideration based upon the appellate court findings.[54]

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51. Hussein v. INS, 61 F.3d 377, 382 (5th Cir. 1995) (ruling that alien failed to show lawful domicile for seven years); Raya-Ledesma v. INS, 55 F.3d 418 (9th Cir. 1994) (holding seven-year residency requirement not violative of equal protection principles); Miranda v. INS, 51 F.3d 767, 768-69 (8th Cir. 1995) (rejecting transsexual applicant's medical and social hardship claim); Shooshtary v. INS, 39 F.3d 1049, 1051 (9th Cir. 1994) (affirming agency determination that applicant did not show how joining him in Great Britain would cause extreme hardship to his family); Salas-Velazquez v. INS, 34 F.3d 705, 707-08 (8th Cir. 1994) (finding that applicant's previous attempt to evade immigration laws through a sham marriage precluded a showing of good moral character, despite his bona fide second marriage, and that applicant failed to show extreme hardship to his resident wife and children since the wife knew at the time of the marriage the applicant was deportable).

52. *See supra* text accompanying notes 46-47.

53. Flores v. INS, 66 F.3d 1069, 1073 (9th Cir. 1995) (involving welfare fraud), *withdrawn*, 73 F.3d 258 (9th Cir. 1996); Izedonmwen v. INS, 37 F.3d 416, 417-18 (8th Cir. 1994) (involving Pell Grant fraud). On rehearing in *Flores*, the Ninth Circuit filed an unpublished memorandum disposition distinguishing between commission *of* and conviction *for* fraudulent acts in finding bad moral character per se. Flores v. INS, No. 94-70178, 1996 WL 5569, at *1-*2 (9th Cir. Jan. 5, 1996) (citing 8 U.S.C. § 1101(f) (1994)), *on reh'g from*, 66 F.3d 1069 (9th Cir. 1995). The BIA erred, the court held, in finding per se bad moral character based on acts committed outside the seven-year continuous residency period, for purposes of 8 U.S.C. § 1254(a)(1). *Id.* at *2. The BIA could, however, find that the prior bad acts indicated "her moral character remained poor" after the inception of the seven-year period. *Id.* This satisfied the "catchall clause" of § 1101(f). *Id.* ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.") (quoting 8 U.S.C. § 1101(f)).

54. Tukhowinich v. INS, 64 F.3d 460, 463-64 (9th Cir. 1995) (ruling that BIA improperly failed to review all facts of alien's case, including political conditions in native country and particular and unusual psychological hardship alien would face upon deportation, and that BIA's order failed to adequately articulate reasons for denying relief); Watkins v. INS, 63 F.3d 844, 848 (9th Cir. 1995) (finding abuse of discretion in agency's failure to mention several relevant factors in decision denying extreme hardship, to consider cumulative effect of factors, and to offer reasoned explanation for decision); Acosta-Montero v. INS, 62 F.3d 1347, 1350-51 (11th Cir. 1995) (holding that the agency abused its discretion when it did not consider new evidence of applicant's changed family responsibilities); Castrejon-Garcia v. INS, 60 F.3d 1359, 1362-63 (9th Cir. 1995) (ruling that applicant's eight-day trip to Mexico did not interrupt required continuous presence); Foroughi v. INS, 60 F.3d 570, 575-76 (9th Cir. 1995) (stating that an applicant does not lose eligibility to apply for discretionary relief when lawful permanent resident status ended with final deportation order after he had achieved seven years of continuous lawful residence); Rodriguez-Gutierrez v. INS, 59 F.3d 504, 509-10 (5th Cir. 1995) (holding that departures of one or two days each did not interrupt continuous physical presence, and that the BIA abused its discretion by not meaningfully addressing positive equities in denying relief); Avelar-Cruz v. INS, 58 F.3d 338, 341 (7th Cir. 1995) (noting that in accumulating seven years of continuous residence an applicant need not be a lawful permanent resident to be lawfully domiciled in this country); Biggs v. INS, 55 F.3d 1398, 1401-02 (9th Cir. 1995) (finding that IJ abused discretion in essentially ignoring evidence of serious illness and refusing to allow physician to testify by telephone); Delmundo v. INS, 43 F.3d 436, 438, 443 (9th Cir. 1994) (holding that BIA did not adequately consider hardship that applicant's deportation would cause to her family).

III. ASYLUM AND WITHHOLDING OF DEPORTATION: STATUTORY INTERPRETATION

A. *Background*

Before 1952, the United States had no mechanism in place for providing sanctuary to persons in fear of persecution, other than through special legislation or by designating the person as a parolee.[55] Since World War II, Congress has frequently amended the statutory provisions governing refugee status and asylum admissions.[56] The Refugee Act of 1980, the most significant recent legislation affecting refugees, incorporated U.N. convention standards in an effort to improve the handling of refugee admissions.[57] Despite these changes, however, the United States is still far from having a truly adequate and reliable system for processing the great number of immigration applications received each year.[58]

To qualify for either asylum or withholding of deportation, an applicant must first show that she qualifies as a refugee.[59] Under the statute, a refugee is a person outside the country of her nationality who is unwilling or unable to return to that country because of a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.[60] The applicant must show that a reasonable person in her position would fear persecution; only once this is established does the applicant's subjective fear become relevant.[61]

Applicants for refugee status and applicants for asylum must both satisfy the statutory criteria expressed in § 1101(a)(42), but annual quotas are placed only on refugee applications, not requests for asylum.[62] Gaining refugee

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55. BOSWELL & CARRASCO, *supra* note 3, at 143. A "parolee," as the term was originally used, described an alien who could be removed from a vessel pending the ultimate outcome of her case. *Id.* at 42. Statutory authority for parole is now contained in 8 U.S.C. § 1182(d)(5)(A) (1994).

56. ALEINIKOFF & MARTIN, *supra* note 13, at 694.

57. BOSWELL & CARRASCO, *supra* note 3, at 145.

58. ALEINIKOFF & MARTIN, *supra* note 13, at 694; *see infra* note 187.

59. 8 U.S.C. § 1158(a) (1994). Although applicants for refugee status, asylum, and withholding of deportation must all show varying degrees of persecution based on the same statutory language, each category faces different procedural hurdles. An application for refugee status differs from that of asylum because it is based, in part, on the applicant's location at the time of application. If the person is outside her home country, but not in the United States, the application must be for refugee status. If the person is within the United States, the application must be for asylum. BOSWELL & CARRASCO, *supra* note 3, at 146. Asylum differs from withholding of deportation by the degree of power that the Attorney General wields over the application. Asylum is available only as a discretionary grant by the Attorney General. 8 U.S.C. § 1158. Conversely, withholding of deportation is mandatory if an alien meets the statutory requirements. 8 U.S.C. § 1253(h) (1994).

60. 8 U.S.C. § 1101(a)(42) (1994).

61. Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990). The narrow scope of current immigration law governing refugee status has prompted intense litigation, especially where the applicant's homeland is experiencing internal armed conflict. For a discussion of the current trend toward disallowing generalized claims of fear of violence to satisfy the statutory persecution requirement, see Mark R. von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 SUFFOLK TRANSNAT'L L.J. 1 (1989).

62. BOSWELL & CARRASCO, *supra* note 3, at 145.

status does not therefore necessarily guarantee admission into the United States.[63]

Although both asylum and withholding of deportation prevent forcible return to a country where persecution is likely, important differences distinguish the two forms of relief.[64] The Attorney General is statutorily prohibited from deporting an alien to a country where her life or freedom would be at risk.[65] However, even if an alien meets the statutory requirements and establishes refugee status, the Attorney General can refuse to grant asylum and order deportation of the applicant.[66] As a practical matter, when faced with an application for both asylum and withholding of deportation, the decision-maker reviews the asylum request first.[67] If the applicant cannot meet the less stringent standard for a grant of asylum, the agency denies the entire application.[68]

At first glance, withholding of deportation seems a more favorable status for the alien than asylum; however, the scope of relief available under withholding of deportation is limited.[69] Asylum status confers upon the alien employment authorization,[70] the opportunity to include her spouse and minor children in the grant,[71] and the possibility of an adjustment of status to permanent resident.[72] Conversely, withholding of deportation does not provide for inclusion of the alien's family, and the alien's status cannot adjust to that of permanent resident.[73]

Tenth Circuit decisions during the past year demonstrate a reluctance to grant asylum absent clear evidence of an objective basis for petitioner's fear of persecution.[74] As the following cases show, many obstacles prevent

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63. *Id.* at 145-46.

64. Jividen, *supra* note 7, at 943. In practice, the INS treats all applications for asylum filed during exclusion or deportation proceedings as applications for withholding of deportation as well. 8 C.F.R. § 208.3(b) (1995).

65. The statute providing for withholding of deportation states: "The Attorney General *shall not deport* . . . an alien . . . if the Attorney General determines that such alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (emphasis added). This provision does not apply to aliens who have participated in the persecution of other groups, or been convicted of a "particularly serious crime." *Id.* § 1253(h)(2)(A)-(D). In addition, an alien is not eligible for withholding of deportation if the Attorney General finds "serious reasons" to believe the alien committed a "serious nonpolitical crime" in another country or represents a "danger to the security of the United States." *Id.*

66. The statute providing for asylum states that it may be granted "in the *discretion* of the Attorney General." *Id.* § 1158(a) (emphasis added).

67. Hadjimehdigholi v. INS, 49 F.3d 642, 646-47 (10th Cir. 1995).

68. *Id.*

69. Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 33-34 (1992).

70. *Id.* at 33.

71. *Id.*

72. Jividen, *supra* note 7, at 944.

73. Abriel, *supra* note 69, at 34.

74. As increasing numbers of asylum-seekers have come to the United States from nations such as Cuba, Haiti, Nicaragua, and El Salvador, the tension in American immigration law has become more apparent, and the treatment of these asylum-seekers by the United States has become highly controversial. ALEINIKOFF & MARTIN, *supra* note 13, at 690; *see also* Tonnas, *supra*

applicants from meeting their burden because: (1) claimed persecution based on subjective fear alone does not suffice;[75] (2) evidence of firm resettlement in a third country bars an application for asylum;[76] and (3) in one instance, the court even required a petitioner to carry the burden of negative proof of a foreign law.[77] In addition, the court remanded one case to the BIA because it incorrectly required an alien to establish a nationality of origin as a prerequisite to a grant of asylum.[78] Issues of credibility peppered many decisions, causing the Tenth Circuit to stray from what sometimes appeared to be a "rubber stamp" affirmation of administrative decisions. For example, in one case, the court required the BIA to state with specificity the basis for its determination that certain testimony was not credible.[79]

B. *Tenth Circuit Decisions*

1. *Hadjimehdigholi v. INS*[80]

a. *Facts*

Hadjimehdigholi served in the Iranian army from 1959 until 1986.[81] In 1963, as a tank commander under the Shah, he led one of the four tank units instrumental in quelling an uprising by supporters of the Ayatollah Khomeini.[82] He later received commendations for his part in putting down this revolt.[83] Hadjimehdigholi's military records reflected his activities against Khomeini supporters, but the new government failed to discover them when the Ayatollah came to power.[84] In his application for asylum and withholding of deportation, he claimed that it was only a matter of time before the Iranian government discovered his early military activities.[85] In support of his claimed fear of persecution, Hadjimehdigholi offered evidence of other military officers put to death because of their involvement in anti-Khomeini activities.[86]

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note 13, at 308 (discussing how the 1990 INA "highlights the right of the sovereign to exclude immigrants for any reason").

75. *Hadjimehdigholi*, 49 F.3d at 646.

76. Abdalla v. INS, 43 F.3d 1397, 1399 (10th Cir. 1994).

77. Sadeghi v. INS, 40 F.3d 1139, 1142-43 (10th Cir. 1994).

78. Dulane v. INS, 46 F.3d 988, 997, 999 (10th Cir. 1995).

79. *Id.* In addition, the court remanded at least one decision to the BIA because of its failure to articulate a reason for finding the petitioner's testimony not credible. Velis v. INS, No. 94-9526, 1995 WL 66536, at *3 (10th Cir. Feb. 13, 1995) (unpublished decision). Credibility determinations are critical to the process because often an applicant's own testimony is essentially the only evidence offered in support of the applicant's "well-founded fear of persecution." *See, e.g.*, Deborah Anker & Carolyn P. Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in* INS v. Cardoza-Fonesca, *in* 22ND ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 147 (PLI Litig. & Admin. Prac. Course Handbook Series No. 384, 1989).

80. 49 F.3d 642 (10th Cir. 1995).

81. *Hadjimehdigholi*, 49 F.3d at 644.

82. *Id.*

83. *Id.*

84. *Id.* at 644-45.

85. *Id.* at 645.

86. *Id.* at 648-49. Although the court was unpersuaded in this case, circumstantial evidence involving persons similarly situated can be used to show the required objective fear of persecu-

The IJ ruled that although Hadjimehdigholi had established a subjective fear of persecution upon his return to Iran, he did not prove the required objective fear of persecution.[87] Unconvinced that a reasonable person in the petitioner's position would fear persecution based on race, religion, nationality, political beliefs, or membership in a social group, the IJ denied Hadjimehdigholi's application.[88]

The BIA affirmed the IJ's decision, stating that Hadjimehdigholi's fear was based on speculation[89] and that a grant of asylum requires hard evidence of the likelihood of persecution.[90] The BIA pointed out that Hadjimehdigholi had served in the Iranian army for several years after the Ayatollah came to power, and that the Khomeini government did not persecute him, but rather promoted him several times and even granted him a pension upon his retirement.[91]

b. *Decision*

The Tenth Circuit ruled that the BIA applied the correct standard for determining asylum eligibility.[92] Although Hadjimehdigholi demonstrated a subjective fear, he failed to provide evidence supporting an objective fear of persecution on any of the enumerated statutory grounds.[93]

2. *Abdalla v. INS*[94]

a. *Facts*

Petitioner, a Sudanese national, lived for twenty years in the United Arab Emirates (UAE) under a "residence" visa/permit prior to entering the United States.[95] Denying Abdalla's application for asylum, the BIA held that under recent regulatory amendments to 8 C.F.R. § 208.14(c)(2),[96] an alien's firm resettlement in a third country prior to entering the United States precludes a grant of asylum based on persecution in his native country.[97] The firm resettlement in a third country presumably demonstrated that Abdalla found a safe haven in the UAE, which undermined an asylum claim based on feared persecution in his native country.[98]

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tion. 8 C.F.R. § 208.13(b)(2)(i)(A)-(B) (1995).

87. *Hadjimehdigholi*, 49 F.3d at 646.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 647.
92. *Id.* at 650.
93. *Id.* at 648.
94. 43 F.3d 1397 (10th Cir. 1994).
95. *Abdalla*, 43 F.3d at 1398-99.
96. 8 C.F.R. § 208.14(c)(2) (1995).
97. *Abdulla*, 43 F.3d at 1399.
98. Although immigration laws did not specifically contain provisions relating to firm resettlement until the 1980 Refugee Act, the concept has "long been" a part of United States immigration policy. *In re* Lam, 18 I. & N. Dec. 15, 19 (1981). However, an alien may be found not to have "firmly resettled" if the third country restricted the alien's rights significantly more than those of its own citizens. *See generally* Arthur C. Helton, *Reform of Political Asylum*, *in* 27TH

b. *Decision*

The Tenth Circuit upheld the BIA's evidentiary finding that Abdalla had firmly resettled in the UAE, and it therefore determined that Abdalla was precluded from a grant of asylum or withholding of deportation.[99]

3. *Sadeghi v. INS*[100]

a. *Facts*

Sadeghi, an Iranian national, sought asylum and withholding of deportation, asserting that the Iranian government was attempting to arrest him for purposes of persecution, rather than for legitimate criminal prosecution, because he counseled a fourteen-year-old student not to enter the military.[101] The IJ ruled that Sadeghi's fear was of criminal prosecution and not persecution based on race, religion, nationality, membership in a social group, or political opinion, as required under the statute.[102] Consequently, the request for asylum and withholding of deportation was denied.[103] The BIA affirmed the IJ's denial of asylum and withholding of deportation on the same grounds, but further found the petitioner's testimony not entirely credible.[104]

b. *Decision*

The Tenth Circuit agreed with the BIA that the Iranian government's act of seeking petitioner for arrest did not qualify as persecution based on statutory grounds.[105] Rather, the Iranian government was simply trying to prosecute a criminal act under its laws.[106] Furthermore, the court stated that Sadeghi was required to disprove the existence of a law that was the basis for his criminal act, which he did not do.[107]

In a dissenting opinion, Judge Kane argued that there was no evidence that Sadeghi had violated any law.[108] Furthermore, requiring Sadeghi to disprove the existence of the very law upon which the INS rested its case required him to go far beyond his own burden.[109]

ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 145 (PLI Litig. & Admin. Pract. Course Handbook Series No. 515, 1994) (discussing the asylum process in the United States).

99. *Abdalla*, 43 F.3d at 1399-1400.

100. 40 F.3d 1139 (10th Cir. 1994).

101. *Sadeghi*, 40 F.3d at 1140-41.

102. *Id.* at 1141.

103. *Id.*

104. *Id.* at 1142.

105. *Id.* at 1143.

106. *Id.* at 1142.

107. *Id.* at 1143. The majority concluded that requiring the government to produce evidence of a foreign law would run contrary to the requirement that the petitioner bear the burden of proof throughout the asylum hearing. *Id.*

108. *Id.* at 1145 (Kane, J., dissenting).

109. *Id.* at 1146. The dissent also pointed out a fact the majority did not address: Iran is a signatory to an international treaty which prohibits participating countries from permitting or requiring children to participate in wars. The Convention on the Rights of the Child, G.A. Res. 25,

4. *Dulane v. INS*[110]

a. *Facts*

Dulane entered the United States from Somalia on June 11, 1983, under a student visa.[111] Although he possessed a Somalian passport, Dulane was actually an Ethiopian national.[112] He filed asylum applications in September 1983 and June 1988, but received no response from the INS to either application.[113] The INS denied his third application for asylum, filed in November 1988.[114] After hearing the case, an IJ ruled that Dulane's deportability had been established, and that he had only provided evidence of general political upheaval in his native country, a ground insufficient to satisfy the refugee requirement for a grant of asylum.[115]

Dulane then filed a motion to reopen[116] with the BIA, alleging new facts in support of his application.[117] The BIA denied the motion, stating that even in light of the new facts Dulane failed to establish a prima facie case of eligibility for asylum.[118]

b. *Decision*

The Tenth Circuit ruled that the BIA had not sufficiently articulated its reasoning for denying the motion,[119] reversed the decision, and reviewed the

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art. 38, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1448, 1470 (1989). The United States also signed this treaty on February 16, 1995. Sandra L. Jamison, *Proposition 187: The United States May Be Jeopardizing Its International Treaty Obligations*, 24 DENV. J. INT'L L. & POL'Y 229, 233 (1995). And although Congress must still ratify this treaty before it becomes binding, the United States has demonstrated a clear intent to join the other 169 signatories worldwide. *Id.* If this Iranian law does, in fact, exist, its enforcement in this instance would amount to a direct "conflict with fundamental human rights under both the Geneva Convention and customary international law." *Sadeghi*, 40 F.3d at 1147 (Kane, J., dissenting).

110. 46 F.3d 988 (1995).

111. *Dulane*, 46 F.3d at 990.

112. *Id.* at 992. Petitioner explained that in order to flee Ethiopia, he had acquired a Somalian passport on the black market. When filling out his application, he was instructed by INS staff that his country of origin must match the passport in his possession. *Id.*

113. *Id.* at 990.

114. *Id.* at 990, 993.

115. *Id.*

116. A motion to reopen, available only in limited circumstances, requires the petitioner to meet a heavy burden of proof. Barbara Hines, *Asylum and Withholding of Deportation, in* IMMIGRATION & NATIONALITY LAW HANDBOOK 411, 429-30 (R. Patrick Murphy et al. eds., 1992). The motion must be consolidated with any petition requesting review of a final deportation order, 8 U.S.C. § 1105a(a)(6) (1994), and will not be granted unless the respondent offers material new evidence unavailable during prior proceedings. Yee, *supra* note 20, at 615. Filing a motion to reopen does not stay deportation proceedings, and the alien may be forced to leave the country while the motion is pending. *Id.* at 622.

117. *Dulane*, 46 F.3d at 993.

118. *Id.* at 994. The new evidence, which the Tenth Circuit referred to as "significant," included "an affidavit by . . . a long-time family friend, explaining Dulane's father's position in relation to the Ethiopian government, as a leader of the Ogaden secessionist movement . . . [and] an affidavit of Dulane outlining facts which he had learned since the hearing before the IJ from a friend who immigrated to Canada." *Id.* at 995.

119. As in cases involving credibility, discussed *supra* note 79, the Tenth Circuit demands enough specificity for an adequate review of the administrative decision. *See, e.g., Dulane*, 46 F.3d at 994 (scrutinizing the BIA's decision for "procedural regularity" and consideration of all

evidence presented by Dulane.[120] Upon examination, the court concluded that the BIA had failed to address whether Dulane had a well-founded fear of persecution if he returned to either Ethiopia or Somalia, and remanded for further proceedings on the issue.[121] Specifically, the Tenth Circuit ruled that the BIA erred in requiring Dulane to establish his nationality as a prerequisite to a granting of asylum. The statute lists no such requirement.[122]

C. *Analysis*

Both asylum and withholding of deportation decisions rely heavily on the quality of factual evidence the applicant puts forth, and can pose problems for reviewing courts. Since review is necessarily limited to evidence submitted to the agency during administrative proceedings, the circuit courts all demonstrate a heavy reliance on the agency's judgment in making factual determinations. As the decisions over the past year show, only when the agency's determination is clearly unsupported by evidence contained in the record will the Tenth Circuit disturb the administrative ruling.

D. *Other Circuits*

A variety of issues faced other circuit courts during the past year in their review of denials of asylum and withholding of deportation. On June 6, 1993, a Chinese ocean liner, the M/V *Golden Venture*, ran aground on a sandbar 100 yards from the shore in New York harbor.[123] Several of the Chinese immigrants aboard presented applications for asylum and withholding of deportation, claiming persecution based on China's family planning policy.[124] The circuit courts held uniformly that evidence of this national policy, on its own, failed to establish evidence of persecution necessary for asylum or withholding of deportation.[125]

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relevant factors).

120. *Dulane*, 46 F.3d at 996.

121. *Id.* at 999.

122. *Id.* at 997; 8 U.S.C. § 1101(a)(42)(A) (1994).

123. Approximately 300 illegal Chinese immigrants were aboard, each having paid approximately $35,000 to a Chinese gang for passage to the United States. Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1334 & n.1 (4th Cir. 1995). When the ship ran aground, hundreds of the immigrants attempted to swim to shore. *Id.* INS officials apprehended most of the would-be immigrants, but 10 died before reaching the shore. *Id.* News of the *Golden Venture* refugees was widely reported across the United States. *See generally* Malcolm Gladwell & Rachel E. Stassen-Berger, *Immigrant Boat Tragedy Ended 4-Month Odyssey*, CHI. SUN TIMES, June 8, 1993, at 10; *'Well-Coached' Chinese Refugees Await Hearings*, BALTIMORE SUN, June 8, 1993, at 12A.

124. The People's Republic of China imposes a "one couple, one child" policy on its citizens and requires forced abortion/sterilization of those who violate the policy. *Chen Zhou Chai*, 48 F.3d at 1334-35.

125. *Id.* at 1334, 1339-40. In *Chen Zhou Chai*, for example, the Fourth Circuit ruled that the applicant failed to show persecution for his political opinions despite his wife's forced abortion, his sterilization, and the government's imposition of a fine equal to 12 times his annual salary. *Id.*; *see also* Chang Lian Zheng v. INS, 44 F.3d 379 (5th Cir. 1995) (finding that the BIA's determination that applicants were not entitled to asylum because of China's population control policy was not arbitrary and capricious). Some commentators have accused the INS and the Clinton Administration of bias in asylum proceedings requested by the *Golden Venture* aliens. Robyn K. Pretlow, *Attorney General's Motion for a Protective Order Limiting the Scope of Discovery Depo-*

Numerous other decisions rendered by circuit courts over the past year articulated a variety of reasons for denying relief to the applicants.[126] However, a significant number were remanded by the circuit courts to the BIA for reconsideration.[127] In one case, the Second Circuit ordered payment of attorney's fees to the prevailing applicant when the court determined that the government's position in litigation was not substantially justified.[128]

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sitions Is Denied in Golden Venture *Litigation*, 9 GEO. IMMIGR. L.J. 221, 221 (1995).

126. Hamzehi v. INS, 64 F.3d 1240, 1243 (8th Cir. 1995) (holding that applicant failed to establish requisite "selective and severe" injuries on which to base a well-founded fear of persecution); Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995) (affirming denial of political asylum despite BIA's failure to consider the underlying circumstances of alien's conviction for first-degree manslaughter); Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (finding that evidence did not establish well-founded fear of persecution despite alien's having successfully shown existence of private discrimination against Coptic Christians); Adhiyappa v. INS, 58 F.3d 261, 263, 268 (6th Cir. 1995) (finding that applicant who provided names of student activists to the government was subject to persecution by separatists because of his activities, not his political opinions); Gomez-Mejia v. INS, 56 F.3d 700, 702 (5th Cir. 1995) (affirming that former soldier did not establish possibility of persecution in Nicaragua because he had never expressed his political opinion); Urukov v. INS, 55 F.3d 222, 228 (7th Cir. 1995) (holding that, although applicant demonstrated that members of his ethnic group were treated as "second-class citizens," he failed to establish that he had been "singled out" for persecution); Anton v. INS, 50 F.3d 469, 471-72 (7th Cir. 1995) (finding that applicant's inability to refute evidence that Romania's current government allows the free practice of religion precluded his showing of religious persecution); Bevc v. INS, 47 F.3d 907, 910 (7th Cir. 1995) (stating that although this "may not be an ideal time for any non-Serbians to be living in Serbia," general unrest does not satisfy the requirements for fear of persecution); Prasad v. INS, 47 F.3d 336, 339-40 (9th Cir. 1995) (ruling evidence that applicant received a jail-cell beating and that his home had been stoned by ethnic Fijians unconnected with the government was insufficient to establish persecution); Kazlauskas v. INS, 46 F.3d 902, 906 (9th Cir. 1995) (ruling that dramatic changes in applicant's country of origin since his departure prevented demonstration of well-founded fear of persecution); Ozdemir v. INS, 46 F.3d 6, 7-8 (5th Cir. 1994) (affirming the BIA's conclusion that even if applicant's testimony was credible, he had failed to establish past persecution based on one beating and two subsequent police questionings); Cuevas v. INS, 43 F.3d 1167, 1169, 1171 (7th Cir. 1995) (finding that harassment following applicants' refusal to sell land to individuals suspected of acting on behalf of the "armed wing of Communist Party of the Philippines" was not basis for well-founded fear of persecution); Jukic v. INS, 40 F.3d 747, 748, 750 (5th Cir. 1994) (holding that applicant's fear of persecution based on his having ignored a recall notice to serve in the Yugoslavian army did not warrant grant of asylum or withholding of deportation); Faddoul v. INS, 37 F.3d 185, 188-90 (5th Cir. 1994) (ruling that Saudi Arabia's failure to grant citizenship to individuals of non-Saudi heritage born within its borders did not reach level of individualized persecution because "statelessness alone does not warrant asylum").

127. Singh v. Ilchert, 63 F.3d 1501, 1504, 1510 (9th Cir. 1995) (holding that an applicant beaten by police for suspected military connections was not required to show nationwide persecution); Ramos-Vasquez v. INS, 57 F.3d 857, 863-64 (9th Cir. 1995) (remanding case due to the BIA's failure to consider testimony regarding treatment of military deserters or whether applicant's desertion based on "political neutrality" represented a political opinion); Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995) (stating that in denying the petitioner's application, the BIA wrongly assumed that fortitude in the face of danger demonstrated an absence of fear); Sanon v. INS, 52 F.3d 648, 652 (7th Cir. 1995) (criticizing the BIA's failure to demonstrate that it had actually considered the fact that the applicant escaped from Burkina Faso, in West Africa, only because of an error and was the only student to successfully immigrate to the United States); Makonnen v. INS, 44 F.3d 1378, 1384 (8th Cir. 1995) (rejecting the BIA's requirement that an Ethiopian national demonstrate persecution of all members of her ethnic group, especially since her grasp of English was such that she likely used the term "Oromo People" to mean "members of the Oromo Liberation Front," a political group); Cordero-Trejo v. INS, 40 F.3d 482, 492 (1st Cir. 1994) (expressing "grave doubts" that a reasonable fact-finder could decide the applicant, a Guatemalan national, was ineligible for asylum after disregarding 150 pages of information concerning 60 specific acts of persecution).

128. Sotelo-Aquije v. Slattery, 62 F.3d 54 (2d Cir. 1995).

IV. CONSTITUTIONAL IMPLICATIONS OF UNITED STATES IMMIGRATION PROCEDURES

A. *Background*

Congress first provided for expedited processing of immigrant visa applications submitted by those aliens who married United States citizens when it enacted the War Brides Act of 1945.[129] By marrying a United States citizen, an immigrant can obtain an immigrant visa,[130] obtain admission into the United States (if not already present), and apply for permanent residency after three years of residency.[131] The relative ease with which marriage conveys an immigrant visa, and subsequent permanent residency, creates a tension between the objective of preventing fraud and abuse and that of facilitating family unification.[132] In response to this concern, Congress complicated the procedure by enacting a two-year administrative process for deciding permanent residency applications based on marriage.[133]

The BIA in In re *Garcia*,[134] an interim decision, established a rule that "pending prima facie approvable visa petition[s] would be treated as though [they] were already approved for purposes of reopening."[135] Thus, a marriage between an alien and a United States citizen was considered prima facie valid under the *Garcia* analysis.[136] Following the enactment of the Immigration Marriage Fraud Amendments of 1986 (IMFA)[137] and the Immigration Act of 1990 (IA),[138] however, the BIA modified this holding in In re *Arthur*,[139] Under the *Arthur* rule, the INS presumes that marriages entered into after deportation proceedings have begun are fraudulent; hence, the BIA will reject motions to reopen while visa petitions are pending.[140] The following case examined the constitutionality of the *Arthur* rule.

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129. Act of Dec. 28, 1945, Pub. L. No. 271, 59 Stat 659 (1946).

130. 8 U.S.C. § 1151(b)(2)(A)(i) (1994).

131. *Id.* § 1430(a) (1994).

132. ALEINIKOFF & MARTIN, *supra* note 13, at 161.

133. *See* Mary L. Sfasciotti & Luanne B. Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 ILL. B.J. 644, 644-46 (1993) (suggesting that the IMFA creates an "administrative trap for the unwary").

134. 16 I. & N. Dec. 653 (1978).

135. *In re* Arthur, No. A-29575767, 1992 WL 195807, at *3 (B.I.A. May 5, 1992) (citing In re *Garcia*, 16 I. & N. Dec. at 653).

136. *See, e.g., id.*

137. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1989) (codified as amended at 8 U.S.C. § 1186(a) (1994)). The IMFA was enacted to deter fraud by aliens seeking to acquire lawful residency in the United States through marriage to a United States citizen or lawful permanent resident by requiring a two-year foreign residence requirement when the marriage was entered into *after* initiation of deportation proceedings by the INS. *See* Sfasciotti & Redmond, *supra* note 133, at 645-48 (describing the provisions of the 1986 IMFA).

138. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991). The IA exempted qualified applicants from the two-year foreign residence requirement and the bar to adjustment imposed by the 1986 amendments. *See* Sfasciotti & Redmond, *supra* note 133, at 648 (discussing the 1990 revisions to the IMFA).

139. No. A-29575767, 1992 WL 195807 (B.I.A. May 5, 1992).

140. In re *Arthur*, 1992 WL 195807, at *4.

B. Rezai v. INS[141]

1. Facts

Petitioner Saeed Rezai, an Iranian national, arrived in the United States on a student visa in 1986 after residing in Germany for seven years.[142] He graduated from college in 1990, but did not apply for asylum until eight months after the INS initiated deportation proceedings against him for overstaying his student visa.[143]

During the proceedings with the INS, Rezai claimed that while residing in Germany he participated actively in the Council of Iranian Royalists, an activity which would result in his persecution if the United States forced him to return to Iran.[144] The tribunal doubted the credibility of this assertion, however, because petitioner only raised this issue after the INS brought deportation proceedings against him, not in his original residency application.[145]

In addition to a claim for asylum, Rezai sought residency status through marriage to two different United States citizens.[146] The first marriage in 1988 ended in divorce in 1990.[147] In 1991, Rezai entered into a second marriage, six months after the IJ had issued a deportation order.[148] The INS rejected the subsequent application for an immigrant visa filed by his wife because the evidence showed that Rezai had entered into his first marriage fraudulently, for the purpose of receiving immigration benefits.[149] The BIA denied the motion to reopen and reconsider this ruling based on the *Arthur* rule.[150] Rezai appealed this decision, asserting that application of the *Arthur* rule was a violation of his First Amendment right to familial association.[151]

2. Decision

The Tenth Circuit rejected this constitutional attack, stating that the BIA's decision not to reopen the proceedings was motivated by a bona fide desire not to interfere with the role of the district director in adjudicating outstanding visa petitions.[152] The court held that the BIA's decision not to interfere with the district director's power to hear visa petitions did not violate petitioner's First Amendment rights.[153]

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141. 62 F.3d 1286 (10th Cir. 1995).
142. *Rezai*, 62 F.3d at 1287.
143. *Id.* at 1288.
144. *Id.* at 1287-88.
145. *Id.* at 1288.
146. *Id.*
147. *Id.*
148. *Id.* at 1288, 1290.
149. *Id.* at 1290.
150. *Id.* at 1290-91.
151. *Id.*
152. *Id.* The court stated that so long as the basis for the decision is facially legitimate, the *Arthur* rule does not violate the First Amendment. *Id.* Note that in denying this motion, the BIA did not foreclose all avenues of relief for petitioner. His visa application, filed by his new wife after their marriage, was still pending. *Id.*
153. *Id.* at 1292.

C. *Analysis*

Rejecting a visa application based on suspected fraudulent marriage is consistent with other forms of deportation relief that rely on the applicant's good moral character.[154] Because strong policy motivations support family unity, aliens can qualify for permanent residency rather expeditiously through marriage to a United States citizen.[155] This policy goal is tempered, however, by the government's fear that ignoring evidence of "sham marriages" may lead to a rash of visa applications based on marriages to United States citizens.[156]

D. *Other Circuits*

The Eleventh Circuit upheld a constitutional attack, on equal protection grounds, of a decision in which the IJ ruled an alien ineligible to file for a waiver of deportation based on his marriage to a lawful permanent resident and the fact that his child was a United States citizen.[157] The court held that the BIA had created two virtually identical classifications of aliens in waiver of deportation decisions—the only difference being that one class departed and returned prior to filing for the waiver.[158] As such, the BIA's interpretation was unconstitutional as applied.[159]

The Seventh Circuit decided two cases involving sham marriages entered into for the purpose of circumventing immigration laws. In *Yong Hong Guan v. INS*,[160] the Court of Appeals upheld a BIA deportation order based on a sham marriage, even though the applicant had subsequently remarried another United States citizen and given birth to a United States citizen.[161] The court cited "legitimate concerns regarding the administration of the immigration laws" in support of its conclusion.[162] *Ghaly v. INS*[163] involved another constitutional challenge, based on the Fifth Amendment procedural due process guarantee.[164] Ghaly charged that the INS's failure to provide him with a copy of his first wife's statement denying the validity of their marriage deprived him of the opportunity to address the evidence against him or adequately prepare a defense.[165] The Seventh Circuit rejected this argument, stating that the summary the agency provided sufficiently satisfied procedural due process.[166]

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154. *See supra* note 28 and accompanying text.

155. *See* Sfasciotti & Redmond, *supra* note 133, at 649. Some have criticized amendments to the statutory scheme providing for residency through marriage as an attempt to "micro-manage the problem of marriage fraud by an elaborate administrative process." *Id.*

156. In support of the proposed 1986 Marriage Fraud Amendments, the INS reported to Congress that a full 30% of marriage-based visa applications were fraudulant. Sfasciotti & Redmond, *supra* note 133, at 645. The basis for this study has subsequently been challenged. *Id.*

157. Po Shing Yeung v. INS, 76 F.3d 337 (11th Cir. 1995).

158. *Id.* at 339.

159. *Id.* at 344.

160. 49 F.3d 1259 (7th Cir. 1995).

161. *Yong Hong Guan*, 49 F.3d at 1260-61.

162. *Id.* at 1263.

163. 48 F.3d 1426 (7th Cir. 1995).

164. *Ghaly*, 48 F.3d at 1434.

165. *Id.*

166. *Id.* The *Arthur* rule has withstood attack in other circuit courts: Dielmann v. INS, 34

V. DEPORTATION OF PERSONS CONVICTED OF CRIMES

A. *Background*

Non-citizens[167] may be deported under U.S. immigration laws for crimes committed within the United States. The Immigration and Nationality Act provides the Attorney General with the authority to denaturalize, and even deport, undesirable citizens.[168] Two statutes under Title 8 of the U.S. Code compel the deportation of alien criminals: § 1251[169] and § 1253.[170] Section 1251 provides for deportation based on four criminal categories:[171] general crimes,[172] controlled substances violations,[173] certain firearms offenses,[174] and miscellaneous crimes."[175] Section 1253 precludes relief of withholding of deportation for an alien convicted of a particularly serious crime.[176] The provisions applicable to the Tenth Circuit cases decided over the past year concern general crimes (including aggravated felonies)[177] and controlled substances violations.[178]

Under § 1253, the Attorney General is instructed not to deport any person whose deportation would threaten that person's life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion.[179] This withholding of deportation does not apply, however, if the Attorney General determines that an alien convicted of a particularly serious crime "constitutes a danger to the community."[180] Although the Supreme Court has recognized deportation as a drastic measure equivalent to "banishment or exile,"[181] Congress has enacted several major pieces of legislation to respond to growing concern about the relationship between

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F.3d 851, 853 (9th Cir. 1994) (rejecting due process challenge and finding "no deficit, constitutional or otherwise" in the *Arthur* rule); Pritchett v. INS, 993 F.2d 80, 84 (5th Cir.) (upholding the *Arthur* rule as an expression of policy in an "area where the BIA carries expertise and has been bestowed with broad discretion"), *cert. denied*, 114 S. Ct. 345 (1993).

167. This includes lawful permanent residents, nonimmigrants, and undocumented aliens. Minsky et al., *supra* note 4, at 14.

168. 8 U.S.C. §§ 1251, 1451 (1994).

169. 8 U.S.C. § 1251(a)(2)(A)(i).

170. 8 U.S.C. § 1253(h)(2)(B) (1994).

171. *See generally* Robert Frank, *Criminal Defense of Foreign Nationals*, 167 N.J. LAW. 36 (1995) (discussing deportation of immigrants through criminal procedures).

172. 8 U.S.C. § 1251(a)(2)(A).

173. *Id.* § 1251(a)(2)(B).

174. *Id.* § 1251(a)(2)(C).

175. *Id.* § 1251(a)(2)(D).

176. *Id.* § 1253(h)(2)(B).

177. For purposes of § 1251(a)(2)(A)(iii), an aggravated felony encompasses conviction for a crime of violence where the "term of imprisonment imposed . . . is at least [5] years." 8 U.S.C. § 1101(a)(43)(F) (1994).

178. A violation of The Controlled Substances Act, 21 U.S.C. § 802 (1994), renders an alien deportable. Frank, *supra* note 171, at 37-38.

179. 8 U.S.C. § 1253(h)(1).

180. *Id.* § 1253(h)(2)(B).

181. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may result in "loss of both property and life, or of all that makes life worth living").

immigration and crime.[182] As a result of this recent legislation, the INS began its Alien Criminal Apprehension Program (ACAP), an aggressive pilot program created to expeditiously remove criminal aliens from the street, from the community, and from the United States.[183]

Even though conviction of a crime of requisite seriousness renders an alien deportable under United States immigration law, the citizens of the United States have an interest in requiring the fulfillment of the imposed prison sentence.[184] In fact, the statute providing for deportation of criminal aliens specifically mandates, "An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement."[185]

The INS has often come under attack for inefficiencies in the system causing cases to progress slowly.[186] Aliens convicted of qualifying crimes are released from prison into INS custody to await deportation proceedings.[187] Congress has articulated the goal, at least for aliens who commit aggravated felonies, of completing deportation proceedings prior to the end of their prison term.[188] However, the statute does not require prior completion of the proceedings.

B. *Tenth Circuit Decisions*

1. Aggravated Felony Conviction Bars a Withholding of Deportation

In *Al-Salehi v. INS*,[189] the Tenth Circuit decided an issue of first impression regarding whether an aggravated felony conviction, without an additional finding that the alien posed a danger to the community, precluded withholding of deportation under 8 U.S.C. § 1253(h)(2)(B).[190] Congress enacted § 1253 pursuant to Article 33 of the United Nations Protocol Relating to the Status of Refugees, which states in pertinent part:

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182. Those Acts are: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1989); the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1990); and the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991). Abriel, *supra* note 69, at 39-40.

183. *INS Increases Efforts Against Criminal Aliens*, 65 INTERPRETER RELEASES 955, 955 (1988).

184. Walford v. INS, 48 F.3d 477, 478 (10th Cir. 1995).

185. 8 U.S.C. § 1252(h) (1994).

186. *See* Kenneth Y. Geman, *Important New Asylum Regulations*, *in* 27TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 175 (PLI Litig. & Admin. Prac. Course Handbook Series No. 515, 1994). In 1993, 150,000 asylum applications were filed. Of these, only 36,000 were decided or administratively closed. The rest joined a backlog of nearly 400,000 cases. *Id.*

187. *See* Abriel, *supra* note 69, at 42. Aliens convicted of aggravated felonies are presumed deportable. Aliens awaiting deportation proceedings must remain in INS custody unless they lawfully entered the United States and can demonstrate they pose no threat to society and are likely to appear for any scheduled hearings. *Id.*

188. *See* 8 U.S.C. § 1252a(d)(1) (1994). As part of recent legislative reforms designed to streamline the deportation of convicted aliens, the Executive Office for Immigration Review (EOIR) enacted an institutional hearing program and began holding deportation hearings against alien criminals in state and federal prisons. *INS Increases Efforts Against Criminal Aliens*, *supra* note 183, at 956.

189. 47 F.3d 390 (10th Cir. 1995).

190. *Al-Salehi*, 47 F.3d at 396.

> 1. No Contracting State shall expel . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. *The benefit of the present provision may not, however, be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*[191]

For the decade following the Refugee Act of 1980, In re *Frentescu*[192] set the standards for interpreting this provision. In re *Frentescu* did not require an independent determination of the danger that the applicant posed to the community,[193] but required a case-by-case determination of whether the offense was a crime of requisite seriousness.[194]

In *Arauz v. Rivkind*,[195] the Eleventh Circuit ruled that conviction of a "particularly serious crime"[196] was the only evidence required for a showing of dangerousness to the community. The conviction made the alien per se statutorily ineligible for withholding of deportation.[197] Based on its interpretation that all applicants have a right to a hearing under 8 C.F.R. § 208,[198] however, the *Arauz* court held that an IJ, unlike a district director, must still consider evidence other than conviction of a serious offense before denying an application.[199] In response to *Arauz*, the Attorney General revised the regulations so that mandatory denial of asylum applications[200] would not require a hearing for aliens convicted of a "particularly serious crime."[201] The Immigration Act of 1990[202] further simplified the analysis by defining aggravated

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191. *See* Mosquera-Perez v. INS, 3 F.3d 553, 556-57 (1st Cir. 1993) (internal citations omitted) (emphasis added).

192. 18 I. & N. Dec. 244 (1982).

193. In re *Frentescu*, 18 I. & N. Dec. at 247. "Withholding of deportation as well as asylum is not available to an alien who, having been convicted by a final judgment of a 'particularly serious crime, constitutes a danger to the community of the United States.'" *Id.* at 245 (citing 8 C.F.R. § 208.8(f)(iv) (1995)).

194. *Id.* at 247.

195. 845 F.2d 271 (11th Cir. 1988) (superseded by regulation as stated in Narhns v. INS, 972 F.2d 657 (5th Cir. 1992)).

196. *Arauz*, 845 F.2d at 275 (citing Crespo-Gomez v. Richard, 780 F.2d 932, 934 (11th Cir. 1986)).

197. *Id.* (citing 8 U.S.C. § 1253(h)(2)(B)).

198. *Id.*

199. *Id.* at 276-77.

200. For the conditions required for mandatory denial, see 8 C.F.R. § 208.14(d) (1995).

201. *Id.* § 208.14(d)(1); *see also* Martins v. INS, 972 F.2d 657, 662 (5th Cir. 1992) (discussing the Attorney General's attempt to defeat the right to a judicial hearing created in the *Arauz* line of cases).

202. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

felonies as "particularly serious crimes."[203] The Tenth Circuit Court of Appeals addressed this issue for the first time in the following case.

a. Al-Salehi v. INS[204]

i. Facts

Al-Salehi pleaded guilty to possession with intent to distribute at least 500 grams of cocaine, a statutorily-defined aggravated felony.[205] When the INS initiated deportation proceedings, Al-Salehi applied for asylum and withholding of deportation.[206] The application included statements from the prosecuting attorney and the presiding judge strongly supporting his request because of his role in convicting a major drug dealer.[207] The IJ denied the application, holding that, according to 8 U.S.C. §§ 1158(d) and 1253(h)(2)(B), an aggravated felony conviction absolutely barred the relief sought.[208] Al-Salehi appealed only the withholding of deportation to the BIA, which upheld the IJ's decision.[209]

ii. Decision

The Tenth Circuit agreed with the statutory interpretation employed by both the IJ and the BIA, ruling that Al-Salehi's conviction of an enumerated aggravated felony conclusively disqualified him from seeking a withholding of deportation.[210] The circumstances surrounding the conviction, the court stated, cannot serve to mitigate the effect of the statute.[211]

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203. "For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime." 104 Stat. at 5053, 8 U.S.C. § 1253(h) (1994); *see* Garcia v. INS, 7 F.3d 1320, 1323 (7th Cir. 1993) (holding that Congress intended aggravated felony convictions to function as barriers to withholding of deportation); Mosquera-Perez v. INS, 3 F.3d 553, 555, 559 (1st Cir. 1993) (stating that conviction for cocaine possession with intent to distribute operates as an absolute bar to withholding deportation); Martins v. INS, 972 F.2d 657, 661 (5th Cir. 1992) (denying withholding of deportation on showing of conviction for conspiracy to possess heroin with intent to distribute).

204. 47 F.3d 390 (10th Cir. 1995).

205. *Al-Salehi*, 47 F.3d at 391; *see* 8 U.S.C. § 1101(a)(43)(B) (1994) (defining drug trafficking as an aggravated felony).

206. *Al-Salehi*, 47 F.3d at 391.

207. *Id.* The presiding judge noted that the evidence showed that petitioner had likely been "prodded" by a "badgering" DEA agent to arrange for the sale, and that the supplier "would never have been convicted without [petitioner's] assistance and testimony." *Id.* at 391 n.2 (quoting Record at 58, *Al-Salehi* (No. 94-9527)). The prosecuting attorney also wrote of petitioner's "minimal criminal involvement, sincere remorse, and substantial cooperation in the conviction of a 'significant cocaine supplier.'" *Id.* (quoting Record at 56-57, *Al-Salehi* (No. 94-9527)).

208. *Id.* at 391.

209. *Id.*

210. *Id.* at 396.

211. *Id.*

2. The Legal Effect of the Prison Sentence Determines Deportability Under § 1251

a. Nam Quoc Nguyen v. INS[212]

i. Facts

Nam, a native and citizen of Vietnam, entered the United States in 1989 and was granted permanent resident status in 1990.[213] In 1993, a Kansas court convicted Nam of aggravated assault and sentenced him to a prison term of three to eight years.[214] The INS subsequently charged Nam with deportability under § 1251.[215] Both the IJ and the BIA found Nam statutorily deportable under §§ 1251 and 1101.[216] The IJ ruled, and the BIA agreed, that the indeterminate sentence had the legal effect of at least a five year sentence, barring Nam from a withholding of deportation.[217]

ii. Decision

The Tenth Circuit agreed with the agency's decision.[218] The court held that where Congress has not specifically addressed an issue, an agency has broad discretion in applying the law, provided its interpretation constitutes a permissible construction of its enabling statute.[219] Furthermore, the statutory construction employed by the agency need not be the only one it could have permissibly adopted, or even the construction that the reviewing court would have applied.[220] The BIA did not err, therefore, in considering the maximum term imposed to define the conviction as an aggravated felony.[221]

3. Inmates Do Not Have Standing to Compel Their Own Deportation Under § 1253(h)

a. Walford v. INS[222]

i. Facts

An INS deportation order alerted prison officials that upon Walford's completion of his prison term, they were to transfer him to the INS for processing.[223] Walford claimed the deportation order violated his due process

212. 53 F.3d 310 (10th Cir. 1995).
213. *Nguyen*, 53 F.3d at 311.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).
220. *Id.* at 843 n.11.
221. *Nguyen*, 53 F.3d at 311.
222. 48 F.3d 477 (10th Cir. 1995).
223. *Walford*, 48 F.3d at 477.

rights.[224] Since the notice resulted in a higher security classification, Walford argued that it prevented him from participating in activities that could expedite his release from prison.[225] Walford requested relief in the form of either immediate deportation or a lifting of the deportation order during incarceration.[226] The district court treated the habeas corpus application as an attack on the merits of the final deportation order and dismissed the motion for lack of jurisdiction.[227]

ii. Decision

The Tenth Circuit treated Walford's petition as both a writ of habeas corpus[228] and a writ of mandamus.[229] The Tenth Circuit upheld the district court's denial of the writ of mandamus, agreeing that an inmate cannot compel deportation proceedings.[230] An administrative decision by the INS to delay deportation proceedings pending an inmate's release is immune from judicial review.[231]

As for the habeas petition, Walford denied that the petition attacked the merits of the final deportation order; he alleged, rather, that the existence of the order violated his due process rights.[232] The Tenth Circuit ruled that absent an attack on the merits of the order, the petition did not constitute a due process violation.[233] The detainer itself clearly instructed prison officials that its existence did not limit their decisions affecting "the offender's classification, work and quarters assignments or other treatment which he would otherwise receive."[234]

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224. *Id.* at 477-78.

225. *Id.* at 477.

226. *Id.* at 477-78.

227. *Id.* at 478. Attacks on the merits of final deportation orders must be brought directly before the circuit court of appeals, which serves as the forum for judicial review of agency decisions. 8 U.S.C. § 1105a(a)(2) (1994).

228. *Walford*, 48 F.3d at 477. 28 U.S.C. § 2241 (1994) authorizes issuance of writs of habeas corpus.

229. *Walford*, 48 F.3d at 477. 28 U.S.C. § 1361 (1994) pertains to writs of mandamus.

230. *Walford*, 48 F.3d at 478.

231. *See, e.g., Chevron*, 467 U.S. at 843-45 (stating that courts may not substitute their judgment for an agency's reasonable interpretation). Appellate courts from other circuits have ruled similarly on writs of mandamus. *See* Rodriguez v. INS, 994 F.2d 110, 111 (2d Cir. 1993) (holding that an alien may not be deported before completing term of imprisonment); Perez v. INS, 979 F.2d 299, 301 (3d Cir. 1992) (stating that the INS cannot be compelled to deport a prisoner).

232. *Walford*, 48 F.3d at 478.

233. *Id.*; *accord* McDonald v. New Mexico Parole Bd., 955 F.2d 631, 635 (10th Cir. 1991) (dismissing writ of habeas corpus upon finding that an unexecuted detainer warrant does not deny any constitutional rights, even though petitioner claimed it prevented him from taking advantage of prison programs).

234. *Walford*, 48 F.3d at 478.

b. Hernandez-Avalos v. INS[235]

i. Facts

Four aliens convicted of deportable offenses sought a writ of mandamus compelling the INS to initiate deportation proceedings against them.[236] The district court dismissed the claims for lack of jurisdiction, stating that no law applied to the case because the Immigration Act itself did not contain any criteria for evaluating the government's actions, and no relevant regulations existed.[237]

ii. Decision

The Tenth Circuit ruled that, at a minimum, no private right of action exists under § 1252(i).[238] Additionally, since legislative history indicated congressional intent that no one would be able to satisfy the "zone of interests" test in a suit to enforce § 1252(i), "no would-be plaintiff has standing to bring suit, either directly under the statute or by way of the Mandamus Act."[239]

As an alternative basis for denying the petitioners' relief, the court stated that the "zone of interests" test under the Administrative Procedure Act (APA) governs standing to seek mandamus.[240] Both the APA and the Mandamus Act compel "wrongfully withheld agency action,"[241] with the analysis focusing on whether the defendant agency has failed to discharge a duty owed to plaintiff.[242] The question, then, was whether these plaintiffs satisfied the zone of interests test, and should therefore be heard,[243] regardless of whom the statute was enacted to benefit.[244] The court determined that Congress did not

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235. 50 F.3d 842 (10th Cir.), *cert. denied*, 116 S. Ct. 92 (1995).

236. *Hernandez-Avalos*, 50 F.3d at 843.

237. *Id.* The underlying statute, 8 U.S.C. § 1252(i) (1994), states only that deportation should begin "expeditiously" after conviction.

238. *Hernandez-Avalos*, 50 F.3d at 844.

239. *Id.*

240. *Id.*

241. *Id.* at 845 n.7.

242. Resilient Tile Layers Local Union No. 419 v. Brown, 656 F.2d 564, 566-67 (10th Cir. 1981).

243. *Hernandez-Avalos*, 50 F.3d at 847.

244. Id. at 847-48. The court stated that the legislative history behind § 1252(i) makes it clear that the statute was enacted to benefit the taxpayer by avoiding the costs associated with maintaining deportable criminal aliens:

> These people are not being deported; the expedited procedure is not working; the local and State jails are jammed up, the Immigration and Naturalization Service has no incentive to give priority to these because the burden of inaction falls on State and local governments and not on the Federal system.

Id. at 848 n.12 (quoting 132 CONG. REC. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. MacKay)). The court quoted Senator Alan Simpson:

> Not only will the Federal prison system benefit from an enhanced program to deport aliens in its custody, but even . . . greater benefits can be anticipated at the State and local level, if the program can reach that far. It may well be that a supplemental request may be necessary to provide for additional personnel and resources to expedite these deportations. However, any such increases would be but a small fraction of the cost to

intend to create a duty to plaintiffs by enactment of the statute, nor that incarcerated aliens would enforce the statute.[245]

C. *Analysis*

American citizenship is a precious right which some fear recent developments in United States immigration laws will dangerously erode.[246] Competing policy considerations come into play when examining the issue of alien criminals. Although United States citizens have an interest in seeing justice served through incarceration of the alien criminal, imprisonment is expensive and places an ever-increasing burden on the already overcrowded prison system.[247]

Immediate deportation of alien criminals also presents a host of problems. In addition to negating the deterrence effect of incarceration, many deported criminals may simply re-enter the United States. These returning criminal aliens have the potential to further impact negatively on society, financially or otherwise.

The current strategy of conducting deportation proceedings after the term of the alien's incarceration, although resulting in longer periods of detention, represents the most prudent approach. The valid interests of the United States in maintaining the highest level of social order should subordinate any frustration experienced by aliens awaiting the slow process of deportation.

D. *Other Circuits*

When faced with aliens convicted of aggravated felonies, other circuits have consistently ruled that a bar of discretionary relief from deportation does not require a separate finding of dangerousness.[248] In a case of first impression, the Eleventh Circuit ruled that the aggravated felony conviction language contained in § 1251 referred to all aggravated felonies, regardless of the

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provide prison and jail space for these individuals.

Id. (quoting 132 CONG. REC. S16,908 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson)).

245. *Id.* at 847-48.

246. *See generally* Jeffrey A. Evans, *Denaturalization/Deportation: What Standards for Withdrawing the Welcome Mat?*, 23 U.S.F. L. REV. 415 (1989) (discussing the denaturalization and deportation of "undesirable citizens" accused of committing serious crimes prior to entering the United States).

247. *See* Walford v. INS, 48 F.3d 477, 478 (1995) (stating that Congress considered the deterrent effect of prison sentences, and the savings that could be realized by deporting aliens without imprisoning them first, when enacting 8 U.S.C. § 1252(h), which requires an alien criminal to serve the entire prison sentence); *see also New York Deports 86 Illegal Aliens*, PATRIOT LEDGER, Aug. 29, 1995, at 02 (reporting that criminal aliens comprise approximately 5% of the state's "costly and overcrowded prison system").

248. *See* Kofa v. INS, 60 F.3d 1084, 1088-89, 1091 (4th Cir. 1995) (including survey of five other circuits not requiring separate determination); *see also* Ramsey v. INS, 55 F.3d 580, 584 (11th Cir. 1995) (holding that lewd assault was a "crime of violence" constituting an aggravated felony for purposes of deportation); Samaniego-Meraz v. INS, 53 F.3d 254, 257 (9th Cir. 1995) (ruling that aggravated felony bar pre-dates enactment of Anti-Drug Abuse Act); Gjonaj v. INS, 47 F.3d 824, 826 (6th Cir. 1995) (stating that assault with firearm with intent to murder qualifies as a "particularly serious crime" to bar relief from deportation).

date.[249] Two other circuits decided cases involving the moral turpitude provision of § 1251, ruling that second-degree malicious mischief is not a crime of moral turpitude,[250] but that first-degree incest is.[251]

In a case involving a writ of habeas corpus, the Ninth Circuit, reversing a view articulated in a previous decision,[252] ruled that incarcerated aliens do not have standing to compel expedited deportation hearings.[253] In another habeas action, the Ninth Circuit held that an excludable alien has no private right of action to assert procedural due process rights concerning admission or exclusion;[254] rather, the Attorney General has the authority to detain an excludable alien indefinitely if undeportable.[255]

CONCLUSION

At first glance, many of the Tenth Circuit's immigration rulings seem somewhat harsh. Stories of political upheaval, warfare, and tragic economic hardship strike a sympathetic chord in most. Analyzed in light of the legislative history and congressional intent underlying current immigration policy, however, it becomes apparent that this narrow construction remained true to the letter of the law during the 1994-95 survey period.

The United States, for very practical reasons, can only afford to welcome aliens whom society deems beneficial and, hence, "worthy" of citizenship. Immigration laws provide a structure for determining this worth based on established public policy goals. The agencies and courts, on the other hand, provide the mechanism which tests these goals. Combined, the structure of these laws and enforcement mechanisms theoretically ensure that each applicant is evaluated in light of both practical and idealistic goals.

Kathleen M. Kelly

249. Asencio v. INS, 37 F.3d 614, 617 (11th Cir. 1994).
250. Rodriguez-Herrera v. INS, 52 F.3d 238, 240 (9th Cir. 1995).
251. Gonzalez-Alvarado v. INS, 39 F.3d 245, 246-47 (9th Cir. 1994).
252. Garcia v. Taylor, 40 F.3d 299, 304 (9th Cir. 1994), *superseded by statute as stated in* Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995).
253. Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995).
254. Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449 (9th Cir.), *cert. denied*, 116 S. Ct. 479 (1995).
255. *Id.* at 1444.

INDIAN LAW

INTRODUCTION

The Tenth Circuit recently decided several cases on the issue of tribal court jurisdiction over non-Indians. Following a brief general discussion of the history of federal Indian policy, this Survey will explore the Tenth Circuit's latest decisions regarding the tribal abstention doctrine and the Indian Child Welfare Act (ICWA).[1]

In *Worcester v. Georgia*,[2] the Supreme Court recognized that Indian tribes exist "as distinct political communities, having territorial boundaries, within which their authority is exclusive."[3] The decision in *Worcester*, however, did not stop the federal government from attempting to assimilate Indians into white society.[4] Such attempts blurred the territorial boundaries between state and tribal authority.[5]

Congress gradually has abandoned its assimilation policies in favor of self-determination.[6] In the past, the laws, policies, and treaties of the United States have compelled the integration of Indians and non-Indians. The policy of self-determination represents a departure from tradition: an attempt to recognize the rights of Indians, and in some instances, to redress the wrongs inflicted on Indians over the centuries. As a result of self-determination, federal Indian laws, policies, and treaties often separate Indians from non-Indians.

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1. 25 U.S.C. §§ 1901-1963 (1994).
2. 31 U.S. (6 Pet.) 515 (1832).
3. *Worcester*, 31 U.S. (6 Pet.) at 557.
4. *See* Indian General Allotment (Dawes) Act, ch. 119, §§ 1-11, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1994)). "The ultimate purpose of the Dawes Act was to break up tribal governments, abolish Indian reservations, and force Indians to assimilate into white society." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 5 (Norman Dorsen ed., 2d ed. 1992). The Dawes Act created a checkerboard effect with respect to land within a reservation, and non-Indians were allowed to purchase reservation land. *Id.* The changes that occurred as a result of the Dawes Act continue to affect questions of tribal authority.

In 1934, Congress shifted gears and passed the Indian Reorganization Act (IRA), ch. 576, §§ 1-19, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 461-479 (1994)). The IRA prohibited further allotment of Indian land, added lands to existing reservations, created new reservations, and restored tribal ownership to unoccupied "surplus" land. The act encouraged tribes to self-govern. *See* PEVAR, *supra*, at 6-7. In 1953, Congress again changed Indian policy. In an effort to reduce federal spending and responsibility, Congress adopted a policy of "termination" with respect to Indian tribes. Termination effectively abolished both tribal government and landholdings. Because of the ensuing drastic effects on Indian culture, some scholars compare termination to "genocide." *Id.* at 57. During termination, Congress granted jurisdiction over Indians tribes to several designated states and provided an option for the rest of the states to assume jurisdiction at a later time. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1994)); *see also* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 49 (1987) (discussing case law limitations on congressional jurisdiction under the act). During the 1960s and early 1970s, the Kennedy, Johnson, and Nixon administrations worked with Congress to end the "termination era" to promote Indian self-determination. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 252 (3d ed. 1993).
5. *See supra* note 4.
6. *See* GETCHES ET AL., *supra* note 4, at 252.

Separation does not equal isolation, however, and controversies continue to arise between Indians and non-Indians as well as between federal and local governments.[7]

I. JURISDICTION

A. *Tribal Abstention Doctrine*[8]

1. Background

In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,[9] the Supreme Court required a federal court to "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."[10] Tribal courts have the first opportunity to determine jurisdiction before federal courts may examine the issue.[11] The Court articulated exceptions to this abstention doctrine where: (1) tribal jurisdiction is motivated by bad faith; (2) the action patently violates express jurisdictional prohibitions; or (3) exhaustion would be futile.[12] Although federal

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7. Nowhere is this fact more evident than in the recent Supreme Court decision, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996). *Seminole Tribe* resolved a circuit split between a Tenth Circuit case, Ponca Tribe v. Oklahoma, 37 F.3d 142 (10th Cir. 1994), an Eleventh Circuit case, Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996), and a congressional interpretation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994).

Congress had enacted IGRA in reaction to California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), in which the Court concluded that, so long as a state allowed any gambling, it could not regulate tribal gaming. *See* Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 56 (1995). IGRA attempts to promote cooperation between tribal and state governments by providing a regulatory framework for gaming activities on Indian lands while balancing tribal, state, and federal interests. *See id.* In *Ponca Tribe*, the Tenth Circuit upheld the IGRA, reasoning that the U.S. Constitution's Indian Commerce Clause empowers Congress to bring states into court. *Ponca Tribe*, 37 F.3d at 1427. In *Seminole Tribe*, however, the Eleventh Circuit held that Congress lacked the authority to abrogate Eleventh Amendment state immunity. *Seminole Tribe*, 11 F.3d at 1028. The United States Supreme Court sided with the Eleventh Circuit, holding that Congress may not force a state governor to enter into good faith negotiations with a tribe. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (referring to the doctrine announced in *Ex Parte* Young, 209 U.S. 123 (1908), which allowed a federal court to enjoin the state Attorney General from performing an unconstitutional discretionary act, regardless of whether the state consented to the suit).

8. The tribal abstention doctrine requires federal courts to abstain from hearing a matter until a tribal court has first had the opportunity to consider the matter. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985). Challengers must exhaust all tribal remedies before a federal court may review a challenge to a tribal court ruling. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987).

9. 471 U.S. 845 (1985).

10. *National Farmers*, 471 U.S. at 857 (footnotes omitted).

11. *Id.* at 856-57; *see* Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 336-44 (1989) (discussing the factors that a tribal court must consider in determining its jurisdiction). Two years after *National Farmers*, the Court in *LaPlante* decided that "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *LaPlante*, 480 U.S. at 16 (quoting *National Farmers*, 471 U.S. at 857).

12. *National Farmers*, 471 U.S. at 856 n.21.

courts may hear a challenge to tribal jurisdiction,[13] a challenger must generally exhaust tribal remedies before raising the issue in federal court.[14]

A tribe's authority to exercise jurisdiction within its territory is subject to any limitations that Congress may seek to impose.[15] For example, tribes cannot exert criminal jurisdiction over non-Indians.[16] Federal jurisdictional limitations, however, do not extend to civil matters where the conduct in question involves Indians, reservation land, or trust land that was once within the boundaries of a reservation.[17] A non-Indian who challenges the authority of a tribe to exert jurisdiction usually claims either that the action did not occur in Indian country,[18] or that the tribe lacks sufficient interest in the matter to exert jurisdiction.[19] The term "Indian country" encompasses not only the formal reservation, but Indian allotments and dependent Indian communities as well.[20] A tribe may exercise civil authority over Indian country as defined by 18 U.S.C. § 1151.[21] The boundaries of Indian Country determine the extent

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13. *Id.* at 855-57.

14. *Id.* at 856-57. The tribal abstention doctrine is based on the congressional policy of "supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856 (footnotes omitted).

15. United States v. Wheeler, 435 U.S. 313, 323 (1978) (stating that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance"); *see* PEVAR, *supra* note 4, at 154; Pommersheim, *supra* note 11, at 335-36 (discussing the extent of tribal legislative and regulatory authority over non-Indians). *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (Rennard Strickland et al. eds., 1982 ed.) (discussing the history of United States policy toward Indians).

16. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978). The exercise of tribal jurisdiction in criminal matters does not extend to non-Indians unless Congress gives that power to the tribe. *Id.* at 208. *But see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (holding that acts passed by Congress "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

17. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-53 (1980); PEVAR, *supra* note 4, at 155-56; Pommersheim, *supra* note 11, at 343-44 ("Does a tribal court have civil jurisdiction over a civil transaction that took place outside the boundaries of the diminished reservation but on trust land within the original borders of the reservation? The apparent answer is yes.").

18. "Indian country" refers to:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994). Section 1151 on its face defines "Indian country" solely for the purpose of criminal jurisdiction. The Court, however, has held that § 1151 applies to questions of civil jurisdiction as well. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Difficulties arise in determination of what constitutes "Indian country," due in part to the inconsistent treatment of Indians by Congress. *See supra* note 4.

19. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981). "[A] tribe may assert its authority if the non-Indian activity threatens or has a direct effect on the political integrity, economic security, or health and welfare of the tribe or if the activity is the result of a consensual agreement, such as a business contract, with the tribe." PEVAR, *supra* note 4, at 156.

20. *See supra* note 18.

21. *DeCoteau*, 420 U.S. at 427 n.2.

of tribal court jurisdiction, tribal legislative and regulatory authority, and the applicability of the tribal abstention doctrine.

2. *Pittsburg & Midway Coal Mining Co. v. Watchman*[22]

a. *Facts*

The South McKinley Mine lies outside the Navajo Reservation (Reservation) and adjacent to a companion mine located within the Reservation boundary. Five interests hold shares in the surface title to the mine shaft.[23] Three interests have an ownership interest in the subsurface coal estate.[24] The Pittsburg & Midway Coal Mining Company (P&M) leased the right to conduct mining operations from these titleholders.[25]

The Navajo Nation imposed a 5% levy on source gains[26] in the form of a Business Activities Tax.[27] Under protest, P&M paid this tax, and, in 1986, filed an action seeking an injunction and a declaratory judgment that the Navajo Nation (the Nation) lacked jurisdiction to impose this tax.[28] The Nation argued that the federal court should abstain from exercising its jurisdiction due to the tribal abstention doctrine and should allow the tribal court to hear the matter first.[29] Finding that the mine was not on the Reservation, the district court refused to defer to the tribal court.[30]

The Nation offered two theories in support of its claim for federal court abstention. It claimed that the mine was located on part of the Reservation, and, in the alternative, that the area in question included Indian Country as defined by 18 U.S.C. § 1151.[31] The Tenth Circuit affirmed the district court's finding that the mine did not lie on the Reservation.[32] Since the district court failed to determine if the mine's location involved Indian Country, however, the Tenth Circuit remanded the case to address this issue.[33]

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22. 52 F.3d 1531 (10th Cir. 1995).

23. *Pittsburg & Midway Coal*, 52 F.3d at 1534. The United States holds 47% in trust for individual Navajo allotees, non-Indian private parties hold 40%, the Navajo Nation holds 7%, the United States holds 5% as public lands, and New Mexico holds title to less than 0.5%. *Id.*

24. *Id.* The United States holds title to 52%, Cerillos Land Company holds title to 47%, and New Mexico holds title to less than 0.5%. *Id.*

25. *Id.*

26. "Source gains of a Branch are the gross receipts of that Branch from the sale, either within or without the Navajo Nation, of Navajo goods or services . . . ." Navajo Tribal Code, 24 § 404 (2). "Branch" means any person engaged in trade, commerce, manufacture, power production, or any other productive activity whether for profit or not, wholly or in part within the Navajo Nation." Navajo Tribal Code, 24 § 404 (1).

27. *Pittsburg & Midway Coal*, 52 F.3d at 1535. A Business Activity Tax is a tax "imposed on the source-gains of a Branch at the rate established . . . . The tax due for a period is computed by multiplying the source-gains of the Branch for the period by the tax rate." Navajo Tribal Code, 24 § 401; *see also supra* note 26 (defining source-gains).

28. *Pittsburg & Midway Coal*, 52 F.3d at 1534. *See generally* Pommersheim, *supra* note 11, at 347 (discussing tribal taxation of non-Indians).

29. *Pittsburg & Midway Coal*, 52 F.3d at 1534.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

On remand, the district court held that the area in question did not include Indian Country,[34] and refused to dismiss P&M's complaint.[35] The Nation appealed again, raising three arguments: (1) the district court should abstain from hearing the matter until P&M exhausts its tribal remedies because the three exceptions to the tribal abstention doctrine are inapplicable; (2) the district court erred in concluding that no part of the mine site was within a trust allotment; and (3) the district court chose the wrong "community of reference" for its dependent Indian community analysis.[36]

b. *Decision*

The Tenth Circuit found that at least a portion of the mine existed in Indian Country due to the state's trust holdings of individual Navajo allotments.[37] The court held, however, that the record was insufficiently developed to determine whether the mine's location included a dependent Indian community.[38] This determination was crucial: the Navajo's interests would not be sufficient to invoke the abstention doctrine unless a dependent Indian community existed in addition to individual allotments. Therefore, the court reversed and remanded the matter again with new criteria for the district court to consider as to whether the mine and surrounding area constituted a dependent Indian community.[39]

P&M argued that the Nation's attempt to tax the mining company violated express jurisdictional prohibitions because 18 U.S.C § 1151 did not confer civil jurisdiction over Indian country to the Nation.[40] The Tenth Circuit disagreed, holding that § 1151 is "an express Congressional delegation of civil

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34. *Id.*

35. *Id.*

36. *Id.* at 1535-36. Community of reference refers to the fact that in order to determine if a dependent community exists, the court must first ascertain what community to include in its analysis.

37. *Id.* at 1541. "[T]he United States holds 47% of the mine site area in trust for individual Navajo allotees. These Navajo trust allotments are Indian country by definition under 18 U.S.C. § 1151(c)." *Id.*

38. *Id.*

39. *Id.* The court expanded the "community of reference" from that which the district court had used in its initial determination. The Tenth Circuit also adopted the Eighth Circuit's four-prong test for determining what constitutes a dependent Indian community:

> (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area"; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality"; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Id. at 1545 (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (citations omitted)).

40. *Id.* at 1536. P&M dismissed as dicta the Supreme Court precedent set forth in DeCoteau v. District County Court, 420 U.S. 425, 428 n.2 (1975), which recognized that § 1151 generally applies to civil jurisdiction as well as criminal jurisdiction. *Pittsburg & Midway Coal*, 52 F.3d at 1540 n.10.

authority over Indian country to the tribes,"[41] which includes the authority to tax.[42]

3. Analysis

Pittsburg & Midway Coal presents a question of first impression for the Tenth Circuit regarding the appropriate "community of reference" for the purpose of defining a dependent Indian community within Indian Country.[43] Jurisdiction turns on whether or not the mine is located within a dependent Indian community. The question then becomes who determines the "community of reference" for the purpose of jurisdiction.

As discussed above, the statutory definition of "Indian country" includes Indian allotments.[44] Here, both parties agreed that a portion of the mine lies on Indian allotments.[45] Because the court held that the Nation has authority to tax mining activities in Indian country, the Business Activities Tax did not violate any express jurisdictional prohibitions.[46] Thus, the Tenth Circuit decided that the tax did not fit the "express jurisdictional prohibitions" exception to the abstention doctrine articulated in *National Farmers*. P&M, therefore, had no grounds for escaping tribal court jurisdiction. The court, however, upheld the district court finding that the Indian allotments alone provided an insufficient basis for removal.[47] In order for the tribal court to exercise jurisdiction, the mine site and surrounding community must be considered Indian country: a dependent Indian community.[48] An initial determination that a dependent Indian community exists is a prerequisite to the exercise of tribal court jurisdiction.

National Farmers indicates that the tribal court should have the first opportunity to make initial jurisdiction determinations.[49] The Tenth Circuit, in *Pittsburg & Midway Coal*, acknowledged that a federal court should not rule on tribal court jurisdiction until tribal remedies are exhausted.[50] In *Pittsburg & Midway Coal*, the Tenth Circuit could have directed the district court to abstain until the tribal court determined jurisdiction. Applying the Tenth Circuit's test for a dependent Indian community,[51] the tribal court could have made the initial determination regarding its jurisdiction. Had P&M challenged the tribal court's decision, it would have had the benefit of the federal district court's review,[52] as *National Farmers* provides federal review of tribal court

41. *Pittsburg & Midway Coal*, 52 F.3d at 1541.
42. *Id.*
43. *Id.* at 1543; *see supra* note 18.
44. *See supra* note 18.
45. *Pittsburg & Midway Coal*, 52 F.3d at 1542.
46. *Id.* at 1538.
47. *Id.* at 1542. The Tenth Circuit noted that if the mine were located entirely on Navajo trust allotments, or if only the 47% of the mine within the allotments were in controversy, the abstention doctrine would apply without question. *Id.* at 1542 n.11.
48. *Id.* at 1542.
49. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).
50. *Pittsburg & Midway Coal*, 52 F.3d at 1537.
51. *See supra* note 39.
52. *National Farmers*, 471 U.S. at 857 (concluding "that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaus-

jurisdiction after exhaustion in tribal court.[53] The Tenth Circuit, however, did not direct the district court to abstain. Instead, the Tenth Circuit directed the district court to decide whether the mine lies in Indian Country.[54] The court maintains that the remand to the district court is consistent with *National Farmers* and its analysis of the tribal abstention doctrine.[55] This is not the case. The remand is inconsistent with *National Farmers* and contradicts the Tenth Circuit's stance on initial questions of tribal court jurisdiction.

If the district court finds a dependent Indian community, the tribal court may exercise jurisdiction. The Tenth Circuit allows the federal court to review tribal court jurisdiction before the tribal court has exercised jurisdiction.[56] By contrast, *National Farmers* provides for federal court review after the tribal court has exercised jurisdiction. In this case, if the tribal court should acquire jurisdiction, then P&M's right to subsequent federal court review of the tribal court's exercise of jurisdiction[57] should be precluded by the doctrine of *res judicata*.[58]

When the Supreme Court set forth the tribal abstention doctrine in *National Farmers*, the Court failed to direct the lower courts as to its proper scope. Thus, federal courts apply the tribal abstention doctrine inconsistently.[59] In *Pittsburg & Midway Coal*, the court failed to explain why the tribal court should *not* be allowed to determine the existence of Indian country for jurisdictional purposes. Absent such an explanation, the Tenth Circuit's approach either: (1) calls into question the ability of tribal courts to examine questions of jurisdiction without bias or prejudice; or (2) suggests that tribal courts lack the competence to follow directions. A more definitive line between federal and tribal court jurisdiction would resolve the inconsistency in application of *National Farmers*.[60]

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tion is required before such a claim may be entertained by a federal court"). In *National Farmers*, the Court implied that exhaustion of tribal remedies would "legitimize" the tribal courts. *See id.* at 856-57. This, in turn, would allow tribal courts to explain the reasoning behind their actions. *Id.* Subsequently, on review, federal courts would have the benefit of the tribal court's expertise as well as a comprehensive record. *Id.*; *see also* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1105 (1995) (analyzing the development of the tribal abstention doctrine).

53. *National Farmers*, 471 U.S. at 856-57.

54. *Pittsburg & Midway Coal*, 52 F.3d at 1541.

55. *Id.* at 1539 n.8. "We do not believe our final disposition of this appeal contradicts this analysis. Our remand to the district court on the dependent Indian community issue is essentially limited to the resolution of factual issues and their application to the legal framework outlined in this opinion." *Id.*

56. It appears to follow that if the mine is located in Indian country, and the tribal court has jurisdiction to hear the matter, then the tribe probably has authority to tax. If this is true, then the federal district court has, in effect, resolved the controversy in its entirety. *See id.* at 1541 (holding that § 1151 "represents an express Congressional delegation of civil authority over Indian country to the tribes. As a result, the Navajo Nation has authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions").

57. *National Farmers*, 471 U.S. at 856-57.

58. "A matter decided or passed upon by a court of competent jurisdiction is received as evidence of the truth." BLACK'S LAW DICTIONARY 1310 (6th ed. 1990).

59. Reynolds, *supra* note 52, at 1114-19; *see also* Phillip W. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277, 285-92 (1995) (pointing out the inconsistent application of the exhaustion rule by federal circuit courts).

60. *See* Reynolds, *supra* note 52, at 1113-56 (discussing uncertainties related to the exhaus-

B. *Indian Child Welfare Act of 1978*[61]

1. Background

Congress passed the Indian Child Welfare Act (ICWA) in an effort to remedy past wrongs against the Indian community.[62] Prior to ICWA's enactment, presumably well-intentioned, but misguided, state agencies and courts engaged in the systematic removal of reservation Indian children from their parents.[63] In passing ICWA, Congress recognized that as a sovereign entity, an Indian tribe has a vital interest in its children. ICWA, therefore, gives exclusive jurisdiction to tribal courts when a child resides on a reservation, and concurrent jurisdiction with state courts when an Indian child is domiciled or residing off a reservation.[64] Since state laws defining domicile vary among the states, the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*[65] defined "domicile" for the purpose of jurisdiction under ICWA.[66] In *Holyfield*, the Court held that the domicile of a child is that of the child's parents.[67]

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tion doctrine and possible clarifications); *see also* Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing* National Farmers Union, Iowa Mutual, *and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519, 521-34 (1995) (comparing other federal abstention doctrines to that set forth in *National Farmers* and suggesting that tribal abstention should be limited in application as it is in the federal/state context).

61. 25 U.S.C. §§ 1901-1963 (1994).

62. *See* 25 U.S.C. §§ 1901(4), 1902.

63. Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 57, 66-73 (1979); *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37 (1989) (discussing the history and purpose of the Indian Child Welfare Act).

64. Section 1911 reads in relevant part:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> . . . In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(3).

65. 490 U.S. 30 (1989).

66. *Holyfield*, 490 U.S. at 44-48. In *Holyfield*, the Supreme Court addressed the meaning of the word "domicile" in its analysis of an adoption decree executed by the mother of twin babies. Although the parents lived on the reservation, the babies were born off-site. The Holyfields, both non-Indians, adopted the twins. The Choctaw Tribe moved to vacate the adoption decree based on the ICWA. The lower court denied the motion, finding that the Tribe did not have exclusive jurisdiction because the children had never resided on the reservation and were not domiciled on the reservation. *Id.* at 37-40. The Mississippi Supreme Court affirmed. *Id.* at 38-40. The Supreme Court reversed and remanded the proceeding, reasoning that "domicile" is not synonymous with residence. Because a child cannot form the intent to establish domicile, their domicile is determined by the domicile of its parents (i.e., the parents' physical presence in a place with the intent to remain there). *Id.* at 53.

67. *Id.* at 48-49.

2. *Comanche Indian Tribe v. Hovis*[68]

a. *Facts*

Rhonda Wahnee (Rhonda), a non-Indian, filed for divorce from Stuart Wahnee (Stuart), a member of the Comanche Indian Tribe of Oklahoma (Tribe).[69] Rhonda and Stuart signed a power of attorney giving custody of their daughter to Stuart's sister, Blanche Wahnee, another member of the Tribe.[70] The state court granted a divorce decree but stayed determination of custody and child support pending another proceeding on Rhonda's parental rights.[71] In accordance with ICWA, the tribal court informed the state court at a hearing of its wish to assume jurisdiction over the termination of parental rights proceeding.[72] Rhonda objected to the transfer.[73] Consequently, the tribal court filed a formal motion with the state court for the transfer of jurisdiction over the termination of parental rights proceeding pursuant to ICWA. The state court granted the motion.[74]

Rhonda then filed a motion in state court to vacate the order of transfer on the grounds that her oral objection made the transfer to the tribal court improper.[75] The state court vacated its order, and the tribal court filed two additional motions to transfer under ICWA.[76] The first claimed that the tribal court had exclusive jurisdiction to determine child custody proceedings pursuant to ICWA. The second requested that the state court rescind its order vacating the transfer to the tribal court, or in the alternative, transfer the matter back to tribal court.[77] The tribal court claimed that the state court had lost jurisdiction to vacate its transfer order when jurisdiction was transferred to the tribal court.[78]

The state court entered summary judgment in favor of Rhonda.[79] The court found that at the time of the filing of the juvenile proceeding, Rhonda and Stuart were not residing on tribal land.[80] Therefore, ICWA did not apply. Rather than appeal to the Oklahoma Supreme Court, the Tribe filed an action in federal court seeking a declaratory judgment as to which court had exclusive jurisdiction to adjudicate the parental termination proceedings.[81] The

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68. 53 F.3d 298 (10th Cir. 1995).
69. *Comanche Indian Tribe*, 53 F.3d at 299.
70. *Id.*
71. *Id.*
72. *Id.* at 300.
73. *Id.*
74. *Id.* The ICWA directs state courts to transfer proceedings to tribal court absent objection by either parent. *See supra* note 64.
75. *Comanche Indian Tribe*, 53 F.3d at 300. The motion to vacate was made almost four years after the state court ordered the transfer of the termination proceedings to the tribal court. Despite this extraordinary length of time, the court apparently regarded the motion as timely. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 301 n.5; *see* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) (indicating that "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents").
81. *Comanche Indian Tribe*, 53 F.3d at 300-01.

federal district court ruled that the tribal court had exclusive jurisdiction because Kristy was a domiciled resident of the reservation, and a ward of the tribal court. In addition, the federal district court ruled that the state court had no jurisdiction to vacate its transfer order.[82]

b. *Decision*

Without addressing the Tribe's substantive arguments, the Tenth Circuit found that the ICWA did not provide independent grounds to litigate state court decisions in federal court and reversed the lower court decision. As a result, the tribe could not appeal the state court's judgment in federal court.[83] By statute, federal courts must give a state court judgment the same preclusive effect that the courts of that state would give to such judgments.[84] As such, the Tenth Circuit reviewed Oklahoma's rules of issue and claim preclusion.[85] Finding that Oklahoma's "estoppel by judgment" doctrine precluded the Tribe from re-litigating the matter in federal court under the guise of a motion for declaratory judgment,[86] the Tenth Circuit concluded that the federal court lacked jurisdiction to hear the matter.[87] Because the matter was litigated in state court, appellate review of that decision was limited to the state court system.[88]

3. Analysis

The Tenth Circuit's holding in *Comanche Indian Tribe* follows its earlier decision in *Kiowa Tribe v. Lewis*.[89] When a tribe disagrees with a state court's application of ICWA, the only available judicial review lies with the state appellate court and the United States Supreme Court.[90]

Comanche Indian Tribe and *Pittsburg & Midway Coal* demonstrate what some perceive as a general bias against tribal courts.[91] For example, when a tribal court assumes jurisdiction in a matter involving a non-Indian, the ensuing decision is subject to review by a federal district court.[92] In contrast,

82. *Id.* at 301.

83. *Id.* at 304-05. Rhonda appealed to the Tenth Circuit asserting that the Tribe was collaterally estopped from raising this issue in federal court. The Tribe argued that § 1914 of ICWA gave the Tribe the right to challenge in federal court the state court's ruling regarding the applicability of § 1911(a). The pertinent language in § 1914 authorizes certain individuals to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of" § 1911. *Id.* at 300-04 (quoting 25 U.S.C. § 1911 (1994)).

84. *Id.* at 302.

85. *Id.* at 302-03.

86. *Id.* at 303.

87. *See id.* at 302-04.

88. *Id.*

89. 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986) (ruling on a tribe's attempt to secure federal review of a Kansas Supreme Court decision denying the tribe's motion to intervene under the ICWA). In *Kiowa Tribe*, the Tenth Circuit found that § 1914 was not an independent ground to relitigate the applicability of ICWA. *Id.* at 592.

90. *Comanche Indian Tribe*, 53 F.3d at 304-05.

91. *See generally* GETCHES ET AL., *supra* note 4, at 522-23 (discussing barriers to the improvement of and bias against tribal courts).

92. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-57 (1985).

when a state court assumes jurisdiction over a matter involving an Indian tribe, there is no similar option. The state court decision to exercise jurisdiction stands unless the United States Supreme Court determines otherwise.

In *Comanche Indian Tribe*, the question of jurisdiction arose under the ICWA, a statute purporting to favor tribal court jurisdiction. In application, however, the ICWA places a tribal court on unequal footing with state courts. For example, the ICWA gives state courts superior authority over tribal courts in deciding child custody proceedings. For example, a state court decides whether or not to grant a tribe's motion for transfer of jurisdiction,[93] despite congressional recognition that state courts in the past have often ordered unwarranted separation of Indian children from their parents.[94] Considering past and present conflicts existing between state and Indian governments,[95] the wisdom of giving states the authority to decide matters that are so vital to the survival of tribal government is questionable,[96] and at odds with the federal policy of self-determination.[97] Without federal review, a tribe remains at the mercy of state courts.

C. *Other Circuits*

During the Survey period, federal courts examined questions of tribal jurisdiction in a variety of contexts. In *United States* ex rel. *Morongo Band of Mission Indians v. Rose*,[98] the Morongo Band of Indians brought an action against a non-Indian and an Indian involving a contract and enforcement of a tribal ordinance regulating bingo on reservation land.[99] The Ninth Circuit ruled that the contract did not preclude enforcement of the tribal ordinance

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93. *See supra* note 55.

94. *See* 25 U.S.C. § 1901 (1994).

95. The battle between the states and the tribes to determine who prevails has continued since, if not before, the Supreme Court's holding in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the Court held that Georgia could not extend its laws within the boundaries of the Cherokee reservation. *Id.* at 557-61. Since this decision, the rule has eroded largely due to the enactment of the General Allotment Act, ch. 119, §§ 1-11, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1995)). The General Allotment Act opened up reservation land to white settlement. As a result, some land within a reservation is owned in fee by non-Indians. States have authority to regulate these non-Indians, but state regulation often interferes with tribal regulation. These conflicts are readily apparent in more recent cases regarding hunting and fishing rights and regulations and zoning. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (noting that tribes cannot zone areas within reservations owned predominately by non-Indians); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (stating that tribes have the power to regulate land and resources including the taking of wildlife); Montana v. United States, 450 U.S. 544 (1981) (noting that tribes have authority to regulate hunting and fishing by non-members); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) (stating that tribes have power to regulate hunting and fishing by members). Most recently, the issue of regulating gaming on all reservation land has been the focus of legal battles between states and tribes. *See* Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996) (involving an Eleventh Amendment challenge to the Indian Gaming Regulatory Act); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that a state which merely regulates, but does not prohibit, gambling may not regulate tribal gaming operations). For a further discussion of the regulation of gaming activities, see *supra* note 7.

96. Guerrero, *supra* note 63, at 51-54.

97. *See supra* note 4 and accompanying text.

98. 34 F.3d 901 (9th Cir. 1994).

99. *Morongo Band*, 34 F.3d at 903-04.

because the Secretary of Interior and the Commissioner of Indian Affairs had not approved the contract.[100] The Ninth Circuit concluded that the non-Indian party had subjected himself to the authority of the Morongo tribe by entering into a consensual commercial relationship with a tribal member.[101] The Ninth Circuit affirmed the district court judgment against the non-Indian.[102]

In another Ninth Circuit case, *Hinshaw v. Mahler*,[103] the court addressed subject matter and personal jurisdiction in a wrongful death and survivorship action.[104] The court found that pursuant to *Montana v. United States*[105] and *National Farmers*, the tribal court retained subject matter jurisdiction over both claims.[106] The Ninth Circuit conceded that the tribal court did not have concurrent probate jurisdiction over the survivorship claim, but held that this tort action did not relate to the administration of an estate.[107] The state court's probate action, therefore, did not initiate the plaintiff's tort action in state court.[108]

Addressing the defendant's claim that the tribal court lacked personal jurisdiction, the Ninth Circuit found that the defendant's contacts with the

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100. *Id.* at 904-05. The United States Code governs contracts made with Indians and tribes. It provides in relevant part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . . .
>
> All contracts or agreement made in violation of this section shall be null and void . . . .

25 U.S.C. § 81 (1994).

101. *Morongo Band*, 34 F.3d at 906; *see also* Montana v. United States, 450 U.S. 544, 565 (1981) (explaining that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements").

102. *Morongo Band*, 34 F.3d at 906. The court noted that *Montana* is relevant where a court determines that "there has been a general divestiture of tribal authority over non-Indians by alienation of the land." *Id.* According to the Ninth Circuit, "whether or not the Band generally has the authority to impose regulations such as its ordinance against non-Indians on Indians' trust allotments" remains an unanswered question. *Id.* Rose, a non-Indian, argued that the allotment of land to Miller, an Indian, should divest the tribe of authority over the activities carried on therein. *Id.* This argument appears to ignore precedent. First, tribes presumably retain civil jurisdiction over non-Indians in Indian country unless Congress expressly states otherwise. United States v. Wheeler, 435 U.S. 313, 323 (1978). Second, in *DeCoteau*, the Supreme Court recognized that 18 U.S.C. § 1151 defines "Indian country" for the purpose of civil as well as criminal jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Third, § 1151(c) includes "all Indian allotments" in its definition of "Indian country." 18 U.S.C. § 1151(c) (1994).

103. 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994).

104. *Hinshaw*, 42 F.3d at 1179.

105. 450 U.S. 544 (1981); *see supra* note 18.

106. *Hinshaw*, 42 F.3d at 1180-81. Tribal Ordinance 40-A provides for concurrent tribal and state jurisdiction over civil matters related to the operation of motor vehicles on public roads. Tribal Ordinance 36-B defines the circumstances under which such actions could be filed. *Id.*

107. *Id.* In Montana, a wrongful death claim and a survivorship claim must be brought in a separate nonprobate action. *Id.*

108. *Id.* at 1181.

forum met the personal jurisdiction requirements of both tribal law[109] and *International Shoe Co. v. Washington.*[110] The Ninth Circuit affirmed the district court's denial of summary judgment and affirmed the tribal court's jurisdiction over both the defendant and the subject matter.[111]

In *South Dakota v. Bourland*,[112] South Dakota filed an action to enjoin the Cheyenne River Sioux Tribe from excluding non-Indians from hunting and fishing on nontrust lands within the reservation.[113] The Eighth Circuit concluded that the conduct of the non-Indians did not fall within the exceptions set forth in *Montana* and affirmed the district court's decision to grant the injunction.[114] The dissenting opinion criticized the standard used by the district court.[115] The dissent concluded that under *Montana*, the conduct of the non-Indians was sufficient to constitute a direct effect on the tribe warranting tribal jurisdiction.[116]

During the survey period, the Eighth Circuit mirrored the Tenth Circuit's conservative approach to issues involving tribal jurisdiction and its preference for vesting jurisdiction in federal and state courts.[117] The Ninth Circuit, however, appears more comfortable with tribal authority and the exercise of such power. Unlike other circuits, the Ninth Circuit does not hesitate to rely on the general principles and precedents set forth by the Supreme Court that support

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109. *Id.* Tribal case law provides for personal jurisdiction where some relationship exists between the Tribes and the parties. By living on the reservation, Hinshaw "purposefully availed herself of the privilege of conducting activities in the forum." Her claim, therefore, arose out of her forum related activities. The Tribes' special interest in exercising jurisdiction in this matter makes such exercise of jurisdiction reasonable. *Id.*

110. 326 U.S. 310 (1945).

111. *Hinshaw*, 42 F.3d at 1179.

112. 39 F.3d 868 (8th Cir. 1994).

113. *Bourland*, 39 F.3d at 869.

114. The Tenth Circuit concluded that the district court's findings were not clearly erroneous in that the hunting and fishing of non-Indians on the taken land neither threatened nor directly affected the political integrity, economic security, or public health and welfare of the tribe. *Id.* at 870-71. The district court noted that harassment had occurred and that the deer population had been reduced. This reduction did not decrease subsistence hunting, however, and the court refused to find these actions sufficient to trigger the second exception in *Montana*. *Id.* Non-Indians "may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences." *Id.* at 870 (citations omitted). The Eighth Circuit called such actions merely "vexatious." *Id.* Apparently, the district court and Eighth Circuit did not find cattle or the use and enjoyment of tribal property to be economic interests worth protecting. The court's unwillingness to categorize livestock as an economic interest is puzzling, especially given the cattle industry's reaction to the wolf reintroduction in some western states. *See Federal Efforts to Introduce Canadian Gray Wolves into Yellowstone National Park and the Central Idaho Wilderness, 1995: Oversight Hearing Before the House of Representatives, Committee on Resources*, 104th Cong. 1st Sess. 2 (1995) (arguing against reintroduction of wolves based in part on the fears of ranchers that wolves will kill cattle, and that states should have a say in whether or not to allow wolves to exist within their borders).

115. *Bourland*, 39 F.3d at 871-73 (Heaney, J., dissenting).

116. *Id.* Senior Circuit Judge Heaney pointed out that the Supreme Court quoted the language of *Montana*. *Id.* at 871-72. Judge Heaney concluded that the district court misapplied the *Montana* test because it only considered whether there was any "threat" or "peril" rather than addressing the "direct effect" to the Tribe's economic security, political integrity, health, or welfare. *Id.* at 873.

117. *But see* Lear & Miller, *supra* note 59, at 290-92 (noting that "[o]f all of the circuits, the Tenth Circuit most readily embraces a mandatory exhaustion requirement"); *cf.* Reynolds, *supra* note 52, at 1114 (referring to a Tenth Circuit opinion in which the court "avoided application of the exhaustion doctrine").

vesting substantial jurisdiction in tribal courts. The circuits, however, seem to share a common inconsistency in the application of Supreme Court precedent.

CONCLUSION

Jurisdiction questions cast a harsh light on the confusion and contradiction in federal courts with respect to Indian affairs, throwing these inconsistencies into sharp relief. For example, Congress removed criminal jurisdiction from tribes in several acts[118] that must be viewed together in order to determine (a) whether federal or state law has been violated, and (b) which court may exercise jurisdiction.[119] While the statutory structure is puzzling, some semblance of consistency appears in the exercise of criminal jurisdiction.

No such consistency exists, however, with respect to civil jurisdiction. In *Montana*[120] and *National Farmers*,[121] the Supreme Court sets forth tests which leave the scope of tribal jurisdiction to the discretion of lower federal courts. Since the Court gave no formal guidance, this precedent has proved of limited value. Perhaps this inconsistency and confusion could have been avoided by adhering to earlier precedent and leaving tribes with exclusive authority over their territory.[122]

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118. GETCHES ET AL., *supra* note 4, at 551-73 (detailing the Indian Country Crimes (General Crimes) Act, 18 U.S.C. § 1152 (1994); the Major Crimes Act, 18 U.S.C. § 1153 (1994); the Assimilative Crimes Act, 18 U.S.C. § 13 (1994); as well as other federal laws which vest "the United States with jurisdiction over crimes by and against Indians, in and out of Indian country"); PEVAR, *supra* note 4, at 130-33 (explaining that the General Crimes Act, the Major Crimes Act, and the Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1994)), "are the three most important statutes regarding criminal jurisdiction in Indian country").

119. *See* PEVAR, *supra* note 4, at 116, 132 (providing tables showing the confusion surrounding criminal jurisdiction).

120. *See supra* note 19.

121. *See supra* text accompanying note 9-10.

122. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832). *Worcester* stated that:

> [C]ongress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States.

Id.

INTELLECTUAL PROPERTY

INTRODUCTION

The Tenth Circuit issued two published intellectual property opinions during the September 1994 to September 1995 survey period. These cases warrant discussion for their advancement of new law and adoption of legal principles common in other circuits. In *Vornado Air Circulation Systems v. Duracraft Corp.*,[1] the Tenth Circuit demonstrated the dormant power of federal patent law.[2] In *Vornado*, the court permitted patent law "principles" to trump the clear statutory language of the Lanham Act.[3] According to the court, the Lanham Act may not protect a nonfunctional product configuration constituting part of a utility patent claim, even if the configuration falls within the Act's explicit protections.[4] The Tenth Circuit also decided *Stanfield v. Osborne Industries*.[5] In a holding consistent with other circuits, the *Stanfield* court held that granting a license to use a trademark without maintaining adequate quality control measures results in the licensor's abandonment of rights to the trademark.[6]

This Survey analyzes both *Vornado* and *Stanfield*. Part I discusses the history and relationship between the federal patent system and the Lanham Act's protection for trademarks and trade dress. After presenting the facts and decision in *Vornado*, Part I compares the Tenth Circuit's decision to those of other circuits and then analyzes the court's reasoning. In addressing the *Stanfield* decision, Part II first discusses the history of trademark licensing and the requirements of quality control. Part II then presents the facts and decision in *Stanfield*, analyzes the court's position, and briefly addresses the positions of other circuits on similar issues.

I. PATENT LAW'S CORE PURPOSE PREEMPTS THE LANHAM ACT

A. *Statutory Background*

Three basic principles support the federal patent system: (1) "to foster and reward invention[]" by permitting an inventor to enforce contracts licensing inventions in exchange for royalties;[7] (2) to "promote[] disclosure of

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1. 58 F.3d 1498 (10th Cir. 1995).
2. *Vornado*, 58 F.3d at 1508-10 (discussing the relevance of federal patent law principles and policy).
3. *Id.*; *see* Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1994)).
4. *Vornado*, 58 F.3d at 1510.
5. 52 F.3d 867 (10th Cir. 1995).
6. *Stanfield*, 52 F.3d at 871 (adopting the views of the Second and Ninth circuits).
7. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979). To qualify for a patent, an invention must satisfy the three elements of utility, novelty, and non-obviousness. 35 U.S.C. §§ 101-103 (1994). The inventor must first show that the invention is "useful." *Id.* § 101. "Useful"

inventions . . . once the patent expires" and thus allow public use of the patented invention;[8] and (3) "to assure that ideas in the public domain remain there for the free use of the public."[9]

Section 43(a) of the Lanham Act provides protection for trademarks.[10] Courts have interpreted section 43(a) to protect "trade dress," the features comprising a product's look or image.[11] When litigating trade dress infringement issues, plaintiffs must establish that the trade dress is either (1) inherently distinctive, or (2) has acquired secondary meaning and that confusion in the marketplace would result from copying.[12] If determined primarily functional,[13] however, competitors may copy the trade dress.[14] Both courts and commentators acknowledge that the functionality defense prevents the Lanham Act from conflicting with federal patent law.[15]

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generally means that the item serves some identifiable benefit to people. *See, e.g.*, Brenner v. Manson, 383 U.S. 519-30 (1966) (explaining the requirement and definition of utility). An invention is "novel" if another person has not already produced the exact same invention. 35 U.S.C. § 102. Finally, the inventor must establish that the invention is "'non-obvious' to a person having ordinary skill in the art which the subject matter pertains." *Id.* § 103.

8. *Aronson*, 440 U.S. at 262.

9. *Id.*

10. Section 43(a) provides in part:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin . . . which—
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> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin . . . of his or her goods . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (1994).

11. The Tenth Circuit explains trade dress as follows:

> Trade dress is a complex composite of features. One may be size, another may be color or color combinations, another may be texture, another may be the graphics and arrangement and so on. Trade dress is a term reflecting the overall general impact, usually visual, but sometimes also tactile, of all these features taken together.

Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1271 (10th Cir.) (citing SK & F Co. v. Premo Pharmaceutical Lab., 481 F. Supp. 1184, 1187 (D.N.J. 1979), *aff'd*, 625 F.2d 1055 (3d Cir. 1980)), *cert. denied*, 448 U.S. 708 (1988).

12. *Vornado*, 58 F.3d at 1502-03.

13. In W.T. Rogers Co. v. Keene, 778 F.2d 334 (7th Cir. 1985), the Seventh Circuit discussed extensively the concept of functionality. The court provided an example: "A firm that makes footballs could not use as its trademark the characteristic oval shape of the football, thereby forcing its rivals to find another shape for their footballs." *Id.* at 339. Because a football must be oval to function correctly, the shape is functional. *Id.* No alternative shapes exist that would suffice for a football. *Id.*

One test used to determine functionality is to ask "whether the protection of the feature would hinder competition or impinge upon the rights of others to compete effectively in the sale of goods." *Hallmark Cards*, 846 F.2d at 1272. If competitors could use alternative designs, the challenged feature would likely be found nonfunctional. *Id.* at 1273.

As one commentator explained, "[A] nonfunctional feature . . . is one with perfect (or nearly perfect) substitutes." Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of* Shakespeare v. Silstar Co., 18 SEATTLE U. L. REV. 259, 265 (1995).

14. *Vornado*, 58 F.3d at 1503.

15. *See infra* note 32.

B. *Case Law Background*

1. The *Sears-Compco* Decisions

The idea that the federal patent system prevents other laws from protecting an invention originates from *Sears, Roebuck & Co. v. Stiffel Co.*[16] and *Compco Corp. v. Day-Brite Lighting, Inc.*[17] Because these decisions were consistent and announced on the same day, they have become known as the *Sears-Compco* decisions. The *Sears-Compco* decisions prohibit states from enacting laws protecting objects if such protection is inconsistent with the objectives of federal patent laws.[18]

The dispute in *Sears* began when Sears copied a pole lamp design for which Stiffel had obtained both design and utility patents.[19] Stiffel sued Sears for patent infringement and unfair competition, claiming that Sears had caused confusion in the market about the source of Sears's lamps.[20] The Supreme Court found the lamp unpatentable and held that federal patent law preempted Illinois unfair competition laws.[21] The Court explained that "[a]n unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so."[22] This reasoning led to a similar result in *Compco*.[23]

2. Cases Following the *Sears-Compco* Decisions

Over two decades later, the Supreme Court returned to this issue in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*[24] Bonito sued Thunder Craft under a Florida statute prohibiting "direct molding," a simple and inexpensive way of duplicating boat hulls.[25] The Supreme Court held that the Florida law "substantially impede[d] the public use of the otherwise unprotected design and

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16. 376 U.S. 225 (1964).

17. 376 U.S. 234 (1964).

18. *Sears*, 376 U.S. at 231. The Supreme Court subsequently explained the *Sears-Compco* decisions as follows:

> [I]deas once placed before the public without the protection of a valid patent are subject to appropriation without significant restraint.
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> At the heart of Sears and Compco [sic] is the conclusion that the efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions.

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 156 (1989) (citations omitted).

19. *Sears*, 376 U.S. at 225-26.

20. *Id.* at 226.

21. *Id.* at 231-33. The Court stated, "When [a] patent expires, the monopoly created by it expires, too, and the right to make the article—including the right to make it in precisely the shape it carried when patented—passes to the public." *Id.* at 230.

22. *Id.* at 231.

23. *Compco*, 376 U.S. at 238. *Compco* also involved a lamp design protected by a state unfair competition law that conflicted with federal patent laws. *Id.* at 234. Day-Brite sued Compco for unfair competition for copying the design of its lighting fixtures. *Id.* at 235. The district court held the design of the lighting fixtures manufactured by Day-Brite unpatentable. *Id.* As in *Sears*, the Supreme Court held that federal patent law preempted state unfair competition laws protecting the lighting fixture. *Id.* at 238.

24. 489 U.S. 141 (1989).

25. *Bonito Boats*, 489 U.S. at 144-45. Bonito Boats did not have a patent for the boat hull design in question. *Id.* at 144.

utilitarian ideas embodied in unpatented boat hulls," and therefore federal patent law preempted the Florida statute.[26]

The Third Circuit, however, in *Sylvania Electric Products v. Dura Electric Lamp Co.*, recognized a situation where trademark protections survive against federal patent law.[27] Sylvania sued Dura for copying Sylvania's registered "blue dot" flash bulb system.[28] Applying the general rule that trademark protection does not extend to functional articles,[29] the *Sylvania* court held that it may extend to a feature of a patentable article as long as the portion protected by the trademark adds no functional use or value.[30] Sylvania's claim ultimately failed because the blue dot flash bulb system itself was functional.[31]

Other courts and commentators have recognized the necessity of this functionality exception to trademark protection.[32] As the next section discusses, however, the Tenth Circuit departed from this trend and distanced itself from the functionality requirement.

C. Vornado Air Circulation Systems v. Duracraft Corp.:[33] *The Tenth Circuit's Rejection of the Functionality Defense*

In *Vornado*, the Tenth Circuit confronted competing policies. Vornado alleged a classic claim of trade dress infringement, but the claim also involved an object in the public domain.[34] On February 22, 1994, the Patent Office issued a utility patent to Vornado's founders for a ducted fan manufactured

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26. *Id.* at 157, 168. The Court also referred to the "balance struck by Congress in our patent laws" between protection and public domain, and noted that "state regulation of intellectual property must yield" to that balance. *Id.* at 152. As a matter of law, once a patent has expired, the public is free to use the subject matter of the expired patent. *Id.*

In dicta, the Court recognized that "the common-law tort of unfair competition has been limited to protection against copying of nonfunctional aspects of consumer products which have acquired secondary meaning such that they operate as a designation of source." *Id.* at 158. It is this nonfunctional requirement that supposedly prevents friction between the Lanham Act and federal patent law. *See* W.T. Rogers Co. v. Keene, 778 F.2d 334, 337-38 (7th Cir. 1985) (recognizing a nonfunctionality defense).

27. 247 F.2d 730 (3d Cir. 1957).

28. *Sylvania*, 247 F.2d at 731. The blue dot indicated when the bulb was spent. *Id.*

29. *Id.* at 732; *see* RESTATEMENT OF TORTS § 715 (1938) (stating that "[a] trade-mark is any mark, word, letter, number, design, picture, or combination thereof in any form or arrangement, which . . . (c) is not . . . a designation descriptive of goods or of their quality, ingredients, properties or functions").

30. *Sylvania*, 247 F.2d at 734 n.1.

31. *Id.* at 734. The court stated that "[t]he purpose of this rule is obviously to prevent the grant of perpetual monopoly by the issuance of a trade-mark in the situation where a patent has either expired, or for one reason or another, cannot be granted." *Id.* at 732.

32. For example, in *W.T. Rogers Co.*, the Seventh Circuit stated that when dealing with a claim for trademark/trade dress infringement, "provided that a defense of functionality is recognized, there is no conflict with federal patent law." *W.T. Rogers Co.*, 778 F.2d at 337. The court recognized that the functionality defense only exists to "head off a collision between section 43(a) and patent law." *Id.* at 338. Commentators have embraced the idea that the functionality defense keeps the Lanham Act and patent laws in separate corners. One commentator stated that the purpose behind the doctrine of functionality is "to exclude from trademark protection subject matter properly covered by utility patents." Jay Dratler Jr., *Trademark Protection for Industrial Designs*, 1988 U. ILL. L. REV. 887, 928.

33. 58 F.3d 1498 (10th Cir. 1995).

34. *Vornado*, 58 F.3d at 1500.

with a spiral grill.[35] Although patent protection did not extend to the grill itself because it was already in the public domain,[36] Vornado was able to patent the entire configuration because of the fan,[37] and in the original patent request asserted that the spiral grill increased air flow and enhanced the fan's safety.[38] Vornado's own tests, however, had revealed that fans adorned with commonly shaped grills worked as well as Vornado fans.[39] Thus, according to Vornado, the spiral design served no useful function other than pure aesthetic enhancement.[40] From November 1988 until August 1990, Vornado was the only company selling fans with a spiral grill.[41] Thus, according to the district court, consumers associated the grill design solely with Vornado fans.[42]

In August 1990, Duracraft began selling the DT-7 "Turbo Fan."[43] The DT-7 "Turbo Fan" was an inexpensive house fan with a spiral grill designed specifically to avoid infringing upon Vornado's patent while replicating the appearance of Vornado's spiral grill.[44] Vornado sued Duracraft, alleging that Duracraft infringed upon Vornado's trade dress.[45] The district court found that the spiral grill design was nonfunctional and inherently distinctive and that "consumers were likely to be confused by Duracraft's use of a similar grill."[46]

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35. *Id.* Vornado's founders acquired their first patent on May 22, 1990, and subsequently applied for a reissue patent which was granted on February 20, 1994. *Id.*

36. *Id.* The spiral grill was in the public domain because it was part of earlier expired patent. *Id.* The grill was known as the AirTensity Grill. James W. Dabney, *Trademarks, Unfair Competition, and Copyrights: Recent Developments and Other Selected Issues*, C962 ALI-ABA 179, 201 (1994).

37. *Vornado*, 58 F.3d at 1500.

38. Dabney, *supra* note 36, at 200, 202. Specifically, the 1990 patent claimed that the grill design was superior to a conventional grill in that it absorbed impact shock better, provided higher air flow at a normal power usage, and focused output where the vents were spaced at their maximum. *Id.* Vornado also advertised that the AirTensity Grill served a functional purpose. Examples of advertisements included claims that the AirTensity grill: "actually amplifies the vortex for better, more efficient operation," *id.*; "is specifically designed to amplify and enhance the naturally occurring vortex created by the propeller"; and "[it] accomplishes a high degree of safety and functionality." *Id.* at 202-04.

39. *Vornado*, 58 F.3d at 1500. In fact, according to Vornado's expert, alternative grill designs produced better results. Dabney, *supra* note 36, at 259. An in-court comparison of Vornado fans with different grills illustrated little or no difference in the velocity or effect of the air flow when using a spiral grill rather than a straight radial grill. *Id.* at 261. The district court found that any difference in performance between fans using spiral grills and fans using normal radial grills was minimal at best and that there was no "practical difference in the performance between such grills." *Id.* at 264.

40. *Vornado*, 58 F.3d at 1501. Vornado argued that the spiral shape was chosen mainly to associate the fan with the name "Vornado," a combination of "vortex" and "tornado." Dabney, *supra* note 36, at 248.

41. *Vornado*, 58 F.3d at 1500. Vornado began selling its fans in November 1988. *Id.* Apparently, no other competitors offered fans with spiral grills. *Id.*

42. *See id.* at 1502 n.7 (noting that the district court found "an association between the grill design and [the] Vornado [name]").

43. *Id.* at 1500.

44. *Id.* at 1500-01. The President/CEO of Duracraft had decided "'to borrow some ideas from' the Vornado," and the result was the DT-7 "Turbo Fan." Dabney, *supra* note 36, at 254.

45. *Vornado*, 58 F.3d at 1501.

46. *Id.* at 1501-02. Vornado introduced evidence of a consumer who had bought both a Vornado fan and a Duracraft DT-7 "Turbo Fan" and believed that the same company manufactured both fans due to similarities in fan design. Dabney, *supra* note 36, at 264-65. Other witnesses associated with retailers who sell Vornado fans testified that they had confused DT-7 "Turbo

The Tenth Circuit admitted that it was reasonable "to assume that a nonfunctionality requirement would eliminate any possible conflicts between the Lanham Act and the Patent Act."[47] Relying on *Bonito Boats*, however, the Tenth Circuit reversed the district court, stating that the Supreme Court had previously determined that once a product feature enters the public domain, competitors may copy and use the product feature.[48] Therefore, the Supreme Court's precedent mandated that when unfair competition laws protecting a product shape from copying clashes with the right to copy under federal patent law, "the right to copy must prevail."[49]

Because of the conflict between the Lanham's Act trade dress protection and the right to copy under federal patent law, both statutes cannot simultaneously apply. Therefore, the Tenth Circuit looked to the "fundamental purposes" of each statute to determine which statute prevailed.[50] The court stated that federal patent law's objective was to pass on technological progress to the public.[51] The Tenth Circuit also concluded that protecting against consumer confusion associated with copying a product configuration is not a primary emphasis of section 43(a) of the Lanham Act.[52] Therefore, in resolving the conflict between federal patent laws and federal trademark protections, the Tenth Circuit favored "core patent principles."[53] The court held that

> where a disputed product configuration is part of a claim in a utility patent, and the configuration is a described, significant inventive aspect of the invention . . . so that without it the invention could not fairly be said to be the same invention, patent law prevents its protection as trade dress, even if the configuration is nonfunctional.[54]

D. *Other Circuits*

The Court of Patent Appeals faced a factually similar situation in *In re Shakespeare Co.*,[55] also finding in favor of the federal right to copy expired patents.[56] The appellant in *Shakespeare* manufactured fishing rods using a patented process.[57] A natural result of the unique manufacturing process was a spiral design embedded in the rod.[58] After the public began associating the spiral mark with Shakespeare's rods, the company attempted to register the

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Fans" with Vornado fans. *Id.* at 265. Also, a store employee who sells Vornado fans testified that upon seeing the DT-7 "Turbo Fan," he knew that the fan was "a 'copycat' or [a] 'knockoff' of a Vornado [fan]." *Id.*

47. *Vornado*, 58 F.3d at 1506.
48. *Id.* at 1503.
49. *Id.* at 1504.
50. *Id.* at 1507.
51. *Id.* at 1508.
52. *Id.* at 1509.
53. *Id.*
54. *Id.* at 1510.
55. 289 F.2d 506 (C.C.P.A. 1961).
56. *Shakespeare*, 289 F.2d at 508.
57. *Id.* at 507.
58. *Id.*

spiral mark.[59] The court denied Shakespeare's request because the patented process would eventually pass into the public domain.[60] The court believed that the spiral design was nonfunctional.[61] Despite this belief, the court denied Shakespeare trade dress protection because such protection violated the right to copy under federal patent law.[62]

In contrast, the Ninth Circuit applied the Third Circuit's functionality distinction when addressing a similar situation in *Clamp Manufacturing v. Enco Manufacturing*.[63] Clamp Manufacturing (Clamp) manufactured and distributed the Kant-twist c-clamp under an expired patent.[64] When Enco began selling an identical c-clamp, litigation ensued and the district court held that Enco infringed upon Clamp's configuration.[65] After examining the meaning of functionality in detail,[66] the Ninth Circuit upheld the district court's ruling. The Ninth Circuit held that although the Kant-twist clamp was the subject matter of an expired utility patent, the Kant-twist clamp's configuration was nonfunctional.[67]

E. *Analysis*

The Tenth Circuit in *Vornado* ignored the fact that the spiral design failed to improve the performance of Vornado's fans. Vornado argued, and the district court found, that the spiral design is neither functional nor necessary for competition since the Vornado fan worked equally well with other grill designs.[68] The only reason to copy the spiral grill design, therefore, was aesthetic enhancement. Despite Vornado's argument, the Tenth Circuit concluded that preventing others from copying features of a product with an expired patent

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59. *Id.*

60. *Id.* at 508. If competitors could not make rods with the unique spiral markings, competitors would be unable to practice the patented process upon the patent's expiration. Thus, allowing trademark protection would grant the appellants a perpetual monopoly on the process or require competitors to incur the expense of grinding off the spiral mark from their rods. Either way, allowing protection hinders competition. *Id.*

61. *Id.*

62. *Id.*

63. 870 F.2d 512 (9th Cir.), *cert. denied*, 439 U.S. 901 (1989).

64. *Clamp*, 870 F.2d at 513 & n.1.

65. *Id.* at 514. The district court found "that the Kant-twist clamps were distinctive, primarily nonfunctional, arbitrary, and that commercially feasible alternative configurations existed." *Id.* at 516.

66. *See id.* at 515-17. The *Clamp* court quoted from an earlier Ninth Circuit decision: "Functional features of a product are features 'which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product.'" *Id.* at 516 (quoting Vuitton Et Fils S.A. v. J. Young Enters., 644 F.2d 769, 772 (9th Cir. 1981)). The court looked at several factors in analyzing functionality, including:

> [T]he existence of an expired utility patent disclosing the utilitarian advantage of the design sought to be protected as a trademark; the extent of advertising touting the utilitarian advantages of the design; the availability of alternative designs; and whether a particular design results from a comparatively simple or cheap method of manufacture.

Id.

67. *Id.* at 516-17. Necessary to the court's decision was the fact that the "C" design of the clamp added nothing to the utility of the clamp and that other designs were available. *Id.* at 516.

68. *Vornado*, 58 F.3d at 1501.

seriously conflicts with the patent system's core objectives, "even when those features are not necessary to [sic] competition."[69]

Both *Vornado* and *Shakespeare* enable competitors to legally produce similar, but inferior, products. Under these decisions, competitors can legally manufacture an inferior fishing rod affixed with a spiral design or produce a poor-quality fan adorned with a spiral grill.[70] In *Shakespeare*, however, practicing the patent necessarily resulted in the appearance of a spiral marking on the rod.[71] Competitors practicing the *Vornado* patent, on the other hand, could easily achieve the Vornado's functionality without including the spiral grill because the grill failed to enhance the fan's functionality. A competitor's ability to practice the useful aspects of an expired patent is certainly important. If, however, the overall appearance of a patented invention has become associated with a particular company, and practicing the patent does not dictate a particular appearance for the resulting product, the invention's appearance should be entitled to trade dress protection.

The Tenth Circuit considered important the fact that the spiral grill constituted part of an expired patent.[72] The court, however, should not have ignored Vornado's tests demonstrating that the spiral design failed to improve the fan's performance. If accurate, the tests show that the spiral design is not necessary to foster competition. Competitors simply employ the spiral design to enhance sales by confusing potential Vornado fan consumers. Benefits certainly result from allowing subsequent inventors to build upon the genius and practical experience of expired patent holders. These benefits, however, should not preempt Lanham Act protection for the general appearance of a patented invention if the appearance is not a necessary aspect of the patent's utility.[73]

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69. *Id.* at 1508.

70. Vornado fans actually function differently from ordinary house fans. Vornado fans shoot a beam of air into a wall at such a high speed that streams of air begin circulating around the room. Susan Caba, *From Futuristic to Vintage, Fans Today are so Cool, They're Hot*, ARIZ. REPUBLIC, Aug. 6, 1994, at AH6. By putting a spiral grill on their fans similar to Vornado's, Duracraft can mislead the public into believing that their fan operates the same as a Vornado fan.

On the other hand, Duracraft attorneys have called the decision "a great victory for consumers" since Vornado will not be able to hold a perpetual monopoly on patented subject matter. Roz Hutchinson, *Vornado Loses Appeals Ruling on Trademark*, WICHITA BUS. J., July 21, 1995, § 1, at 1.

71. *Shakespeare*, 289 F.2d at 507.

72. *Vornado*, 58 F.3d at 1500.

73. Although the Tenth Circuit's decision seems contrary to what the functionality doctrine directs, some support exists for the *Vornado* decision in past Supreme Court cases. In *Bonito Boats*, the Supreme Court conceded that "all state regulation of potentially patentable but unpatented subject matter is not ipso facto preempted by the federal patent laws." Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989). By analogy, the same would be true for Lanham Act protection since the Lanham Act is simply the federal government's version of an unfair competition law. *Id.*

However, the Supreme Court also stated that "the heart of *Sears* and *Compco* [sic] is the conclusion that the efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions." *Id.* at 156. Further, the Supreme Court has recognized that "the ultimate goal of public disclosure and use [of once-patented inventions] is the centerpiece of federal patent policy." *Id.* at 157.

II. LICENSING RIGHTS TO A TRADE NAME

A. *Background*

Trademark law permits trademark owners to issue licenses for the use of registered trademarks.[74] The trademark owner, however, must ensure that the licensee maintains the quality of goods bearing the trademark.[75] Failure to ensure quality control results in a "naked" license.[76] A naked license may justify a court's finding that the trademark owner has abandoned the trademark.[77] Once abandonment occurs, the trademark owner may not assert rights to the trademark.[78]

The belief that naked licensing is "inherently deceptive" underlies the quality control requirement.[79] The quality control requirement protects the public from being misled.[80] The Second Circuit decided one of the principal naked licensing cases in 1959.[81]

In Dawn Donut Co. v. Hart's Food Stores,[82] the plaintiff brought an action to enjoin the defendant, Hart's Food, from using the name "Dawn" in connection with its donut sales.[83] As part of its defense, Hart's Foods claimed Dawn had failed to exercise adequate control over the quality of donuts sold by Dawn's licensees and thus had abandoned the mark.[84] The Second Circuit noted that failing to include quality control requirements in licensing agreements results in the production and sale of goods with varying qualities

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74. Moore Business Forms v. Ryu, 960 F.2d 486, 489 (5th Cir. 1992).

75. *Id.* The Lanham Act allows companies related to the owner of a trademark to use the owner's mark so long as the use of the mark does not deceive the public. 15 U.S.C. § 1055 (1994). The Lanham Act defines "related company" as "any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used." *Id.* § 1127. To ensure that the use does not deceive the public, the owner of the trademark must control the nature and quality of goods bearing the mark. *Id.* § 1055.

76. *Moore*, 960 F.2d at 489.

77. *Id.*

78. *Id.* Abandonment precludes the licensor from bringing any complaints concerning infringement of the mark. AmCan Enters. v. Renzi, 32 F.3d 233, 235 (7th Cir. 1994).

79. First Interstate Bancorp v. Stenquist, 16 U.S.P.Q.2d 1704, 1706 (N.D. Cal. 1990). Quality control ensures that the "trademark is not used to deceive the public as to the quality of the goods or services bearing the name." Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1327 (7th Cir. 1979).

80. Haymaker Sports, Inc. v. Turian, 581 F.2d 257, 261 (C.C.P.A. 1978). Commentator Frank I. Schechter remarked that "the trade-mark is not merely the symbol of good-will but often the most effective agent for the creation of good-will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions." Kevin Parks, *"Naked" Is Not a Four-letter Word: Debunking the Myth of the "Quality Control Requirement" in Trademark Licensing*, 82 TRADEMARK REP. 531, 532 (1992). Furthermore, the trademark has become an assurance of quality. *Id.* Failing to maintain the quality of products bearing a licensed trademark defrauds the public since the public is relying on the trademark name as guarantee of quality. *Id.* at 533.

81. *See* Dawn Donut Co. v. Hart's Food Stores, 267 F.2d 358 (2d Cir. 1959) (discussing whether the Lanham Act protects the "Dawn" trademark).

82. 267 F.2d 358 (2d Cir. 1959).

83. *Dawn*, 267 F.2d at 360. Hart's Food Stores sold baked goods in their grocery stores with the word "Dawn" imprinted on the packages. *Id.* at 361. Dawn sold doughnut mix to bakeries and allowed those bakers to sell the doughnuts under its name. *Id.*

84. *Id.* at 366.

bearing the same trademark.[85] The Second Circuit determined that the correct inquiry asks "whether the [licensor] sufficiently policed and inspected its licensees' operations to guarantee the quality of the products they sold under its trademarks to the public."[86] Although no one disputes the necessity of quality control, no bright-line rule exists explaining what constitutes an "adequate" level of quality control.[87]

Courts determine the adequacy of control on a case-by-case basis.[88] One commentator divided the types of quality control into six categories: (1) actual control by the licensor;[89] (2) a mere contractual right to control; (3) control by an agent of the licensor; (4) control by a third party;[90] (5) reasonable reliance on the licensee to control itself; and (6) control by stock ownership.[91]

B. Stanfield v. Osborne Industries:[92]
The Tenth Circuit's Adoption of the "Naked" License Rule

Stanfield, a developer of agricultural products, agreed to allow Osborne Industries, Inc. (OII) to manufacture certain agricultural products for royalties.[93] Additionally, Stanfield began working for OII.[94] Pursuant to a subsequent agreement, Stanfield allowed OII to use "Stanfield" as a trademark for fifteen years in exchange for $75.00.[95] Eventually the relationship between Stanfield and OII soured.[96] Stanfield quit his job at OII, and the contract

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85. *Id.* at 367. The court reasoned that because the primary goal of the Lanham Act is to protect against confusion, and the public cannot adequately protect itself against deceptive use of a trademark, a licensor must take steps to ensure that others do not misuse the trademark. *Id.*

86. *Id.* The Second Circuit found no error in the district court's finding that Dawn had exercised adequate control and supervision. *Id.* at 367-68.

87. The licensor does not need to be involved in the day-to-day operations of the licensee to ensure quality control. *Oberlin*, 596 F.2d at 1327.

88. Parks, *supra* note 80, at 540.

89. William M. Borchard & Richard M. Osman, *Trademark Sublicensing and Quality Control*, 70 TRADEMARK REP. 99, 100-04 (1980).

90. *Id.* at 105. Granting a license to use the trademark on pharmaceutical products falls within this category. *Id.* Since the FDA regulates the quality of pharmaceuticals, the licensor may rely on the FDA's regulation of quality control. *Id.*

91. *Id.* at 106-07.

92. 52 F.3d 867 (10th Cir.), *cert. denied*, 116 S. Ct. 314 (1995). It is not surprising that the Tenth Circuit recognized the requirement of quality control. Presumably everyone accepts the quality control requirement without controversy. Parks, *supra* note 80, at 534-35.

93. *Stanfield*, 52 F.3d at 869.

94. *Id.*

95. *Id.* The pertinent language of the license follows:

> WHEREAS, Second Party [OII] desires to use the name "Stanfield" on all or part of the products manufactured by Second Party whether or not the same be invented by First Party, as a distinctive mark on said products in conjunction with the name of said products, and
>
> WHEREAS, Second Party [OII] desires to use the name "Stanfield" as a distinctive mark on all or part of its products manufactured, at its discretion for a period of Fifteen (15) years from the date of this agreement and that said design of the distinctive mark bearing the name "Stanfield" shall be at the sole discretion of said party of the Second Part [OII] as to the design of the same . . . .

Id.

96. *Id.* at 870.

between OII and Stanfield expired.[97] OII registered "Stanfield" as its trademark.[98] In September 1991 Stanfield requested that OII discontinue using "Stanfield" as a trademark.[99] OII continued using the "Stanfield" name and Stanfield initiated suit against OII.[100] Stanfield alleged that OII's use of the "Stanfield" name violated 15 U.S.C. § 1125, which prohibits false representations about the quality of goods and false designation of product origin. Stanfield also alleged that OII fraudulently procured the mark, and that OII was liable under various state laws.[101] The district court entered summary judgment in favor of OII.[102]

The Tenth Circuit held that the July 1975 agreement granted OII a naked license.[103] Pursuant to the agreement, Stanfield had allowed OII "to use the mark on any quality or type of good [OII] chooses."[104] The court concluded that under the agreement, Stanfield failed to exercise control over the quality of goods produced by OII bearing the "Stanfield" name. Hence, Stanfield abandoned any rights to the trademark by granting OII a naked license to the trademark.[105]

The Tenth Circuit also addressed Stanfield's claim that even if he had not expressly controlled quality through the agreement, he had reasonably relied on OII to maintain quality.[106] The court rejected this argument, stating that Stanfield and OII did not have the "special relationship" required for reliance to substitute for quality control.[107] The continued litigation between Stanfield and OII and the acrimonious nature of the parties' relationship persuaded the court that such a relationship did not exist.[108]

C. *Other Circuits*

Every circuit addressing this issue has recognized the naked license theory, under which the holder of a trademark can lose trademark rights through non-use or abandonment.[109] However, some cases indicate that a licensor does not automatically abandon a trademark by failing to personally maintain

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97. *Id.*
98. *Id.*
99. *Id.* at 869-70.
100. *Id.* at 870.
101. *Id.* Because the district court did not exercise jurisdiction over the state law claims, the Tenth Circuit did not address them. *Id.*
102. *Id.* at 868.
103. *Id.* at 871.
104. *Id.*
105. *Id.* at 871-72. It is irrelevant that the license was for a fixed term of years, since the right that Stanfield must retain is the right to control the quality of the products that bear the name "Stanfield." *Id.*
106. *Id.* at 872.
107. *Id.* The court cited, as examples of cases in which a "special relationship" existed, Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir. 1991) and Land O'Lakes Creameries, Inc. v. Oconomowoc Canning Co., 330 F.2d 667 (7th Cir. 1964). *Id.*
108. *Stanfield*, 52 F.3d at 873.
109. *E.g.*, *Taco Cabana*, 932 F.2d at 1121; Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022-23 (11th Cir. 1989); Kulack v. The Pearl Jack, 178 F.2d 154, 156 (6th Cir. 1949).

quality control. These cases involve a licensor who reasonably relies on the licensee's control of quality.

In *Taco Cabana International, Inc. v. Two Pesos, Inc.*,[110] the Fifth Circuit held that a lack of certified quality control did not result in abandonment.[111] Two brothers operated several Taco Cabana Mexican restaurants.[112] The brothers later split the business, one retaining the Taco Cabana name and the other using the name "TaCasita."[113] Despite the split, the brothers agreed to share the Taco Cabana trade dress.[114] The Fifth Circuit held that the brothers did not abandon the Taco Cabana trade dress because the brothers had engaged in a close working relationship and could rely on each other's working relationship to maintain quality control.[115]

Similarly, in *Land O'Lakes Creameries v. Oconomowoc Canning*,[116] the Seventh Circuit recognized a set of circumstances in which a licensee could rely on the licensor to exercise quality control. In *Land O'Lakes*, the defendant agreed to allow a licensee to use the trade name "Land O'Lakes" on canned goods.[117] The licensee used the name for forty years.[118] The court held that the agreement was "more than a naked license" and did not constitute an abandonment of the mark because there had been no complaints about the quality of goods over this forty year time period.[119] The court affirmed the lower court's decision that the "defendant's reliance on the Licensee's control over the quality of products constituted sufficient supervision to protect the quality of the goods bearing the trade-mark."[120]

D. *Analysis*

In *Stanfield*, the Tenth Circuit adopted the majority rule that granting a license to use a trade name without maintaining quality control results in a trademark's abandonment. Stanfield clearly granted a license without maintaining quality control, as the license agreement did not provide for quality control and Stanfield did not exercise actual quality control.

The Tenth Circuit gave little credit to the fact that Stanfield had once worked for OII and was reasonably aware of the quality of OII's goods. Likewise, the fact that no litigation ensued over the quality of goods bearing the "Stanfield" trademark did not persuade the court. The Tenth Circuit emphasized that the parties must have a "special relationship" before a licensor may

110. 932 F.2d 113 (5th Cir. 1991), *aff'd on other grounds*, 505 U.S. 763 (1992).
111. *Taco Cabana*, 932 F.2d at 1121-22.
112. *Id.* at 1117.
113. *Id.*
114. *Id.*
115. *Id.* at 1121-22.
116. 330 F.2d 667 (7th Cir. 1964).
117. *Land O'Lakes*, 330 F.2d at 669.
118. *Id.* at 670.
119. *Id.* The district court also based its decision on the following factors: (1) that the licensee exercised adequate quality control; (2) that the licensor was familiar with the quality of products produced by the licensee; and (3) that the licensee's distributor received all quality related complaints. Borchard & Osman, *supra* note 89, at 106.
120. *Land O'Lakes*, 330 F.2d at 670.

rely on the licensee to maintain quality control. But the court failed to describe the circumstances under which such a relationship might exist. Thus, the circumstances in which reliance on a licensee can substitute for a licensor's obligation to maintain quality control remains an open question.

CONCLUSION

The importance of *Vornado* and *Stanfield* goes beyond the fact that both are cases of first impression in the Tenth Circuit. Attorneys practicing in the intellectual property area should be aware that the Lanham Act may not protect an invention with a completely nonfunctional and unique appearance, even if the invention is "a described, significant inventive aspect of [an] invention."[121] *Stanfield* gave the Tenth Circuit the opportunity to address the importance of maintaining quality control when licensing a trade name, and providing an example of when a licensor cannot rely on a licensee to maintain quality control. Perhaps the best lesson to be learned from *Stanfield* is that prospective licensors should seek representation prior to entering into an agreement.

Timothy W. Gordon

121. *Vornado*, 58 F.3d at 1510.

JUVENILE LAW

INTRODUCTION

The juvenile system, only recently established in the United States, has a dark history in its treatment of delinquent youths.[1] Until the mid-1960s, juveniles had no constitutional rights or protections from the system's abuse.[2] Several major revisions to juvenile law culminated to form a juvenile justice system nearly rivaling in size and complexity that of the adult criminal system.[3] In spite of the transformation, the judicial shift from pursuing the "best interests of the child"[4] to proof of criminal guilt continues to stimulate controversy while steering juvenile law in the direction of greater criminalization.[5]

In light of the debate surrounding adult sentence enhancement and certification issues, this Survey examines two cases that came before the United States Court of Appeals for the Tenth Circuit in 1995. Part I examines the use of juvenile convictions to enhance adult criminal sentences. In *United States v.*

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1. JUDGE JERRY L. MERSHON, JUVENILE JUSTICE: THE ADJUDICATORY AND DISPOSITIONAL PROCESS 11 (1991). Other than the New York House of Refuge, established in 1824, there were very few early juvenile institutions in the United States. *Id.* While some discussion of the government's *parens patriae* existed as early as 1839, the theory that children under a certain age should be treated differently from adult criminals did not gain acceptance until the first juvenile code in 1989. *Id.*

2. *Id.* at 12.

3. *Id.* Past juvenile law procedures, which did not guarantee the right to remain silent, the right to counsel, and other basic rights, were constitutionally suspect. In recent years, the Supreme Court has corrected most of these deficiencies without destroying the underlying basis of the juvenile justice system. *Id.* As attitudes shift toward making juvenile offenders more accountable for their actions, the adult and juvenile systems will become even less distinguishable.

4. Entrenched in family law, the "best interests" philosophy remains the predominant custody standard in most jurisdictions. Best interests philosophy developed by way of *parens patriae*, on the theory that when a child's natural parents die, a special court would manage the family estate until the child reached age 21. THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 69 (1992). A fundamental difference, however, exists between the state's role as a parent and the state's interest in the control and discipline of disruptive youths. *Id.* A parent may discipline his/her child by placing limits on the child's behavior. *Id.* The state, on the other hand, punishes the child by imposing sanctions such as arrest, detention, prosecution, stigmatization, probation, and institutionalization. *Id.*

5. The juvenile justice system first evolved as an attempt to deal with the problems of dependent, neglected, and delinquent juveniles. Originally, the court's role did not include culpability determinations or assignments of punishment, but served to protect and help youths in trouble with the law. *Id.*

Through its evolutionary process, the philosophy has split into several directions in an attempt to draw the most serious offenders further into the juvenile system and divert the least serious offenders away from it. The juvenile justice system subscribes to several basic models when dealing with juvenile offenders. DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM 179 (1992). These models guide the different types of decision making made on behalf of or against specific juvenile offenders. *Id.* Discussed in context throughout this Survey, these models include: (1) the rehabilitation model, (2) the treatment or medical model, and (3) the "just desserts" or justice model. *Id.* at 179-80. Other models include the noninterventionist, the due process, and the crime control models. *Id.*

Alberty,[6] the court affirmed the federal district court's legal conclusions regarding the application and interpretation of the United States Sentencing Guidelines.[7] Part II discusses the Tenth Circuit's treatment of certifying juveniles for adult criminal prosecution. In *Green v. Reynolds*,[8] the court departed from its traditional interpretation of Rule 9(b),[9] which requires the dismissal of successive habeas corpus petitions, and concluded that denying counsel at a retroactive adult certification hearing constitutes a deprivation of due process.[10] After these two decisions, the Tenth Circuit's position on juvenile rights is now less clear; it is evident, however, that the court has taken a step backward in awarding the protections of procedural due process to minors.[11]

I. THE USE OF JUVENILE CONVICTIONS TO ENHANCE ADULT CRIMINAL SENTENCES[12]

A. *Background*

The juvenile justice system establishes the means by which state courts adjudicate youths charged with violations of state laws or ordinances.[13] The adult criminal system, however, may only sustain sanctions or penalties against those offenders whom the court officially designates as "adults."[14] In that respect, the state must prove cases against adult defendants, who assume full responsibility for their actions, beyond a reasonable doubt.[15] For non-

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6. 40 F.3d 1132 (10th Cir.), *cert. denied*, 115 S. Ct. 1416 (1995).

7. *Alberty*, 40 F.3d at 1135.

8. 57 F.3d 956 (10th Cir. 1995).

9. Rule 9(b) applies to section 2254, or federal habeas corpus petitions. The rule states:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petition to assert those grounds in a prior petition constituted an abuse of the writ.

Rules Governing Section 2254 Cases in the United States District Courts, rule 9(b), 28 U.S.C. § 2254 (1994).

10. *Green*, 57 F.3d at 958.

11. While the Tenth Circuit's present stance on juvenile rights is evident given the increased punishment for serious or violent juvenile offenders, its opinion as to the future of the juvenile justice system remains unclear. In any event, the current system must respond to complaints that minors, left to the juvenile court's jurisdiction, receive neither the constitutional protections accorded adults nor the rehabilitative treatment postulated for children.

12. 40 F.3d 1132 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1416 (1995).

13. CHAMPION, *supra* note 5, at 1-2. State juvenile laws include, within their definitions of delinquent behavior, all criminal acts, whether violative of local ordinance, state law, or federal law. Robert E. Shepherd Jr., *Trying Juveniles in Federal Court*, 9 CRIM. JUST. 45, 45 (1994). Although most juvenile delinquency proceedings fall within state court jurisdiction, several provisions of the 1994 federal crime bill encourage or even require the federal handling of juveniles charged with gun or gang related crimes. *Id.* As a result, state juvenile courts will likely see a greater number of juvenile cases adjudicated in the federal system. *Id.* Unless otherwise stated, this Survey will focus on state court procedures.

14. CHAMPION, *supra* note 5, at 1-2. Generally, an individual reaches adulthood at age 21. Yet, the upper limit for many state juvenile courts is 18. The juvenile system resolves this problem by certifying certain juvenile cases to adult court for criminal prosecution.

15. Whenever a person's freedom becomes jeopardized, "beyond a reasonable doubt" serves as the appropriate standard of proof in both criminal and juvenile courts. CHAMPION, *supra* note 5, at 28. However, in many instances, juvenile courts continue to use the civil "preponderance of the evidence" standard despite the Supreme Court's ruling in *In re* Winship, 397 U.S. 358 (1970).

adults, a separate adjudication process exists for the purpose of deciding culpability and appropriate treatments.[16] As a result, two separate systems of justice coexist: adult and juvenile.[17]

1. Defining Delinquency

Juvenile courts have exclusive jurisdiction over three major categories of juvenile behavior.[18] First, the court may intervene in "delinquent offenses" where the minor allegedly committed an act that the state defines as criminal for an adult.[19] Second, the juvenile court reviews "status offenses"[20] involving juvenile behavior that would not be considered criminal if committed by an adult.[21] Finally, the court has exclusive jurisdiction over juvenile cases involving dependency and neglect.[22] In these situations, parent-child conflicts and/or removal decisions merit court intervention simply for the child's protection.[23]

Much of the controversy surrounding the juvenile justice system lies in the status offender classification.[24] This category's very existence illustrates society's insatiable desire to punish juveniles whenever possible.[25] In

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CHAMPION, *supra* note 5, at 28. The Court ruled in that case that the U.S. Constitution entitled juveniles to the standard of proof beyond a reasonable doubt. *Id.* The Court, however, used a due process rationale rather than the equal protection analysis which would have destroyed all distinctions between juvenile and criminal proceedings. MERSHON, *supra* note 1, at 27.

16. BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 64 (1993). Since juveniles are not considered fully responsible for their actions, the antiquated view is that juveniles do not deserve the same harsh treatment as their adult counterparts. *Id.* at 65. The logic of this argument served as the basis for many notions adopted by the early juvenile courts. *Id.* Contemporary jurisprudence, however, stresses individual accountability for one's action which departs from the traditional view of the term "treatment." Consistent with the adult criminal system, the juvenile justice system has also responded to the growing trend of "just desserts." CHAMPION, *supra* note 5, at 19.

17. This idea, reflected in court nomenclature, illustrates several outdated principles that merely add to the complexity and confusion surrounding the juvenile system. For example, an officer may not arrest a child, but may place him/her in "Protective Custody." MERSHON, *supra* note 1, at 12. Similarly, the system does not jail children, but "Detains" them upon the adjudication of an "offense" rather than imprisonment following the conviction of a crime. *Id.* The juvenile court procedures refer to a "Hearing," not a trial, where a "Disposition" takes place instead of sentencing. *Id.*

18. KRISBERG & AUSTIN, *supra* note 16, at 64.

19. *Id.*

20. *Id.* at 65. This group of juveniles is also referred to as "Persons (or Children, or Juveniles, or Minors) in Need of Supervision." MARTIN L. FORST, THE NEW JUVENILE JUSTICE 80 (1995).

21. KRISBERG & AUSTIN, *supra* note 16, at 65. This category includes truancy, curfew violations, and running away. *Id.*

22. *Id.* The only behavioral categories that involve the commission of an offense include delinquency and status offenses. The children in the last category, whose contact with the law involves issues of dependency and neglect, fall within the juvenile court's jurisdiction through uncontrollable circumstances. Their only problem is one of "status," in that these children are either dependent (without family or support) or neglected (where the family situation is harmful for the child). CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 30-31 (3d ed. 1991).

23. KRISBERG & AUSTIN, *supra* note 16, at 65.

24. Generally, status offending children have the same legal and constitutional rights as the juvenile delinquent. Judge Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 11 (1992). Under state and federal law, the juvenile court does not have the same power to detain or incarcerate status offenders. *Id.* at 12. In practice, however, most states still permit the detention of status offenders. *Id.*

25. A considerable part of the status offender debate surrounds the issue regarding the han-

response to society's concern for violence by and against youth, the juvenile system tends to "redefine" status offenders as delinquent offenders—directly subjecting the child to juvenile court processing.[26] For example, the more a court official believes that a particular youth's "best interests" require institutional placement, the more severe the particular status offense becomes.[27] Furthermore, federal policy categorizes probation violations as criminal offenses, providing juvenile judges the authority to institutionalize status offenders directly, even where the original violation constitutes only a mere status offense.[28]

In addition to the various behavioral categories, juvenile delinquency definitions "differ from time to time and place to place" according to several criteria.[29] The term "juvenile offender" may differ depending on the particular jurisdiction, the scope of the offensive behavior, and the ambiguities surrounding age requirements.[30] To add to the complexity, the juvenile system breaks down the definition of offender status into categories of serious, violent, and chronic.[31] The Federal Bureau of Investigation[32] defines a "serious juvenile offender" as a youth convicted of a Part I offense[33] who is at least age fourteen at the time of the offense.[34] Similarly, a "violent offender" is a

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dling of children who commit noncriminal acts. While a law enforcement agency would not arrest an adult for running away from home, receiving an unexcused absence from school, or walking the streets after dark, these behaviors call for juvenile sanctioning. Considered part of the juvenile justice system, status offenders undergo a delinquent labeling process similar to society's more serious juvenile offenders. Without judicial review, juvenile courts may legally institutionalize youths who have not committed any criminal acts until they reach their twenty-first birthday. KRISBERG & AUSTIN, *supra* note 16, at 58. In that respect, society fails to distinguish between juvenile delinquencies such as running away from severe offenses: armed robbery, forcible rape, aggravated assault, or murder.

26. BERNARD, *supra* note 4, at 27.

27. *Id.* Not only does the juvenile receive institutional placement, he now becomes labeled a "criminal," rather than a status offender. *Id.*

28. *Id.* at 28. Under federal policy, a youth charged with a status offense may appear in court and receive court-ordered probation. *Id.* As a condition of this probation, the juvenile court may order the youth not to commit another status offense. *Id.* Repeat offenders who violate the conditions of their probation by committing a status offense may then receive criminal institutionalization. *Id.*

29. STEVEN M. COX & JOHN J. CONRAD, JUVENILE JUSTICE: A GUIDE TO PRACTICE AND THEORY 12 (3d ed. 1991).

30. *Id.* at 12-15. For example, an act might be delinquent in State X, but not State Y or the law may change in State X, such that an act considered delinquent this year is not delinquent the following year. *Id.* at 12. The scope of behaviors is subject to a wide variety of interpretations at all levels of the juvenile justice system. For example, the terms "incorrigible" or "indecent" conduct may appear in delinquency definitions without a standard to guide judges and practitioners. *Id.* at 13. Finally, states differ as to the minimum age below which the juvenile court will not hold a child accountable for illegal acts, or an upper limit where the juvenile court loses jurisdiction. *Id.* at 14.

31. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, MYTHS AND REALITIES: MEETING THE CHALLENGE OF SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS, 1992 ANNUAL REPORT 27 (1993) [hereinafter ANNUAL REPORT]. Note, however, that these definitions do not fall along rigid lines as some youths may share the characteristics of more than one category.

32. The Federal Bureau of Investigation's Uniform Crime Reports borrows the juvenile offender definitions from the United States Department of Justice. *Id.*

33. Included among Part I offenses are murder and non-negligent homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

34. *Id.* at 8.

youth convicted of a violent Part I offense who has a prior adjudication of such an offense.[35] The violent offender category also includes youths convicted of murder alone.[36] The third classification, "chronic juvenile offender," applies to youths whose records reflect five or more separate charges of delinquency, regardless of the gravity of each offense.[37]

2. Procedural Rights

Juvenile justice philosophy developed from two distinct legal theories: the doctrine of *parens patriae* and the rationale of due process.[38] The most comprehensive landmark juvenile Supreme Court decision to date is In re *Gault*,[39] in which the Court held that juvenile proceedings must measure up to the standards of due process and fair treatment.[40]

The revolutionary *Gault* decision at last addressed the constitutionality of the *parens patriae* doctrine. The Court, however, not only failed to overthrow the juvenile court system, but also disregarded many other aspects of the *parens patriae* doctrine. In an attempt to provide only basic procedural rights for juveniles,[41] the Court formally established the process of "selective incorporation" of constitutional guarantees on a case-by-case basis.[42] Subsequent decisions have broadened the juvenile's due process rights, but the Supreme Court has failed to grant juveniles constitutional protection equivalent to those granted to adults.[43]

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35. *Id.*

36. The Office of Juvenile Justice and Delinquency Prevention considers a youth a violent offender if "found guilty of murder alone or of attempted murder, rape or attempted rape, aggravated assault, armed robbery, arson of an occupied dwelling, voluntary manslaughter, or kidnapping, combined with a prior adjudication." *Id.* at 27.

37. *Id.* at 8.

38. For a discussion of the *parens patriae* philosophy, see *supra* notes 1, 4 and accompanying text.

39. 387 U.S. 1 (1967). The treatment of Gerry Gault, arrested at the age of 15 for making obscene phone calls to a neighbor, illustrates the disparity in treatment between youths and adults. *Gault*, 387 U.S. at 4. Gault was taken into custody and detained overnight without notification of his parents and appeared at a hearing the following day without counsel. *Id.* at 5-6. At the hearing, the complaining witness did not appear, the judge did not take any sworn testimony, and the court made no transcript or formal memorandum of the proceedings. *Id.* at 5. The trial court convicted Gault of the charge and sentenced him to a penal institution for six years. *Id.* at 29. In the same state and year, an adult would receive a prison sentence of 60 days or less with a maximum fine of 50 dollars. *Id.*

40. *Id.* at 30-31.

41. Instead of demanding exact conformity with adult criminal procedural safeguards, the Court required only a standard of "fundamental fairness" combined with four specific procedural protections. These protections include: the right to adequate and timely notice; confrontation of adverse witnesses; counsel; and the recognition of the privilege against self-incrimination. *Id.* at 31-57. Indicating that certain protections become applicable only in confinement cases, the Court did not address the rights of a juvenile in the pre- or post-adjudicatory stages of the proceeding. BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 19 (1993). Instead, the Court chose to narrowly confine the holding to the actual adjudication of guilt or innocence. *Id.* Other matters not decided under *Gault* include: arrest rights, public or jury trials, jeopardy, capacity under the insanity defense, grand jury indictment, and appellate review. MERSHON, *supra* note 1, at 25.

42. MERSHON, *supra* note 1, at 24. In reviewing juvenile cases, the Court "selects" which constitutional rights extend to juveniles and which do not, based upon a seemingly arbitrary decision-making process.

43. Listed in chronological order showing the evolution of the Court's incorporation doctrine

3. Sentence Determinations

Another difference between the adult and juvenile justice system concerns individualized dispositions.[44] The philosophy underlying juvenile justice includes rehabilitation and individualized justice, thus the juvenile sentence structure grants judges wide latitude in disposing of juvenile cases.[45] Although juvenile delinquency adjudications carry far less serious consequences today, few sanctions actually reflect the seriousness of the crimes committed.[46] Tied to sentence determinations are confidentiality concerns.[47] Generally, states hold juvenile records confidential, forbidding their use in subsequent civil or criminal proceedings.[48] Note, however, that a judge in a subsequent criminal case may properly have access to juvenile records paraphrased in the presentence report.[49] In addition, the presentence report itself may be a key component in guiding the sentencing judge's decision.[50] In that respect, the use of juvenile adjudications to enhance the sentences of adult offenders has a long lineage.[51] Since juveniles do not have the full array of procedural rights afforded to adults, critics argue that the use of juvenile adjudications for

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regarding juvenile rights, the major cases include the following: Haley v. Ohio, 332 U.S. 596 (1948) (protecting juveniles against coerced confessions); Kent v. United States, 383 U.S. 541 (1966) (establishing procedural requirements for certification hearings); *In re* Gault, 387 U.S. 1 (1967) (providing juveniles with rights of notice, counsel, confrontation, cross examination, and protection against self-incrimination); *In re* Winship, 397 U.S. 358 (1970) (establishing the child's right, in a delinquency adjudication, to have charges proven beyond a reasonable doubt); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (refusing to extend the right to a jury trial to juveniles); Breed v. Jones, 421 U.S. 519 (1975) (establishing the child's right against double jeopardy); Schall v. Martin, 467 U.S. 253 (1984) (rejecting the claim that pre-trial detention of juveniles offended the Due Process Clause); New Jersey v. T.L.O., 460 U.S. 325 (1985) (holding that a diminished Fourth Amendment standard applies to school searches).

44. FORST, *supra* note 20, at 2.

45. *Id.*

46. Considered a necessity to the treatment model, the indeterminate sentence has become the hallmark of the juvenile justice system. *Id.* When disposing of offenders, one cannot determine in advance how long it will take for the treatment to become effective. Leslie T. Wilkins, *Foreword* to GERALD R. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION xii (1978).

47. In achieving the purpose of rehabilitating troubled juveniles, the juvenile system promises confidentiality to avoid the stigma of an arrest, criminal conviction, or delinquency finding. DONALD B. KING, 100 INJUSTICES TO THE CHILD 14-15 (1971). The juvenile justice system often undermines this promise, however, by the sheer number of people who have access to police records. *Id.* at 15.

48. MERSHON, *supra* note 1, at 13. Most state statutes incorporate this principle, and case law clearly supports this proposition. *Id.* Exploring the traditional idea of juvenile confidentiality, Judge Mershon refers to Eugene H. Czajkoski, author of *Why Confidentiality in Juvenile Justice?*, which called for the abolishment of confidentiality in juvenile proceedings due to its lack of effect on the juvenile offender and the disastrous effect on the court's control over serious crimes. *Id.* at 14.

49. *Id.* at 14-15.

50. *Id.*

51. *See* United States v. Chester, 919 F.2d 896, 898 (4th Cir. 1990); United States v. Reid, 911 F.2d 1456, 1466 (10th Cir. 1990), *cert. denied*, 498 U.S. 1097 (1991); United States v. Brown, 903 F.2d 540, 543 (8th Cir. 1990); United States v. Keys, 899 F.2d 983, 989 (10th Cir.), *cert. denied*, 498 U.S. 858 (1990); United States v. White, 888 F.2d 1252, 1254 (8th Cir. 1989).

Other circuits have held that incarceration in a juvenile facility is "imprisonment" for sentencing purposes, and that the use of juvenile adjudications to enhance adult sentences do not violate due process. *See* United States v. Davis, 929 F.2d 930 (3d Cir. 1991). For a review of the context of other circuit court decisions, see also *infra* notes 100-08 and accompanying text.

sentencing purposes amounts to a denial of due process.[52] Like several other circuits, the Tenth Circuit has accepted the constitutionality of the sentence enhancement provisions without question.[53]

Another procedural issue in juvenile case law addresses whether the Fourteenth Amendment's Due Process Clause provides juveniles a right to a jury in delinquency proceedings. In *McKeiver v. Pennsylvania*,[54] the Supreme Court held that the right to a jury does not extend to juveniles.[55] Emphasizing treatment rather than punishment,[56] the Court reasoned that the "juvenile proceeding has not yet been held to be a 'criminal prosecution' within the meaning and reach of the Sixth Amendment."[57] Again, the Court invoked its "selective incorporation" of constitutional principles in reaching this conclusion. Arguably, the use of less stringent procedures to generate an adjudication in juvenile court followed by use of that same conviction to enhance a subsequent criminal sentences defies logic.[58]

Overall, the Supreme Court has sent a mixed message concerning the constitutionality of the use of prior convictions.[59] If ruled constitutionally invalid,

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52. *See generally* David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769 (1991).

53. Few federal courts have addressed the precise question of whether sentence enhancement provisions violate the Due Process Clause. For example, the Ninth Circuit passed upon this issue in United States v. Williams, 891 F.2d 212 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990). The court reasoned that since *McKeiver* allowed juvenile courts to deprive liberty without benefit of a jury trial, courts may use the juvenile sentence to later enhance an adult's deprivation of liberty. *Id.* at 215.

54. 403 U.S. 528 (1971). Two juveniles, aged 15 and 16 (one charged with a felony and the other charged with a misdemeanor), did not have the benefit of a jury during a delinquency proceeding. *McKeiver*, 403 U.S. at 534. The state accused the first child, Joseph McKeiver, of robbery, larceny, and receiving stolen goods. *Id.* Three of the felony charges arose from an incident in which McKeiver, along with several other youths, chased three younger children and took 25 cents from them. *Id.* at 536.

In a separate case, the second child, Edward Terry, allegedly hit a police officer with his fists and a stick, after the officer attempted to break up a fight not involving Terry. *Id.* After the Pennsylvania Supreme Court denied each the right to a jury trial, in the consolidated case the question eventually appeared before the U.S. Supreme Court, where it joined two North Carolina cases. *Id.* at 536-38. The North Carolina cases involved two separate incidents where children allegedly obstructed traffic and created a disturbance in a principal's office as a result of a march protesting racial discrimination. *Id.* at 537.

55. *Id.* at 545.

56. *Id.* at 544 n.5. Emphasizing the potential adverse impact that jury trials may have on the informality, flexibility, and confidentiality of juvenile court proceedings, the Court decided not to alter juvenile court practices. FELD, *supra* note 41, at 23.

57. *McKeiver*, 403 U.S. at 541. The Court remained unwilling to "remake the juvenile proceeding into a fully adversary process" and put "an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

58. If a juvenile court adjudicates a juvenile offender, the adult criminal court may use that "conviction" in future prosecutions, even if the individual's rights were compromised (denial of mandatory advice of counsel and/or the option of a jury trial) as a juvenile.

59. Enhancement provisions call into question two basic premises underlying Supreme Court decisions. First, if a court uses a juvenile adjudication to enhance an adult sentence, the adjudication itself becomes "criminalized." Dormont, *supra* note 52, at 1797. Thus, the rehabilitative goal of the juvenile justice system is abandoned and the fundamental differences between the adult and juvenile procedural rights no longer hold true. *Id.* Second, the length of the juvenile confinement directly affects the period of adult incarceration. If a minor receives a sentence of confinement for treatment or warning purposes, the system later penalizes that person as an adult.

courts may not use convictions against defendants in subsequent proceedings.[60] The Court refined this principle in *Burgett v. Texas*,[61] holding that the use of such convictions would essentially deprive a defendant of a constitutional right twice.[62] Nevertheless, the Court continues to permit the use of prior juvenile adjudications to enhance later sentences.

Despite case law prohibiting the use of prior uncounseled convictions, federal courts must include prior juvenile adjudications in adult sentence calculations.[63] Federal courts generate their sentencing determinations with guidelines promulgated by the United States Sentencing Commission.[64] The heart of the United States Sentencing Guidelines (Guidelines)[65] is a sentencing table, consisting of forty-three base offense levels and six criminal history categories, identifying the applicable sentencing range for offenders.[66] According to the Guidelines, assignments to the highest criminal history category, level VI, include those persons classified as career offenders.[67] Juvenile defendants, aged eighteen years at the time of the offense, who commit crimes of violence or controlled substance offenses, and have at least two similar prior felony convictions, are classified as career offenders.[68] Furthermore, the various offense levels may also increase depending on the statutory penalty for a particular crime.[69]

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60. The Court has held that the denial of constitutional protections will invalidate a conviction in several instances. *Id.* at 1805 n.32. For example, the denial of a speedy trial invalidated the defendant's conviction in Dickey v. Florida, 398 U.S. 30, 37-38 (1970). In Duncan v. Louisiana, 391 U.S. 145 (1968), the denial of a jury trial invalidated the conviction. *Id.* at 162. Similarly, the Court held that the denial of the right both to confront and cross-examine accusers, and the right against self-incrimination invalidated convictions in Pointer v. Texas, 380 U.S. 400 (1965) and Malloy v. Hogan, 378 U.S. 1 (1964). Finally, the Court invalidated a defendant's conviction where he had been denied of the right to counsel in Carnley v. Cochran, 369 U.S. 506, 517 (1962).

61. 389 U.S. 109 (1967).

62. *Burgett*, 389 U.S. at 115. The Court concluded that the admissions of constitutionally infirm convictions result in inherently prejudicial decisions. *Id.*

63. Shepherd, *supra* note 13, at 47. "Despite their 'civil' tag, prior juvenile adjudications are included as part of the 'criminal history' category under the Federal Sentencing Guidelines." *Id.*

64. Paul M. Winters et al., *Project: Twenty-fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994 Sentencing Guidelines*, 83 GEO. L.J. 1229, 1229 (1995).

65. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4A1.3 (November 1993) [hereinafter U.S.S.G.]. The Guidelines are applicable to all offenses committed on or after November 1, 1987. U.S.S.G. Ch.1, Pt.A(1). When a federal court convicts a defendant, the sentencing judge must impose a sentence based on the Guidelines in effect at defendant's sentencing date. *Id.* § 1B1.11, comment.

66. The base offense level constitutes the vertical axis of the Sentencing Table. *Id.* at Ch.5, Pt.A. This level focuses on the defendant's conduct during the commission of the convicted offense(s). Darren M. Gelber, Note, *The Federal Sentencing Guidelines: Is Discretion Still the Better Part of Valor?*, 9 N.Y.L. SCH. J. HUM. RTS. 355, 357 (1992). The criminal history category constitutes the horizontal axis of the table. U.S.S.G. Ch.5, Pt.A. The judge determines the appropriate category by totaling the number of criminal history points calculated in the pre-sentence report. *Id.* § 4A1.1. The points start at zero and have no upper limit. *Id.* All defendants with 13 or more points have a criminal history category of VI, regardless of whether their point total adds up to 14 or 43. *Id.* at Ch.3, Pt.A.

67. U.S.S.G. § 4B1.1.

68. Winters et al., *supra* note 64, at 1244.

69. *Id.* at 1230. Adjustment factors include the harm to the victim, the defendant's role in the offense, the presence of any obstruction of justice, defendant's conviction of multiple offenses, and whether the defendant accepted personal responsibility for the offense. *Id.* at 1230-36.

The Guidelines treat prior sentences, imposed in "related" cases, as one sentence for purposes of calculating the criminal history category.[70] Prior sentences relate if the sentence results from one of three criteria. The commission of the crimes must occur either: (1) on the same occasion, (2) as part of a single common scheme or plan, or (3) or as a result of consolidation for trial or sentencing.[71] Prior sentences do not "relate" if an intervening arrest occurs.[72]

B. United States v. Alberty[73]

1. Facts

Defendant-appellant Anthony Alberty received indictments for unlawful possession of a firearm as a convicted felon and unlawful possession of ammunition as a convicted felon.[74] Pursuant to a plea agreement, Alberty pleaded guilty to the firearm charge in exchange for the government's agreement to dismiss the ammunition possession.[75] Subsequently, the probation officer classified Alberty as a level VI offender based on thirteen criminal history points.[76] Alberty maintained that his two prior juvenile offenses were "related," and therefore, made him only a level V offender with eleven criminal

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70. U.S.S.G. § 4A1.2. The applicable provisions of the Guidelines read:

(a) Prior Sentences Defined. (1) The term "prior sentences" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense. (2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment in the case of consecutive sentences.

. . . .

(d) Offenses Committed Prior to Age Eighteen. (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence. (2) In any other case, (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under § 4A.1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

Id.

71. U.S.S.G. § 4A1.2, comment. (n.3).

72. *Id.*

73. 40 F.3d 1132 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1416 (1995).

74. *Alberty*, 40 F.3d at 1132. The felonies were in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) respectively.

75. *Id.* at 1132-33.

76. *Id.* at 1133. The pre-sentence report assigned Alberty an unadjusted base level of 24. *Id.* After receiving a two-level reduction for acceptance of responsibility, and an additional one-level reduction for entering a timely guilty plea, the base dropped to 21. The issue presented on appeal concerned Alberty's criminal history score of 13. *Id.* Assessed two criminal points for each prior juvenile adjudication, Alberty received a total of 13 criminal history points. *Id.*

The first prior juvenile conviction stemmed from a failure to appear for a hearing relating to a second-degree burglary charge. *Id.* Even though the court eventually dismissed the burglary charge, Alberty received a delinquent adjudication for jumping bail on June 9, 1989. *Id.* at 1134. Adjudicated on the same day, the second offense, robbery by force, occurred on a separate occasion. *Id.* Placed in custody from June 23, 1989 to June 13, 1990, the court ordered the sentences for bail jumping and robbery to run concurrently. *Id.*

history points.[77] In ruling against Alberty's argument, the district court concluded that the two offenses were separate and unrelated.[78] The court sentenced Alberty to a ninety month term of imprisonment.[79]

2. Decision

The Tenth Circuit affirmed the lower court's decision, holding that Alberty's two prior juvenile offenses were not "consolidated for sentencing" under the Guidelines.[80] The sole issue before the court concerned the "relatedness" of Alberty's two prior juvenile convictions. Relying on the prior sentence criteria in the Guidelines' comment section, the court required Alberty to prove the existence of some formal order of transfer or consolidation in support of his claim. However, the Tenth Circuit chose to rely on circuit precedent and ruled that Alberty failed to satisfy his burden of demonstrating the existence of a judicial order.[81]

The absence of a "factual nexus" between the prior offenses further persuaded the court's ruling.[82] In the Tenth Circuit precedents requiring no formal order,[83] the court required each of the prior cases to tie together factually.[84] Since the prior cases at issue lacked any factual connection, other than the fact that the juvenile judge adjudicated both cases on the same day,[85] the court upheld the district court's assessment of two criminal history points for each prior juvenile offense.[86]

C. *Analysis*

In *Alberty*, the Tenth Circuit relied on its precedent in *United States v. Chavez-Palacios*,[87] which adopted as authority the commentary in the Guide-

77. *Id.* The greater the defendant's criminal history score, the more severe his sentence. For example, the sentencing table for a level six offense and a level I criminal history category has a range of imprisonment of zero to six months. Dormont, *supra* note 52, at 1772 n.20. If another defendant commits the same offense, with a criminal history score of VI, he will receive 12 to 18 months imprisonment. *Id.*

78. *Alberty*, 40 F.3d at 1133-34.

79. *Id.*

80. *Id.* at 1135.

81. *Id.* Specifically, the court relied on: United States v. Gary, 999 F.2d 474 (10th Cir.), *cert. denied*, 114 S. Ct. 259 (1993) and United States v. Villarreal, 960 F.2d 117 (10th Cir.), *cert. denied*, 506 U.S. 856 (1992). These cases, however, "impliedly suggest" the inclusion of a formal judicial order (but do not necessarily require one) to permit a finding of consolidation. *Gary*, 999 F.2d at 479-80; *Villarreal*, 960 F.2d at 119-21.

82. *Alberty*, 40 F.3d at 1135.

83. *See supra* note 81 (discussing the *Gary* and *Villarreal* decisions).

84. *Gary*, 999 F.2d at 479-80.

85. *Alberty*, 40 F.3d at 1134.

86. *Id.* at 1135. In finding the district court's judgment not clearly erroneous, the Tenth Circuit cited other circuits where a formal judicial order serves as a prerequisite to a consolidation finding. *Id.* at 1135 n.4. In United States v. Russell, 2 F.3d 200 (7th Cir. 1993), the court required a judicial determination from the sentencing judge to consolidate into a single sentence. *Id.* at 204. "Without something in the record . . . the district court did not err in finding the offenses unrelated." *Id.* The Eighth Circuit, in United States v. McComber, 996 F.2d 946 (8th Cir. 1993), held that the section 4A1.2(a)(2) consolidation requirement does not apply where the cases proceeded to sentencing under separate docket numbers and no formal order exists. *Id.* at 947.

87. 30 F.3d 1290 (10th Cir. 1994).

lines, unless it conflicts with federal law.[88] Regardless of whether the prior sentence counts as one related sentence or two separate sentences, sentence enhancements undermine the important distinction between adult and juvenile defendants. Sentence enhancement provisions directly conflict with the informal, nonadversarial setting of the juvenile courts.[89] As part of child development,[90] society expects young people to make mistakes and learn from their indiscretions without exacting the full extent of adult criminal penalties on juveniles.[91] In practice, sentence enhancements illustrate the extreme difficulties faced by the appellate courts in upholding the developmental element of juvenile law.[92] In *Alberty*, the Tenth Circuit misinterpreted the *McKeiver* Court's treatment of youths who fall between the two worlds—the adult and juvenile courts.[93]

Unbeknownst to the *McKeiver* Court, section 4A1.2 of the Guidelines opened the floodgates for the enhancement of individual sentences based upon prior juvenile adjudications.[94] As juveniles, these defendants did not receive the benefit of Sixth Amendment protections;[95] yet as adults, they may endure

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88. *Chavez-Palacios*, 30 F.3d at 1295 (quoting Stinson v. United States, 113 S. Ct. 1913 (1993)). Note, however, that the legislative history of the Guidelines fails to mention *Gault*, *McKeiver*, or provide any logical basis for including juvenile adjudications in the criminal history scoring. Dormont, *supra* note 52, at 1785 n.89.

89. SIMONSEN, *supra* note 22, at ix; *see also* CHAMPION, *supra* note 5, at 21 ("Juvenile courts are civil proceedings designed exclusively for juveniles, whereas criminal courts are proceedings designed for alleged violators of criminal laws."). This civil-criminal distinction becomes apparent in several areas: the absence of a criminal record, limited punishments, and extensive leniency. Formal criminal procedures, relating to the admissibility of evidence or testimony, do not enjoy the same heightened scrutiny in juvenile proceedings. *Id.* In addition, hearsay receives the same consideration as hard information and evidence. *Id.* at 27.

Another remaining legacy of *parens patriae* lies in the right to a jury. In recent years, the Court has consistently rejected attempts to extend the full range of procedural due process guarantees to juveniles. *Id.* at 173.

90. Research on delinquency suggests that most youths mature out of illegal behaviors or misdeeds. KRISBERG & AUSTIN, *supra* note 16, at 4. Generally considered less mature and responsible than adults, minors often lack experience, perspective and judgment. Shelia L. Sanders, Comment, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line*, 19 S.U. L. REV. 141, 153 n.87 (1992).

91. KRISBERG & AUSTIN, *supra* note 16, at 5.

92. *Id.*

93. Similar to other federal courts, the Tenth Circuit's interpretation of § 4A1.2 produces a result inconsistent with U.S. Supreme Court precedent. Dormont, *supra* note 52, at 1788-89. The interpretation problem arises when the underlying premises of the juvenile justice system do not manifest themselves in adult sentencing requirements. *Id.* at 1790. In *McKeiver*, the Court made two key assumptions in justifying a lower standard of due process for juveniles. *Id.* The first view relies on the difference between juvenile punishment and treatment. *Id.* at 1790 n.103. The second view reflects the belief that juvenile proceedings will not detrimentally affect individuals once they reach adulthood. *Id.* at 1790. For a related discussion of the *McKeiver* decision, see *infra* notes 54-62. For a review of the context of other circuit court decisions, see also *infra* notes 100-08 and accompanying text.

94. Dormont, *supra* note 52, at 1805.

95. The Sixth Amendment provides:

> In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

additional adult punishment.[96] The collateral use of juvenile adjudications demonstrates the failure of the "fundamental fairness" standard to protect the very persons the Court meant to protect.[97] By refusing to address the constitutionality of sentence enhancements,[98] the Tenth Circuit merely postponed another challenge to juvenile rights.[99]

D. *Other Circuits*

Certain types of prior sentences are generally not included in the defendant's criminal history calculations.[100] Note, however, that the circuit courts do not always agree as to what constitutes an includable prior sentence. The First Circuit ruled, in *United States v. Unger*,[101] that uncounseled juvenile proceedings count toward the criminal history scoring.[102] In *United States v. Ashburn*,[103] the Fifth Circuit held that a juvenile conviction, automatically set aside under a state statute, properly received the prior sentence designation.[104] In comparison, the Seventh Circuit held, in *United States v. Kozinski*,[105] that a sentence of supervision not based on a finding of guilt received improper consideration as a prior sentence.[106] However, in *Nichols v. United States*,[107] the Supreme Court permitted use of a prior uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction that did not, by itself, justify imprisonment.[108]

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96. Dormont, *supra* note 52, at 1805.

97. *Id.*

98. The Ninth Circuit was the first appellate court to address the constitutionality of U.S.S.G. § 4A1.2(d). In United States v. Williams, 891 F.2d 212 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990), the trial court committed the defendant to the California Youth Authority following his second juvenile bank robbery. *Id.* at 213. His commitment, however, consisted of an indeterminate sentence according to a treatment mandate. Dormont, *supra* note 52, at 1803. Had the sentencing judge not included Williams's juvenile sentences in his criminal history scoring, his sentence would have ranged from 30 to 37 months, not 46 to 57 months. *Williams*, 891 F.2d at 214. Williams's first bank robbery would have added two points to his criminal history score regardless of whether he had received incarceration in an adult prison, with full constitutional protection, or in juvenile hall with limited protections. Dormont, *supra* note 52, at 1804.

99. Dormont, *supra* note 52, at 1805.

100. U.S.S.G. § 4A1.2(c). According to the Guidelines, sentences for offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions, public intoxication, and vagrancy do not count towards the criminal history scoring. *Id.* To work around these constraints, "the Guidelines place no cap on the number of points an adult may acquire from his juvenile record." Dormont, *supra* note 52, at 1774.

101. 915 F.2d 759 (1st Cir. 1990), *cert. denied*, 498 U.S. 1104 (1991).

102. *Unger*, 915 F.2d at 761-62. Unger allegedly engaged in a variety of criminal conduct as a juvenile, including breaking and entering, receiving stolen goods, and assault and battery. *Id.* at 763. In failing to prove this conduct, the state could not convict Unger of these offenses, but instead found him "guilty" of being "wayward." Two years later, an adult court judge used this wayward finding to increase his criminal history score, imposing the maximum sentence. *Id.* at 760.

103. 20 F.3d 1336 (5th Cir.), *opinion reinstated in part on reh'g en banc*, 38 F.3d 804 (1994), *cert. denied*, 115 S. Ct 1969 (1995).

104. *Ashburn*, 20 F.3d at 1343.

105. 16 F.3d 795 (7th Cir. 1994).

106. *Kozinski*, 16 F.3d at 812.

107. 114 S. Ct. 1921 (1994).

108. *Nichols*, 114 S. Ct. at 1928.

II. CERTIFYING JUVENILES FOR ADULT CRIMINAL PROSECUTIONS[109]

A. *Background*

Another issue in juvenile justice concerns the adequacy of "transfer" proceedings. Transfers, also known as waivers or certifications, refer to the transfer or jurisdictional shift of certain cases from juvenile courts to adult criminal courts[110] for purposes of adult prosecution and punishment.[111] Few jurisdictions provide an intermediate juvenile-adult category for sentencing serious young offenders. As a result, juveniles indicted for certain serious crimes may either be tried in juvenile court with inadequate procedures, or in adult court, with standard adult sentences.[112] Juveniles tried in juvenile courts do not have a right to a jury trial and may receive longer sentences than young adult offenders convicted for the same offense in criminal court.[113] On the other hand, juveniles transferred out of the juvenile justice system are subject to the full range of adult punishments, including life imprisonment and the death penalty.[114]

The landmark case concerning waiver of juvenile court jurisdiction is *Kent v. United States*.[115] Regarded as the first major juvenile rights case, *Kent* addressed the issue of whether a juvenile should receive less protection than that awarded to adults suspected of criminal offenses.[116] *Kent* established that: (1)

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109. 57 F.3d 956 (10th Cir. 1995).

110. Hon. Vida J. Taliaferro, *Waiver of Juvenile Court Jurisdiction*, 38 RES GESTAE 38 (1995).

111. CHAMPION, *supra* note 5, at 212. Intake officers generally refer the more serious cases to juvenile prosecutors with a recommendation that the children receive a jurisdictional transfer, for their safety, as well as the safety of others. *Id.* at 178. Once granted, the jurisdictional waiver redefines and classifies the defendants as adults for prosecution in criminal courts. *Id.* at 212.

112. Juvenile judges have limited options when dealing with those offenders who commit particularly serious violent or capital offenses. *Id.* at 228. Generally, prolonged incarceration in a juvenile facility serves as the most powerful sanction available to these judges. *Id.* As a result, officials consider waiver or certification actions the desired method of obtaining more severe punishments for juvenile offenders. *Id.*

113. Due to their wide discretion in handling juveniles, juvenile courts have the power to administer lengthy sentences of detention. *Id.* Unfortunately, this discretion applies to status offenders as well as to serious or dangerous juvenile offenders. *Id.* Despite the few unfavorable implications of juvenile court adjudications, however, many juveniles prefer not to contest or fight their transfers to criminal courts.

114. Generally, life imprisonment and the death penalty lie beyond the powers of the juvenile court judge. *Id.* Age, however, no longer remains a mitigating factor as the U.S. Supreme Court has upheld death sentences for two offenders who committed criminal offenses at age 16 and 17 in the consolidated cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*. Stanford v. Kentucky, 492 U.S. 361 (1989). *See generally* Sanders, *supra* note 90, at 141 (discussing the death penalty and juvenile defendants).

115. 383 U.S. 541 (1966). The state arrested Morris Kent, then age 16, on charges of housebreaking, robbery, and rape, as he was serving probation for housebreaking and attempted purse snatching. *Kent*, 383 U.S. at 543. After repeated interrogations, the juvenile court detained Kent for one week at the receiving home for children, without the benefit of an arraignment or probable cause hearing. *Id.* at 544-45. During the detention, the police interrogated Kent without the benefit of his counsel or parents. *Id.* at 551. Kent's attorney filed a motion for a hearing on whether to waive jurisdiction. *Id.* at 545. The judge waived jurisdiction without ruling on the motion and without a waiver hearing. *Id.* at 546.

116. *Id.* at 551.

juvenile courts must conduct waiver hearings before transferring juveniles to the jurisdiction of adult criminal court;[117] and (2) juveniles have the right to counsel before and during such hearings.[118] After summarizing the differences between adult courts and juvenile delinquency proceedings,[119] the Court laid out several determinative factors to guide waiver judicial decision-making.[120]

B. Green v. Reynolds[121]

1. Facts

The Oklahoma district court convicted and sentenced Rickke Green when he was sixteen years old.[122] After filing the first of three federal habeas petitions, Green pursued a state post-conviction claim asserting that his adult prosecution violated the Equal Protection Clause of the Fourteenth Amendment.[123] At the time of the convictions, the applicable Oklahoma statute allowed the adjudication of females, eighteen years old and younger, in juvenile court[124] while subjecting juvenile males, sixteen to eighteen years old, to adult prosecution without providing a transfer hearing.

Pursuant to the remedy announced by the Tenth Circuit in *Bromley v. Crisp*,[125] the state granted Green a retroactive adult certification hearing

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117. *Id.* at 561.

118. *Id.*

119. These differences include:

> [The juvenile] may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the [D.C. juvenile] statute to give preference to retaining the child in the custody of his parents "unless his welfare and the safety and protection of the public cannot be adequately safeguarded. . . ." The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.

Id. at 556-57 (quoting D.C. CODE ANN. §§ 11-907, -915, -927, -929 (1961)).

120. The *Kent* factors address issues such as the seriousness of the alleged offense, the sophistication and maturity of the juvenile, and the likelihood of rehabilitation. For a complete listing of the *Kent* factors, see *id.* at 566-67.

121. 57 F.3d 956 (1995).

122. *Green*, 57 F.3d at 957. Green faced over 55 years of incarceration for grand larceny, possession of and robbery with a firearm after former conviction of a felony (AFCF), and concealment of stolen property AFCF. *Id.*

123. *Id.*

124. *Id.* at 958.

125. 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). This case established the proper procedures for determining whether a defendant's conviction survived a challenge under Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). Under Oklahoma juvenile code provisions, the state could prosecute males under age 16 as adults, while females of the same age remained subject to the juvenile court's jurisdiction, unless certified to stand trial as adults. OKLA. STAT. tit. X, § 1101(a) (Supp. 1969). The *Lamb* court held that the sex-based statute violated the Equal Protection Clause. *Lamb*, 456 F.2d at 20. The court later held that the *Lamb* decision applied retroactively. Radcliff v. Anderson, 509 F.2d 1093, 1096 (10th Cir.), *cert. denied*, 421 U.S. 939 (1975).

Citing *Kent*, the *Bromley* court held that it need not set aside convictions if the juvenile court can establish that the adult certification would have taken place had it conducted an adequate hearing. *Bromley*, 561 F.2d at 1356-57 (citing *Kent*, 383 U.S. at 564-65). To make such determinations, the court requires that a state or federal court conduct an evidentiary hearing. *Id.* at 1357 n.6. The burden of proof, however, rests with the state to take into account all doubts and any weakness of proof due to the passage of time. *Id.*

(RAC hearing) to determine whether a transfer would have even taken place had the court followed the proper procedures in 1971.[126] After denying Green's request for assistance of appointed counsel, Green refused to participate in the hearing claiming insufficient time to prepare.[127] Upon hearing the state's evidence at the RAC hearing, the court concluded that Green's transfer would have occurred had the district court conducted a proper hearing in 1971.[128] The district court concluded that each of the seven grounds for relief[129] referred to in the habeas petition related to the 1971 convictions.[130] The district court ruled that defendant's grounds "could have been, or were, raised" in an earlier petition,[131] and dismissed all the claims under Rule 9(b).[132]

2. Decision

The Tenth Circuit affirmed the lower court's decision as to six of the seven grounds—finding relief unavailable due to their omission from the first habeas petition in 1977.[133] The last ground for relief survived dismissal as the Tenth Circuit further ruled that the state's denial of Green's request for counsel at the RAC hearing deprived him of due process.[134] The Tenth Circuit reasoned that the claim contained neither successive nor abusive elements, and, therefore, required a constitutional review on the merits due to the inapplicability of Rule 9(b).[135] Consequently, the Tenth Circuit remanded in part, reversed in part,[136] and instructed the lower court to issue a conditional writ vacating the pertinent convictions unless the state conducted an RAC hearing, complete with representation.[137]

C. *Analysis*

The Tenth Circuit's decision in *Green v. Reynolds* follows a long line of cases protecting the rights of juveniles.[138] To comply with the Supreme Court's ruling in *Kent*, a transfer hearing "must measure up to the essentials of due process and fair treatment."[139] Generally, a habeas petition requires

126. *Green*, 57 F.3d at 957.
127. *Id.*
128. *Id.* at 957-58.
129. Defendant's grounds included: (1) ineffective assistance of appellate counsel; and (2) that the Court of Criminal Appeals acted to deprive him of effective assistance of appellate counsel. *Id.* Other grounds included one claim that the court subjected him to an unconstitutional appellate delay and one claim that the convictions were unconstitutional under *Lamb*. *Id.*
130. *Id.* at 957.
131. *Id.* at 958.
132. *Id.*
133. *Id.* at 957.
134. *Id.* at 961.
135. *Id.* at 958.
136. *Id.* at 961.
137. *Id.*
138. For a brief description of the major juvenile rights cases, see *supra* note 43.
139. *Kent*, 383 U.S. at 562. Relevant provisions include representation by counsel; the juvenile's meaningful access to pertinent information considered by the juvenile court; and an adequate statement of reasons for the juvenile court's decision. *Id.* at 561-63.

Rule 9(b) dismissal if the petition "successfully" repeats a claim previously determined on the merits, or the petition "abusively" asserts new grounds unjustifiably omitted from a prior petition.[140] The "unique" factual twist presented in *Green*, however, required a somewhat different analysis of Rule 9(b).[141] As the only logical alternative, the Tenth Circuit regarded the *Lamb* violation (gender-discrimination) and the denial of counsel as substantively separate claims. Had the Tenth Circuit deemed the RAC hearing a post-conviction proceeding, the district court could deny counsel, thus repeating the same due process violation.[142]

The principal purpose of a jurisdictional waiver is to decide whether the juvenile should receive criminal prosecution in adult court or be subject to the rehabilitation of the juvenile courts.[143] Transfer procedures represent a type of community vengeance toward juveniles.[144] Too frequently, however, the use of transfers serves merely as a convenient tool for shifting jurisdiction over certain juveniles to adult courts.[145] The system arbitrarily renders some juveniles "death eligible" simply because a particular judge subjectively deems the juvenile "mature."[146] If the separation of juveniles from hardened adult criminals serves as a crucial component of juvenile rehabilitation, then transfers to adult facilities deprive youths of an opportunity for rehabilitation.[147] This loss also subjects juveniles to cruelty and abuse by other inmates.[148]

The current standard of appellate review of waiver decisions[149] and the consequences of reversal should remain separate and independent issues.[150] Every decision to transfer a child to criminal court should automatically create

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140. *Green*, 57 F.3d at 958 n.3 (citing Watkins v. Champion, 39 F.3d 273, 275 (10th Cir. 1994)).

141. *Id.* at 958.

142. *Id.* at 961. As a post-conviction hearing, the only available remedy would be to institute another uncounseled hearing on adult certification. *Id.* For an explanation of the *Lamb* decision and *Lamb* violations, see *supra* note 125.

143. KING, *supra* note 47, at 70. According to the founders of the juvenile justice system, all children capable of rehabilitation should receive a trial through the juvenile court procedures rather than the criminal law system. *Id.*

144. *Id.* at 68.

145. Twenty years ago, most certification cases occurred as a result of a some type of sensational delinquency or criminal act that attracted public attention. *Id.* As a result, the child was unjustly "thrown to the lions" to satisfy the community's sense of vengeance. Today, many children receive the same fate simply due to society's abhorrence for youth violence. *Id.*

146. Glenn M. Bieler, Note, *Death Be Not Proud: A Note on Juvenile Capital Punishment*, 7 N.Y.L. SCH. J. HUM. RTS. 179, 201 (1990).

147. KING, *supra* note 47, at 85-86.

148. *Id.* It is not uncommon for younger boys to be exposed to various sexual assaults by other inmates. *Id.* Adult facilities may also become an undesirable school yard where juveniles learn even more sophisticated methods of criminal activity from adults. *Id.* One study observed that juveniles held in adult jails have a suicide rate nearly five times that of juveniles housed in juvenile facilities. Sarah Freitas, *Extending the Privilege Against Self-Incrimination to the Juvenile Waiver Hearing*, 62 U. CHI. L. REV. 301, 309 (1995). In addition, it is likely that a juvenile detainee, without a prior record may share a cell with a hardened and dangerous adult offender. *Id.*

149. Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 278 (1991). Generally, a defendant must demonstrate that the trial court abused its "sound discretion." *Id.* In *Green*, the Tenth Circuit reviewed the district court's factual findings for clear error and its legal conclusions de novo. *Green*, 57 F.3d at 957.

150. Zimring, *supra* note 149, at 278.

a right of appeal.[151] As demonstrated by *Green*, a number of difficult issues surround the standard of review and the appropriate remedy, especially if the alleged behavior does not warrant the transfer.[152] If the Tenth Circuit had held the district court's waiver decision inappropriate, Green's age, at the time of the appeal, would have pushed him far beyond the reach and setting of the juvenile court.[153] The consequences of reversal directly influenced the Tenth Circuit's unwillingness to intervene and correct an abusive result. The court did nothing but "pass the buck" back to the lower court, without addressing the prejudicial effects of the entire waiver process. If the court truly recognized the philosophy of "best interests," it would have to remand with instructions to impose juvenile sanctions.[154]

D. *Other Circuits*

Transfer issues represent a complex area of juvenile law with many statutory schemes. As it stands today, appellate courts reviewing the constitutionality of state laws have found variance in their due process provisions. For example, in *Russell v. Parratt*, the Eight Circuit found no denial of due process in proceeding against a juvenile as an adult without an evidentiary hearing.[155] In addition, the Ninth Circuit, in *Guam v. Kinsbury*,[156] held that due process does not require a social investigation as a condition precedent to certification.

CONCLUSION

The juvenile courts in this country have an important mission regarding their place within the criminal justice system. Since juveniles do not have the full range of procedural protection under the law, the systematic violation of juvenile rights becomes inevitable. At one extreme, a great tragedy would result if the judicial system abolished all rehabilitative goals envisioned for

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151. *Id.* at 277. Zimring proposes a system that provides "waived" defendants the option to appeal the waiver determination before trial or after the conviction in criminal court. *Id.*

152. *Id.*

153. Prosecuted at the age of 16 as an adult, Green received a sentence of incarceration for over 55 years. *Green*, 57 F.3d at 957. Having served some 24 years in an adult penitentiary, the only available recourse is to reduce Green's sentence. Zimring, *supra* note 149, at 278. Had defendant received a juvenile delinquency proceeding in 1971, state law would have mandated Green's release from detention by his nineteenth birthday. *Green*, 57 F.3d at 961 n.8. Although a reduction in sentence does not restore the defendant to juvenile status, it does prevent the state court from conducting a retroactive adult certification (RAC) hearing in its favor.

154. Contrary to precedent established by Kelley v. Kaiser, 992 F.2d 1509 (10th Cir. 1993), the *Green* court remanded the case to state court to conduct a constitutionally adequate RAC hearing. *Green*, 57 F.3d at 960. Similar to Green, Kelley had also suffered a *Lamb* injustice. However, the *Kelley* court ruled that the state already had the opportunity to address the certification issue and had resolved the question without providing the defendant with a full and fair hearing. *Kelley*, 992 F.2d at 1516. The court then held that proper procedures required the district court to address the issue. *Id.* While no proof exists as to which court, state or federal, provides the better forum, the *Green* decision provides the trial judge an opportunity to search for new reasons to certify the juvenile. If a trial judge denied jurisdiction over the juvenile once, it is highly unlikely that judge would fairly reconsider the issue on remand.

155. 543 F.2d 1214 (8th Cir. 1976).

156. 649 F.2d 740 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981).

youthful offenders and treated all juveniles as adults. At the other extreme, the system will continue to hold delinquents criminally responsible for their misbehavior without the added benefit of certain privileges and immunities intended for juveniles. In sum, the juvenile justice system lacks a coherent and consistent policy on how to deal with juveniles. American society must decide whether it wants to punish, protect, or treat its wayward youth. Only then may the judicial system clear the muddle surrounding juvenile justice. Until that time, the lack of response serves only to help offenders generate future crimes.

Leta R. Holden

LABOR LAW

INTRODUCTION

During the last year, the Tenth Circuit interpreted several federal labor statutes. It addressed the Worker Adjustment and Retraining Notification Act (WARN)[1] and the Fair Labor Standards Act of 1938 (FLSA).[2] The court also considered preemption of various state and common law remedies under the Employment Retirement Income Security Act of 1974 (ERISA).[3]

This Survey begins with a detailed examination of *Frymire v. Ampex Corp.*[4] *Frymire* presented the Tenth Circuit with its first opportunity to address provisions of WARN.[5] Among the numerous issues involved, the court set forth its interpretation of the applicable statute of limitations and the calculation of back pay, issues which other circuits have not treated consistently. Part II of this Survey discusses three cases in which the Tenth Circuit examined issues affecting compensation calculation under the FLSA. In *Henderson v. Inter-Chem Coal Co.*,[6] the court reviewed the analysis used to determine whether an individual is an employee or independent contractor for FLSA purposes.[7] In *Reich v. Iowa Beef Packers, Inc.*,[8] the Tenth Circuit clarified the analysis used to determine the types of activities that constitute compensable work time within the meaning of the FLSA.[9] Finally, in *Aaron v. City of Wichita*,[10] the court addressed the method of calculating the "regular rate of pay"[11] used to compute overtime and the exemption of certain employees from FLSA overtime requirements.[12] Part III examines the Tenth Circuit's treatment of ERISA preemption of various statutory and common law remedies. The court in *Guidry v. Sheet Metal Workers National Pension Fund*[13] held that ERISA did not preempt statutory provisions exempting disposable earnings from garnishment when state law does not sufficiently relate to the benefit plan.[14] Additionally, in *Pacificare of Oklahoma, Inc. v. Burrage*,[15] the Tenth Circuit held that ERISA did not preempt a medical malpractice claim targeted at a health maintenance organization.[16]

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1. 29 U.S.C. §§ 2101-2109 (1994).
2. 29 U.S.C. §§ 201-219 (1994).
3. 29 U.S.C. §§ 1001-1461 (1994).
4. 61 F.3d 757 (10th Cir. 1995).
5. *Frymire*, 61 F.3d at 761.
6. 41 F.3d 567 (10th Cir. 1994).
7. *Henderson*, 41 F.3d at 567-71.
8. 38 F.3d 1123 (10th Cir. 1994).
9. *Reich*, 38 F.3d at 1125-26.
10. 54 F.3d 652 (10th Cir. 1995).
11. 29 U.S.C. § 207(a)(1) (1994).
12. *Aaron*, 54 F.3d at 655-59.
13. 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995).
14. *Guidry*, 39 F.2d at 1083-86.
15. 59 F.3d 151 (10th Cir. 1995).
16. *Pacificare*, 59 F.3d at 153, 155.

I. THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT[17]

A. *Background*

In response to what Congress perceived as unhealthy and demoralizing work force reductions by employers,[18] it enacted the Worker Adjustment and Retraining Notification Act (WARN). Congress designed WARN to give state and local governments, unions, and workers the time necessary to react and adjust to reductions in the work force.[19] WARN prohibits employers with one hundred or more employees[20] from "closing" a plant[21] or instituting a "mass layoff"[22] without giving written notice to each affected employee or the employee's representative at least sixty days prior to the action.[23] Violations of WARN subject employers to civil liability[24] and fines.[25]

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17. 29 U.S.C. §§ 2101-2109 (1994).

18. Jeffrey Turner, Comment, *Damages Under the Workers Adjustment and Retraining Act (WARN): Why Damages Cannot Be Based on Calendar Days*, 12 COOLEY L. REV. 197, 201 (1995).

19. *Id.*; *see* Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining and Notification (WARN) Act in Practice*, 14 BERKELEY J. EMPLOYMENT & LAB. L. 1, 3 (1993).

20. The statute defines the affected employer as "any business enterprise that employs-(A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a)(1).

21. The statute defines a "plant closing" as

> the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

29 U.S.C. § 2101(a)(2).

22. The statute defines a "mass layoff" as

> a reduction in force which—(A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for—(i)(I) at least 33 percent of the employees (excluding any part-time employees) and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees).

29 U.S.C. § 2101(a)(3).

23. The provision states:

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and (2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

29 U.S.C. § 2102(a).

24. WARN provides:

> Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—(A) back pay for each day of violation at a rate of compensation not less than the higher of—(i) the average regular rate received by such employee during the last three years of the employee's employment; or (ii) the final regular rate received by such employee . . . [s]uch liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

The language of WARN leaves ample room for conflicting interpretations. The circuit courts have inconsistently treated the issues of the appropriate statute of limitations and the calculation of back pay. In passing WARN, the legislature did not incorporate an express statute of limitations.[26] The 1990 Implementation Act created a four-year federal statute of limitations applicable to federal statutes enacted after December 1, 1990.[27] Having no retroactive effect, the Implementation Act does not apply to WARN actions.[28] WARN limitation periods vary among the circuits from six months to six years, depending on whether that circuit chose to use an analogous federal or state statute.[29]

The Supreme Court, in *North Star Steel Co. v. Thomas*,[30] attempted to address the dispute between the circuits regarding the applicable WARN limitations period.[31] In *North Star*, the Court affirmed the Third Circuit's holding that the period of limitations for WARN actions should be borrowed from state law.[32] Because the federal statute failed to specify a limitations period for the cause of action, the Court, consistent with its settled practice,[33] borrowed from the state law.[34] An exception is made to this practice only when the state limitations period would interfere with or frustrate the underlying policies and implementation of the federal statute.[35] The Court, however, declined to provide guidelines for determining the most applicable type of state limitations periods.[36] Subsequent to the *North Star* decision, several circuit courts which had previously mandated a federal limitations period (specifically the NLRA statute of limitations) vacated and remanded pending cases for further consideration.[37]

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29 U.S.C. § 2104(a)(1).

25. WARN provides:

> Any employer who violates the provisions of section 2101 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable within three weeks from the date the employer orders the shutdown or layoff.

29 U.S.C. § 2104(a)(3).

26. North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1929 (1995).

27. The Implementation Act states, "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." 28 U.S.C. § 1658 (1988).

28. 28 U.S.C. § 1658; *see also* Kimberly J. Norwood, *28 U.S.C. § 1658: A Limitation Period with Real Limitations*, 69 IND. L.J. 477, 503 (1994) (discussing the Implementation Act's failure to specify a federal limitations period for civil rights actions under pre-existing statutes).

29. Norwood, *supra* note 28, at 501-02.

30. 115 S. Ct. 1927 (1995).

31. *North Star*, 115 S. Ct. at 1930.

32. *Id.*

33. *See* Reed v. United Transp. Union, 488 U.S. 319 (1989) (holding that state personal injury statutes govern limitations period for Labor-Management Reporting and Disclosure Act); Wilson v. Garcia, 471 U.S. 261 (1985) (stating that the state personal injury limitations period governs civil rights claims under 42 U.S.C. § 1983).

34. *North Star*, 115 S. Ct. at 1931.

35. *Id.* at 1930-31.

36. The Supreme Court recognized the appellate court's identification of four state limitations periods: a two-year period for general civil penalties, a three-year period under a state wage payment and collection law, a four-year period for contract breaches, and a six-year residual statute of limitations. *Id* at 1931.

37. United Mine Workers v. Peabody Coal Co., 38 F.3d 850 (6th Cir. 1994), *cert. granted*

The Fifth Circuit Court of Appeals, in *Carpenters District Council v. Dillard Department Stores, Inc.*,[38] addressed the other unsettled issue of calculating back pay damages.[39] The Fifth Circuit, after examining the statutory language and legislative intent, determined that back pay damages should be based upon work days instead of calendar days.[40] The court noted that the traditional notion of back pay connotes a sum of money which would put the employee in as good a position as he would have been had the employer not violated WARN.[41] The Fifth Circuit determined that this calculation of back pay aligned with Congress's intent to award damages under WARN equal to the wages an employee would have received had he not been laid off.[42]

B. Frymire v. Ampex Corp.[43]

1. Facts

Ampex Corporation (Ampex) designs, manufactures, and markets electronic audio and visual recording products.[44] Although headquartered in California, it maintained facilities in Colorado Springs, Colorado, where the plaintiffs were employed.[45] Two wholly owned subsidiaries, Ampex Recording Systems Corporation (RSC) and Ampex Video Systems Corporation (VSC), shared the Colorado Springs facility.[46] Ampex separated RSC and VSC, which were previously housed in the same building, into two separate adjacent buildings.[47]

In September 1990, approximately six months after Ampex separated the subsidiaries, the company informed its employees that it would be conducting a work force reduction in the coming months.[48] In a November 1990 update, Ampex notified its employees that approximately 350 employees would be laid off.[49] In January 1991, Ampex issued immediate termination notices to the plaintiffs.[50] Carolyn Frymire and eighty-four other employees brought a

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and vacated, 115 S. Ct. 2272 (1995); Halkias v. General Dynamics Corp., 31 F.3d 224 (5th Cir. 1994), *vacated per curiam*, 56 F.3d 27 (5th Cir. 1995).

38. 15 F.3d 1275 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995).

39. *Dillard*, 15 F.3d at 1282-86.

40. *Id.* at 1285-86.

41. *Id.* at 1283 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

42. *Id.* at 1284-85 (citing S. REP. NO. 62, 100th Cong., 1st Sess. 24 (1987)). The court adeptly hypothesized possible unfair results where

> [e]mployee "A" is a full-time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the Third Circuit's calendar-day approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while the part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days).

Id. at 1285.

43. 61 F.3d 757 (10th Cir. 1995).

44. *Frymire*, 61 F.3d at 761.

45. *Id.* at 761-62.

46. *Id.* at 762.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

WARN action against Ampex Corporation for failing to provide the requisite notice.[51]

The trial court granted Ampex's motion for summary judgment with respect to the RSC employees.[52] The court held that the two facilities were separate sites of employment; therefore, the number of RSC employees fell below the WARN threshold requirement.[53] With respect to the group employed by VSC, the court denied Ampex's motion for summary judgment, finding that group's number met the WARN threshold.[54] Subsequently, the court denied Ampex's motion for reconsideration and granted class certification to the plaintiffs.[55]

At trial, the court found that Ampex had violated WARN's notice requirement and assessed damages, postjudgment interest, and attorneys fees.[56] On appeal, Ampex raised six issues: (1) whether the action exceeded the NLRA six-month statute of limitations and was thus time-barred;[57] (2) whether the VSC and RSC facilities constituted separate sites or a single site of employment;[58] (3) whether Ampex should have its damages reduced via "good faith" mitigation;[59] (4) whether Ampex should have its damages set off by the

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51. *Id.* at 761.
52. *Id.* at 762.
53. *Id.*
54. *Id.*
55. *Id.*
56. Frymire v. Ampex Corp., 858 F. Supp. 1081, 1083-87 (D. Colo. 1994).
57. *Frymire*, 61 F.3d at 763.
58. *Id.* at 764-65. The Tenth Circuit relied on rules promulgated by the Secretary of Labor. *Id.* at 765-66. The pertinent rule states:

> (i) Single site of employment. (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment . . . . (3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment . . . . (4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site . . . . (5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

20 C.F.R. § 639.3(i) (1995).

The Tenth Circuit upheld the lower court's finding that VSC and RSC could be considered two separate employment sites for WARN purposes. *Frymire*, 61 F.3d at 766-67. The court considered the criteria of proximity, contiguity, and, to a lesser extent, the dissimilarity of products. *Id.*

59. *Frymire*, 61 F.3d at 767. WARN provides:

> If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided in this section.

29 U.S.C. § 2104(a)(4).

The Tenth Circuit found that Ampex had a good faith belief that its conduct did not violate the WARN notice requirement. *Frymire*, 61 F.3d at 768. The court concluded that liability therefore should have been reduced pursuant to § 2104(a)(4) by the lower court. *Id.* at 768-69. At a minimum, the "good faith" defense requires proof of the employer's subjective intent to comply with WARN and proof of the employer's objective reasonable belief that its conduct also complied. *Id.* at 767-68.

amount of voluntary severance benefits provided to the discharged employees;[60] (5) whether the district court erroneously used calendar days instead of work days for calculating back pay damages;[61] and (6) whether the plaintiff's award of prejudgment interest was barred by WARN's "exclusive remedies" provision.[62]

2. Decision

Relying on the U.S. Supreme Court's decision in *North Star Steel v. Thomas*,[63] the Tenth Circuit held that the lower court correctly applied Colorado's three-year statute of limitations for contract claims.[64] The court noted the split in the circuits regarding WARN causes of action[65] and the *North Star* Court's refusal to decide which state limitations period applied.[66]

The Tenth Circuit affirmed the trial court's holding on the limitations period on three grounds. First, the goal of uniformity would be furthered if a "universally recognized cause of action, such as a contract action" were borrowed for WARN purposes.[67] Second, the employer-employee relationship and the WARN remedy of back pay most closely resembled an implied contract and the remedy for a breach thereof.[68] Third, the court noted that other circuits have supported the use of state contractual limitation periods.[69]

The court also acknowledged a circuit split on the issue of whether work or calendar days should be used in calculating back pay damages.[70] The court

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60. *Frymire*, 61 F.3d at 769. The Tenth Circuit held that Ampex could not set off payments made under its "pay in lieu of notice" policy. *Id.* at 770. The court upheld the lower court's finding that such payments represented a binding contractual obligation to pay benefits having no set-off effect on WARN. *Id.* However, the court found that the lower court should have considered monies paid under the policy in calculating good faith reductions of Ampex's liability. *Id.* at 770-71.

61. *Id.* at 771.

62. *Id.* at 773. WARN states that "the remedies provided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. § 2104(b). The circuit court found that while WARN contains an exclusive remedies provision, it also contains a nonexclusive remedies provision. *Frymire*, 61 F.3d at 773. WARN states in relevant part:

> The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

29 U.S.C. § 2105.

Given the apparent ambiguity in the statute, the court looked to the congressional purpose. *Frymire*, 61 F.3d at 773. The Tenth Circuit held that 28 U.S.C. § 1961(a), which provides for allowance of interest on civil case money judgments awarded, in conjunction with WARN's nonexclusive remedies provision, evinced Congress's intent not to preclude prejudgment interest. *Id.*

63. 115 S. Ct. 1927 (1995).

64. *Frymire*, 61 F.3d at 763.

65. *Id.*

66. *Id.* at 764.

67. *Id.*

68. *Id.*

69. *Id.*; *see* Halkias v. General Dynamics Corp., 31 F.3d 224, 246 (5th Cir. 1994) (Wisdom, J., dissenting); United Paperworkers Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51, 57 (2d Cir. 1993) (stating that state statutes of limitations should be applied).

70. *Frymire*, 61 F.3d at 772. The Fifth Circuit applied work days in Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1282-86 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933

examined the language of the text,[71] as well as the legislative history of WARN, but found little clarification.[72] Because the Tenth Circuit had never addressed the method for calculating back pay damages, it looked to the Fifth Circuit's decision in *Dillard* for guidance.[73] The court agreed with the Fifth Circuit and concluded that using work days rather than calendar days to calculate back pay damages more appropriately reflected the purpose of WARN.[74]

C. *Analysis*

The Tenth Circuit's interpretation of WARN in *Frymire* reflected sound policy and demonstrated consistent reasoning. The court correctly applied contract theory to the statute of limitations, mitigation, and back pay calculation issues, but some flaws exist. By preventing Ampex from setting off payments under its "pay in lieu of notice" policy,[75] the court diminished the employers' incentive to comply with the purpose and intent of WARN notice requirements. On the other hand, by holding that work days should be used in calculating back pay damages,[76] the Tenth Circuit eliminated some potential for unjust enrichment.[77]

As a result of the Supreme Court's decision in *North Star*, a concern with any federal court's decision with respect to the statute of limitations in a WARN action is the lack of consistency and predictability nationally. A federal statute of limitations would alleviate this problem. Under the current scheme, with circuit courts selecting appropriate state statutes of limitations, multi-state employers must be wary of potential plaintiffs who may avail themselves to venues that possess longer state limitations periods.

D. *Other Circuits*

The Second Circuit Court of Appeals was the first circuit court to discuss which limitations period to apply in WARN actions.[78] The Second Circuit relied on the Supreme Court's analytical framework set forth in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[79] to identify the proper limitations

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(1995). In contrast, the Third Circuit applied calendar days in United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 41-43 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994).

71. *See supra* text accompanying notes 39-40.

72. *Frymire*, 61 F.3d at 771-72.

73. *Id.* at 772 (citing *Dillard*, 15 F.3d at 1275).

74. *Id.*

75. *Id.* at 770.

76. *Id.* at 772.

77. *But see* Turner, *supra* note 18, at 222 (noting an inconsistency in basing the state's civil fine upon calendar days, while basing workers' damages on work days).

78. United Paperworkers Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993). The defendant, Specialty Paperboard, terminated all 232 employees of its mill and sold the mill the same day to the co-defendant, Rock-Tenn Company. *Id.* at 52. On the same day, Rock-Tenn rehired 141 of the employees. *Id.* The employees' union filed a class action suit under WARN on behalf of the laid-off employees against both the selling and purchasing companies. *Id.* The union claimed that the companies' actions violated notice requirements. *Id.*

79. 501 U.S. 350 (1991).

period when the statute is silent.[80] In such a situation, the court should borrow the local statute of limitations most analogous to the instant situation, so long as it does not undermine federal goals.[81]

The circuits reflect a more dramatic split on the calculation of damages when an employer fails to give sufficient notice in contravention of WARN.[82] The dispute centers on the interpretation of § 2104 of WARN, which states that the employer is liable to the employee for "back pay for each day of violation . . . up to a maximum of [sixty] days."[83] Only two circuits addressed this issue prior to *Frymire*, both reaching different conclusions. The Third Circuit in *United Steel Workers v. North Star Steel Co.*[84] found that damages should be based upon calendar days.[85] In *Carpenters District Council v. Dillard Department Stores, Inc.*,[86] the Fifth Circuit declared that damages should be calculated on the basis of work days.[87] The Supreme Court declined to settle this dispute between the circuits by denying certiorari in *Dillard*.[88] As the issue percolates within the circuits, the potential exists for varying interpretations of the WARN damages calculation provision.

II. FAIR LABOR STANDARDS ACT OF 1938:[89] OVERTIME COMPENSATION CALCULATION

A. *Background*

Relevant sections of the Fair Labor Standards Act (FLSA) set compensation requirements for overtime hours worked by employees.[90] The FLSA did this in an attempt to remedy low wages and long hours that endangered workers' health.[91] In 1985, a sharply divided Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*[92] expanded the statute's reach, stating that state and local governments would now be held accountable to FLSA requirements.[93]

FLSA overtime requirements apply only to employees, and not to independent contractors.[94] In *Dole v. Snell*,[95] however, the Tenth Circuit stated

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80. *United Paperworkers*, 999 F.2d at 53.
81. *Id.* (citing *Lampf*, 501 U.S. at 355).
82. *See* Turner, *supra* note 18, at 199-201.
83. 29 U.S.C. § 2104(a)(1).
84. 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994).
85. *North Star*, 5 F.3d at 42.
86. 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995).
87. *Dillard*, 15 F.3d at 1286.
88. 115 S. Ct. 933 (1995).
89. 29 U.S.C. §§ 201-219 (1994).
90. The statute provides that an employee who works longer than 40 hours shall be paid at least one and a half times her regular pay rate. 29 U.S.C. § 207(a)(1).
91. Kimberly A. Pace, *What Does It Mean to Be a Salaried Employee? The Future of Pay-Docking*, 21 J. LEGIS. 49, 52 (1995).
92. 469 U.S. 528 (1985).
93. *Garcia*, 469 U.S. at 556 (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).
94. The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The FLSA further defines an employer as

that the degree and nature of the employer's control determines the status of the worker, not solely the employer's classification.[96] The *Dole* court stated that the economic realities of the relationship governed whether an individual is an "employee."[97] Under the FLSA, an employer must pay one and one-half times the employee's "regular rate of pay for each hour worked over forty hours per week."[98] However, the FLSA exempts managerial and professional employees from the overtime requirements.[99]

B. *Tenth Circuit Decisions*

1. *Henderson v. Inter-Chem Coal Co.*[100]

a. *Facts*

The defendant companies, Inter-Chem Coal Company, Nationwide Mining, Inc., and Brent Nations, employed Henderson to repair and maintain equipment.[101] Henderson filed suit against the companies seeking unpaid overtime compensation pursuant to the FLSA.[102] The evidence indicated that although the defendant companies exerted little control over him, Henderson was economically more dependent on the companies than not.[103] The district court granted summary judgment for the companies after holding that Henderson was an independent contractor.[104] Henderson appealed the decision.[105]

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any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d).

95. 875 F.2d 802 (10th Cir. 1989).

96. *Dole*, 875 F.2d at 805.

97. Six factors comprise the economic reality test:

(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.

Id.

98. 29 U.S.C. § 207 (a)(1).

99. 29 U.S.C. § 213 (a)(1). The exemption may have been partly prompted by the notion that managers and professionals possessed sufficient bargaining power as to make such governmental protection unnecessary. Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 141 (1993).

100. 41 F.3d 567 (10th Cir. 1994).

101. *Henderson*, 41 F.3d at 570.

102. *Id.* at 569.

103. *Id.* at 570. Defendants provided affidavits showing that while they informed Henderson about what equipment needed to be fixed, Henderson chose the manner of repair. *Id.* He did no other type of mechanical work for the companies and possessed his own specialized tools and truck. *Id.* However, Henderson worked almost exclusively for the defendant companies, which paid him by the hour. *Id.* The working relationship between Henderson and the companies spanned approximately three years and four months. *Id.* Lastly, the companies called on Henderson for equipment repair work as needed, not solely on specific projects. *Id.*

104. *Id.* at 569.

105. *Id.*

b. *Decision*

The Tenth Circuit found that genuine issues of material fact existed as to whether Henderson was an independent contractor, thus precluding summary judgment.[106] The court recognized that the FLSA definitions of "employer" and "employee" expanded the boundaries of traditional agency law principles.[107] The court, therefore, did not limit its inquiry into the employment context by relying on contractual terminology or common law concepts of "employee" or "independent contractor."[108] The court instead applied the economic reality test, which classifies employment based on economic dependence upon the principal entity.[109] The totality of the circumstances determines the characterization.[110] The Tenth Circuit noted that because material issues of fact remained, the defendants were not entitled to summary judgment.[111] The court outlined three findings a lower court must make as the trier of fact. First, the district court must determine the historical facts surrounding Henderson's work.[112] The next step is to analyze the six factors of the economic realities test.[113] Third, the district court must determine whether or not the individual is an "employee" under the FLSA.[114]

2. *Reich v. Iowa Beef Packers, Inc.*[115]

a. *Facts*

Iowa Beef Packers (IBP) slaughters, processes, and packs meat throughout the Midwest.[116] In accordance both with its own internal policies and with OSHA and USDA regulations, IBP required its employees to wear certain garments and safety equipment on the job.[117] The trial court found that there were two types of hourly production workers, those who used cutting utensils in their jobs and those who did not.[118] Both categories of workers wore special white outergarments.[119]

106. *Id.* at 570-71.
107. *Id.* at 570 (relying upon Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)).
108. *Id.* (citing Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989)).
109. *Id.*
110. *Id.*
111. *Id.* at 571.
112. *Id.*
113. *Id.* For a list of the six factors, see *supra* note 97.
114. *Id.*
115. 38 F.3d 1123 (10th Cir. 1994).
116. *Reich*, 38 F.3d at 1124.
117. The knife-wielding/meat-cutting workers wore garments and special safety equipment which included "a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guard, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, scabbard and shin guards." *Id.* The second category of workers wore gear such as hard hats, earplugs, safety footwear, and safety eyewear. *Id.*
118. *Id.*
119. *Id.* at 1125.

Under § 17 of the FLSA[120] the Secretary of Labor brought an action against IBP seeking to enforce the overtime and recordkeeping provisions.[121] The Secretary argued that the time employees spent putting on, taking off, and storing the safety equipment between shifts constituted compensable work time under the FLSA.[122] IBP countered that the tasks were preliminary and postliminary activities that were noncompensable under the Portal-to-Portal Act of 1947.[123]

The trial court agreed in part with both parties. It initially granted a restitutionary injunction, having determined that part of the contested work time for the knife-wielding workers was "hours worked" under the FLSA.[124] The trial court, however, later vacated the injunction and certified for appeal the question of whether the FLSA required retroactive application of the injunction.[125] The parties appealed the issues of determining compensable hours and issuance of the restitutionary injunction.[126]

b. *Decision*

The Tenth Circuit agreed with the trial court's determination of compensable work time,[127] but provided a different justification.[128] The court reasoned that time spent by the second category of workers did not constitute FLSA compensable time because that activity failed to reach the level of mental or physical exertion that defines "work."[129] The court defined work as a physical or mental exertion, whether burdensome or not, which the employer controls or requires of the employee, and which is pursued necessarily and primarily for the benefit of the employer.[130]

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120. 29 U.S.C. §§ 201-219 (1994).

121. *Reich*, 38 F.3d at 1124.

122. *Id.* at 1125.

123. *Id.* The Portal-to-Portal Act provides that

> no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . . . (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254 (1994).

124. *Reich*, 38 F.3d at 1125.

125. *Id.*

126. *Id.*

127. *Id.* The lower court found that the time consumed in donning, doffing, and storing the protective gear by the knife-wielding workers was compensable because of the "integral and indispensable" part it played in the performance of the principal activity, meat cutting. Reich v. Iowa Beef Packers, Inc., 820 F. Supp. 1315, 1326 (D. Kan. 1993).

128. *Reich*, 38 F.3d at 1125.

129. *Id.* at 1125-26.

130. *Id.* at 1125 (relying on Tennessee Coal Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)). The circuit court also noted that such work could also be qualified as de minimis as a matter of law. *Id.* at 1126 n.1.

The court also agreed with the lower court's initial grant of a restitutionary injunction.[131] IBP's "good faith reliance defense"[132] necessarily failed because IBP did not rely upon either a written opinion issued by the Administrator of the Wage and Hour Division of the Department of Labor or upon any other valid basis.[133] The Tenth Circuit adopted the Fifth Circuit's standard for judging the district court's discretion to implement a restitutionary injunction.[134] The court examined the purpose of the FLSA and determined that it seeks to secure full compensation due hourly workers for their labor.[135] The court also affirmed the lower court's initial holding that knife-wielding workers should be paid on the basis of a reasonable time to put on and remove gear, rather than the actual time taken, in order to account for the documented "wait-and-walk time" which is not compensable.[136]

3. *Aaron v. City of Wichita*[137]

a. *Facts*

Wichita firefighters sued the City of Wichita (City) for wages due under the FLSA.[138] The firefighters claimed that the City improperly calculated the "regular rate" of pay used to compute overtime and impermissibly exempted certain employees from FLSA overtime requirements.[139]

The firefighters alleged that the City had violated FLSA provisions by failing to pay for sleep and mealtime hours, improperly exempting Division Chiefs, Battalion Chiefs, and Captains from overtime requirements, and using an overstated number of hours to create an artificial hourly rate of pay.[140] In

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131. *Id.* at 1125.

132. The defense is found in the Portal-to-Portal Act, which states:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

29 U.S.C. § 259 (1994).

133. *Reich*, 38 F.3d at 1126.

134. "'While a restitutionary injunction need not issue as a matter of course upon a finding of past wages due, the district court's discretion to deny the injunction where it makes such a finding is severely limited and must be exercised with an eye to the purposes of the act.'" *Id.* (quoting Donovan v. Grantham, 690 F.2d 453, 456 (5th Cir. 1982)).

135. *Id.* at 1127.

136. *Id.*

137. 54 F.3d 652 (10th Cir. 1995).

138. *Aaron*, 54 F.3d at 653.

139. *Id.* at 654.

140. *Id.* With respect to the rank and file firefighters, the International Association of Fire Fighters and the City had bargained for a written Memorandum of Agreement (MOA) which contained pay schedules indicating fortnight salaries and hourly rates. *Id.* The salaries and hourly pay were based upon a 56-hour work week. *Id.* The City arrived at the "regular rate of pay" by dividing the salary by the 112 bi-weekly hours (which included some overtime hours). *Id.* The firefighters argued that the "regular rate of pay" should have been calculated by dividing the salary by the number of non-overtime hours worked, which would in effect raise the regular rate of pay. *Id.*

its summary judgment order, the district court denied the unpaid hours claim, but found for the firefighters on the other claims.[141]

b. *Decision*

In regard to the issue of the regular rate of pay, the Tenth Circuit recognized that the dispute hinged on the number of hours the union-bargained salaries were intended to cover.[142] The court stated that the lower court's holding clearly conflicted with FLSA regulations which allow the use of base salaries in calculating a regular rate to cover more than forty hours in one week.[143] The Tenth Circuit further stated that the lower court misinterpreted *149 Madison Avenue Corp. v. Asselta*[144] in holding that the City's method of calculation was improper.[145] The court explicitly held that the base salary should be divided by the total number of hours worked if the designated base salary intentionally covers overtime hours, in order to avoid calculating a rate that would not fairly represent the "normal, non-overtime workweek."[146]

The Tenth Circuit noted that the FLSA exempts any employee in an executive, administrative, or professional capacity from its overtime requirements.[147] Using the two-pronged short test found in the federal

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141. *Id.* The district court held that the City incorrectly calculated the regular wage as a matter of law because overtime hours could not be used in finding the regular rate of pay. *Id.*

142. *Id.* at 655. The firefighters argued that the MOA salaries were intended to cover non-overtime hours only, while the City contended that the salaries were intended to cover some overtime hours. *Id.*

143. *Id.* The court set forth an example from the regulations:

> If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and the statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55.

Id. (quoting 29 C.F.R. § 778.325 (1993)).

144. 331 U.S. 199, *modified*, 331 U.S. 795 (1947) (holding that regular rate of pay equaled a non-overtime work week).

145. *Aaron*, 54 F.3d at 655-56. The Supreme Court has held that the regular rate of pay represented the rate actually paid for the "normal, non-overtime workweek." *149 Madison Avenue*, 331 U.S. at 204. However, the implication of the Court's statement was not to forbid the use of overtime hours in calculating the regular rate, but rather to state that "the object of that computation is to determine what rate was being paid for the non-overtime workweek unaffected by any inflated rate paid for overtime work hours." *Aaron*, 54 F.3d at 655-56.

146. *Aaron*, 54 F.3d at 656. The Tenth Circuit then turned to new issues raised by the firefighters concerning the incorporation of "Kelly days" in the rate calculation and whether the rate accurately represented the parties' intent. The court found that "Kelly days" were another form of paid vacation, and were thus properly included in the regular rate of pay calculation. *Id.* The court found the contractual intent issue without merit. *Id.*

147. The relevant section provides, "The provisions of section[] 206 . . . and section 207 of this title shall not apply to—(1) any employee employed in a bona fide executive, administrative or professional capacity." 29 U.S.C. § 213(1) (1994).

regulations,[148] the court held that the City had satisfied the initial salary prong of the test.[149]

Federal regulations consider an employee "salaried" if his paycheck consists of a predetermined amount which is not subject to reduction due to fluctuations in quality or quantity of the work performed.[150] The Tenth Circuit noted the varying treatment between other circuits of the salary prong.[151] The court adopted neither analysis of the salary prong because the City's policy allowed for deductions in accrued leave for absences of less than one day[152] and it did not dock pay for days missed.[153] The court found no additional support for the firefighters' contention that the captains' and chiefs' additional compensation for overtime hours,[154] together with paystubs showing the number of hours covered in the pay period,[155] undermined the determination that the City paid the captains and chiefs on a salary basis.[156]

The Tenth Circuit found that a genuine issue of material fact did exist concerning the duties prong of the short test.[157] Because the lower court erroneously concluded that the captains and chiefs were not salaried, it never reached findings of fact concerning the duties prong.[158] In order to satisfy the duties prong of the short test, an employee's primary duties must consist of

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148. 29 C.F.R. § 541.1(f) (1994). The regulation states that "executive-exempt" status is given to an employee who

> is compensated for his services on a salary basis at a rate of not less than . . . $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

Id.

149. *Aaron*, 54 F.3d at 659.

150. 29 C.F.R. § 541.118(a).

151. *Aaron*, 54 F.3d at 658. A number of circuits have held that where the employer penalizes an employee with lost pay for absences of less than one day, the employees are not salaried, and therefore not covered by the executive exemption. *See* Kinney v. District of Columbia, 994 F.2d 6, 11 (D.C. Cir. 1993); Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990). Other circuits have held that unless the employer actually docks the pay, the employee is salaried and therefore still under the aegis of the executive exemption. *See* McDonnell v. City of Omaha, 999 F.2d 293, 294, 296 (8th Cir. 1993); York v. City of Wichita Falls, 944 F.2d 236, 242 (5th Cir. 1991); Atlanta Professional Firefighters Union v. City of Atlanta, 920 F.2d 800, 805 (11th Cir. 1991).

152. *Aaron*, 54 F.3d at 657.

153. *Id.* at 658.

154. *Id.* The court relied upon federal regulations stating that compensation in addition to salary is not inconsistent with the employee's salary status. *Id.* (citing 29 C.F.R. § 541.118(b) (1994)).

155. *Id.* The court found that tallying hours was a simple accounting function. *Id.*

156. *Id.* at 659.

157. *Id.*

158. *Id.* The firefighters had argued, regarding the captains and chiefs, that: they exercised little independent judgment or discretion; they had no authority in personnel decisions; they had no authority to transfer, or raise or reduce pay; and they had no authority to make policy judgments, spending decisions, or equipment modifications. *Id.* The firefighters also argued that the battalion and division chiefs' work consisted of mostly clerical duties and that they were expected to perform with the rank and file in responding to emergencies. *Id.* The City argued that the captains and chiefs spent more than 80% of their time managing subdivisions of the fire department and that they possessed supervisory power commensurate to the position. *Id.*

managing the enterprise, department, or subdivision, and include the "customary and regular direction of the work of two or more employees."[159] The Tenth Circuit directed the lower court to determine whether the employee spent more than fifty percent of his time performing management functions in order to be characterized as executive.[160]

C. *Analysis*

The Tenth Circuit succinctly and accurately dealt with the definition of "employee," the definition of "work," and the principles behind calculating the FLSA regular rate of pay. The court's failure, however, to choose between the competing analyses that control the salary prong of the executive exemption may lead to future difficulties.

The court's failure to dictate a controlling analysis does not advance the goals of predictability and fairness. Employers in the Tenth Circuit will continue to operate without a definitive rule upon which they may base their business decisions. Furthermore, the court's omission raises another issue. The court based its decision not to choose an analysis on the fact that the City of Wichita's policy dealt with deductions in accrued leave.[161] The Tenth Circuit did not address whether FLSA compensation encompasses accrued leave. Federal regulations state that an executive's compensation cannot be subject to reduction.[162] If the employee's predetermined compensation includes accrued leave, it follows that deductions would undermine the salary prong of the executive exemption.[163]

D. *Other Circuits*

In *Carrel v. Sunland Construction, Inc.*,[164] the Fifth Circuit held that the plaintiffs were not employees in an examination of the employee/independent contractor distinction.[165] The court relied on a five-factor economic realities test very similar to the *Henderson* test.[166] The court determined that the

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159. *Id.* (quoting 29 C.F.R. § 541.1(f) (1994)).

160. *Id.* (citing Department of Labor v. City of Sapulpa, 30 F.3d 1285 (10th Cir. 1994)). The Tenth Circuit noted that in the event the captains and chiefs were found to spend less than 50% of their time on managerial tasks, the trial court must still apply a four-factor analysis to determine whether they may be considered executive. *Id.* The four factors a trial court must examine are: "(1) the relative importance of management as opposed to other duties; (2) the frequency with which the employee exercises discretionary powers; (3) the employee's relative freedom from supervision; and (4) the relationship between the alleged exempt employee's salary and the wages paid to other employees for similar nonexempt work." *Id.*

161. *Id.* at 658.

162. 29 C.F.R. § 541.118(a).

163. Pace, *supra* note 91, at 58-59; *see also* Robert D. Lipman et al., *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 358 (1994) (noting that the salary prong of the executive exemption test is too rigid to accurately account for paid leave policies).

164. 998 F.2d 330 (5th Cir. 1993).

165. *Carrel*, 998 F.2d at 334. Sunland Construction employed welders for pipeline construction projects and considered them to be independent contractors. *Id.* The welders generally worked 60 hours per week. *Id.* at 332.

166. *Id.* The court said the five factors were

economic realities supported Sunland's classification of the workers as independent contractors.[167]

With regard to executive exemptions under the FLSA, the District of Columbia Circuit held in *Kinney v. District of Columbia*[168] that D.C. firefighters failed the salary prong of the short test and therefore were protected by FLSA overtime requirements.[169] The D.C. Circuit agreed with the district court that the critical issue was whether the employees are "subject to" docking of their pay for partial absences.[170] By contrast, the Eighth Circuit, in *McDonnell v. City of Omaha*,[171] held that employees retain their executive status unless the employer actually docks the employees' pay.[172]

III. EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974[173] (ERISA) PREEMPTION

A. *Background*

Congress enacted the Employment Retirement Income Security Act (ERISA) in response to the rapid growth in size and scope of employee benefit plans.[174] The legislature designed ERISA to provide consistent federal regulation and minimum benefits vesting and funding requirements.[175] To ensure uniformity, Congress inserted a preemption clause mandating that the statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[176] The Supreme Court expansively interpreted the phrase "relate to," stating that any connection or reference to an employee benefit plan sufficiently draws ERISA concerns.[177] In *District of Columbia v. Greater Washington Board of Trade*,[178] however, the Court tempered the broad scope of the provision by holding that the preemption will not apply to state laws of general applicability.[179]

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the degree of control exercised by the alleged employer, the extent of the relative investments of the worker and alleged employer, the degree to which the worker's opportunity for profit and loss is determined by the alleged employer, the skill and initiative required to perform the job, and the permanency of the relationship.

Id.

167. *Id.* at 334. The court found in part that the welders worked on a "project by project, company to company" basis, that they were highly skilled, that Sunland controlled none of the methods or details of the welding work, and that the welders provided their own equipment. *Id.*

168. 994 F.2d 6 (D.C. Cir. 1993).

169. *Kinney*, 994 F.2d at 11.

170. *Id.*

171. 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1188 (1994).

172. *McDonnell*, 999 F.2d at 296.

173. 29 U.S.C. §§ 1001-1461 (1994).

174. 29 U.S.C § 1001(a).

175. 29 U.S.C. § 1001(c).

176. 29 U.S.C. § 1144(a).

177. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983). For a discussion of the "relates to" standard, see Robert J. Conrad, Jr. & Patrick Seiter, *Health Plan Liability in the Age of Managed Care*, 62 DEF. COUNS. J. 191, 197 (1995) (concluding that despite the wealth of ERISA preemption cases, there is no definitive test for determining whether a state law "relates to" an employee benefit plan).

178. 506 U.S. 125 (1992).

179. *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1.

B. *Tenth Circuit Decisions*

1. *Guidry v. Sheet Metal Workers National Pension Fund*[180]

a. *Facts*

Guidry, a judgment debtor of the Sheet Metal Workers' International Association (Union), sought to recover ERISA retirement benefits from the Union.[181] After failing to impose a constructive trust on Guidry's pension benefits,[182] the Union tried statutory garnishment to collect its judgment.[183] The district court held that ERISA's anti-alienation provisions protected Guidry's pension fund benefits from garnishment,[184] just as the provisions had protected against a constructive trust in *Guidry I*.[185]

On remand, the Tenth Circuit panel reversed the district court, stating that *Guidry I* did not control because that case did not present the issue of post-payment garnishment.[186] In the remanded case,[187] Guidry additionally argued that Colorado law restricting garnishment applied to his pension benefits.[188] Although it held that ERISA did not bar post-payment garnishment, the *Guidry II* court also held that ERISA preempted Colorado law restricting garnishment to twenty-five percent of disposable earnings.[189] Guidry appealed for rehearing en banc.

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180. 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995).

181. *Guidry*, 39 F.3d at 1081. From 1964 to 1981, Sheet Metal Workers' International Association, Local No. 9, employed Guidry as its chief executive officer. Guidry v. National Sheet Metal Workers' Nat'l Pension Fund, 641 F. Supp. 360, 361 (D. Colo. 1986). In 1982, Guidry pleaded guilty to embezzling $377,301.53 from the Union and served prison time. *Id.* The Union never recovered the embezzled money. *Id.* The Sheet Metal Workers' National Pension Fund and the Local Unions and Councils Pension Plan denied Guidry's subsequent request for early retirement benefits. *Id.*

182. *Guidry*, 39 F.3d at 1081. On prior review, the Supreme Court held that ERISA prohibited assignment or alienation of pension benefits. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S 365, 371-72 (1990) [hereinafter *Guidry I*].

183. *Guidry*, 39 F.3d at 1081. The parties agreed to channel all disputed pension payments into a single bank account in Denver, Colorado. *Id.* The funds thereby became subject to a single writ of garnishment for the purposes of this suit. *Id.*

184. *Id.*

185. *Id.* (citing *Guidry I*, 493 U.S. at 375-76 (1990)).

186. *Id.* (citing Guidry v. Sheet Metal Workers Int'l Ass'n, 10 F.3d 700, 717 (10th Cir. 1993)).

187. Guidry v. Sheet Metal Workers Int'l Ass'n, 10 F.3d 700 (10th Cir. 1993) [hereinafter *Guidry II*].

188. *Id.* at 713. Guidry argued that two Colorado statutes exempted garnishment of pension benefits in whole or in part. One statute provides 75% exemption: "Except as provided . . . the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment or levy under execution or attachment may not exceed . . . twenty-five percent of the individual's disposable earnings . . . ." COLO. REV. STAT. § 13-54-104(2)(a) (Supp. 1995). Another statute provides complete exemption:

> Property, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, including those in which the debtor has received benefits or payments, has the present right to receive benefits or payments, or has the right to receive benefits or payments in the future and including pensions or plans which qualify under the federal "Employee Retirement Income Security Act of 1974" as an employee pension benefit plan . . . .

COLO. REV. STAT. § 13-54-102(1)(s) (Supp. 1995).

189. *Guidry II*, 10 F.3d at 713.

b. *Decision*

On rehearing en banc, the Tenth Circuit affirmed *Guidry II*'s primary holding, reasoning that the anti-alienation provision of ERISA does not bar garnishment of private pension benefits once they are received by the beneficiary.[190] The Tenth Circuit, however, also concluded that ERISA does not preempt Colorado law, which exempts seventy-five percent of disposable earnings from garnishment.[191] The court held that total exemption under section 13-54-102(1)(s) of the Colorado statute was not available because the underlying writs were filed before the effective date of the statute.[192]

The court noted that ERISA preemption occurs when the state law "relate[s] to any employee benefit plan."[193] The Tenth Circuit explained that the parameters within which a state law relates to an employment benefit plan should be construed expansively[194] insofar as there exists a connection or reference to a benefit plan,[195] and regardless of whether the law indirectly affects the plan.[196] The court conceded, however, that ERISA does not preempt state law if only a tenuous connection exists.[197] The Tenth Circuit held that where the Colorado statute did not relate to ERISA pension plans,[198] no preemption occurred.[199]

2. *Pacificare of Oklahoma, Inc. v. Burrage*[200]

a. *Facts*

Originally filed in state court, *Pacificare of Oklahoma, Inc. v. Burrage*[201] involved a medical malpractice claim.[202] Pacificare, the defendant health maintenance organization, argued that ERISA preempted Burrage's state law claims and successfully removed the action to federal court.[203] The district court found that ERISA preempted only one of the state law claims, dismissed it, and remanded the remaining two claims to state court.[204]

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190. *Guidry*, 39 F.3d at 1083.
191. *Id.*
192. *Id.* at 1084.
193. *Id.* at 1083 (quoting 29 U.S.C. § 1144(a) (1988)).
194. *Id.* at 1083-84 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 8 (1987)).
195. *Id.* at 1083 (citing Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983)).
196. *Id.* (quoting District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 130 (1992)).
197. *Id.* at 1084 (quoting *Greater Washington Bd. of Trade*, 506 U.S. at 125, 130 n.1).
198. *Id.* at 1084-85. The Tenth Circuit found it significant that the statute, while including pension or retirement benefits, does not specifically refer to ERISA pension plans or benefits. *Id.* at 1085.
199. *But see* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 830 (1988) (holding that ERISA preempted where a state statute identified ERISA welfare plan benefits for protection under state garnishment law).
200. 59 F.3d 151 (10th Cir. 1995).
201. *Pacificare*, 59 F.3d at 151.
202. *Id.* at 152.
203. *Id.*
204. *Id.*

The remaining claims charged that Pacificare was liable for the malpractice of one of its physicians and that Pacificare should be held vicariously and directly liable for loss of consortium.[205] Pacificare petitioned for a writ of mandamus to the district court to rescind its order remanding the two claims to state court and to decide that ERISA preempted those claims.[206] The dispute hinged upon whether the state law medical malpractice claim related to the Pacificare plan, an employee benefit plan.[207]

b. *Decision*

The Tenth Circuit denied Pacificare's petition for writ of mandamus, holding that the state claims did not relate to employee benefit plans and, therefore, were not preempted by ERISA.[208] The court acknowledged that no circuit had yet addressed ERISA preemption of HMO malpractice actions and that there existed a division in the district courts.[209]

As noted previously, a law relates to an employee benefit plan if it refers to such a plan.[210] The Tenth Circuit identified four categories of law which "relate to" employee benefit plans: (1) laws regulating the type of benefits or terms of ERISA plans; (2) laws creating reporting, disclosure, funding, or vesting requirements for ERISA plans; (3) laws providing rules governing the calculation of benefit amounts under ERISA plans; and (4) laws and common-law rules providing remedies for misconduct arising from the administration of ERISA plans.[211] The Tenth Circuit concurred with the district court's determination that the malpractice claim did not involve the HMO plan's administration of benefits or the level or quality of benefits promised.[212] The Tenth Circuit disposed of the loss of consortium claim: because the claim hinged upon Pacificare's vicarious liability, it did not trigger ERISA preemption.[213]

C. *Analysis*

The Tenth Circuit's decision in *Guidry* walks a precarious line. Although the reasoning seems sound and persuasive, and protects the legal rights of judgment debtors, the decision may provide perverse incentives for law-breakers.[214] The court's ruling provides lawbreakers with largely ungarnishable pension benefits, even in the event of a successful criminal prosecution.

The medical malpractice claim against Pacificare of Oklahoma is representative of the nationwide tide of lawsuits filed against health maintenance

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205. *Id.*
206. *Id.*
207. *Id.* at 154.
208. *Id.* at 153.
209. *Id.*
210. *Id.* at 154 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983)).
211. *Id.* (quoting National Elevator Indus., Inc. v. Calhoon, 957 F.2d 1555, 1558-59 (10th Cir.), *cert. denied*, 506 U.S. 953 (1992)).
212. *Id.* at 155.
213. *Id.*
214. *See Guidry*, 39 F.3d 1078, 1087-88 (10th Cir. 1995) (Brorby, J., dissenting) (stating that the majority's holding mandates a bizarre result).

organizations nationwide.[215] With such lawsuits comes the issue of ERISA preemption. The *Pacificare* analysis indicated that factual posturing is critical in determining whether ERISA preemption follows.[216] As some commentators have observed, if the claim against the health benefit plan subject to ERISA derives from a decision to limit or deny coverage, ERISA likely will preempt state law.[217]

D. *Other Circuits*

The Fifth Circuit Court of Appeals, in *Corcoran v. United Healthcare, Inc.*,[218] addressed a medical malpractice claim brought against a health plan administrator, United Healthcare.[219] The court noted the congressional intent to broadly extend ERISA's reach.[220] Based upon its findings that United Healthcare dispensed medical advice in the context of making determinations regarding the availability of benefits under the health insurance plan, the Fifth Circuit held that ERISA preempted the plaintiffs' wrongful death claim.[221]

In *Spain v. Aetna Life Insurance Co.*,[222] a case similar to *Corcoran*, the Ninth Circuit also found that ERISA preempted the plaintiffs' wrongful death claim against an employee benefit plan administrator.[223] The plaintiffs argued that Aetna's delay in authorizing a bone marrow transplant negligently caused the death of Steven Spain, the plaintiffs' husband and father.[224] Citing the established premise that ERISA should be applied expansively,[225] the Ninth Circuit stated that ERISA preempted common law claims based upon improper administration of health benefits.[226] The court stated that the plaintiffs' state law action directly related to the administration of ERISA plan benefits.[227]

CONCLUSION

The Tenth Circuit Court of Appeals decided many significant labor law and employment cases during the last year. In *Frymire v. Ampex Corp.*,[228] the court found that the three-year contract actions period represented the appropriate statute of limitations period for WARN actions.[229] It also held

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215. *See* Conrad & Seiter, *supra* note 177, at 197.
216. *Pacificare*, 59 F.3d at 154-55.
217. *See* Conrad & Seiter, *supra* note 177, at 197; *see also* Diana J. Bearden & Bryan J. Maedgen, *Emerging Theories of Liability in the Managed Health Care Industry*, 47 BAYLOR L. REV. 285, 339 (1995) (concluding that ERISA will likely not preempt common law medical malpractice claims).
218. 965 F.2d 1321 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992).
219. *Corcoran*, 965 F.2d at 1321, 1323.
220. *Id.* at 1328-29 n.11.
221. *Id.* at 1331.
222. 11 F.3d 129 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994).
223. *Spain*, 11 F.3d at 132.
224. *Id.* at 131.
225. *Id.*
226. *Id.*
227. *Id.*
228. 61 F.3d 757 (10th Cir. 1995).
229. *Frymire*, 61 F.3d at 763.

that actual work days rather than calendar days should provide the basis for WARN back pay awards.[230]

In *Henderson v. Inter-Chem Coal Co.*,[231] the Tenth Circuit reiterated the analysis for determining the employee/independent contractor distinction for FLSA purposes.[232] The court in *Reich v. IBP, Inc.*,[233] held that "physical or mental exertion" best defines compensable work under the FLSA.[234] In *Aaron v. City of Wichita*,[235] the Tenth Circuit determined that base salaries which covered more than forty hours in a week could be used for calculating the regular rate of pay for FLSA overtime purposes.[236] The court also clarified the analysis used to determine when the FLSA executive exemption applied.[237]

In the area of ERISA preemption, the Tenth Circuit decided two significant cases. In *Guidry v. Sheet Metal Workers National Pension Fund*,[238] the court held that ERISA did not preempt statutory garnishment protections.[239] In *Pacificare of Oklahoma v. Burrage*,[240] the court further found that ERISA did not preempt a medical malpractice claim against a health maintenance organization.[241]

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230. *Id.* at 774.
231. 41 F.3d 567 (10th Cir. 1994).
232. *Henderson*, 41 F.3d at 570.
233. 38 F.3d 1123 (10th Cir. 1994).
234. *Reich*, 38 F.3d at 1125.
235. 54 F.3d 652 (10th Cir. 1995).
236. *Aaron*, 54 F.3d at 655.
237. *Id.* at 658.
238. 39 F.3d 1078, 1083 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995).
239. *Guidry*, 39 F.3d at 1083.
240. 59 F.3d 151 (10th Cir. 1995).
241. *Pacificare*, 59 F.3d at 155.

PRISONERS' RIGHTS

INTRODUCTION

During the 1994-1995 survey period, the Tenth Circuit decided several cases involving prisoners' substantive rights. This Survey features the seven most significant cases, dividing them into four topical categories. The first group of cases addresses the controversial freedom of religious exercise under the First Amendment. This group includes *Werner v. McCotter*,[1] the most influential case of the survey period. *Werner* offers the Tenth Circuit's first interpretation of the Religious Freedom Restoration Act of 1993 (RFRA)[2] and its effects on prisoners' rights.[3] This case may have additional far-reaching implications because most other circuits have not yet had an opportunity to interpret RFRA.[4] The second category of cases involves prisoners' Fourth Amendment claims of unreasonable searches and seizures. The third group of cases features the Eighth Amendment prohibition against cruel and unusual punishment. Lastly, the fourth category addresses a prisoner's Fourteenth Amendment right of access to the courts.

I. FREE EXERCISE OF RELIGION UNDER THE FIRST AMENDMENT[5]

A. *Background*

When the United States Supreme Court examines an issue that involves the constitutional rights of prisoners, the Court relies on a qualified premise: prisoners retain constitutional protections even while incarcerated. The nature

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1. 49 F.3d 1476 (10th Cir. 1995). For a discussion of *Werner*, see *infra* notes 29-35 and accompanying text.

2. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 852 (current version at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

3. Congress enacted RFRA to overturn the Supreme Court's ruling in Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), a case having nothing to do with prisoners' rights. *See Religious Freedom Restoration Act (RFRA) Now Law of Land*, Vol. V., No. 5, CORRECTIONAL L. REP. 65, 67 (1994) [hereinafter *RFRA Now Law of Land*]. Several senators and representatives attempted to carve out an exception to RFRA by proposing the Reid Amendment, which would have prohibited RFRA's application to prisoners' free exercise claims. *See* S. REP. NO. 111, 103d Cong., 1st Sess. §§ V(d) and XI (1993); H.R. REP. NO. 88, 103d Cong., 1st Sess. (1993). The Senate defeated the Reid Amendment despite warnings from prison administrators and state Attorneys General that RFRA would open the floodgate for inmate litigation should the act take effect unamended. *See RFRA Now Law of Land*, *supra*, at 67. Congress, therefore, clearly intended to apply RFRA to prisoners' free exercise claims. For a complete legislative history of RFRA, see H.R. REP. NO. 88, 103d Cong., 1st Sess., 1-17 (1993); S. REP. NO. 111, 103d Cong., 1st Sess. 1-38 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892-1912; 139 CONG. REC. H2,356-63 (daily ed. May 11, 1993).

4. *See* Abbott Cooper, Comment, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation*, 56 MONT. L. REV. 325, 338 & n.81 (1995).

5. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof . . . ." U.S. CONST. amend. I.

of incarceration, however, justifiably limits those protections.[6] The Court presumes that prison officials can best balance the constitutional rights of prisoners against penological interests.[7] Consequently, the Court designed a formula, known as the *Turner* test,[8] which heavily favors the interests of penological institutions when those interests are in conflict with prisoners' constitutional protections.[9]

According to this test, a prison administrator's policy decision that encroaches upon a prisoner's constitutional rights is valid as long as it is "reasonably related to [a] legitimate penological interest[]."[10] Thus, courts following *Turner* must give considerable deference to the prison administrator's judgment.[11] Before RFRA's enactment, the *Turner* test represented the standard test used for evaluating prisoners' constitutional claims.[12] In effect, RFRA legislatively overturned the *Turner* test with regard to religious exercise cases.[13] In passing RFRA, Congress set forth new criteria for judging government encroachments on prisoners' rights to practice their religion.[14]

Only those restrictions which place a substantial burden on the practice of religion trigger evaluation under RFRA.[15] This prerequisite places courts in

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6. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).

7. *Id.* at 349.

8. Turner v. Safley, 482 U.S. 78, 89 (1987). After setting forth the doctrine in *Turner*, the Court applied it in *O'Lone*. *O'Lone*, 482 U.S. at 349.

9. *See RFRA Now Law of Land*, *supra* note 3, at 69.

10. *Turner*, 482 U.S. at 89. The *Turner* court set out the following factors as relevant in determining the reasonableness of the regulation: (1) whether or not there is a rational connection between the prison regulation and the legitimate state interest; (2) whether or not there are alternate means available for the prisoners to exercise their rights; (3) the impact on others of accommodating the prisoner's exercise of these rights; and (4) the existence of alternate means of achieving the regulatory purpose. *Id.* at 89-90.

11. *Id.* at 89; *see also RFRA Now Law of Land*, *supra* note 3, at 66. The "legitimate interest," or "mere rationality" standard provides the lowest level of scrutiny employed by the Court in constitutional cases. *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1065 (1979) (describing the rationality standard as the "most minimal of constitutional standards"). The other standards of review which reappear consistently throughout constitutional law are "intermediate scrutiny" and "strict scrutiny." For more commentary on the three standards of review, see 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3 (2d ed. 1992).

12. *See RFRA Now Law of Land*, *supra* note 3, at 69.

13. *Id.* at 65-66. Although RFRA changed the government's burden with respect to violations of religious exercise rights, the *Turner* test remains the standard for all other constitutional questions. *Id.* at 69.

14. *Id.* at 68. For more information on the effects of RFRA, see *The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995). Specific articles of interest include the following: Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, *supra*, at 5; Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, *supra*, at 39; Frederick M. Gedicks, *RFRA and the Possibility of Justice*, *supra*, at 95; David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, *supra*, at 119; Douglas Laycock, *RFRA, Congress, and the Ratchet*, *supra*, at 145; Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, *supra*, at 171; William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, *supra*, at 227; Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, *supra*, at 249.

15. Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995).

the position of assessing the religious value of the practice in question.[16] The Tenth Circuit has held that in order to create a "substantial burden":

> A government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's religious beliefs; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.[17]

Once a prisoner establishes that a correctional regulation substantially burdens his religious exercise rights, the court will find that regulation invalid under RFRA, unless the prison administration shows that the regulation both furthers a compelling state interest, and that the regulation represents the least restrictive means of furthering that interest.[18] The Supreme Court describes a compelling state interest as an interest "of the highest order," one that is "not otherwise served."[19] Historically, courts have recognized health, safety, and security interests as compelling interests in the prison context.[20] In comparison, legitimate penological interests include interests of a lower order, such as avoiding inconvenience to administrative personnel, or balancing the allocation of prison resources.[21] If a regulation survives the compelling state interest analysis, then the government must show there is no less restrictive means of furthering the interest.[22] Because RFRA imposes such a heightened standard of review, nearly every religious exercise restriction existing today is subject to legal challenge.[23]

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16. *RFRA Now Law of Land*, *supra* note 3, at 66.

17. *Werner*, 49 F.3d at 1480 (citations omitted).

18. Religious Freedom Restoration Act of 1993, § 3(a)-(b), 42 U.S.C. § 2000bb-1(a)-(b) (Supp. V 1993). The effects of RFRA are so significant because government encroachments on free exercise rights must now meet the compelling state interest standard, otherwise known as strict scrutiny, in order to survive judgment. *See id.* Compare this to the former rationality standard under the *Turner* test which required the lowest level of scrutiny in cases involving prisoners' constitutional rights. *See supra* notes 8-11 and accompanying text.

19. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also* Kennedy v. Meacham, 540 F.2d 1057, 1061 (10th Cir. 1976) (noting that where restrictions are placed on the exercise of a religious belief, "the court should further determine whether any incidental burden on fundamental First Amendment rights is justified by a compelling state interest").

20. *Werner*, 49 F.3d at 1479-80.

21. *See O'Lone*, 482 U.S. at 352-53. The Supreme Court would probably reject administrative inconvenience and cost as compelling state interests in prison cases, since the Court rejected them as compelling interests years ago in other types of cases. *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 263-69 (1974); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972); *see also RFRA Now Law of Land*, *supra* note 3, at 72 (commenting on administrative costs and inconvenience as a basis for denying a prisoner's religious dietary requests).

22. Religious Freedom Restoration Act of 1993, § 3(a)-(b), 42 U.S.C. § 2000bb-1(a)-(b) (Supp. V 1993). One example of a regulation failing the least restrictive means test comes from a federal district court which held that a prison could not prohibit the wearing of religious beads under clothing. The court found that there was a less restrictive means available for furthering the government security interest of avoiding gang symbols. Campos v. Coughlin, 854 F. Supp. 194, 209 (S.D.N.Y. 1994).

23. *RFRA Now Law of Land*, *supra* note 3, at 65.

B. Werner v. McCotter[24]

1. Facts

A Cherokee Native American, Robert Werner, alleged that the Utah Department of Corrections (UDOC) violated his right to freely exercise Native American Shamanism.[25] Werner claimed that administrators denied him access to a sweat lodge, prohibited him from receiving or possessing a medicine bag and other religious symbols, and failed to provide him with access to a Cherokee Spiritual Advisor and Cherokee religious literature.[26] In defense, the Utah prison administration argued that the restrictions survived analysis under the *Turner* test and moved for summary judgment.[27] The district court granted summary judgment for the prison administration, and Werner appealed.[28]

2. Decision

The Tenth Circuit held that the prison administration's reliance on the *Turner* test was erroneous.[29] The court invoked RFRA, stating that a prison system may only substantially burden a prisoner's right to free exercise if the prison has a compelling state interest, and employs the least restrictive means necessary to further that interest.[30] The court held that only those restrictions placing a "substantial burden" on the practice of religion fall within the ambit of RFRA.[31] Reasonable time, place, and manner restrictions often fail to impose a substantial burden, while the complete prohibition of an important religious practice would impose a substantial burden.[32]

In reference to the plaintiff's specific complaints, the Tenth Circuit remanded the first claim, noting that Werner had presented credible evidence indicating that the sweat lodge played a highly significant role in his sincerely held religious beliefs, therefore presenting a prima facie claim under RFRA.[33] The court also remanded Werner's claim concerning the medicine bag, stating that religious symbols often play a valuable role in the expression of religious beliefs. The denial of such symbols, the court explained, could create a substantial burden on religious exercise.[34] Regarding Werner's claims concerning denial of access to a spiritual advisor and religious literature, the Tenth Circuit affirmed summary judgment, finding the claims devoid of factual support.[35]

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24. 49 F.3d 1476 (10th Cir. 1995).
25. *Werner*, 49 F.3d at 1478-79.
26. *Id.*
27. *Id.* at 1479.
28. *Id.* at 1478.
29. *Id.*
30. *Id.*
31. *Id.* at 1480.
32. *Id.*
33. *Id.*
34. *Id.* at 1481.
35. *Id.* The Tenth Circuit found that prison administrators had employed several part-time chaplains who offered nondenominational religious support to the entire prison population. *Id.* In addition, two Native American spiritual advisors were available on a volunteer basis. *Id.* Werner refused to meet with these advisors because they were Sioux rather than Cherokee. *Id.* Werner

C. *Analysis*

Prior to the passage of RFRA, the Supreme Court tended to narrow lower courts' constructions of inmates' religious rights.[36] By following RFRA, the Tenth Circuit reversed this trend.[37] *Werner* demonstrates the Tenth Circuit's willingness to accept the new standard of review which RFRA imposes. This decision also provides lower courts with a clear path to follow in future free exercise cases.

Although Congress clearly intended RFRA to impose a heightened standard of review, Congress left the major terms of the statute undefined.[38] The Tenth Circuit relied on pre-RFRA case law to define those terms.[39] This reliance demonstrates the court's refusal to abandon pre-RFRA precedent, where such precedent helps to fill in the gaps that Congress left in the wake of statutory construction.

D. *Other Circuits*

When the Tenth Circuit decided *Werner*, few other courts had interpreted RFRA.[40] For example, both the Eighth and Ninth Circuits have recognized that prisoners' claims fall within RFRA's language, yet both Circuits have failed to apply the statute. In *Brown-El v. Harris*,[41] the Eighth Circuit noted that prisoners' free exercise claims fell within the ambit of RFRA, yet the court declined to apply the act.[42] In *Bryant v. Gomez*,[43] the Ninth Circuit generally acknowledged that prisoners' claims fall within RFRA's broad language.[44] The court, however, did not apply the statute, finding that the regulation at issue did not impose a "substantial burden" on the prisoner's exercise of his religion.[45]

In *Abdur-Rahman v. Michigan Department of Corrections*,[46] the Sixth Circuit held that the prison's refusal to allow the plaintiff time off from work in order to attend religious services did not infringe on the prisoner's free exercise rights.[47] The court cited *Werner* and applied the substantial burden

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also refused to accept a donated hawk feather and literature on Native American beliefs. *Id.* The court found that Werner himself thwarted all of the correctional department's efforts to accommodate his desire to pursue a Native American faith. *Id.*

36. *RFRA Now Law of Land*, *supra* note 3, at 65.

37. *Id.*

38. *See* Religious Freedom Restoration Act of 1993 § 2, 42 U.S.C. § 2000bb to 2000bb-4 (Supp. V 1993).

39. *See* Werner v. McCotter, 48 F.3d 1476, 1480 (10th Cir. 1995) (defining "substantial burden" by relying on language in a pre-RFRA Supreme Court decision).

40. *See* Cooper, *supra* note 4, at 338 n.81.

41. 26 F.3d 68 (8th Cir. 1994).

42. *Brown-El*, 26 F.3d at 69. The court noted that although RFRA applied retroactively, the act was inapplicable as the plaintiff failed to raise the issue. *Id.* Furthermore, the court noted that either way, the regulation did not infringe on Brown-El's religious freedom. *Id.*

43. 46 F.3d 948 (9th Cir. 1995).

44. *Bryant*, 46 F.3d at 949.

45. *Id.*

46. 65 F.3d 489 (6th Cir. 1995) (affirming denial of injunctive and monetary relief for the prison's refusal to allow time off to attend religious services).

47. *Abdul-Rahman*, 65 F.3d at 491.

test.[48] *Werner* may have been the first case to invalidate a penal regulation under RFRA's standards.

II. UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT[49]

A. *Background*

Courts generally recognize that a prisoner's constitutional right to privacy is diminished during his incarceration.[50] In *Hudson v. Palmer*,[51] the Supreme Court held that a prisoner has no reasonable expectation of privacy with respect to his room or cell.[52] In the same vein, strip searches and visual body cavity searches do not create per se violations of prisoners' Fourth Amendment rights, despite a lack of probable cause on the part of the performing official.[53] The Court has rejected a precise definition of "reasonableness" for Fourth Amendment purposes, and has instead opted for a case by case balancing test approach.[54] According to the test set forth in *Bell v. Wolfish*,[55] a court must strike a balance between the "need for the particular search against the invasion of personal rights that the search entails."[56] In striking this balance, a court must also consider the facts and circumstances of each case.[57]

In 1989, the Tenth Circuit held that a prison system has a legitimate penological interest in extracting a prisoner's blood for AIDS testing, while a prisoner has only a slight expectation of privacy regarding his blood.[58] In a 1994 case, *Lucero v. Gunter* (*Lucero I*), the Tenth Circuit held that correctional facilities could require inmates to provide urine samples for drug analysis,

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48. *Id.* at 492.

49. The Fourth Amendment provides, "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

50. *See* Pell v. Procunier, 417 U.S. 817, 822 (1974); Ross A. Epstein, Note, *Urinalysis Testing in Correctional Facilities*, 67 B.U. L. REV. 475, 480 (1987).

51. 468 U.S. 517 (1984).

52. *Hudson*, 468 U.S. at 530. The Court, however, noted that a prisoner may have an Eighth Amendment cruel and unusual punishment claim when officials perform particularly egregious cell searches. *Id.* Prisoners may also have a common law tort claim if officials destroy property during a search. *Id.*

53. Bell v. Wolfish, 441 U.S. 520, 558-60 (1979). The Court implied, however, that the Fourth Amendment may proscribe such a search if conducted in an abusive fashion. *Id.* at 560. For further discussion of body cavity searches, see Tracy McMath, Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?*, 56 U. CIN. L. REV. 739 (1987).

54. *Bell*, 441 U.S. at 559.

55. 441 U.S. 520 (1979).

56. *Bell*, 441 U.S. at 559.

57. *Id.* (stating that "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place where it is conducted").

58. *See* Dunn v. White, 880 F.2d 1188, 1194-96 (10th Cir. 1989). In *Dunn*, the Tenth Circuit used the *Turner* test to balance the intrusiveness of a blood test against the prison's justifications for administering the test. *Id.* at 1194. Applying the test, the court found that the prison's regulations rationally related to its justifications and passed constitutional scrutiny. *Id.* In the course of its opinion, the court noted that a prisoner had a diminished expectation of privacy and that prison regulations were entitled to greater deference than those in the outside world. *Id.*

so long as the selection process was random.[59] An "insufficiently developed" record, however, could not prove that the selection process was random, so the court remanded the case.[60] In 1995, *Lucero* once again came before the Tenth Circuit for a clarification of what constitutes a "random" selection process.[61]

B. Lucero v. Gunter (Lucero II)[62]

1. Facts

Colorado Department of Corrections (CDOC) officials requested that inmate Anthony Lucero submit to a urinalysis for drug testing purposes.[63] When Lucero refused, the facility forced him to serve ten days in punitive segregation, and subtracted eighteen days of his good time credit for "disobeying a lawful order."[64] While Lucero conceded that random urine testing was not violative of the Fourth Amendment, he alleged that officials did not select him randomly since they had requested his sample during the evening.[65]

According to prison policy, officials were to randomly select a list of prisoners for urine testing during the day shift.[66] The CDOC acknowledged this policy and admitted that officials requested Lucero's sample during the evening. The CDOC argued, however, that officials randomly selected Lucero for testing during the day shift, but were unable to collect the urine during the day due to the shift manager's work load.[67]

2. Decision

The Tenth Circuit reiterated its holding in *Lucero I*, and further stated that procedures for selecting inmates for urine testing must be truly random.[68] The court defined "random" by explaining that selection procedures must not leave any discretion in the hands of the selecting official, and that the procedures must also provide "limiting guidelines."[69] The Tenth Circuit determined that the Department's computer-guided selection process was random, especially since no evidence existed suggesting the selecting official's awareness of the selected inmate's identity.[70]

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59. Lucero v. Gunter, 17 F.3d 1347, 1349-50 (10th Cir. 1994) (*Lucero I*).
60. *Id.* at 1350.
61. Lucero v. Gunter, 52 F.3d 874, 875-76 (10th Cir. 1995) (*Lucero II*).
62. 52 F.3d 874 (10th Cir. 1995) (*Lucero II*).
63. *Lucero II*, 52 F.3d at 875.
64. *Id.*
65. *Id.* at 876.
66. *Id.*
67. *Id.*
68. *Id.* at 877.
69. "Limiting guidelines" are any guidelines preventing the prison's ability to circumvent the randomness requirement. *See id.*
70. *Id.*

C. *Analysis*

Lucero II establishes that random urine collection for drug testing does not violate the Fourth Amendment because it constitutes a reasonable means of combatting illegal drug use within prisons.[71] Thus, correctional facilities may sample and test inmates' body fluids when such sampling and testing is reasonably related to a legitimate penological interest.[72] The Tenth Circuit's holding conforms to the Supreme Court's general willingness to defer to prison administrators' judgment when reviewing prison policies designed to protect internal order and discipline.[73] According to the Tenth Circuit, however, administrators must make concerted efforts to ensure that officials perform such testing in a reasonable manner.[74]

D. *Other Circuits*

As early as 1984, the Eighth Circuit determined that a urinalysis constitutes a search or seizure for purposes of the Fourth Amendment.[75] Two years later, however, that same court held that prisoners' Fourth Amendment rights were not violated by random urinalysis testing for drugs.[76] The Tenth Circuit appears to have followed the Eighth Circuit concerning this issue.

In 1992, the Seventh Circuit held that urine tests constitute searches for Fourth Amendment purposes because such testing is analogous to body cavity searches and blood testing.[77] That Circuit also held, however, that random selection was unnecessary when prison officials test the entire prison population in one testing session on a periodic basis.[78] This situation eliminates some of the problems raised by a system that allows administrators to choose individual inmates for testing.[79] Random selection, therefore, was not an issue squarely addressed by the Seventh Circuit. No other circuits have had the opportunity to decide this issue.

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71. *See id.* As in *Dunn*, the Tenth Circuit used a balancing test to weigh the "significant and legitimate security interests of the institution against the privacy interests of the prisoner." *Lucero I*, 17 F.3d at 1350 (quoting Bell v. Wolfish, 441 U.S. 520, 560 (1979)). In the spirit of the *Turner* test, the court also recognized the need to give prison administrators "wide-ranging deference in their judgment to preserve internal order and discipline and to maintain institutional security." *Id.* (quoting *Bell*, 441 U.S. at 547); *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 10.9 (2d ed. Supp. 1995).

72. In other words, the body fluid testing must pass the *Turner* test; *see supra* notes 8-14 and accompanying text.

73. *See Bell*, 441 U.S. at 547; Epstein, *supra* note 50, at 480; *see also* Fred Cohen & Kate King, Note, *Drug Testing and Corrections*, 23 CRIM. L. BULL. 151, 172 (1987) (concluding that truly random urinalysis that is not conducted in an abusive fashion will withstand constitutional challenge).

74. *See Lucero I*, 17 F.3d at 1349-50.

75. *See* McDonell v. Hunter, 746 F.2d 785, 786-87 (8th Cir. 1984) (upholding a preliminary injunction prohibiting the Iowa Department of Corrections from conducting strip searches, car searches, blood tests, and urinalyses of employees unless the searching officials reasonably suspect that an employee is smuggling contraband or under the influence of alcohol or a controlled substance).

76. Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986).

77. Forbes v. Trigg, 976 F.2d 308, 312-13 (7th Cir. 1992).

78. *See id.* at 314.

79. *Id.*

III. CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT[80]

A. *Background*

The Supreme Court has not yet created a specific test by which lower courts may determine whether conditions of confinement are cruel and unusual.[81] The Court maintains, however, that in order to survive Eighth Amendment scrutiny, such "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[82] Conditions of confinement must not offend "evolving standards of decency that mark the progress of a maturing society,"[83] nor may they result in a serious deprivation of basic human needs.[84]

Since inmates must rely on prison authorities to provide their basic human needs, a prison official's "deliberate indifference" to any of those needs rises to the level of an Eighth Amendment violation.[85] The Court maintains that such basic needs include medical care,[86] food, warmth, and exercise.[87] The Tenth Circuit's list of basic needs includes additional necessities such as shelter (including adequate space), sanitation, safety, and clothing.[88] Conditions of confinement that do not by themselves establish constitutional violations may constitute Eighth Amendment violations if, when considered in combination with other deprivations, the confinement conditions result in the deprivation of a basic need.[89] The Tenth Circuit explained that "a low cell temperature at night combined with a failure to issue blankets" may deprive an inmate of the basic need of warmth.[90]

A prison official exhibits deliberate indifference to a basic need "if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[91] This is a subjective test requiring actual knowledge of the substantial risk.[92] In the following cases the Tenth Circuit refined its definition of what does, and does not, constitute a basic human need.

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80. The Eight Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

81. *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981).

82. *Id.* at 347.

83. *Id.* at 346.

84. *Id.* at 346-47.

85. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see also* Wilson v. Seiter, 501 U.S. 294, 302 (1991).

86. *Estelle*, 429 U.S. at 104-05.

87. *Wilson*, 501 U.S. at 304.

88. Ramos v. Lamm, 639 F.2d 559, 566-67 (10th Cir. 1980).

89. *See Wilson*, 501 U.S. at 304.

90. *Id.*

91. Farmer v. Brennan, 114 S. Ct. 1970, 1984 (1994).

92. *See Leading Cases, The Supreme Court, 1993 Term*, 108 HARV. L. REV. 231 (1994).

B. *Tenth Circuit Decisions*

1. *Housley v. Dodson*[93]

a. *Facts*

Jim Housley, a prisoner at the Custer County Jail in Oklahoma, brought an action against Department of Health officials for allowing him only thirty minutes of out-of-cell exercise during a three-month period.[94] The district court dismissed the action for failure to state a claim upon which relief could be granted and Housley appealed.[95]

b. *Decision*

Although the Tenth Circuit never expressly held that prisoners have a constitutional right to exercise, the court stated that a "total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment."[96] What constitutes adequate exercise depends upon the circumstances of each case.[97] Relevant factors include the physical characteristics of the inmate's cell, the jail, the average inmate length of stay, and the security risk associated with the particular complainant.[98] An inmate's complaint alleging a deprivation of adequate exercise for an extended period of time is sufficient to state a claim under the Eight Amendment.[99] The court remanded for further proceedings in accordance with its holding.[100]

2. *Adkins v. Rodriguez*[101]

a. *Facts*

Shelly Adkins, a prisoner at the Huerfano County Jail in Colorado, alleged that a prison deputy sexually harassed her and violated her privacy.[102] Adkins claimed that while she was incarcerated, Deputy Rodriguez, a trainee, made comments to her about her body and about his sexual prowess and conquests.[103] Adkins also asserted that Deputy Rodriguez entered her cell one night while she was sleeping, and upon discovering she had awakened, told Adkins she had "nice breasts."[104] Deputy Rodriguez resigned soon after the incident.[105] Finding no clearly established right to be free from verbal sexual harassment, the district court dismissed Adkins's claim.[106] Without violation

93. 41 F.3d 597 (10th Cir. 1994).
94. *Housley*, 41 F.3d at 598.
95. *Id.*
96. *Id.* at 599.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 600.
101. 59 F.3d 1034 (10th Cir. 1995).
102. *Adkins*, 59 F.3d at 1035.
103. *Id.*
104. *Id.* at 1036.
105. *Id.*
106. *Id.* Although Adkins advocated an analysis of her claim under the First, Third, Fourth,

of a clearly established right, government employees retain qualified immunity.[107]

b. *Decision*

Initially, the Tenth Circuit determined that Adkins's claim should remain limited to the confines of the Eighth Amendment, which is the "explicit textual source of constitutional protection in the prison context."[108] Since the court limited the claim to Eighth Amendment parameters, the test for determining whether Deputy Rodriguez violated Adkins's rights involved two considerations. The court never determined whether the right to be free from sexual harassment in prison exists at all.[109] Instead, the court examined whether the alleged deprivation was "objectively, sufficiently serious," and whether the prison official acted with "deliberate indifference to inmate health or safety."[110]

The court admitted that the deputy's conduct was "unacceptable and outrageous."[111] The court refused, however, to acknowledge the harassment as the "sort of violence or threat[] of violence" that violates the Eighth Amendment.[112] Adkins's allegations did not establish that the single invasion of her cell constituted conduct rising to the level of deliberate indifference.[113] Moreover, Adkins did not prove that Deputy Rodriguez knew that she "face[d] a substantial risk of serious harm and disregard[ed] that risk by failing to take reasonable measures to abate the risk."[114]

3. *Brown v. Zavaras*[115]

a. *Facts*

Josephine (formerly Joseph) Brown, an inmate at the Limon Correctional Facility in Colorado, filed a complaint against two correctional officials alleging cruel and unusual punishment for withholding medical care in deliberate indifference to her basic medical needs.[116] Brown, a transsexual, claimed that transsexuality is a medical condition termed "gender dysphoria."[117] She further alleged that gender dysphoria is a medically recognized psychological disorder resulting from the "disjunction between sexual identity and sexual organs."[118] Brown claimed that prison officials failed to provide her with

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Fifth, Eighth, Ninth, and Fourteenth Amendments, the district court confined her claim to analysis under the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.*

107. *Id.* For a discussion of qualified immunity in the prison setting, see Matthew P. Previn, *Procedural Means of Enforcement Under 42 U.S.C. § 1983*, 83 GEO. L.J. 1498 (1995).

108. *Adkins*, 59 F.3d at 1037 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

109. *Id.* at 1036-37.

110. *Id.* at 1037 (internal quotation marks and citations omitted).

111. *Id.*

112. *Id.*

113. *Id.* at 1038.

114. *Id.* at 1037 (quoting Farmer v. Brennan, 114 S. Ct 1970, 1984 (1991)).

115. 63 F.3d 967 (10th Cir. 1995).

116. *Brown*, 63 F.3d at 969.

117. *Id.* at 968-69.

118. *Id.* at 969 (citations omitted). For more information on transsexualism and penological

estrogen hormones and other medical care available to treat gender dysphoria.[119] The district court dismissed the claim and Brown appealed.[120]

b. *Decision*

Referring to an earlier decision, the Tenth Circuit noted that when the provision of estrogen is medically controversial, prison administrators are not legally required to administer estrogen, nor provide any other particular treatment.[121] Nonetheless, the court maintained that prison officials must provide treatment to address the "medical needs" of transsexual prisoners.[122] The court concluded that Brown claimed a medical condition, and, therefore, also claimed a general right to medical treatment for that condition in her complaint.[123] Although prison officials have no duty to administer estrogen as a particular treatment, the court remanded the case to determine whether the Limon facility was providing Brown with the appropriate medical care necessary for her condition.[124]

C. *Analysis*

In *Housley*, the Tenth Circuit followed the Supreme Court's lead, acknowledging exercise as one of the basic human rights officials may not deny inmates.[125] The court, however, did not hold that any deprivation of exercise would automatically rise to the level of an Eighth Amendment violation. Instead, the court required a totality of circumstances analysis and a determination of what constituted adequate exercise on a case by case basis.

In *Adkins*, the court firmly stated that allegations of verbal sexual harassment of inmates by prison officials are limited to an Eighth Amendment analysis. The court relied on the Supreme Court's holding that both the treatment which a prisoner receives in prison and the conditions of his confinement are subject to scrutiny under the Eighth Amendment. The court failed to explain, however, how this language confined the plaintiff's claim exclusively to the Eighth Amendment.[126] The Tenth Circuit also declined to explain why

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concerns, see Ruth Colker, *BI: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1 (1995); Connie Mayer, *Survey of Case Law Establishing Constitutional Minima for the Provision of Mental Health Services to Psychiatrically Involved Inmates*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243 (1990); Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975).

119. *Brown*, 63 F.3d at 969.

120. *Id.* at 968.

121. *Id.* at 970 (citing Supre v. Ricketts, 792 F.2d 958, 962-63 (10th Cir. 1986)).

122. *Id.*

123. *Id.*

124. *Id.* Although the Tenth Circuit consistently referred to the necessity for treatment of "medical needs," it declined to address what separated a medical need from a nonmedical one. *Id.*

125. Housley v. Dodson, 41 F.3d 597, 599 (10th Cir. 1994).

126. The Tenth Circuit relied on language from Graham v. Conner, 490 U.S. 386 (1989), a Fourth Amendment search and seizure case, to justify limiting Adkins's claim to the Eighth Amendment. *See* Adkins v. Rodriquez, 59 F.3d 1034, 1037 (10th Cir. 1995). Nowhere in *Graham*, however, does the Supreme Court state that the Eighth Amendment is the sole source of constitutional protection in the prison context, or that courts may scrutinize government action using only

prisoners appear to have privacy rights in some contexts, such as the Fourth Amendment protection against unreasonable searches, and not in the *Adkins* context.[127]

Likewise, the Tenth Circuit never explained how a policy of allowing prison guards to verbally sexually harass prisoners with no threat of legal liability comports with "evolving standards of decency that mark the progress of a maturing society."[128] Nor did the court explore the possibility that needlessly confining an inmate to a psychologically destructive environment may be grossly disproportionate to the severity of the crime warranting imprisonment.[129] Since the Tenth Circuit found no clearly established right in the *Adkins* claim, it evidently did not recognize verbal sexual harassment as violating a basic human need.

The Tenth Circuit appears to have set the trend on the estrogen issue. After the Tenth Circuit held that transsexuals do not necessarily have a right to receive estrogen, several other circuits held likewise.[130] *Brown* comports with the decisions of *Housley* and *Adkins*; the Tenth Circuit defers to prison administrations concerning policy decisions, and only interferes with those decisions in the event of a clear constitutional violation. The court also seems devoted to a narrow definition of "basic human needs" for purposes of Eighth Amendment analyses.

D. *Other Circuits*

Other circuits have also adopted a narrow definition of "basic needs." The Eleventh Circuit has held that if an inmate receives adequate food, clothing, and sanitation, then the conditions of confinement do not, on their face, violate the Eighth Amendment.[131] The Seventh Circuit states that inmates cannot expect the "amenities, conveniences, and services of a good hotel."[132] It also held that an inmate was not subjected to cruel and unusual punishment during his twenty-eight days in a segregation unit when prison officials offered to

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one provision of the Constitution. In fact, the Court identifies the Eighth Amendment as *one* of the "primary sources of constitutional protection against physically abusive governmental conduct." *Graham*, 490 U.S. at 394. In *Adkins*, however, there was no claim of physically abusive conduct. *Adkins*, 59 F.3d at 1034.

127. The Tenth Circuit noted that Adkins did not allege that the "violation of her right of privacy arose out of an unreasonable search or seizure under the Fourth Amendment," or that she was "denied substantive due process under the Fourteenth Amendment when she was sexually harassed." *Adkins*, 59 F.3d at 1037 n.4. The Supreme Court, however, has used substantive due process to identify a right of privacy in some cases. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-55 (1973). What the Tenth Circuit failed to acknowledge was that the Supreme Court has also recognized that the right of privacy exists in the penumbras of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. *See* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). Curiously, these are the very amendments Adkins invoked in her claim. *See Adkins*, 59 F.3d at 1037. The Tenth Circuit, however, never mentioned that Adkins probably attempted to invoke a substantive due process claim under the penumbra analysis.

128. *See* discussion *supra* text accompanying note 83.

129. *See* discussion *supra* text accompanying note 82.

130. *See* discussion *supra* notes 75-79 and accompanying text.

131. *See* Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987).

132. Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988).

transfer him into the general prison population where he could exercise.[133] Exercise deprivation may rise, however, to an Eighth Amendment violation where "movement is denied and muscles are allowed to atrophy, and the health of the individual is threatened."[134]

The Sixth Circuit agreed with the Tenth Circuit's "totality of circumstances" approach to examining deprivation of exercise actions. However, the Sixth Circuit refused to specify any minimum amount of exercise as a constitutional requirement.[135] The Second, Fifth, and Eighth Circuits generally concur with the Tenth Circuit's views on right to exercise.[136] The Ninth Circuit, however, has gone so far as to hold that the deprivation of outdoor exercise could constitute cruel and unusual punishment.[137]

Regarding the *Adkins* issue, the Sixth Circuit generally agrees with the Tenth Circuit, concluding that an alleged verbal abuse or harassment by prison officials toward an inmate does not necessarily qualify as punishment within the meaning of the Eighth Amendment.[138] The Ninth Circuit, however, did not limit the harassment inquiry to an Eighth Amendment analysis. Instead, the court recognized that "incarcerated prisoners retain a limited right to bodily privacy,"[139] and subjected a policy that impinged on inmates' right to privacy to the *Turner* test.[140] The Ninth Circuit has also held that inappropriate body searches may rise to the level of an Eighth Amendment violation.[141]

Turning to *Brown*, other circuits have also refused to find a transsexual's inherent medical right to receive estrogen. The Seventh Circuit mandated that federal courts should defer to the informed judgment of prison officials to determine the appropriate form of medical treatment for gender dysphoria.[142]

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133. *Id.* at 1236. The plaintiff in this case was in temporary segregation for his own protection. Officials offered him the option of either foregoing his exercise rights or accepting a transfer to the general population where he could exercise. The court noted that, even in his segregation unit, the plaintiff could have "improvised temporarily" with jogging in place, aerobics, or pushups. *Id.*

134. *Id.*

135. *See* Rodgers v. Jabe, 43 F.3d 1082, 1087 (6th Cir. 1995).

136. *See, e.g.*, Leonard v. Norris, 797 F.2d 683, 685 (8th Cir. 1986) (holding that a punitive measure depriving an inmate of out-of-cell exercise for fifteen days is not violative of the Eighth Amendment); Anderson v. Coughlin, 757 F.2d 33, 35-36 (2d Cir. 1985) (stating that one hour of outdoor exercise per 24-hour period for prisoners in "special housing units" did not violate the Eighth Amendment); Wilkerson v. Maggio, 703 F.2d 909, 911-12 (5th Cir. 1983) (finding no Eighth Amendment violation where prison officials allowed an inmate one hour of daily indoor exercise, although the officials did not allow the inmate to exercise outdoors for a period of five years).

137. Allen v. Sakai, 40 F.3d 1001, 1004 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1695 (1995).

138. *See* Ivey v. Wilson, 832 F.2d 950, 955-56 (6th Cir. 1987).

139. Michenfelder v. Sumner, 860 F.2d 328, 333-34 (9th Cir. 1988).

140. *Id.* In this case, inmates alleged that prison officials were violating their privacy rights by performing routine strip searches where female correctional officers and visitors could view them. The court acknowledged that "[a]lthough the inmates' right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether." *Id.* at 334 (quoting Cumbrey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982)). Nonetheless, the court found that the positioning of female guards, that resulted in only infrequent observation, was reasonably related to legitimate penological interests and was not so degrading as to warrant court interference. *Id.*

141. Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993) (holding that a prison policy requiring male guards to conduct suspicionless clothed body searches on female prisoners inflicted "pain" for Eighth Amendment purposes, where many female inmates were victims of prior sexual abuse).

142. Meriwether v. Faulkner, 821 F.2d 408, 414 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987);

The Eighth Circuit conceded that transsexualism is a very complex medical and psychological problem, and that experts disagree on the proper treatment for the problem.[143]

IV. RIGHT OF ACCESS TO THE COURTS UNDER THE FOURTEENTH AMENDMENT[144]

A. *Background*

The Fourteenth Amendment entitles inmates to "adequate, effective, and meaningful" access to the courts.[145] In other words, states must provide inmates with a reasonable opportunity to present constitutional claims.[146] The right of access to the courts requires prison authorities to assist inmates in preparing and filing legal papers, either by providing inmates with adequate law libraries or with assistance from persons trained in the law.[147] The Supreme Court has also recognized that communications between an inmate and his legal counsel can constitute a valuable element of the right of access to the courts.[148]

While acknowledging the Supreme Court's determination that inmates have a right to court access, the Tenth Circuit has noted that the Court did not hold that inmates have "an absolute right to any particular type of legal assistance."[149] In addition, the Tenth Circuit does not require states to provide unlimited access to assistance.[150] In evaluating restrictions on legal access, courts "must consider the regulations, facilities, and available resources together as a whole, remembering that 'meaningful access' is the touchstone of this constitutional guarantee."[151] In the following two cases, the Tenth Circuit discusses what types of limitations on legal access remain constitutional.

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see Mayer, *supra* note 118, at 248.

143. White v. Farrier, 849 F.2d 322, 325 (8th Cir. 1988).

144. The Fourteenth Amendment does not explicitly create the right of access to the courts. The Supreme Court has found the right implicit in the Fourteenth Amendment's Due Process Clause which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

145. Bounds v. Smith, 430 U.S. 817, 822 (1977).

146. *Id.* at 825.

147. *Id.* at 828. *Bounds* does not require prison administrators to provide both as long as access is "meaningful." *See id.* at 832. Note that the right of access to the courts is distinct from the right to assistance of counsel, which is protected under the Sixth Amendment.

148. *Id.* at 823.

149. Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

150. *See* Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978).

151. *Ramos*, 639 F.2d at 583.

B. *Tenth Circuit Decisions*

1. *Mann v. Reynolds*[152]

a. *Facts*

Anthony Mann filed a class action lawsuit on behalf of himself, inmates confined to death row, and inmates confined in high to maximum security who were incarcerated in the H-Unit of the Oklahoma State Penitentiary.[153] The inmates claimed that a prison policy prohibiting barrier-free or contact visits between inmates and legal counsel violated the Sixth Amendment right to counsel[154] and the Fourteenth Amendment right of access to the courts.[155] The policy also prohibited contact visits between inmates and health professionals.[156]

During pre-trial proceedings, the prison altered its policy and allowed medical experts and psychologists to interact with inmates while performing clinical and psychological testing.[157] The prison did not, however, allow the inmates' attorneys this type of interaction. Attorneys were separated from their clients by a wire and plexiglas partition, and restricted to communicating by telephone and passing documents through a two-inch hole.[158] In addition, the prison failed to accommodate requests from double-celled inmates for confidential telephone calls to their attorneys.[159]

b. *Decision*

The Tenth Circuit found that access to counsel may be essential to the guarantee of meaningful access to the courts.[160] The court held that the Sixth and Fourteenth Amendments do not always require full and unfettered contact between an inmate and his counsel.[161] Refusing to acknowledge full contact as a constitutional right, the court was unwilling to recognize, as a matter of law, that the effectiveness of an attorney depends upon the strength of her emotional bond with the client.[162]

Nonetheless, the Tenth Circuit applied the *Turner* test to the prison policy to determine whether the limit on legal access was reasonable.[163] The court found that the policy prohibiting contact visits with attorneys was not reasonably related to any legitimate penological interest. Supporting this conclusion,

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152. 46 F.3d 1055 (10th Cir. 1995).
153. *Mann*, 46 F.3d at 1056.
154. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend VI.
155. *Mann*, 46 F.3d at 1056.
156. *Id.*
157. *Id.* at 1057.
158. *Id.*
159. The court found that approximately 89% of the inmates were double-celled. *Id.*
160. *Id.* at 1059.
161. *Id.* at 1060.
162. *Id.*
163. *Id.* For a discussion of the *Turner* test, see *supra* text accompanying notes 8-11.

the Tenth Circuit noted that the prison offered no evidence that the restrictions were related to any legitimate interest, such as security.[164] The prison also failed to offer any rational explanation showing why attorneys had been singled out for enforcement of the no-contact policy with inmates.[165]

2. *Carper v. DeLand*[166]

a. *Facts*

Wayne Carper and other inmates at the Utah State Prison filed a class action suit against the Director of the Utah Department of Corrections (UDOC).[167] The inmates alleged that the legal services plan at the facility unconstitutionally restricted their access to the courts by not providing attorney assistance in general civil matters.[168] At one time prior to the suit, the legal services plan had provided legal assistance to inmates in general civil matters (such as wills, divorces, workers' compensation, and creditor-debtor disputes), as well as habeas corpus and civil rights actions.[169] However, the Director of UDOC revised the plan to curtail costs, and in the process retained attorney assistance only in the filing of papers concerning habeas corpus and conditions of confinement actions.[170] The plan did not include the provision of a legal library.[171]

b. *Decision*

The Tenth Circuit held that a state's obligation to ensure prison inmates access to the courts does not include providing legal services for civil matters other than habeas corpus or civil rights actions regarding conditions of current confinement.[172] Although prison officials have no duty to provide legal access in general civil matters, the officials may not "erect barriers" to impede inmates from obtaining legal assistance regarding constitutional protections.[173]

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164. *Mann*, 46 F.3d at 1060-61 (noting that a legitimate security concern would rise to the level of a compelling government interest); *see supra* notes 18-20 and accompanying text. The court, however, rejected prison officials' evidence of "isolated occasions when cigarettes, chewing gum, pens, and paper clips have been unwittingly passed by uninitiated lawyers to inmates" as proof of a security risk. *Mann*, 46 F.3d at 1060.

165. *Mann*, 46 F.3d at 1060. The court noted suspiciously that officials had allowed unfettered contact with "virtually all those with whom [inmates] interact except their lawyers." *Id.*

166. 54 F.3d 613 (10th Cir. 1995).

167. *Carper*, 54 F.3d at 614-15.

168. *Id.* at 615.

169. *Id.* at 614.

170. *Id.* at 615.

171. *Id.*

172. *Id.* at 616-17.

173. *Id.* at 617. The court also stated that an inmate's right of access does not require the state to supply legal assistance beyond the stage of initial pleadings in a condition of confinement or habeas corpus action. *Id.*

C. *Analysis*

In *Mann*, the Tenth Circuit did not expressly hold that a policy prohibiting physical contact between attorneys and clients violated the Sixth and Fourteenth Amendments. An encroachment of rights must exist, however, to trigger the *Turner* test.[174] Thus, the *Mann* court's use of the *Turner* test implies that inmates have a constitutional right to contact visitation with their attorneys. It is reasonable to assume, however, that if a prison presented evidence of a legitimate penological interest in prohibiting contact visits, the Tenth Circuit would defer to that interest.[175]

The Tenth Circuit's decision in *Carper* implies that a prison administrator's refusal to provide legal assistance to inmates in general civil matters does not erect a barrier impeding all rights of access. The court suggested that inmates have no right of access to state funded legal assistance in actions such as divorce, wills and estates, and other general civil matters. Considering the conservative nature of the current Supreme Court, the Court would likely support the Tenth Circuit's holding in *Carper*.[176]

D. *Other Circuits*

In 1973, the Seventh Circuit held that an inmate has the right of unfettered access to the courts, and that all other rights become illusory without such a right.[177] This Circuit also declared that "effective protection of access to counsel requires that the traditional privacy of the lawyer-client relationship be implemented in the prison context."[178] Moreover, the Seventh Circuit required a prison administration to show evidence of reasonable suspicion of a security risk in order to justify an impairment of communication between attorneys and inmates.[179]

In 1990, the Ninth Circuit held that the right of access to the courts includes attorney contact visitation.[180] A few years later, however, it found that

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174. *See supra* notes 8-11 and accompanying text.

175. *Id.* The Tenth Circuit would likely defer to penological interests because the *Turner* test is inherently highly deferential to administrative interests. One legitimate state interest is enough to satisfy the test's requirements.

176. This hypothesis is especially convincing when one considers Justice Rehnquist's dissent in Bounds v. Smith, 430 U.S. 817 (1977). In *Bounds*, Justice Rehnquist asserted that inmates have no constitutional right to file habeas corpus and conditions of confinement actions in federal court. *Id.* at 833 (Rehnquist, J., dissenting). He stated, "There is nothing in the United States Constitution which requires that a convict serving a term of imprisonment . . . pursuant to a final judgment . . . have a 'right of access' to the federal courts in order to attack his sentence." *Id.* at 837. The Court has grown more politically conservative since the 1970s. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 3-25 (1992). Thus, it seems unlikely that a modern majority would vote to broaden the rights acknowledged by the majority in *Bounds*.

177. Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973). The court found that unless inmates receive unhindered access to the courts, all constitutional rights would be "entirely dependent for their existence on the whim or caprice of the prison warden." *Id.*

178. *Id.* at 631.

179. *Id.* at 631-32.

180. Ching v. Lewis, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a policy denying a prisoner contact visits with his attorney prohibited effective attorney-client communication and

prohibiting certain inmates from contact visits with attorneys was rationally related to legitimate penological interests in preventing escape, assault, hostage taking, and the introduction of contraband, even where there was no history of such incidents resulting from contact visitation.[181] This decision effectively placed the burden on prison inmates to show that the non-contact visitation policy fails under a *Turner* analysis.[182]

Regarding the *Carper* issue of extent of access in civil matters, the Sixth Circuit recently held that a state's obligation to provide inmates with access to the courts does not extend to civil matters beyond collateral attacks on convictions or challenges to the constitutionality of conditions of confinement.[183] The Third Circuit recently held that the right of court access does not include the right to counsel in civil actions (including habeas corpus proceedings) because the language of the Sixth Amendment limits the right to counsel to criminal proceedings.[184] In contrast to the Tenth Circuit's view, the Fifth Circuit held that a prisoner's reasonable access to the courts "must include access in general civil matters including, but not limited to, divorce and small claims."[185]

CONCLUSION

In general, the Tenth Circuit appears committed to giving deference to prison administrations concerning correctional policy decisions. The court seems unlikely to interfere with prison officials' policy making, absent a clear constitutional violation. Avoiding any broad categorical expansion of inmate rights, the court carefully follows precedent, and strictly applies legal tests and definitions. The Tenth Circuit appears to construe inmate rights rather narrowly; however, it also demonstrates a willingness to defer to legislation designed to expand those rights.

Shann R. Jeffery

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abridged the prisoner's right of meaningful access to the courts).

181. Casey v. Lewis, 4 F.3d 1516, 1520-21 (9th Cir. 1993).

182. *See* Song Hill, Casey v. Lewis: *The Legal Burden Is Raised; The Physical Barrier Is Spared*, 25 GOLDEN GATE U. L. REV. 1, 2 (1995) ("The Ninth Circuit requires prisoners to demonstrate the unreasonableness of a prison regulation which infringes upon their constitutional rights."). The *Casey* court held that the encroaching prison policy was reasonable even in the absence of any history of related security violations. *Casey*, 4 F.3d at 1521. This seems to require a prisoner who challenges the policy to show that, without the policy, the occurrence of a security violation is unlikely or impossible.

183. Knop v. Johnson, 977 F.2d 996, 1009 (6th Cir.), *cert. denied*, 507 U.S. 973 (1993).

184. Bieregu v. Reno, 59 F.3d 1445, 1453-54 (3d Cir. 1995).

185. Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) (holding that the Texas Department of Corrections could not prohibit prisoners from giving or receiving legal assistance with regard to civil matters); *see also* Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986) (stating that the right of access to the courts extends to civil as well as constitutional claims).

PROFESSIONAL RESPONSIBILITY SURVEY: RECUSAL

At the end of this survey article, five Tenth Circuit Court of Appeals judges offer their thoughts and opinions on the subject of judicial recusal. In general, the participants discuss the policy considerations underlying recusal motions and the implications of denying or granting these motions.

INTRODUCTION

The Tenth Circuit cases regarding judicial ethics during the survey period focused exclusively on recusal. The term "recusal" refers to the process by which a judge is disqualified from a case because of self-interest, bias, or prejudice.[1] The provisions of 28 U.S.C. § 455 govern recusal of federal judges.[2] Section 455 provides two separate grounds for recusal. First, § 455(a) sets out the general standard requiring a judge to disqualify himself when "his impartiality might reasonably be questioned."[3] Second, § 455(b) lists specific instances, in addition to situations in which a judge's "impartiality might reasonably be questioned," that necessitate recusal.[4]

Each of the recusal cases that the Tenth Circuit decided during the survey period involved a motion to recuse based on § 455(a). The analysis of the

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1. "[R]ecusal . . . refers to the process by which a judge is disqualified." BLACK'S LAW DICTIONARY 1277 (6th ed. 1990); *see also* Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 787 n.3 (1993). Canon 3(C) of the American Bar Association Code of Judicial Conduct governs recusal. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972).

2. 28 U.S.C. § 455 (1994).

3. "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a)

4. Section 445 (b) provides:

> He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually, or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. § 455(b); *see also* Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1049 (1993) (commenting that § 455(b) may be seen as a list of per se circumstances requiring recusal in situations involving actual bias rather than situations involving subsection (a)'s concern with the public's perception of bias).

surveyed cases focuses primarily on the legislative policies behind the recusal statute. With that in mind, Part I of this Survey traces the statute's legislative history, which reflects the principles underlying 28 U.S.C. § 455(a). Parts II through V discuss the four recusal cases that the Tenth Circuit decided during the survey period.

Part II explores the Tenth Circuit's treatment of judicial biases stemming from extrajudicial[5] sources. In *Maez v. Mountain States Telephone & Telegraph, Inc.*,[6] the alleged bias arose from the judge's professional relationship with the defendant.[7] The Tenth Circuit focused on the temporal context of the relationship and determined that the acquaintanceship did not mandate recusal.[8] Part III examines the Tenth Circuit's approach to bias stemming from intrajudicial[9] sources. In *United States v. Young*,[10] the court held that recusal was unnecessary because the alleged bias stemmed from an intrajudicial source and the judge did not display a "deep-seated favoritism or antagonism."[11] Part IV discusses the implications of the Tenth Circuit's timeliness requirement for § 455 motions. In *United States v. Stenzel*,[12] the court determined that the recusal issue was not preserved for appeal because the motion to recuse was not timely made.[13] Finally, Part V considers the proper remedy for a violation of § 455. In *King v. Champion*,[14] the court concluded that the district judge should have recused himself. The court, however, did not remand the case because the district judge was not required to make credibility determinations or determine disputed facts.

I. HISTORICAL EVOLUTION OF 28 U.S.C. § 455(A)

Prior to the 1975 amendment, § 455(a) contained a subjective test of the judge's impartiality.[15] This subjective test, referred to as the "actual partiality standard," required recusal if the judge himself believed that partiality existed.[16] Whether other reasonable persons thought the judge appeared biased

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5. "Extrajudicial" refers to "[t]hat which is done, given, or effected outside the course of regular judicial proceedings." BLACK'S LAW DICTIONARY 586 (6th ed. 1990).

6. 54 F.3d 1488 (10th Cir. 1995).

7. *Maez*, 54 F.3d at 1508.

8. *Id.*

9. "Intrajudicial," conversely, is that which is done, given, or effected within the course of judicial proceedings.

10. 45 F.3d 1405 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995).

11. *Young*, 45 F.3d at 1415.

12. 49 F.3d 658 (10th Cir.), *cert. denied*, 116 S. Ct. 123 (1995).

13. *Stenzel*, 49 F.3d at 661.

14. 55 F.3d 522, 524 (10th Cir. 1995).

15. Prior to 1975, § 455 provided that:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1968).

16. Kevin D. Swan, Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 815-16 (1987) (discussing § 455 (a) and Congress's utilization of "a standard of actual impartiality based on the judge's per-

was immaterial.[17] Commentators contended that the actual partiality standard did little to encourage public confidence in the judicial system.[18] These critics reasoned that public perception of impartiality determines the extent of public confidence in the integrity of the judiciary and, further, the appearance of bias was as harmful to this faith as actual bias.[19]

In response to this criticism, the American Bar Association (ABA) introduced an objective standard, or the "appearance of partiality test."[20] This test inquires whether "a reasonable person, knowing all of the circumstances, would be led to question the judge's impartiality."[21] In 1975, Congress codified the ABA's objective standard at 28 U.S.C. § 455(a).[22] The codified standard requires a judge to disqualify himself if his "impartiality may reasonably be questioned."[23] If a reasonable basis exists for the motion, the judge should recuse himself.[24] Congress explained that it replaced the subjective standard with the objective standard in order to clarify and broaden the grounds for judicial disqualification and to foster public confidence in the judiciary.[25]

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ception").

17. *Id.* at 816. "Section 455 relied upon judges to recuse themselves when certain circumstances rendered it improper, in [their] opinion, for them to hear the case." *Id.*

18. *Id.*; *see also* Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1481-82 (1981); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 764 (1973).

19. Swan, *supra* note 16, at 816 (stating that "it is the public's perception of neutrality, not that of the judiciary, which governs the public's faith in the judicial system").

20. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972). Canon 3(C)(1) provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." *Id.*; *see also* Swan, *supra* note 16, at 816 (explaining that in response to criticism of the actual impartiality standard the ABA introduced the appearance of impartiality standard in 1972).

21. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3(C) (1972); E. Thode, Reporter's notes to the Code of Judicial Conduct 49 (1973); *see also* Swan, *supra* note 16, at 816 ("The test requires an objective determination of only the appearance of impartiality, not actual impartiality. If a reasonable person, knowing all of the circumstances, would be led to question the judge's impartiality the judge should recuse him or herself.").

22. 28 U.S.C. § 455 (1994). Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id; see also* Swan, *supra* note 16, at 816-17 (explaining that once a judge's impartiality is questioned, the judge decides only whether there is a reasonable basis for the question).

23. 28 U.S.C. § 455(a). The Supreme Court interpreted the amended § 455(a) in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). The *Liljeberg* court held that

> [t]he goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Liljeberg, 486 U.S. at 860.

24. Fredonia Broadcasting Corp. v. RCA Corp., 569 F.2d 251, 256-57 (5th Cir.) (noting that if there is a question about the judge's impartiality, and she finds that the basis for the doubt is reasonable, she must recuse herself), *cert. denied*, 439 U.S. 859 (1978).

25. H.R. REP. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.S.C.A.N. 6351, 6354-55 (describing Congress's intent that the amendment support the public's confidence in the impartiality of the judiciary). The Supreme Court further interpreted Congress's intent, stating:

> The statute was amended . . . to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct . . . . The general language of subsection (a) was designed to promote public confidence in

II. BIASES STEMMING FROM EXTRAJUDICIAL SOURCES: *MAEZ V. MOUNTAIN STATES TELEPHONE & TELEGRAPH, INC.*[26]

A. *Background: The Objective Standard in the Tenth Circuit*

The Tenth Circuit applies § 455(a)'s objective test in judicial recusal cases.[27] In *United States v. Cooley*,[28] the court held that when deciding whether to affirm a judge's denial of a recusal motion, the proper analysis asks "whether a reasonable person armed with the relevant facts would harbor doubts about the judge's partiality."[29] The *Cooley* court explained that the standard is purely objective and that the "inquiry is limited to outward manifestations and reasonable inferences drawn therefrom."[30] A "reasonable factual basis" for questioning the judge's impartiality, however, must exist.[31]

B. Maez v. Mountain States Telephone & Telegraph, Inc.[32]

1. Facts

The plaintiffs, former managers at defendant Mountain States Telephone and Telegraph, Inc. (Mountain Bell), appealed a district judge's denial of their § 445 motion to recuse.[33] The plaintiffs contended that the judge should have recused himself due to his association with Mountain Bell.[34] Specifically, the judge previously worked for Mountain Bell from 1955 through the early 1960s, had served for one year as Mountain Bell's in-house legal staff, had special knowledge of the internal workings of Mountain Bell, and had a professional acquaintance with Mountain Bell's general counsel.[35] The judge personally knew one of the defendants, and had business associations with other defendants dating back twenty years.[36] The district judge held that there was an insufficient basis for a reasonable person to be concerned that the

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the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.

Liljeberg, 468 U.S. at 858 n.7 (citations omitted).

26. 54 F.3d 1488 (10th Cir. 1995).

27. *See* United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993), *cert. denied*, 115 S. Ct. 2250 (1995); United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992), *cert. denied*, 115 S. Ct. 114 (1994); Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987).

28. 1 F.3d 985 (10th Cir. 1993). The *Cooley* judge's participation in a television interview by Barbara Walters mandated recusal when, during the course of the interview, the judge discussed the abortion protest which was at issue in the case. *Cooley*, 1 F.3d at 995.

29. *Id.* at 993.

30. *Id.*

31. *Id.*

32. 54 F.3d 1488 (10th Cir. 1995).

33. *Maez*, 54 F.3d at 1495.

34. *Id.* at 1493.

35. *Id.*

36. *Id.*

judge "might be biased or prejudiced with respect to [the] claims of any of the parties or counsel."[37]

2. Decision

The Tenth Circuit affirmed, refusing to find an abuse of discretion in the district judge's denial of the motion to recuse.[38] After reiterating the objective test set forth in *Cooley*, the court held that the requisite doubts were not raised merely because the judge "worked for or even represented Mountain Bell some thirty years ago and may have socialized with fellow Mountain Bell employees."[39] The court noted that this particular judge had heard three prior cases involving claims and allegations against Mountain Bell where counsel (in all three cases) had perceived no "appearance of impartiality."[40]

C. *Analysis*

The Tenth Circuit's decision in *Maez* reflects the practical realities in the judicial process and the legal profession. One such reality is that a judge will inevitably have numerous social and professional relationships.[41] A judge frequently exploits these professional relationships to obtain judicial office. In practice, a judge will not terminate these relationships or social connections once appointed.[42] A judge's responsibility to set aside personal biases and rule impartially is an inherent requirement of the job; a different rule would require recusal in a prohibitive number of cases. These practical limitations must be weighed against the risk of harm to public confidence in the judicial system created by the appearance of a partial judiciary.

The *Maez* court reasoned that "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."[43] Prior to the 1975 amendment of § 455(a), case law interpreting the statute implied a "duty to sit."[44] Thus, in the past judges chose to err on the side of hearing the case when counsel questioned their impartiality.[45] Congress's amendment of § 455 in 1975, however, included an explicit repudiation of this duty to sit.[46] In proposing the amendment, the House

37. *Id.*
38. *Id.* at 1508.
39. *Id.*
40. *Id.*
41. A New York court recently addressed this issue in a high-profile case involving Andy Warhol's estate. Hayes v. The Andy Warhol Foundation, 637 N.Y.S.2d 708 (N.Y. App. Div. 1996). The chief beneficiary of the estate claimed that the judge was a social acquaintance of the lawyer of the estate. *Id.* The court, however, deemed the motion to recuse "belated," and denied it. *Id.*
42. *See* Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (commenting that "litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench"), *cert. denied*, 491 U.S. 904 (1989).
43. *Maez*, 54 F.3d at 1508 (quoting Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987)).
44. Swan, *supra* note 16, at 816 (noting that cases interpreting § 455 inferred a "duty to sit," and judges presumed that they should hear a case unless it would be improper to do so).
45. *Id.* (stating that "in a situation where there were only doubts about their impartiality, judges would err on the side of hearing the case"); *see* Harold S. Levy, *Judicial Recusals*, 2 PACE L. REV. 35, 46 (1982).
46. H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5, *reprinted in* U.S.S.C.A.N. 6351, 6354-55.

Judiciary Committee disclaimed the duty to sit by specifically requiring adjudication of close or questionable cases in favor of recusal.[47] Thus, the Tenth Circuit's reference to such a duty may be inconsistent with congressional intent.

D. *Other Circuits*

The *Maez* refusal to mandate recusal for the judge's mere familiarity with the party is consistent with case law in other circuits. The First, Second, Fourth, and Federal Circuits have upheld the denial of a recusal motion when the relationship giving rise to the alleged bias terminated some time ago.[48]

III. BIASES STEMMING FROM INTRAJUDICIAL SOURCES: *UNITED STATES V. YOUNG*[49]

A. *Background*

Sections 144[50] and 455(b)[51] govern recusal of federal judges.[52] Under §§ 144 and 455(b)(1), the judge's personal bias or prejudice must stem from outside the course of regular judicial proceedings.[53] The legal community

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(1974). With the adoption of the new § 455, Congress removed the duty to sit. *Id.* Now a judge should seek to "err on the side of caution and [recuse] himself in a questionable case." Postashnick v. Port City Constr. Co., 609 F.2d 1101, 1112 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1981); *see also* Swan, *supra* note 16, at 817 (explaining that the new § 455 repudiates the duty to sit and requires that judges decide doubtful cases on the side of caution and recusal).

47. H.R. REP. NO. 1453.

48. United States v. Lovaglia, 954 F.2d 811, 817 (2d Cir. 1992) (stating that because the judge's relationship with the party ended seven or eight years prior to sentencing, the judge did not abuse his discretion in refusing to recuse himself); *In re* Allied Signal Inc., 891 F.2d 974, 976 (1st Cir. 1989) (holding that a business relationship between the judge and the lawyer that took place eight years prior to the case, and before the judge's appointment, did not cast significant doubt on the judge's impartiality); *Simkins Indus.*, 847 F.2d at 1117 (noting that the judge's brief association with the Sierra Club that terminated over a decade before adversary proceedings commenced did not form the basis for reasonably questioning a district judge's impartiality); Maier v. Orr, 758 F.2d 1578, 1581 (Fed. Cir. 1985) (concluding that a trial judge's former association with the Air Force did not reasonably raise appearance of partiality); Brody v. President & Fellow of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (finding that a trial judge's graduation from the defendant university did not in itself constitute a reasonable basis for recusal motion), *cert. denied*, 455 U.S. 1027 (1982).

49. 45 F.3d 1405 (10th Cir.), *cert. denied*, 115 S. Ct. 2633 (1995).

50. *See* 28 U.S.C. § 144 (1994). As with § 455, this statute applies if a judge has a personal bias or prejudice towards a party. *Id.* Section 144 mandates that the party file a timely recusal motion along with an affidavit stating the facts that suggest the judge's personal bias. *Id.* When faced with a § 144 motion to recuse, the judge rules on the legal sufficiency of the motion but not on the truth of the matters alleged. The affidavit is sufficient if the facts alleged, assuming that they are true, would convince a reasonable person that bias exists. *Id.*; *see* Abramson, *supra* note 4, at 1050 n.11 (commenting on the procedure for filing a § 144 motion).

51. 28 U.S.C. § 455(b) (1994).

52. *See* 28 U.S.C. §§ 144, 455.

53. *See* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (explaining that in a motion for disqualification under § 144, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source"); United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981) (holding that the extrajudicial source limitation applies to §§ 144 and 455(b)(1)), *cert. denied*, 456 U.S. 916 (1982); Lori M. McPherson, Liteky v. United States: *The Supreme Court Restricts the Disqualification of Biased Federal Judges Under Section 455(a)*, 28 U. RICH. L. REV. 1427, 1432-

refers to this requirement as the extrajudicial source doctrine.[54] However, because § 455(a) does not contain the phrase "personal bias and prejudice," circuit courts are divided over whether the extrajudicial source requirement extends to § 455(a).[55] This confusion exists within the Tenth Circuit: the limitation has been applied inconsistently to § 455(a) motions.[56]

The Supreme Court granted certiorari in *Liteky v. United States*[57] to resolve the inconsistent decisions among the circuit courts regarding whether § 455(a) was subject to the same extrajudicial source limitation as § 455(b)(1).[58] The Supreme Court held that the word "personal" in the phrase "personal bias and prejudice" in § 455(b)(1) did not form the basis of the extrajudicial source limitation.[59] Rather, the limitation originated from the

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33 (1994) ("The statutory 'home' of the extrajudicial source doctrine . . . was the phrase 'personal bias and prejudice' found in section 144. Because section 455(b)(1) also contains the personal bias and prejudice language of section 144, the extrajudicial source requirement was universally extended to section 455(b)(1)."); Safer, *supra* note 1; Serena Viswanathan, *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 1144, 1145-48 (1995) (explaining that §§ 144 and 455(b)(1) provide for recusal when the judge has a bias stemming from an extrajudicial source).

54. One example of a motion to recuse originating from an intrajudicial source appears in a high-profile New York state case involving the $1.2 billion estate of tobacco heiress Doris Duke. The movants claimed the facts necessitated recusal because the judge created an appearance of impropriety when he removed the movants as co-executors in a prior meeting. *In re* Will of Duke, 632 N.Y.S.2d 532, 533 (N.Y. App. Div. 1995).

55. United States v. Chantal, 902 F.2d 1018, 1022 (1st Cir. 1990) (holding that "unlike challenges under 28 U.S.C. Sec. 144, the source of the asserted bias/prejudice in a Section 455(a) claim can originate explicitly in judicial proceedings"); United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989) (holding that recusal under § 455(a) must be predicated on extrajudicial conduct); *In re* Beard, 811 F.2d 818, 827 (4th Cir. 1987) (stating that bias must derive from extrajudicial source); Davis v. Board of Comm'rs, 517 F.2d 1044, 1052 (5th Cir. 1975) (holding that § 455(a) contained the extrajudicial source doctrine), *cert. denied*, 425 U.S. 944 (1976); *see* McPherson, *supra* note 53, at 1428-33 (explaining the origin of the confusion in the circuit courts).

56. *See* United States v. Cooley, 1 F.3d 985, 994 n.7 (10th Cir. 1993) (noting the inconsistencies in the Tenth Circuit regarding application of the extrajudicial source doctrine); United States v. Page, 828 F.2d 1476, 1481 (10th Cir.) (stating that the extrajudicial source rules apples to § 455(a) and § 455(b)(1)), *cert. denied*, 484 U.S. 989 (1987); Franks v. Nimmo, 796 F.2d 1230, 1234 (10th Cir. 1986) (holding that the extrajudicial source rule applies to § 455(b)(1), but holding nothing specific as to § 455(a)); United States v. Hines, 696 F.2d 722, 728 (10th Cir. 1982) (stating that § 455 (b)(1) requires recusal for actual bias, but that subsection (a) requires it for the mere appearance of impartiality).

57. 114 S. Ct. 1147 (1994). In 1991, the government charged petitioners with willful destruction of federal property, for spilling human blood on various objects at the Fort Benning Military reservation. *Liteky*, 114 S. Ct. at 1150. Before trial, the petitioners moved to disqualify the district judge pursuant to § 455(a). *Id.* The motion was based on events that had occurred during and after a trial in 1983 involving the same petitioner and the same judge. *Id.* at 1150-51. In the earlier trial, the petitioner, a Catholic priest, was convicted of various misdemeanors committed during protest action. *Id.* at 1151. Petitioner claimed that recusal was necessary in the 1991 case because the judge had displayed impatience and animosity towards the petitioner and his beliefs. *Id.* The judge denied the motion to recuse, reasoning that matters arising out of judicial proceedings were not the proper basis for recusal. *Id.* The petitioners were convicted and appealed, claiming the judge violated § 455(a) by refusing to recuse himself. *Id.* The Eleventh Circuit affirmed, agreeing that matters arising out of the course of judicial proceedings are not the proper basis for recusal. *Id.*

58. *Id.* at 1150; *see* McPherson, *supra* note 53, at 1434 (noting that the Supreme Court granted certiorari to resolve the inconsistent circuit decisions).

59. *Liteky*, 114 S. Ct. at 1154. The Court stated:

connotations of the words "bias and prejudice."[60] The Court then held that although § 455 does not expressly include this statutory language, the word "partiality" has the same negative connotation as the words "bias and prejudice."[61] The Court concluded that the basis for a § 455(a) motion to recuse should stem from an extrajudicial source.[62]

The Court, however, did indicate a possible exception to the extrajudicial source requirement. A bias stemming from an intrajudicial source may constitute the basis for a § 455(a) motion to recuse if it displays "a deep-seated favoritism or antagonism that would make fair judgment impossible."[63] Therefore, the Court concluded that generally neither a judge's critical, disapproving, or hostile remarks during judicial proceedings, nor her expressions of impatience, dissatisfaction, annoyance, or anger, mandate recusal.[64]

B. United States v. Young[65]

1. Facts

Laina Young appealed a conviction on two counts of money laundering, contending that the district judge erred by denying her § 455(a) recusal motion.[66] The grounds for the motion included comments made by the judge during the scheduling conference regarding Young's "obvious" fate in the trial.[67] Young claimed that the judge's remarks demonstrated an inappropriate bias against her such that "his impartiality might reasonably be questioned" under § 455(a).[68]

> In our view . . . the basis of the modern "extrajudicial source" doctrine, is not the statutory term "personal" . . . . Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are never appropriate . . . . [I]nterpreting the term "personal" to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine . . . a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal" bias and would provide no basis for the judge's recusing himself.

Id.

60. *Id.* at 1155.

61. *Id.* at 1155-56.

62. *Id.* at 1156.

63. *Id.* at 1157. The court provided an example of deep-seated antagonism by referring to a World War II espionage case against German-American defendants where the court depicted their hearts as "reeking with disloyalty." *Id.*

64. *Id.*

65. 45 F.3d 1405 (10th Cir. 1995).

66. *Young*, 45 F.3d at 1414.

67. *Id.* at 1414-15. The judge's controversial remarks were:

> And bear in mind this: that the obvious thing that's going to happen to Ms. Young is that she's going to get convicted, and then they're going to sprinkle her and bless her with immunity, and then she's going to get to testify. And then she's going to pull the same act on me again, and then she's going to county jail for at least 30 if not 60 or 90 days for contempt.

Id. at 1414.

68. *Id.* at 1415.

2. Decision

On appeal, the Tenth Circuit held that the judge's remarks in the scheduling conference did not require recusal.[69] Relying on the Supreme Court's recent interpretation of § 455(a) in *Liteky*,[70] the court concluded that since the judge did not express this opinion based upon knowledge gathered outside the course of judicial proceedings, and since the comments, viewed in the context of the case, did not display a deep-seated favoritism or antagonism that would make fair judgement impossible, recusal was unwarranted.[71] The court reasoned that while the comments reflected the judge's belief that the jury would likely convict Young, they did not indicate that the judge could not fulfill his responsibilities impartially.[72]

C. *Analysis*

The Tenth Circuit's opinion in *Young* made a significant contribution to the analysis of recusal cases by clarifying the grounds for a § 455(a) motion to recuse. Specifically, *Young* marks the Tenth Circuit's extension of the extrajudicial source requirement to § 455(a) in accordance with the Supreme Court's decision in *Liteky*. This requirement invalidates § 455(a) motions based on bias deriving from an intrajudicial source, unless it is so extreme that it reveals a "deep-seated favoritism or antagonism" that renders executing a fair judgment impossible. Thus, *Young* demonstrates the Tenth Circuit's belief that statements of opinion by the judge based on knowledge gathered in the course of judicial proceedings should be analyzed differently than similar statements originating from extrajudicial sources.

The court treats extrajudicial and intrajudicial biases differently because of practical realities inherent in the judiciary. Specifically, the extrajudicial source rule recognizes that judges naturally form opinions about the parties based upon the information obtained in the course of judicial proceedings.[73] Thus, it would be unrealistic to expect the judge in *Young* not to have formed opinions about what the jury would likely conclude.

Furthermore, applying the extrajudicial source limitation to § 455(a) decreases the risk that the parties might use the recusal process to disqualify one

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69. *Id.* at 1416.

70. For a discussion of *Liteky v. United States*, see *supra* notes 57-64 and accompanying text.

71. *Young*, 45 F.3d at 1416.

72. *Id.*

73. The Fifth Circuit expressed this idea in their explanation of the extrajudicial source rule:

> [A] judge is not merely a passive observer. He must . . . shrewdly observe the strategies of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court house dramas called trials, he could never render decisions.

United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 325 (5th Cir. 1980) (quoting *In re* I.B.M. Corp., 618 F.2d 923, 930 (2d Cir. 1980)).

judge in order to obtain a judge whose disposition is more favorable to their position. In fact, Congress recognized this potential for "judge-shopping."[74] The report advised courts to avoid interpreting the statute in such a way that a party's fear of an adverse ruling would be treated as a reasonable questioning of the judge's impartiality.[75]

The *Young* court did not address whether a reasonable person, armed with the relevant facts, would harbor doubts about the judge's partiality. The Court declined to apply this objective standard because the alleged bias did not stem from an extrajudicial source. In effect, the extrajudicial source rule replaces the statute's objective test with the "deep-seated favoritism or antagonism" standard if the alleged predisposition originates from facts adduced at trial.[76] Thus, the extension of the extrajudicial source requirement to § 455(a) narrowed the grounds available for recusal. Such constriction, however, conflicts with the policy underlying the recusal statute.[77] By amending § 455(a) in 1975 to encompass an objective test, Congress intended to promote public confidence in the impartiality of the judicial process by broadening and clarifying the grounds for recusal.[78] The Tenth Circuit's narrow interpretation of § 455(a), however, may weaken the public's faith in the judiciary by ruling against recusal, despite the fact that the judge's "impartiality may reasonably be questioned." This is particularly true where the alleged bias stems from an intrajudicial source but does not reach the level of "deep-seated favoritism or antagonism."[79]

D. *Other Circuits*

The full impact of *Liteky's* extension of the extrajudicial source rule to § 455(a) remains unclear. The Seventh Circuit recently denied a § 455(a) recusal claim despite the judge's predisposition in the case because he did not display the "deep-seated and unequivocal antagonism that would render fair judgment

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74. H. REP. NO. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.S.C.A.N. 6351, 6355 (1974). "Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice." *Id.* Judges "must be alert to avoid the possibility that those who would question [their] impartiality are in fact seeking to avoid the consequences of [the judges] expected adverse decision." *Id.*

75. *Id.*

76. *See* McPherson, *supra* note 53, at 1445-46 (commenting that the Court has substituted the "impossibility of fair judgment" standard for the statute's "impartiality might reasonably be questioned" standard).

77. *Id.* at 1446 (commenting that the interpretation defeats the purpose for which the statute was enacted and sounds the "death-knell" on the broad protections that § 455 seeks to provide).

78. H.R. REP. NO. 1453. The Supreme Court explained that

> [t]he statute was amended to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct . . . . The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.

Liljeberg, 468 U.S. at 858.

79. Safer, *supra* note 1, at 812 (remarking that allowing an apparently biased judge to try the case does not promote public confidence in the judiciary, and to suggest otherwise implies that the public would be more confident if an apparently biased judge presided over the case, rather than if the judge were disqualified).

impossible."[80] There is still some uncertainty as to how circuits will apply the "deep-seated favoritism or antagonism" standard to recusal cases involving biases stemming from intrajudicial sources.

IV. PRESERVING RECUSAL FOR APPELLATE REVIEW: *UNITED STATES V. STENZEL*[81]

A. *Background*

A motion for recusal under 28 U.S.C. § 455 may be filed at any time.[82] Section 455 also provides a guideline for the judge to decide when self-recusal is necessary.[83] Thus, either the judge or a litigant may assert a § 455 motion to recuse. The Tenth Circuit requires that the party make a § 455 motion in a timely manner in order to obtain review.[84] Once it grants review, the court of appeals determines whether the trial judge abused her discretion by denying the recusal motion.[85]

B. United States v. Stenzel[86]

1. Facts

Robert Stenzel was convicted under the Assimilative Crimes Act[87] for "concealing his identity, disorderly conduct, failure to exhibit evidence of financial responsibility, and failure to exhibit evidence of vehicle registration."[88] During the trial, the district court judge informed the parties that he had been stationed at the military base where the criminal acts occurred, and that he had recently been the Honorary Commander of the Air National Guard.[89] Mr. Stenzel's counsel asked the judge whether he felt that this

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80. *In re* Huntington Commons Assoc., 21 F.3d 157 (7th Cir. 1994).

81. 49 F.3d 658 (10th Cir. 1995).

82. 28 U.S.C. § 455 (1994).

83. *Id.*

84. Wilner v. University of Kansas, 848 F.2d 1020, 1023 (10th Cir. 1988) (finding that the recusal motion was not timely when plaintiff moved for recusal four and one-half years into the case), *cert. denied*, 488 U.S. 1031 (1989); Singer v. Wadman, 745 F.2d 606, 608 (10th Cir. 1984) (noting that party seeking recusal failed to act in a timely fashion), *cert. denied*, 470 U.S. 1028 (1985).

85. United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993); United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992), *cert. denied*, 115 S. Ct. 114 (1994); Weatherhead v. Globe Int'l, Inc., 832 F.2d 1226, 1227 (10th Cir. 1987).

86. 49 F.3d 658 (10th Cir. 1995).

87. 18 U.S.C. § 13 (1994). The Assimilative Crimes Act provides federal jurisdiction for state crimes committed on federal property. *Id.*

88. *Stenzel*, 49 F.3d at 659.

89. *Id.* at 661. The record states:

> Q: And that's the Wyoming gate at Kirtland where this incident allegedly occurred, is that correct?
>
> A.: Yes, ma'am.
>
> THE COURT: For the record, I'm well acquainted with the base. I was stationed there years ago and I have also recently been the Honorary Commander of the Air Force National Guard, so I know what it is.
>
> MS. ROSENSTEIN [Stenzel's counsel]: I was unaware of that, Your Honor. Does the Court feel that that would be an apparent conflict?

"would be an apparent conflict."[90] The judge responded that it would not be a conflict, and Mr. Stenzel's counsel replied, "Okay."[91] On appeal, Mr. Stenzel contended that the district court judge erred in not recusing himself due to his relationship with the military.[92]

2. Decision

The Tenth Circuit Court held that the conversation between the district court judge and Mr. Stenzel's counsel about a possible conflict of interest did not constitute a request for recusal.[93] Additionally, the court noted that Mr. Stenzel's counsel did not develop, in the record, any basis for disqualification of the district judge.[94] Consequently, Mr. Stenzel did not make a timely objection, and the recusal issue was not preserved for appeal.[95]

C. *Analysis*

Stenzel confirms the Tenth Circuit's timeliness requirement regarding § 455 motions to recuse. Timeliness preserves judicial resources by limiting the issues reviewed on appeal. Furthermore, a contrary decision may encourage litigants to manipulate the judicial process by delaying motions to recuse to "wait and see" whether judgment will be in favor of the opposing party. Congress's concern with "judge shopping" is equally relevant upon the trial's completion.[96] Although the equities do not favor the losing party requesting recusal after an adverse judgment, the timeliness requirement creates an inherent risk that the litigant will be denied the right to a neutral and impartial judge. In *Stenzel*, the Court never analyzed whether a reasonable person would harbor doubts about the district judge's partiality because the recusal issue was not preserved for appellate review. A possibility therefore exists that recusal was necessary and that the failure to recuse may have denied Mr. Stenzel his right to an impartial tribunal. The timeliness requirement seems particularly unfair in *Stenzel*, where counsel had previously expressed concern that the judge might have a conflict of interest.

D. *Other Circuits*

The Fifth, Eighth, and Eleventh Circuits have also held that failure to file a timely recusal motion bars the party from claiming on appeal that the judge was biased.[97] The Third and Ninth Circuits, however, have held that failure to

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THE COURT: No, I said I'm acquainted with the base.
MS. ROSENSTEIN: Okay.

Id.

90. *Id.*
91. *Id.*
92. *Id.* at 660-61.
93. *Id.* at 661.
94. *Id.*
95. *Id.*
96. *See* discussion *supra* notes 73-78 and accompanying text.
97. McKinney v. Pate, 20 F.3d 1550, 1562 (11th Cir. 1994) (stating that defendant must

file a timely recusal motion in the trial court does not constitute waiver of the claim, but results in a higher burden of proof on appeal.[98] Additionally, some circuits have distinguished between recusal motions based on the appearance of impartiality and motions based on actual bias, imposing a timeliness requirement only on the motions based on the appearance of impartiality.[99]

V. REMEDIES: *KING V. CHAMPION*[100]

A. *Background*

Section 455 does not specify the proper remedy upon a finding that the trial judge issued an erroneous recusal decision,[101] which leaves the task of constructing a remedy for a violation of § 455(a) to the judiciary. The Supreme Court, in *Liljeberg v. Health Services Acquisition Corp.*, offers some direction.[102] The *Liljeberg* Court advised that when determining whether to vacate a judgment for a violation of § 455, a court should "consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[103]

B. King v. Champion[104]

1. Facts

Oklahoman Doyle Kent King was convicted in state court of "assault and battery with intent to commit a felony."[105] After appealing his conviction, King filed a habeas petition in federal court, claiming that the delay in adjudicating his appeal violated his constitutional right to due process.[106] The court joined Mr. King's habeas case together with other similar habeas cases and referred to the group as the "Harris cases."[107] A panel of three federal district judges presided over the factually similar cases.[108]

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object to bias in a pre-trial motion to recuse before trial or as soon as alleged bias is discovered), *cert. denied*, 115 S. Ct. 898 (1995); United States v. Bauer, 19 F.3d 409, 414 (8th Cir. 1994) (holding that § 455 claims "will not be considered unless timely made"); United States v. York, 888 F.2d 1050, 1053-56 (5th Cir. 1989) (construing § 455 to require timeliness); *see supra* note 41 (noting a denial of a motion to recuse due to "belatedness" in a high-profile case involving Andy Warhol's estate).

98. United States v. Bosh, 951 F.2d 1546, 1548-49 (9th Cir. 1991), *cert. denied*, 504 U.S. 989 (1992); United States v. Schreiber, 599 F.2d 534, 536 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979).

99. United States v. Murphy, 768 F.2d 1518, 1539-41 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Unites States v. Slay, 714 F.2d 1093, 1094-95 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050 (1984).

100. 55 F.3d 522 (10th Cir. 1995).

101. 29 U.S.C. § 455 (1994).

102. 486 U.S. 847, 863-64 (1988).

103. *Liljeberg*, 486 U.S. at 864.

104. 55 F.3d 522 (10th Cir. 1995).

105. *King*, 55 F.3d at 523.

106. *Id.*

107. *Id.*; *see* Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994).

108. *King*, 55 F.3d at 523.

One of the panel judges, Judge Brett, also presided over an evidentiary hearing concerning King's case.[109] Judge Brett determined that King's evidence was insufficient, and denied King's petition for habeas relief.[110] King appealed the district court's denial of habeas relief and also insisted that Judge Brett erred by not recusing himself from the evidentiary hearing.[111] Because Judge Brett's uncle was a member of the Oklahoma Court of Criminal Appeals during the period of excessive time delay alleged in many of the *Harris* cases, King argued on appeal that Judge Brett was required to recuse himself under § 455.[112] Furthermore, the *Harris* civil rights claims named Judge Brett's uncle as a party.[113]

2. Decision

The Tenth Circuit held that Judge Brett should have recused himself from the habeas action pursuant to § 455.[114] The court also held, however, that the judge's failure to recuse himself did not necessitate vacating the judge's opinion.[115] The court reasoned that a vacation of the judgment and remand were unnecessary since further delay would only add to the injuries that King allegedly suffered due to the state court delays.[116] The court also justified its conclusion by explaining that Judge Brett based his decision on the delay claim almost entirely on undisputed facts, and the resolution of the case at the evidentiary hearing did not require him to make any credibility determinations.[117]

C. *Analysis*

King represents the Tenth Circuit's position that absent credibility issues or disputed facts, a new trial is not the proper remedy.[118] Arguably, in a case where the judge is not compelled to determine which version of the facts is true, or who has told the truth, impartiality is less crucial and a new trial might waste judicial resources and entail unnecessary duplication.

The issue that the Tenth Circuit faced in *King* is directly attributable to Congress's failure to specify appropriate remedial measures for violations of § 455. Despite the holding in *King*, the principles underlying § 455 suggest that if recusal were necessary at the trial level, the appropriate remedial measure would be to remand for a new trial. The legislative history of § 455 illustrates

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 524. The court reached this conclusion by relying on *Harris*, which found that Judge Brett should have recused himself but holding that his failure to do so did not require vacation of the panel's decision. *Id.* (citing Harris v. Champion, 15 F.3d 1538, 1572 (10th Cir. 1994)). Rather, the proper remedial action was for the judge to recuse himself from all further proceedings related to those matters. *Id.* (citing *Harris*, 15 F.3d at 1571).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

Congress's recognition that the appearance of impartiality is as damaging to the public confidence in the judicial process as actual bias. Thus, Congress drafted the statute to inhibit both actual bias and the appearance of bias. If the statute exists to avoid even the appearance of impartiality, it appears inconsistent to limit the determination of an appropriate remedy to an examination of what the district court judge was actually required to do at the trial.

CONCLUSION

The legislative history of § 455 reveals that Congress intended to establish an objective standard designed to promote public confidence in the integrity of the judicial process. The recusal statute attempts to preserve this confidence by protecting one of the underlying principles of the American judicial system, the right to an impartial tribunal.

The Tenth Circuit's case law regarding motions to recuse based on § 455(a) illustrates the court's reluctance to overturn the denial of a motion to recuse at the district court level. In three of the four cases handed down on this issue during the survey period, the court found recusal unnecessary. In the remaining case, the court found recusal appropriate, but did not remand or vacate the decision. The decisions as a whole reflect the Tenth Circuit's long-standing belief that § 455(a) "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."[119]

Ultimately, the judge with the alleged prejudice knows whether or not the bias exists. Regardless of the judge's perception, the litigant and the general public believe that the litigant is being deprived of a fair trial. In this way, the effect of the Tenth Circuit's tolerance for the appearance of partiality may ultimately be to injure the public confidence in the essential fairness and integrity of the judicial system.

Amy J. Shimek

119. United States v. Hines, 696 F.2d 722, 729 (10th Cir. 1982).

PROFESSIONAL RESPONSIBILITY: COMMENTS ON RECUSAL

A DISCUSSION WITH:
JUDGE DAVID M. EBEL[1]
JUDGE PAUL J. KELLY, JR.[2]
JUDGE CARLOS F. LUCERO[3]
JUDGE JOHN J. PORFILIO[4]
JUDGE DEANELL R. TACHA[5]

INTRODUCTION

The following edited and condensed version of a conversation between members of the *Denver University Law Review* and five Tenth Circuit Court of Appeal's judges is intended to supplement the preceding survey article on judicial recusal. These members of the judiciary share their thoughts and opinions on the topic of judicial recusal, focusing primarily on the purpose of recusal, the objectives underlying recusal statutes, the potential abuse of the recusal process, the Supreme Court's recent treatment of recusal in *Liteky v. United States*,[6] and circumstances requiring recusal.

In the subsequent discussion, members of the *Denver University Law Review* posed questions to Tenth Circuit judges to better understand the recusal process in this Circuit. The participants wish to emphasize that they are responding to the questions in a general way and that they are in no way intending to prejudge issues that may come before them. In future cases, the judges will analyze these issues on a case by case basis.

THE DISCUSSION

Law Review: 28 U.S.C. § 455(a) provides that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court recently interpreted § 455(a) in *Liteky v. United States* and held that the alleged bias which forms the basis for the motion to recuse should stem from an extrajudicial source.[7] If the alleged

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1. Judge, United States Court of Appeals for the Tenth Circuit; B.A., Northwestern University, 1962; J.D., University of Michigan, 1965.

2. Judge, United States Court of Appeals for the Tenth Circuit; B.B.A., University of Notre Dame, 1963; J.D., Fordham University School of Law, 1967.

3. Judge, United States Court of Appeals for the Tenth Circuit; B.A., Adams State College, 1961; J.D., George Washington University, 1964.

4. Judge, United States Court of Appeals for the Tenth Circuit; B.A., University of Denver, 1956; LL.B., University of Denver College of Law, 1959.

5. Judge, United States Court of Appeals for the Tenth Circuit; B.A., University of Kansas, 1968; J.D., University of Michigan, 1971.

6. 114 S. Ct. 1147 (1994).

7. Extrajudicial refers to "[t]hat which is done, given, or effected outside of the course of

bias originates from an intrajudicial proceeding,[8] the motion will be granted only if the judge displays deep-seated favoritism or antagonism that would make fair judgment impossible. When § 455(a) was amended in 1975 to include an objective standard, Congress intended to promote public confidence in the integrity of the judicial process by broadening the grounds for disqualification.[9] Do you think the imposition of the extrajudicial source doctrine on § 455(a) is inconsistent with this goal because it limits the grounds available for disqualification?

JUDGE LUCERO: Congress' intent to establish an objective standard is clearly evidenced in the words "might reasonably be questioned." The Supreme Court's decision in *Liteky* appears to narrow the scope of these words. I am not necessarily critical of that because the statute sweeps with a broad brush.

The distinction between biases stemming from extrajudicial and intrajudicial sources is not particularly significant to me because I am extremely sensitive to any bias whatsoever, and personally would recuse if there is any reasonable possibility or suspicion of an appearance of impropriety.

JUDGE TACHA: What the statute requires is the lowest threshold and the litigants' last ditch argument. Recusal is not about statutes, but about ethics and avoiding the appearance of impropriety which is an individual determination of the judge. Most biases stem from extrajudicial sources, but I suppose it could stem from an intrajudicial source in which case I would ask myself whether it looks to others that there is an appearance of impropriety.

Law Review: The public's belief in the impartiality of the judicial system is essential to their willingness to abide by judicial decisions and, thus, is possibly the backbone of the American judicial system. Arguably, a narrow interpretation of § 455(a) weakens the public's faith in the judiciary because the appearance of unfairness is as damaging to this faith as an actual bias. Do you agree?

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regular judicial proceedings." BLACK'S LAW DICTIONARY 586 (6th ed. 1990). If the motion to recuse stems from "judicial rulings, routine trial administrative efforts, and ordinary admonishments," then disqualification is not required. *Liteky*, 114 S. Ct. at 1150.

8. Intrajudicial refers to that which is done, given, or effected within the course of judicial proceedings. An example of a motion to recuse originating from a judicial source is found in United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990). In *Chantal*, the criminal defendant's motion to recuse stemmed from the presiding judge's statements at a prior sentencing hearing indicating that the judge had doubts regarding the defendant's ability to rehabilitate himself. *Id.* at 1019-20.

9. H.R. REP. No. 93-1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-55 (describing the intention of the amendment to firther support the public's confidence in the impartiality of the judiciary). The Supreme Court explained:

> The statute was amended . . . to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct. The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.

Liljeberg v. Health Acquisition Corp., 486 U.S. 847, 858 n.7 (1988).

JUDGE LUCERO: When compared to other institutions, polls show that the public has the highest level of confidence in the judicial system. It is of the utmost importance that this trend continue. It is questionable whether the public would view *Liteky* as a problematic narrowing of the grounds available for motions to recuse.

JUDGE KELLY: I agree that the appearance of fairness is extremely important to maintain the public's faith in the judicial system. I am uncomfortable recusing, however, just because some guy points a finger if no factual predicate for the bias exists.

Law Review: In close cases do you think doubts should be decided in favor of the party or do you feel a duty to sit?

JUDGE EBEL: In a close case, I decide in favor of the party requesting recusal. However, there is a duty to sit and unless the party presented a colorable case for recusal, I would sit. This is not to undermine the importance of the appearance of impartiality, but a reasonable basis for the challenge must exist.

JUDGE PORFILIO: This is a tough question because certainly there is a duty to sit. I am concerned with the party, however, because in the final analysis it is the party's belief in the fairness of the tribunal that is of the utmost importance.

JUDGE KELLY: There are no close cases. You either are or are not biased.

Law Review: Some states have dealt with the recusal issue by enacting provisions that permit the litigant one preemptory disqualification.[10] What do you think of such provisions?

JUDGE EBEL: Such provisions are inherently not a good idea because they encourage forum shopping. The litigant ought to have to prove that a bias exists because it is a serious thing to get a judge removed from a case. Even at the trial level the trend is to move away from preemptories.

JUDGE KELLY: Not only do preemptive recusal provisions allow for judge-shopping, but they may actually get rid of the best judge for the case.

JUDGE PORFILIO: I am also opposed to preemptive disqualification provisions because they allow for considerable manipulation.

Law Review: Section 455 requires recusal when there is a bias concerning a party but not when the bias concerns an issue in the case. The drafters of the American Bar Association's Code of Judicial Conduct have suggested that it is

10. For example, in California if a party files an affidavit stating that she believes she cannot have a fair and impartial trial or hearing before the assigned judge, no further act or proof is required and a different judge is assigned. CAL. CIV. PROC. CODE § 170.6 (West 1982 & Supp. 1996).

unavoidable, and even desirable, that a judge have previously developed views on constitutional and legal issues. Do you agree?

JUDGE LUCERO: I agree with the drafters that it is unlikely that a judge will not have some view on many issues. However, someone must eventually make the decision. Public policy considerations are less sensitive at the circuit court and Supreme Court levels. A panel of judges can balance out one judge who has, for example, a view on abortion or the death penalty. On the Supreme Court there are nine different views to act as a check and balance procedure. Furthermore, the very nature of the appointment process takes the appointee's background and views into account.

JUDGE EBEL: It is unavoidable to develop positions on issues and it would be impractical to expect otherwise, considering that it is the judges' job to publish their views in decisions. If a judge expresses a view outside of an official proceeding, however, and the opinion is direct enough that the party reasonably does not think he or she will receive a fair trial, then recusal is necessary.

JUDGE PORFILIO: The issue is whether the belief is so strongly held that the judge cannot view the case with an open mind. If he cannot, then his opinion on the issue should be grounds for recusal.

Law Review: Do you think a judge ought to recuse himself or herself if one of the parties is a personal acquaintance?

JUDGE LUCERO: It depends on how "personal acquaintance" is defined. Knowing the party's name is not enough to mandate recusal. I am more inclined to recuse if I am acquainted with the party due to a social function rather than a public function.

JUDGE EBEL: I agree that if a judge is socially interactive with the person they should ordinarily disqualify themselves. Basically, my test is if there is more than a professional relationship—a personal friendship—then I would recuse.

JUDGE KELLY: I agree that it would be impractical to recuse every time you are acquainted with a party. Especially considering that judges get appointed to the bench due to their familiarity with a lot of people and the organized bar.

JUDGE TACHA: The test is not whether you know the party as a personal acquaintance, or know them personally—the test is whether you are biased.

Law Review: Do you think a judge should automatically recuse when a former law clerk represents a party in the litigation?

JUDGE EBEL: If an attorney was formerly my law clerk, I would consider recusal but would not automatically step down. I would analyze how close a relationship we held and the number of years that have passed since the clerkship.

JUDGE LUCERO: I also would require a substantial cooling off period—three to four years at a minimum. Not because I would fear favoring the

clerk's position, but because I am afraid I would bend over backwards to avoid the appearance of impropriety and hold the clerk to a higher standard. This would disadvantage the clerk.

JUDGE TACHA: I personally do not sit on former law clerk's cases and think it is presumptively not a good idea. I have a five-year time line. After five years I would consider it. I do, however, sit in front of past students.

Law Review: Are you concerned that a per se rule against hearing cases involving former law clerks would prevent highly qualified people from applying for clerkships?

JUDGE EBEL: A per se rule would be unrealistic, especially in smaller towns where the wheels of justice may stop if certain lawyers are disqualified from trying cases in front of what may be one of the only judges in town.

Law Review: When you are deciding whether or not to recuse, or to overturn a denial of a recusal motion at the district level, is society's frustration with the massive flood of litigation or preserving resources a concern?

JUDGE TACHA: Most definitely! However, recusal motions are a rare occurrence in the Tenth Circuit because the judges usually recuse themselves before the parties or lawyers are even aware of which judge was assigned to the case. In ten years, I have never had a recusal motion.

JUDGE PORFILIO: I am more inclined to rule in favor of saving judicial resources if it appears that the party may have filed the motion to recuse in order to manipulate the court.

Law Review: When it is decided on appeal that a motion to recuse should have been granted, do you think the case should always be remanded?

JUDGE EBEL: If I decide that the district court judge should have recused himself, I usually remand for a new proceeding unless there was only harmless error.

JUDGE PORFILIO: If the recusal denial was erroneous, I agree that remand should follow. But the error can be more technical than substantive, and, therefore, harmless.

Law Review: Do you think the statute should specify what action should be taken in the event of a violation?

JUDGE TACHA: I do not think that the statute should designate a remedy because every case is different. It would be a waste of judicial resources to mandate a remand when the failure to recuse was harmless.

JUDGE KELLY: A common sense approach is best. The judge is in the best position to determine the appropriate remedy and, thus, the statute does not need to stipulate a remedy.

JUDGE LUCERO: I agree that the remedy should be decided on a case by case basis because the court has adequate internal mechanisms to deal with this. It is important to keep the independence of the judiciary intact and there

is the danger of a separation of powers problem when Congress begins to legislate in the judicial arena.

CONCLUSION

The above discussion indicates that the judges we met with are extremely sensitive to any appearance of bias. In fact, they are so concerned with the appearance of impropriety that there are rarely recusal cases attempting to disqualify a Tenth Circuit Court of Appeals member. The judicial process itself helps to reduce the number of recusal motions at the circuit level by notifying the judges of the case assignments before the lawyers or parties are informed of which Court of Appeals panel has been appointed to hear their case. This mechanism gives the judges an opportunity to recuse themselves from the case and for the case to be reassigned before the parties were ever aware that the original judge was assigned to the case. Sorting out the recusal concerns in advance cuts down on motions to recuse later in the judicial process. Thus, the recusal issues that circuit court judges usually hear involve motions to recuse that were denied at the district court level.

It is our hope that this discussion, as well as the survey article on recusal, will benefit the practitioner in their understanding of the recusal process and the manner in which the judges on the Tenth Circuit consider the issue.

REAL PROPERTY

INTRODUCTION

The Tenth Circuit Court of Appeals decided three noteworthy cases in the area of real property during the 1994-1995 survey period.[1] These cases address issues of eminent domain, public lands, and water courses.

Part I of this Survey discusses third party authority to condemn property under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] In *United States v. Hardage*,[3] the Tenth Circuit followed the Supreme Court and at least two other federal circuits by using CERCLA to interpret a federal statute's permanent taking authority. Part II considers the valuation of undeveloped subsurface minerals for admittedly "taken" property. *United States v. Consolidated Mayflower Mines, Inc.*[4] solidified current Tenth Circuit law despite seemingly contrary Supreme Court and circuit authority. Part III addresses an ambiguous land grant from the federal government. Circuit courts disagree as to whether state or federal law controls this issue. In *Koch v. United States Department of Interior*,[5] a case of first impression, the Tenth Circuit utilized state law to interpret an ambiguous federal land grant.

I. EMINENT DOMAIN AND THIRD PARTY AUTHORITY TO CONDEMN: *UNITED STATES V. HARDAGE*[6]

A. *Background*

1. Congressional Grant of Condemnation Power

The United States Constitution reserves to the government the right to take property for public use when it justly compensates the owner.[7] Congress may confer this power of eminent domain upon whatever entity it selects.[8]

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1. This Survey covers cases decided from September 1994 to September 1995.
2. 42 U.S.C. §§ 9601-9675 (1988).
3. 58 F.3d 569 (10th Cir. 1995).
4. 60 F.3d 1470 (10th Cir. 1995).
5. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).
6. 58 F.3d 569 (10th Cir. 1995).
7. U.S. CONST. amend. V. For a theoretical overview of eminent domain, see Marla Mansfield, *When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193 (1994). *See generally* George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863, 863 (1993) (surveying cases decided by the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit in 1991 through 1993); Sidney Z. Searles, *The Law of Eminent Domain in the U.S.A.*, C975 ALI-ABA 333, 333-57 (1995) (providing an overview of the history of eminent domain and offering recommendations to promote a more equitable balance between the interest of the public at large and the individual property owner).
8. 1A JULIUS L. SACKMAN, NICHOLS' ON EMINENT DOMAIN § 3.03(3), at 3-58 to 3-76 (rev. 3d ed. 1995) (noting that the party must be bound to use the property taken for public use).

The grant of condemnation power, however, must exist in express statutory terms.[9] In addition, no one with a special grant of eminent domain power may delegate that authority without a legislative designation.[10] Most importantly, an exercise of condemnation power must derive its source from a statute.[11]

2. The All Writs Act[12] Power of Condemnation

If the legislature makes no affirmative grant of authority, the judicial branch may effect a condemnation through the federal "All Writs Act" (AWA).[13] In order to broaden judicial condemnation power through the AWA, an issuance: (1) must be appropriate to aid the court's existing jurisdiction; and (2) comply with "the usages and principles of law."[14] The AWA does not grant independent jurisdiction; it only strengthens condemnation power that independently preexists.[15]

The AWA authorizes a taking under certain highly specific circumstances. The most expansive interpretation of the AWA is found in *United States v. New York Telephone Co.*[16] In *New York Telephone*, the Supreme Court invoked AWA authority to allow a partial, temporary taking by physical occupation of a company's phones lines.[17]

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9. *Id.* The courts may also read a grant into a statute through "necessary implication" when the grant would be without force in the absence of an implication. Pennsylvania R.R. Company's Appeal, 93 Pa. 150 (1878) (finding that an act granting the railroad right-of-ways was impotent without condemnation power); *see* 1A SACKMAN, *supra* note 8, § 3.21.4, at 3-62 (noting that the party must have no control over the situation creating the necessity).

10. Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 594, 598, 603 (1904) (holding that the lessee of a corporation with power of eminent domain cannot exercise that right).

11. 1A SACKMAN, *supra* note 8, § 3.03(12), at 3-194 to 3-195 (noting that Congress may grant the power of eminent domain to an individual, but the delegation must be explicitly granted by statute).

12. 28 U.S.C. § 1651 (1994). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

13. 28 U.S.C § 1651.

14. *Id.*; *see also* Board of Educ. v. York, 429 F.2d 66, 69 (10th Cir. 1970) (granting an injunction to solve segregation problems as pursuant to the AWA "necessary and appropriate" standard), *cert. denied*, 401 U.S. 954 (1971).

15. 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3932, at 185 (1977). There are two requirements under the AWA: (1) the case has some potential for an independent source of jurisdiction, and (2) the writ will aid that jurisdiction. *Id.* at 188; *see* Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34-37 (1980) (reversing mandamus to restore a jury verdict because parties may not immediately appeal an order granting a new trial). The Supreme Court has said that the AWA is not a jurisdictional blank check, and thus, "it does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 43 (1985) (holding the district court's use of the AWA improper absent a showing of "exceptional circumstances").

16. 434 U.S. 159 (1977).

17. *New York Tel.*, 434 U.S. at 176-78. FBI officials had probable cause to believe that illegal gambling was occurring by telephone. The telephone company refused, however, to comply with a court order requiring it to lease the telephone lines to the FBI for surveillance purposes. *Id.* at 161-62. The Supreme Court held that although "unreasonable burdens may not be imposed" under the AWA, the AWA authorized commands to thwart frustration of a prior court order. *Id.* at 172. The Court found especially persuasive the circumstances where: (1) the company allowed the illegal actions; (2) the company had a public duty; (3) the order was not burdensome; and (4) the FBI had no alternative method to accomplish its goals. *Id.* at 174-75.

The AWA may also force compliance with a previous court order frustrated by the acts of an individual.[18] Occasionally, this power can extend to individuals who "have not taken any affirmative action to hinder justice."[19] Frustration traditionally includes wrongful obstruction of an order or public duty by one party.[20]

3. Congressional Grant of Condemnation Power: CERCLA

CERCLA[21] provides for condemnation of Superfund cleanup sites and adjacent land.[22] Although commentators and courts interpret this provision liberally in order to secure beneficial environmental goals,[23] the statutory language does not grant condemnation powers to third parties.[24] Trustees with the power to bring a CERCLA damage claim include local governments, states, and federal government departments.[25] Consequently, the private party charged with cleaning up a hazardous site has no power under CERCLA to procure any necessary private property.

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18. *See id.* at 172 (noting repeated Supreme Court recognition of the AWA grant of power to prevent frustration of prior orders); Kemp v. Peterson, 940 F.2d 110, 113 (4th Cir. 1991) (finding no abuse of discretion in an order intending to facilitate monitoring of compliance with an earlier order).

19. *New York Tel.*, 434 U.S. at 174 (allowing a court to find frustration if people, "though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order"); *see also* United States v. Field, 193 F.2d 92, 96-97 (2d Cir.) (finding that third parties must answer questions and produce books despite self-incrimination privilege), *cert. denied*, 342 U.S. 894 (1951), *cert. dismissed*, 342 U.S. 908 (1952); United States v. McHie, 196 F. 586, 587-88 (N.D. Ill. 1912) (finding power in the AWA to impound books illegally seized by the government where they were necessary evidence).

20. Frustration is more readily found when one party has a public duty to protect the public interest. *See New York Tel.*, 434 U.S. at 174 (finding that the telephone company had taken on a public duty); Federal Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 608 (1966) (preventing the consummation of an illegal merger); Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242, 245 (D.C. Cir. 1954) (granting an injunction based on the Public Utilities Commission's ties to Congress).

21. 42 U.S.C. §§ 9601-9675 (1995). The original proceeding in *Hardage* came under 1980 CERCLA, 42 U.S.C. §§ 9601-9657 (Supp. IV 1980), as opposed to the Superfund Amendments and Reauthorization Act of 1986)

22. 42 U.S.C. § 9604(j) (1988). *See generally* Bruce P. Howard & Kevin E. Solliday, *CERCLA and Similar State Laws: Overview and Current Developments*, 797 Prac. L. Inst./Corp. L. & Prac. 39 (1992) (describing the basic fundamentals of Superfund sites). A Superfund site contains hazardous waste, is designated to receive federal funding for cleanup, and imposes liability for most of the costs on private parties once owning the land. *Id.* at 39-40.

23. Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986) (interpreting CERCLA to eliminate a "procedural obstacle that would otherwise hamper the efforts of private parties"); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing to interpret CERCLA to frustrate the environmental goals of the statute without affirmative congressional intent).

24. Although the original 1980 CERCLA made no provision for condemnation, the amendments provide for presidential condemnation authority. 42 U.S.C. § 9607(j)(1) (providing that "[t]he President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in property that the President in his discretion determines is needed to conduct a remedial action under this chapter"). *See generally* Carter H. Strickland, Jr., *The Scope of Authority of Natural Resource Trustees*, 20 COLUM. J. ENVTL. L. 301, 303 (1995) (providing background on authority to condemn under CERCLA).

25. Strickland, *supra* note 24, at 303-04. The Environmental Protection Agency (EPA) may condemn a piece of property for public use as a CERCLA Superfund site, but third parties have no statutory authority to do the same. 42 U.S.C. § 9604(j)(1).

B. United States v. Hardage[26]

1. Facts

The United States filed suit under CERCLA to compel the Hardage Steering Committee (HSC) to implement remedial cleanup of a Superfund site.[27] The cleanup order necessitated the acquisition of the neighboring property, owned by Mr. Whitehead.[28] HSC failed to negotiate a price for forty acres of Mr. Whitehead's dairy farm, and instead initiated a third party complaint seeking to take the land.[29] HSC cited ancillary jurisdiction for condemnation authority under the inherent powers of the court through CERCLA and the AWA.[30] The trial court compelled the condemnation through the AWA.[31]

2. Decision

The Tenth Circuit refused to extend the AWA to provide authority for a permanent taking because CERCLA does not grant such power.[32] Determining that the broadest application of the AWA granted authority for only a temporary physical occupation,[33] the court found nothing in the language of the AWA that would vest district courts with such extensive condemnation jurisdiction.[34] For such an extension, the AWA would require a finding that Mr. Whitehead frustrated the previous order.[35] The Tenth Circuit refused to find frustration based only upon the failure of negotiations.[36]

The decision also reaffirmed the court's view that Federal Rule of Civil Procedure 71A guarantees the right to a jury in a condemnation proceeding.[37]

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26. 58 F.3d 569 (10th Cir. 1995).
27. *Hardage*, 58 F.3d at 571.
28. *Id.*
29. *Id.*
30. *Id.*; *see* 28 U.S.C. § 1651(a) (1994). Alternatively, HSC asserted a private right to eminent domain under an Oklahoma law providing condemnation power for a "sanitary purpose," but the district court held that these grounds were not necessary because the AWA grounds determined the case. *Hardage*, 58 F.3d at 571-73; *see* OKLA. STAT. ANN. tit. 27, § 6 (West 1991). HSC launched its claim that the Whiteheads do not have the right to a jury trial based upon this state law claim. *Hardage*, 58 F.3d at 576.
31. *Hardage*, 58 F.3d at 573-74.
32. *Id.* at 573. HSC's counsel admitted that the EPA would have condemnation power in the instant situation, but that HSC was not linked to the EPA. *Id.* at 572; *see* Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir. 1972) (limiting the AWA to preserving jurisdiction, not granting jurisdiction over people or property).
33. *Hardage*, 58 F.3d at 574-75 (citing *New York Tel.*, 434 U.S. at 168-78).
34. *Id.* at 575.
35. *Id.* at 575-76.
36. *Id.*
37. *Id.* at 576. Rule 71A(h) states that if a tribunal is not specifically provided for by an act of Congress, a party *may* have a jury trial. FED. R. CIV. P. 71A(h) (emphasis added). The Supreme Court, however, has declared that "there is no constitutional right to a jury in eminent domain proceedings." United States v. Reynolds, 397 U.S. 14, 18, 20 (1970) (providing that "[t]he rule gives the trial court discretion to eliminate a jury entirely"); *see also* 12 WRIGHT ET AL., *supra* note 15, § 3051, at 123-25 & n.56 (1977 & Supp. 1995) (noting that the landowner may demand a jury, but that the court may refuse); Searles, *supra* note 7, at 356-57 (stating that federal claimants have a right to demand a jury trial unless the court appoints a commission).

The Tenth Circuit, in *Hardage*, recognized certain exceptions to the jury right, and stated that the district court did not make appropriate findings for exceptions. *Hardage*, 58 F.3d at 576 n.5. The trial court did appoint a commission for the valuation. *Id.* at 573. The Tenth Circuit also

Federal law governs a CERCLA action; therefore, the court determined that Mr. Whitehead was due a "panoply of due process rights" under the Fifth Amendment.[38]

C. *Analysis*

The Tenth Circuit's decision to limit the jurisdiction of the AWA was reasonable.[39] First, the AWA itself does not explicitly mention power of condemnation.[40] The Tenth Circuit correctly relied upon *New York Telephone*, which recognized that "unreasonable burdens may not be imposed," to determine the AWA's boundaries.[41] *New York Telephone* relied on the AWA for a partial, temporary taking, as opposed to the "full-blown eminent domain proceeding" in *Hardage*, which imposed severe burdens on the innocent neighbor to the Superfund site.[42] The Supreme Court has not extended the AWA to allow a permanent taking, primarily because CERCLA's congressional intent was not to allow third party condemnation authority.[43] Indeed, the Supreme Court cautioned against the inherent dangers in expanding the AWA too far.[44]

Second, the Tenth Circuit realistically considered that failed negotiations may not necessarily be an attempt to thwart a judicial order.[45] The new test for finding frustration, as articulated in *Hardage*, requires proof of either: (1)

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noted that both attorneys misled the trial court as to the jury trial right offered in its circuit. *Id.* at 576. In addition, the court noted that HSC's argument on appeal—that the Whiteheads simply failed to demand a jury—was disingenuous because the trial court determined that the Whiteheads could not have a jury prior to the point at which they could have demanded one. *Id.*

38. *Hardage*, 58 F.3d at 576.

39. The courts have traditionally used the AWA for the following procedural injunctive actions and writs of mandamus: protecting the right to a jury trial; staying proceedings; denying a stay of proceedings; reviewing orders compelling discovery; motions to dismiss; new trials; class actions; reviewing requests for judge disqualification; transfers; and writs of habeas corpus. 16 WRIGHT ET AL., *supra* note 15, §§ 3932, 3935.

40. 28 U.S.C. § 1651(a) (1994).

41. *New York Tel.*, 434 U.S. at 172 ("We agree that the power of federal courts to impose duties upon third parties is not without limits . . . ."); *see supra* note 17 and accompanying text.

42. *Hardage*, 58 F.3d at 575. Many other important distinctions exist between *Hardage* and *New York Tel.*: (1) the phone company was not innocent like Whitehead; (2) unlike Whitehead, the phone company had a public duty; (3) the phone company's burden was minor, whereas Whitehead risked becoming landlocked; (4) the FBI had no other manner in which to accomplish its investigation, whereas the government could use the EPA to obtain Whitehead's land; (5) unlike HSC, the FBI needed assistance with law enforcement; and (6) the Supreme Court found congressional intent to allow the FBI access to phone lines, whereas CERCLA does not grant third party condemnation power. *Id.* at 569-74; *New York Tel.*, 434 U.S. at 174-76.

43. The AWA does not allow "exercise of a specific nonexistent power." 16 WRIGHT ET AL., *supra* note 15, § 3933, at 225.

44. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945) ("While courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."). *See generally* Paul Ganson, *The SEC Speaks in 1995: Recent Judicial Developments*, 880 PRAC. L. INST./CORP. L. & PRAC., 613 (1995) (noting that a recent case denied use of the AWA to base a sua sponte exercise of jurisdiction over a person who was not a party to the action).

45. *Hardage*, 58 F.3d at 575 (stating that "the 'frustration' of [the] prior order was simply the product of the inability of either side to agree upon a fair price"). A court traditionally finds frustration when a direct order is thwarted, even by a third party. *Id.* The *Hardage* order, however, compelled HSC to acquire the land, not to condemn the land. *Id.* at 571.

intentional refusal to bargain in good faith; or (2) intentional balking to obstruct a court order.[46]

D. *Other Circuits*

The Tenth Circuit's refusal in *Hardage* to expand the substantive berth of the AWA in a condemnation proceeding is consistent with case law in other circuits.[47] The narrow definition of "frustration" of a court order is also in accord with other circuits, where courts traditionally limit frustration to situations in which the obstruction had a taint of wrongdoing or when law enforcement required assistance.[48]

II. EMINENT DOMAIN AND VALUATION OF SUBSURFACE MINERALS: *UNITED STATES V. CONSOLIDATED MAYFLOWER MINES, INC.*[49]

A. *Background*

1. Valuation of Taken Property: The Highest and Best Use Test

Once a court determines that the government has taken property from an individual with adequate authority, the government must give "just compensation."[50] Determination of "just compensation" involves the land's market value as determined by the "highest and best use" test.[51] This test compensates the landowner for only the most worthwhile use of the property.[52] Under *Olson v. United States*,[53] the government must consider all uses[54] where

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46. *Id.* at 575 (stating that "both parties must bear some responsibility for their negotiating failure").

47. *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283, 1289-90 (9th Cir. 1979) (limiting the AWA to provide jurisdiction for technical assistance to law enforcement, and not authorizing the power "to order a party to bear risks not otherwise demanded by law"). At least one other circuit has used the AWA to enforce condemnation orders, but not to authorize a third party's power to condemn without a statutory grant. Cole v. United States, 657 F.2d 107, 109 (7th Cir.) (finding injunction proper to prohibit condemnee interference with government possession), *cert. denied*, 454 U.S. 1083 (1981).

48. *See supra* notes 18-20 and accompanying text. The Sixth Circuit found frustration when the EPA refused to comply with an order forcing promised funding of a municipal sewer project. Michigan v. City of Allen Park, 954 F.2d 1201, 1216-17 (6th Cir. 1992); *see also* National Org. for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 544 (9th Cir. 1987) (holding that an appointment of a master to monitor compliance with an order was permissible under the AWA).

49. 60 F.3d 1470 (10th Cir. 1995).

50. U.S. CONST. amend. V.; U.S. CONST. amend. XIV, § 1. For recent in-depth discussions of just compensation, see Michael Debow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); Clynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993).

51. Sidney Z. Searles, *Highest and Best Use: The Keystone of Valuation in Eminent Domain*, C791 ALI-ABA 315, 315 (1993) (discussing the highest and best use doctrine: its meanings, origins, and effects on value).

52. *Id.* at 318 (quoting the earliest appearance of the test in *In re* Furman Street, 17 Wend. 669 (N.Y. Sup. Ct. 1836)). Current use of the land does not dictate the outcome of the doctrine. Boom Co. v. Patterson, 98 U.S. 403, 408 (1878) (providing that "property is not to be deemed worthless because the owner allows it to go to waste"). Important factors to determine highest and best use include land availability, land adaptability, need or demand for a use, and other possible uses. Searles, *supra* note 51, at 321.

53. 292 U.S. 246 (1934).

54. *Olson*, 292 U.S. at 255. The Supreme Court has stated that compensation includes the

there is a reasonable probability that the property will adapt to that use, and a demand for that use in the "reasonably near" future.[55] The government does not consider any remote and speculative uses dependent upon extrinsic conditions in the valuation.[56]

2. Valuation of Undeveloped Subsurface Minerals

Due to the inherently speculative nature of interests in undeveloped mineral deposits, complex valuation doctrines become even more difficult to apply in mineral valuation disputes.[57] For example, strict adherence to the *Olson* test of "reasonable probability in the reasonably near future"[58] would disallow compensation for any speculative mineral deposit.

The United States Supreme Court has noted that speculative values for undeveloped minerals are inevitable and yet may be compensable if (a) they have an ascertainable market value and (b) extraction is the highest and best use for the land.[59] This realization in *Montana Railway v. Warren*[60] directly conflicts with the *Olson* "reasonably probable" standard for compensation. Under *Montana Railway*, a court may consider a speculative use in valuation either before the vein has been fully exploited or the use is "reasonably probable."[61]

The tension between *Olson* and *Montana Railway* causes complex valuation disputes, exacerbated because the rule set forth in *Olson* did not involve a subsurface mineral valuation.[62] *Montana Railway* held that even though the undeveloped mine in question was "only a prospect," mining prospects are subjects of business transactions and, therefore, affect market value of compensation.[63]

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land's "fair market value for all available uses and purposes." United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 80-81 (1913).

55. *Olson*, 292 U.S. at 255-57 (disallowing a valuation based upon use of shoreland as a reservoir where the landowner has little possibility of acquiring all other lands necessary for that use); *see* 4 SACKMAN, *supra* note 8, § 12B.12, at 12B-90 (discussing the prominence of the *Olson* test); Searles, *supra* note 51, at 322 (discussing methods of proving highest and best use).

56. *Olson*, 292 U.S. at 256. *Contra* Montana Ry. v. Warren, 137 U.S. 348, 352-53 (1890) (allowing valuation for a speculative mining use). Possible uses that "have no perceptible effect upon present market value" will not be compensated, but if extrinsic conditions are probable and affect market value, they may be considered. 4 SACKMAN, *supra* note 8, §§ 12B.12, 12B-113.

57. *See* Joseph M. Montano, *Valuation of Lands with Mineral Deposits*, C791 ALI-ABA 269, 271-73 (1993) (discussing various solutions to the problem of speculative mineral values).

58. *Olson*, 292 U.S. at 255-57.

59. *Montana Ry.*, 137 U.S. at 352-54 (allowing compensation for in-place minerals); Montano, *supra* note 57, at 272 (noting a number of different valuation doctrines used to compensate for speculative mineral deposits).

60. 137 U.S. 348 (1890).

61. *Montana Ry.*, 137 U.S. at 352.

62. *Olson*, 292 U.S. at 248-55 (considering the possibility of using shoreland as a reservoir).

63. *Montana Ry.*, 137 U.S. at 352. This recognition of the "market value" concept in mineral rights was reiterated as recently as 1989, after the *Olson* opinion, with regard to mineral lease appraisals. ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989). The Tenth Circuit noted this affirmation, despite that court's contrary outcome. United States v. Consolidated Mayflower Mines, Inc., 60 F.3d 1470, 1476 (10th Cir. 1995).

B. United States v. Consolidated Mayflower Mines, Inc.[64]

1. Facts

To relocate a highway, the government used eminent domain powers to take 18.22 acres of land owned by Consolidated Mayflower Mines, Inc. (CMMI).[65] The government argued that it should base compensation on the land's use for recreational home development.[66] CMMI argued for compensation based upon access to its Mayflower Mine.[67] CMMI's mine leases were subject to the consent of the current surface property owners, Stitching Mayflower Mountain/Recreational Fonds (Stitchings), who had refused to consent to mining activities.[68] CMMI and the government differed as to the profitability of the mining venture.[69] The jury indicated that, based on the *Olson* test, the highest and best use for the land was home development.[70]

2. Decision

The Court of Appeals noted that the *Olson* requirement excludes unexploited mineral deposits under the taken land.[71] The court further stated that *Olson* conflicts with *Montana Railway*, where speculative mining "prospects" were determined to have market value.[72] Despite this discord, the Tenth Circuit followed *United States v. 494.10 Acres of Land*,[73] a decision where the court adopted the *Olson* "reasonably near future" requirement for mineral evaluation.[74] Consequently, the Tenth Circuit currently requires a finding of reasonably probable mineral values in order to qualify for compensation.[75]

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64. 60 F.3d 1470 (10th Cir. 1995).

65. *Mayflower*, 60 F.3d at 1471.

66. *Id.* at 1471-72.

67. *Id.*

68. *Id.* at 1472. CMMI brought a second ground for appeal based upon Stitchings' "double-teaming" with the government. *Id.* at 1477-78. Although Stitchings' standing was limited to protection of their royalty rights, its stance was adverse to CMMI. *Id.* at 1478. For example, Stichings "often sounded as if [it] were seeking an injunction against a mining operation about to begin" and testified that they would not have consented to the operations. *Id.* The court found no basis for CMMI's claim because Stitchings' influence was minimal. *Id.* The court noted in dicta, however, that it thought the district court abused its discretion by allowing Stitchings to exceed their standing limitations. *Id.*

69. *Id.* at 1472-74.

70. *Id.* at 1475. The instructions also provided that the "[m]ere possibility of a use is not enough" and "[s]peculative schemes of the owner or witnesses are to be excluded from your consideration." *Id.*

71. *Id.* at 1476.

72. *Id.* at 1476-77 (citing *Montana Ry.*, 137 U.S. at 353).

73. 592 F.2d 1130, 1132 (10th Cir. 1979) (refusing to compensate for speculative underlying sand and gravel value).

74. *Mayflower*, 60 F.3d at 1477. Thus, the jury instructions were not prejudicial according to de novo review. *Id.* at 1475-77 (citing Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1262 (10th Cir. 1995)). The court also noted that a change in the instructions would not have altered the jury verdict due to the tenuous nature of development. *Id.* at 1477.

75. The Tenth Circuit Court of Appeals relied upon several other opinions utilizing the *Olson* standard. None of these, however, involved mineral valuations. *See* United States v. 77,819.10 Acres of Land, 647 F.2d 104, 110 (10th Cir. 1981) (applying the test in a farmland condemnation case contemplating a hunting use), *cert. denied*, 456 U.S. 926 (1982); United States v. 46,672.96 Acres of Land, 521 F.2d 13, 15 (10th Cir. 1975) (applying the test in a condemnation case contemplating use for a missile range); Wilson v. United States, 350 F.2d 901, 908 (10th Cir.

C. *Analysis*

This case confirms the Tenth Circuit's willingness to apply the *Olson* test to value unexploited minerals, despite the tension between the *Olson* test and the holding in *Montana Railway*. This decision may give the government an unfair advantage in condemnation proceedings because the value and nature of most mineral deposits have an inherently speculative nature.[76] The decision in *494.10 Acres* initially adopted the *Olson* "reasonably *likely* to take place in the near future" requirement,[77] and *Mayflower* consummates the adoption by embracing the "reasonably *probable*" standard for minerals.[78] *Mayflower*, therefore, reinforces the trend from *Montana Railway* to *Olson*,[79] despite the appearance that *Montana Railway* governs the issue.[80]

D. *Other Circuits*

The Fourth and Eighth Circuits have applied the *Olson* test to evaluate unexploited subsurface minerals despite the conflict with *Montana Railway*.[81] Other circuits follow *Olson* in condemnation proceedings, but have yet to apply *Olson* to an unexploited mineral case.[82]

The Fifth, Ninth, and, to some extent, Eleventh Circuits have applied the *Montana Railway* standard to compensate for unexploited minerals.[83]

1965) (applying the test in a ranchland condemnation case contemplating severance damages).

76. Montano, *supra* note 57, at 271-72.

77. *494.10 Acres*, 592 F.2d at 1132 (holding that the near future "element of use" was significant) (quoting *Olson*, 292 U.S. at 255) (emphasis added). This decision conflicted with a prior holding allowing speculative valuations of minerals. United States v. Silver Queen Mining Co., 285 F.2d 506, 510 (10th Cir. 1960) ("[R]equired proof need rise no higher than the circumstances permit. Some speculation is inherent in the ascertainment of value of all resource property . . . ."). Indeed, even after *494.10 Acres*, the Tenth Circuit recognized that awards may still be granted to speculative mineral deposit holders. United States v. 179.26 Acres of Land, 644 F.2d 367, 372-74 (10th Cir. 1981) (holding no error in consideration of underlying limestone while relying on *Silver Queen Mining*, 285 F.2d at 510).

78. *Mayflower*, 60 F.3d at 1476-77 (emphasis added).

79. *Silver Queen Mining* relied heavily upon the *Montana Ry.* allowance of speculative valuations for subsurface mineral condemnation. *Silver Queen Mining*, 285 F.2d at 510.

80. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989) (citing *Montana Ry.*, 137 U.S. at 352-53) (noting that "whatever the difficulties may be in making [mineral] appraisals with complete accuracy, it does not defeat the existence of a 'market value' in mineral rights").

81. *See* United States v. 69.1 Acres of Land, 942 F.2d 290, 293-94 (4th Cir. 1991) (finding that the highest and best use of the condemned land was the potential use for sand mining based on a commercially exploitable amount); United States v. 91.90 Acres of Land, 586 F.2d 79 (8th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Although the Eighth Circuit did not cite *Olson* in this opinion, it did require a market for the minerals, which is tied to the "reasonably probable in the reasonably near future" test. *Id.* at 86; *see supra* text accompanying notes 57-63.

82. *See* United States v. 27.93 Acres of Land, 924 F.2d 506, 514 (3d Cir. 1991) (excluding compensation based on prospect of rezoning as speculative); United States v. 47.3096 Acres of Land, 583 F.2d 270, 272 (6th Cir. 1978) (excluding evidence based upon the *Olson* standard for demand in the near future in a residential land takings case).

83. *See* St. Genevieve Gas Co. v. T.V.A., 747 F.2d 1411, 1413-14 (11th Cir. 1984) (holding that the district court did not err in finding that no potential for production existed); Cal-Bay Corp. v. United States, 169 F.2d 15, 19 (9th Cir.) (taking judicial notice of the fact that land with even a "prospect[] of possible successful development" has a market value), *cert. denied*, 335 U.S. 859 (1948); Eagle Lake Improvement Co. v. United States, 141 F.2d 562, 564 (5th Cir. 1944) (allowing compensation for "reasonable possibilit[ies] of production in paying quantities"). CMMI re-

Furthermore, in *Phillips v. United States*,[84] the Ninth Circuit noted that "[t]he Supreme Court has answered [the unexploited mineral valuation] question" in *Montana Railway*.[85] The Eleventh Circuit applied the probable standard to a taken mineral lease, but noted that the lease would not have survived scrutiny even under the less arduous possibility standard.[86] Although a recent Supreme Court case cited the *Montana Railway* approach, the circuits remain split as to which Supreme Court authority to follow.[87]

III. TITLE TO ISLANDS UNDER AMBIGUOUS FEDERAL GRANTS: *KOCH V. UNITED STATES DEPARTMENT OF INTERIOR*[88]

A. *Background*

1. Origin of Title

Until all of the states became part of the Union, the federal government held, in trust, those lands not possessed by the original thirteen states.[89] The "equal footing doctrine" allowed each new state to enter the Union with the same rights as original states; as a result, the new state took the shores, beds, and submerged lands of navigable waters upon entry into the Union.[90] The United States, however, retained the islands in navigable rivers.[91] Land in non-navigable waters did not pass to the states under the equal footing doctrine.[92] The federal government may pass title to these lands along with a

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quested an instruction based upon *Cal-Bay. Mayflower*, 60 F.3d at 1475.

84. 243 F.2d 1 (9th Cir. 1957).

85. *Phillips*, 243 F.2d at 5. The court held that the trial court erred in relying solely on highest and best use because "where there is a reasonable POSSIBILITY of production in paying quantities, [and] mineral rights are a common subject of barter and sale," a reasonable probability of successful development exists. *Id.* at 6 (quoting *Eagle Lake*, 141 F.2d at 564) (emphasis in original).

86. *St. Genevieve Gas*, 747 F.2d at 1413 n.4 (finding the substantial unprofitable development conclusive that mining was not compensable). The court adopted the Fifth Circuit view, as per the circuit split in 1981, but seemed uncertain as to what that view entails. *Id.*

87. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 628 n.3 (1989) (citing *Montana Ry.*, 137 U.S. at 352-53) (noting that "whatever the difficulties may be in making [mineral] appraisals with complete accuracy, it does not defeat the existence of a 'market value' in mineral rights").

88. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).

89. *See generally* David W. Gross, *Examining Aboriginal Rights in Submerged Lands:* Coeur D'Alene Tribe v. Idaho, 30 IDAHO L. REV. 139 (1993) (discussing the equal footing doctrine).

90. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 425-26 (1867); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845). The equal footing doctrine derives from the United States Constitution. Denise Dosier, Note, *The Clouds Are Lifting: The Problem of Title to Submerged Lands in Alaska*, 8 ALASKA L. REV. 271, 273 & n.10 (citing U.S. CONST. art. IV, § 3). For a discussion of the equal footing doctrine, and navigability theories of ownership, see Phillip W. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 265, 270-73 (1991).

91. Kemp Wilson, *Ownership of Mineral Interests Underlying Inland Bodies of Water and the Effects of Accretion and Erosion*, 30 ROCKY MTN. MIN. L. INST. 14-1, 14-4 to 14-5, 14-22 (1984) (discussing exceptions to the equal footing doctrine).

92. *See* United States v. Holt State Bank, 270 U.S. 49, 54-57 (1926) (applying navigability standards to determine that a lake was in fact navigable, and therefore, it belonged to the state); Gross, *supra* note 89, at 145 n.48. For a discussion of tests determining navigability for purposes of riverbed ownership, see Wilson, *supra* note 91, at 14-7 to 14-15.

patent to surrounding riparian lands, or keep them as public land as expressed in the surrounding land grant itself.[93]

The government passes title by surveying land, by including that survey in an official plat, and then incorporating that plat into a grant by reference.[94] When a plot of land borders a stream or river, the surveyor "meanders" that river by following the turnings of the river to set a record of its course.[95] Unsurveyed lands, those islands not meandered, remain the property of the United States and cannot pass from federal ownership.[96]

2. Omission or Ambiguous Description of Islands

Occasionally, a survey will omit an island, or will contain ambiguous or erroneous information about the island.[97] Over time, the Supreme Court has constructed a twisting course of authority to manage this problem, leading to varying interpretations.[98] First, courts generally use two interpretive doctrines: (1) that no property right passes by implication;[99] and (2) that "nothing passes but that which is conveyed in clear and explicit language."[100]

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93. *See* Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922).

94. Snake River Ranch v. United States, 542 F.2d 555, 556 (10th Cir. 1976); *see* Jefferis v. East Omaha Land Co., 134 U.S. 178, 194-95 (1890) (finding that an incorporated plat includes accretion to the land up to the date of the plat); Walton v. United States, 415 F.2d 121, 123 (10th Cir. 1969) (noting that because a plat omitted riparian fast land, land belonged to the United States).

95. *See* Hardin v. Jordan, 140 U.S. 371, 380 (1891) (holding that meander lines merely ascertain what lands are to be paid for, they do not limit the title to their lines); George J. Morgenthaler, *Surveys of Riparian Real Property: Omitted Lands Make Rights Precarious*, 30 ROCKY MTN. MIN. L. INST. 19-1, 19-10 & nn.19-21 (1984) (providing that "for various reasons, meander lines are inherently inaccurate, meant only to approximate the course of a water body"); *see also* Whitaker v. McBride, 197 U.S. 510, 512 (1905) (stating that the meander helps fix a price). *But cf.* Niles v. Cedar Point Club, 175 U.S. 300, 306 (1899) (holding that a surveying error "does not enlarge the title conveyed by the patents").

96. *See* United States v. Northern Pac. Ry., 311 U.S. 317, 344 (1940) (finding that unsurveyed and ambiguous grants retain title in the United States); Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561, 564 (1923) (holding that ordinary rules do not apply where land was unsurveyed); *Watton*, 415 F.2d at 124 (noting that omitted and unsurveyed lands remained in the possession of the United States). The Bureau of Land Management has consistently applied this principle to riparian island disputes. *See* Loyla C. Waskul, 102 I.B.L.A. 241 (1988); Emma S. Peterson, 39 PUB. LANDS DEC. 566 (1911).

97. *Jeems Bayou*, 260 U.S. at 563-64 (finding that 500 acres missing from initial survey was an omission). Islands are considered omitted when they are permanent, dry, and "large enough that a reasonable surveyor would consider it surveyor error if the island were omitted in a survey." Lear, *supra* note 90, at 274-75.

98. Bourgeois v. United States, 545 F.2d 727, 730 (Ct. Cl. 1976) (noting that navigability may play a key role in determining the ownership of the island). However, the factor tests discussed later seem to be more prevalent. For a discussion of these factors, see *infra* notes 101-08 and accompanying text.

99. *See* MacDonald v. United States, 119 F.2d 821, 825-26 (9th Cir.) (applying rule to a statute to dismiss appeal), *cert. granted sub nom.* Great N. Ry. v. United States, 314 U.S. 596 (1941), *modified*, 315 U.S. 262, 272 (1942); Caldwell v. United States, 250 U.S. 14, 20-21 (1919) (dismissing appeal based on rule). The interpretive doctrine against implication may originate in the desire to retain sovereign power "to achieve important public purposes." Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 948 (1993).

100. *Caldwell*, 250 U.S. at 20. Many, sometimes conflicting, interpretive doctrines for riparian land disputes exist, including: reliability of patents; patents favor the United States; patents favor the grantee; no implied government reservations; no implied government grants; and the govern-

Second, several factors indicate the intention to either exclude or include islands in the grant.[101] The Supreme Court, in *United States v. Lane*,[102] found value, location, size, terrain, and presence or absence of fraud persuasive elements in assessing intent to dispose of the land.[103] Courts also interpret grants as passing title when the surveyor excluded the land due to its valuelessness at the time of the survey.[104] Courts generally include unsurveyed lands in patents,[105] except for unusually large islands likely omitted by error.[106] The Surveyor General's instructions on meandering also relieve ambiguity in a grant: instructions to find lands suitable for cultivation will pass "inconsequential fragments,"[107] while instructions to note the existence of any islands will retain federal possession.[108]

The third signpost on the Supreme Court's winding road consists of two cases: *Moss v. Ramey*[109] and *Scott v. Lattig*.[110] These cases held that the existence of a mistake or error, rather than an ambiguity, demonstrates federal intent to keep title.[111] Fourth, deliberate fraud perpetrated by the surveyor to take land from the government demonstrates federal retention of possession.[112] These four elements show the government's intent with respect to possession of excluded islands.

Additionally, a choice of law problem arises with ambiguous or mistaken title disputes.[113] In *Moss* and *Scott*, the Supreme Court applied federal law in

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ment must produce clear and convincing evidence. Morgenthaler, *supra* note 95, at 19-44 to 19-50.

101. Morgenthaler, *supra* note 95, at 19-50 (noting that courts often resort to factual tests for riparian land disputes). Some important factual tests are: (1) whether occupation, improvement, and use demonstrate intent; (2) survey accuracy; (3) value; (4) size; (5) government acceptance of the survey; and (6) historical evidence. *Id.* at 19-50 to 19-55.

102. 260 U.S. 662 (1923).

103. *Lane*, 260 U.S. at 665; *see* Ainsa v. United States, 161 U.S. 208 (1896) (applying the "substantial area test" to determine that the actual number of acres surveyed and included on the plats limited that plat); Thomas B. Bishop Co. v. Santa Barbara County, 96 F.2d 198 (9th Cir.) (including an adjacent sandpit overlooked in the meander, based on the *Lane* factors), *cert. denied*, 305 U.S. 623 (1938).

104. *See* United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 451 (1908) (noting that "[t]he islands are little more than rocks, rising very slightly above the level of the water"); Whitaker v. McBride, 197 U.S. 510, 511 (1905) (concerning small islands, "frequently covered with water," that the Land Department refused to survey); Grand Rapids & I.R. Co. v. Butler, 159 U.S. 87, 89 (1895) (addressing a low sandbar usually covered with water).

105. *Lane*, 260 U.S. at 664-65 (citing Mitchell v. Smale, 140 U.S. 406, 414 (1891)).

106. *Id.* (citing *Jeems Bayou*, 260 U.S. at 563). The prominence of the factual situations may be the only way to reconcile the conflicting decisions because courts interpret the navigability factor in conflicting ways as well. Morgenthaler, *supra* note 95, at 19-28 (noting that a navigable river case is routinely applied to non-navigable disputes).

107. *Whitaker*, 197 U.S. at 513.

108. Scott v. Lattig, 227 U.S. 229, 241 (1913) (using surveying instructions and size of island in question to show surveyor error).

109. 239 U.S. 538 (1916).

110. 227 U.S. 229 (1913).

111. *Moss*, 239 U.S. at 546 (distinguishing *Whitaker* based on that case's unstable land and the Land Department's refusal to survey); *see Scott*, 227 U.S. at 241-43 (finding that an error in the survey did not work to dispose of the large quantity of land while holding that "[t]itle to islands remains in the United States, unless expressly granted"). *But see Jordan*, 140 U.S. at 400 (requiring extraordinary proof to show mistake and finding none in regard to large spit concerned).

112. Morgenthaler, *supra* note 95, at 19-31 to 19-41.

113. Federal law considers omitted islands government property, whereas state law grants the

the wake of a mistaken survey,[114] whereas in *Oklahoma v. Texas*,[115] the Supreme Court applied state law to an overtly ambiguous grant.[116] These divergent results demonstrate that considerable conflict exists regarding the application of federal law to previously private or state owned lands.[117] The Supreme Court, in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co.*,[118] held that state law governs riparian lands not passed under the equal footing doctrine.[119] The Supreme Court, however, has also stated that the United States retains title to islands not expressly granted, a result which may conflict with state law.[120] Thus, tension remains as to whether state law will always apply to riparian lands,[121] or whether federal law applies according to the *Lane* factors for erroneous surveys.[122]

B. Koch v. United States Department of Interior[123]

1. Facts

An initial survey of the Colorado River described nine islands on a non-navigable portion of the river. The survey, however, did not meander the islands and, as a result, they remained officially unsurveyed.[124] The parties

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riparian landowner title to the center of the water body. Lear, *supra* note 90, at 272-75. Basic property rights are a traditional state area of law. Frank E. Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 476 (1978).

114. *See Moss*, 239 U.S. at 546; *Scott*, 227 U.S. at 241-42.

115. 258 U.S. 574 (1922).

116. *Oklahoma*, 258 U.S. at 594-95 (issuing an ultimatum that absent contrary intent, state law applies to all conveyances); *see also Corvallis*, 429 U.S. at 377 (holding that state law applied to navigable riverbed lands passed in an ambiguous grant); Hardin v. Shedd, 190 U.S. 508, 519 (1903) (stating that state law applied to a non-navigable lakeside property dispute and requiring extraordinary proof to apply federal law). The factors used to interpret an ambiguous grant may also be used to determine if error exists. *See supra* text accompanying notes 101-12.

117. John A. Lovett, Comment, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 TUL. L. REV. 561, 598-603 (1994).

118. 429 U.S. 363 (1977). Although courts may overlook these authorities in a non-navigable water dispute because they concern navigable waters only, the court does not limit itself in this way; nor do commentators suggest that the distinction would change the principles applied. *See Corvallis*, 429 U.S. at 378 (speaking expansively of all land not passed under the equal footing doctrine); Morgenthaler, *supra* note 95, at 19-28 (noting that a navigable river case is routinely applied to non-navigable disputes).

119. *Corvallis*, 429 U.S. at 378. The Court first extended federal law application to any land that passed under the equal footing doctrine. Lovett, *supra* note 117, at 599-600 (citing Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 319 (1973)). Later, the Court overruled *Bonelli Cattle*, stating that state law applied after the state had entered the Union. *Id.* at 600 (citing *Corvallis*, 429 U.S. at 370-71). It remains unresolved whether *Corvallis* overruled only the equal footing portion of *Bonelli Cattle* or also implicitly overruled the entire doctrine that applies federal law to federal grants. Maloney, *supra* note 113, at 485. The Eleventh Circuit recently held that "state law governs the disposition of property held by a state regardless of whether or not the state acquired the property as sovereignty land under the equal footing doctrine." Lovett, *supra* note 117, at 603 (quoting Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 425 (11th Cir. 1982)).

120. Texas v. Louisiana, 410 U.S. 702, 713 (1973) (citing *Scott*, 227 U.S. at 242-43) (applying federal law to a navigable river dispute). One commentator notes that *Scott* is routinely applied to non-navigable river disputes. Morgenthaler, *supra* note 95, at 19-28.

121. *Corvallis*, 429 U.S. at 378.

122. *See supra* notes 101-08 and accompanying text.

123. 47 F.3d 1015 (10th Cir.), *cert. denied*, 116 S. Ct. 303 (1995).

124. *Koch*, 47 F.3d at 1017-18. The survey was intended to locate saleable land in order to

stipulated that the original survey did not meander the islands because they lacked value at that time.[125] The Bureau of Land Management (BLM) asserted that the United States owned the islands because they were not officially surveyed, that they existed when the survey was conducted,[126] and that the government is not bound by ambiguous grants.[127] Koch claimed ownership of six of the islands based on patents incorporating the survey/plat by reference.[128] The district court, applying state law, determined that Koch held title to the island.[129]

2. Decision

The Tenth Circuit found that because the islands exist in a non-navigable part of the river, the islands did not belong to the State of Colorado under the equal footing doctrine.[130] Additionally, the court refused to apply the general rule of construction in favor of the government,[131] despite a finding that the patent recorded did not demonstrate intent by the federal government to either convey or keep the islands.[132] Recognizing that choice of law was an issue of first impression in the Tenth Circuit,[133] the Court of Appeals relied on *Oklahoma* and utilized state law to interpret the ambiguous federal grant.[134] Finally, Colorado state law vested title in the riparian land owner.[135]

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reduce the federal government's deficit, under the order of President Van Buren. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 178 (1968).

125. *Koch*, 47 F.3d at 1017. The islands may now have value as critical habitats for endangered species. Brief for Appellant at 2, *Koch*, 47 F.3d 1015 (No. 93-1298). The government also noted that this decision will cast doubt about the ownership of thousands of islands with valuable mineral resources. *Id.*

126. Some commentators agree that these facts vest title in the government. *See* Lear, *supra* note 90, at 274-75 (discussing possession of omitted islands).

127. *Koch*, 47 F.3d at 1018. The last of these grounds is merely a general rule of construction, not a rule of law. *Id.* at 1019-20.

128. *Id.* at 1017.

129. *Id.* at 1018.

130. *Id.* at 1019 (citing Dimidowich v. Bell & Howell, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986) (recognizing the stipulations of the parties that the river is non-navigable, and noting that "a court is not bound by stipulations of the parties as to questions of law")). The court reviewed all questions of law de novo. *Id.* at 1018.

131. *Id.* at 1019-20 (citing *Oklahoma*, 258 U.S. at 595).

132. *Id.* at 1019 (basing the decision upon the islands' low value, lack of access to the islands, and silence in the patents as to the islands).

133. The court conceded that "the law of this circuit was unclear before this case" and that "other circuits had disagreed over whether state law applied under these circumstances." *Id.* at 1021. Two Tenth Circuit cases relied upon in the parties' briefs were not mentioned in the opinion since they pertained to riverbeds or submerged lands; in addition, neither explicitly dealt with the choice of law problem. *See* Bradford v. United States, 651 F.2d 700, 706-07 (10th Cir. 1981) (holding that the government must expressly reserve land); Snake River Ranch v. United States, 542 F.2d 555, 557-58 (10th Cir. 1976) (applying meander doctrines to determine a boundary).

134. *Oklahoma*, 258 U.S. at 595.

135. More v. Johnson, 568 P.2d 437 (Colo. 1977) (accepting as settled the proposition that Colorado state law vests title in the riparian land owner). The district court result was not disputed. *See also Jordan*, 140 U.S. at 383-84 (stating the common law rule recognizing the riparian landowner's possession of the non-navigable riverbed to the center); United States v. Goodrich Farms Partnership, 947 F.2d 906, 908 (10th Cir. 1991) (applying Colorado law conveying land to the non-navigable stream's center).

C. *Analysis*

The Tenth Circuit has interwoven several Supreme Court "interpretive techniques" to advance the rights of private riparian land owners against the government. First, *Koch* limited the general rule of construction in favor of the government to grants not involving patents on islands in adjacent waters.[136] The Tenth Circuit then distinguished *Moss*: *Moss* applied federal law only to mistaken surveys, rather than ambiguous surveys such as the survey in the instant dispute[137] which concerned purposely overlooked islands.[138] The *Koch* opinion is also significant because it determined that state law controls riparian grants.[139] This result complies with the dictum in *Corvallis* that state law controls all riparian disputes when the equal footing doctrine is inapplicable.[140] Moreover, the *Koch* opinion evaded the factors test,[141] indicating that the Tenth Circuit may have simply adopted the maxim that state law applies to all riparian land controversies.[142]

The facts of *Koch*, however, are consistent with the factual tests used to apply state law, namely low value, small size, an absence of fraud, and surveying instructions based on the need for saleable land.[143] Thus, the Tenth Circuit has probably decided that state law applies to ambiguous grants and federal law applies to erroneous surveys.

D. *Other Circuits*

Different circuits have reached seemingly disparate results for choice of law problems involving riparian land disputes. These differences, however, may be distinguished upon factual circumstances.[144]

The Sixth Circuit and the Federal Court of Claims have both applied state law to ambiguous grants with regard to islands adjacent to the granted

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136. Koch v. United States Dep't of Interior, 47 F.3d 1015, 1020 (10th Cir.) (citing *Oklahoma*, 258 U.S. at 595), *cert. denied*, 116 S. Ct. 303 (1995)).

137. *Id.* at 1020 n.5. The court noted the Sixth Circuit's rationale that *Moss* determines that mistaken surveys do not affect the intent of the government to retain the lands. *Id.* (citing Wolff v. United States, 967 F.2d 222, 225 (6th Cir.), *aff'd*, 974 F.2d 702 (6th Cir. 1992)). Although the Tenth Circuit did not distinguish *Scott*, it also involved a mistaken survey. Scott v. Lattig, 227 U.S. 229, 242-43 (1913).

138. *Koch*, 47 F.3d at 1017. The surveyors did describe the islands in their notes; they simply did not meander them because of their low value. *Id.*

139. *Id.* at 1020.

140. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977); *see also* Lovett, *supra* note 117, at 600-01 (discussing the possible effects of *Corvallis*).

141. The Tenth Circuit relied upon these factors in a past case determining the ownership of fast land on the Snake River, and applied federal law. Walton v. United States, 415 F.2d 121, 124 (10th Cir. 1969).

142. *See Corvallis*, 429 U.S. at 378. "This Court has consistently held that state law governs issues relating to this [navigable river bed], like other real property, unless some other principle of federal law requires a different result." *Id.*

143. *Koch*, 47 F.3d at 1017-18; *see supra* notes 101-08 and accompanying text. Keep in mind that the Tenth Circuit itself did not focus on these factors, but merely relied on persuasive authority that did consider the factors.

144. The Tenth Circuit did not note these factual differences, leaving open the questions of whether federal law applies to all riparian land disputes and whether facts involving surveyor error will be treated differently. *Koch*, 47 F.3d at 1021 (noting a disagreement in the circuits).

shoreland.[145] The Sixth Circuit carefully distinguished *Moss*, *Scott*, and similar opinions as dealing with mistakes, omissions, unheeded survey instructions, and large valuable islands.[146] The Court of Claims applied state law by first applying federal common law,[147] then by interpreting *Scott* as placing only navigable river islands in governmental ownership,[148] and finally by deciding to apply state law to non-navigable islands.[149]

Both the Seventh and Ninth Circuits have interpreted *Scott* to mandate the application of federal law to large or valuable mistakenly omitted islands.[150] The Ninth Circuit also left the government intent issue open to a case-by-case analysis, suggesting that intent to retain possession may be tied to surveyor error and value of islands.[151]

CONCLUSION

The Tenth Circuit Court of Appeals made significant changes in the law of real property during this survey period. Based on the outcome in *Hardage*, parties responsible for cleaning Superfund sites must enlist the EPA's help to condemn land in conjunction with a cleanup plan. Thus, the Tenth Circuit protected the individual's ownership of property and also allowed good faith negotiation failures without entailing the concept of "frustration" of a court order. Although *Mayflower* limited an individual's right to compensation for nonspeculative mineral rights, one may question the stability of this decision

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145. *Wolff*, 967 F.2d at 224; Bourgeois v. United States, 545 F.2d 727, 731 (Ct. Cl. 1976).

146. *Wolff*, 967 F.2d at 225-26 & n.3 (applying state law to both navigable and non-navigable rivers); *see also Wolff*, 974 F.2d 702, 704-05 (relitigating the navigability issue by determining that state law applies to non-navigable rivers, and that land in navigable rivers passed to the state under the equal footing doctrine); *accord* Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922) (applying state law absent intent in grant to keep land); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 452 (1908) (passing "unsurveyed islands and neglected fragments"); Whitaker v. McBride, 197 U.S. 510, 511-12 (1905) (passing unsurveyed island to private landowner under state law); Hardin v. Jordan, 140 U.S. 371, 384 (1891) (applying state law to grants lacking government reservation).

147. *Bourgeois*, 545 F.2d at 729-30 (citing Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 320-21 (1973) as authority that federal law governs federal grants).

148. *Id.* at 730. The Court of Claims is the only court to interpret *Scott* in this manner; the Sixth Circuit expressly rejected this interpretation, holding that state law applies regardless of the river's navigability. *Wolff*, 967 F.2d at 226 n.3. The Court of Claims also characterized *Oklahoma*, *Jordan*, and *Mitchell* as mandating the application of state law only for the beds of non-navigable streams. *Bourgeois*, 545 F.2d at 730. The Court of Claims stands alone in this contention as well. *See generally* Morgenthaler, *supra* note 95, at 19-28 (noting "[t]he river [in *Scott*] is navigable at the point in question, but the navigability does not affect the application of the principles announced in the case to non-navigable waters").

149. *Bourgeois*, 545 F.2d at 731 (citing no authority for its position).

150. Ritter v. Morton, 513 F.2d 942, 946 (9th Cir.), *cert. denied*, 423 U.S. 947 (1975) (stating that federal law applies to federal grants, and citing *Borax*); United States v. Severson, 447 F.2d 631, 634-35 & nn.3-5 (7th Cir. 1971) (citing *Scott*, 227 U.S. at 242-43) (distinguishing *Grand Rapids*, *Chandler-Dunbar*, and *Whitaker* as applying state law to valueless islands), *cert. denied*, 404 U.S. 1039 (1972). Both of these cases predate the overruling of *Borax* by *Corvallis*. *See supra* note 119 and accompanying text.

151. Ritter v. Morton, 513 F.2d 942, 948 (9th Cir.) (holding that "[w]e emphasize again the need to view the factual circumstances in their totality"), *cert. denied*, 423 U.S. 947 (1975). This Survey intends to reconcile the holdings of the different circuits, but they may simply represent a circuit split.

based upon the circuit split and recent Supreme Court dicta affirming the value of speculative mineral rights. Finally, the government attempted to repossess ambiguously granted islands, but *Koch* supported an individual's ownership by applying state law. This outcome may represent a maxim that applies state law to all disputes, or perhps an implicit reliance on the factor test that reflects the government's intent to grant the omitted islands. Together, these cases demonstrate the Tenth Circuit's willingness to protect individual property rights, except in the controversial area of compensation for minerals.

Michelle Foley

TAXATION

INTRODUCTION

During the survey period the Tenth Circuit Court of Appeals decided several notable cases that indicate new trends in the law of federal taxation. Part I examines *O'Gilvie v. United States*,[1] which discussed the inclusion of punitive damage awards in gross income, a subject that baffles many courts. In *O'Gilvie*, the Tenth Circuit was the first to interpret *Commissioner v. Schleier*,[2] a recent Supreme Court decision clarifying the issue of punitive damages.

Several significant decisions in the survey period examined issues relating to tax liens. Part II analyzes the Tenth Circuit's decision in *Burrus v. Oklahoma Tax Commission*,[3] in which the court considered the relative priority of state and federal tax liens.[4] The court failed, however, to consider the decisions of other federal courts and may have reached an incorrect outcome. Part III reviews In re *CF&I Fabricators, Inc.*,[5] in which the Tenth Circuit considered the proper characterization of a "tax" imposed on the accumulated funding deficiency of a pension plan.[6] The characterization of this federal lien as a tax or penalty determined the priority afforded it in bankruptcy proceedings. Part IV discusses a third case focusing on federal tax liens. In re *LMS Holding Co.*[7] considered whether the Internal Revenue Service must refile to perfect a lien against corporate property purchased by another corporation as part of a liquidation plan.[8] The case required an analysis of the Uniform Commercial Code.

In the area of estate and gift tax, Part V examines *DePaoli v. Commissioner*.[9] The court analyzed the validity of a disclaimer and relevant state laws of intestacy. The *DePaoli* analysis provides an informative survey of state intestacy laws.

Finally, Part VI involves a gift revaluation by the IRS and the effect of below-market interest rates on promissory notes given in exchange for the gift. In *Schusterman v. United States*,[10] the Tenth Circuit attempted to resolve this issue, which previously had caused a split in the courts of appeals.

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1. 66 F.3d 1550 (10th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3439 (U.S. Mar. 25, 1996) (Nos. 95-966, 95-977).
2. 504 U.S. 229 (1992) (reiterating the analysis first articulated in United States v. Burke, 504 U.S. 229 (1992)).
3. 59 F.3d 147 (10th Cir. 1995).
4. *Burrus*, 59 F.3d at 148.
5. 53 F.3d 1155 (10th Cir.), *cert. granted*, 116 S. Ct. 558 (1995).
6. In re *CF&I Fabricators*, 53 F.3d at 1157.
7. 50 F.3d 1526 (10th Cir. 1995).
8. In re *LMS Holding*, 50 F.3d at 1527.
9. 62 F.3d 1259 (10th Cir. 1995).
10. 63 F.3d 986 (10th Cir. 1995).

I. THE TAXATION OF PUNITIVE DAMAGES

A. *Background*

The taxation of punitive damages has a long and troubled history in federal courts.[11] Section 104(a)(2) of the Internal Revenue Code (Code) excludes from gross income amounts received "on account of personal injuries or sickness."[12] Theoretically, punitive damages should be fully taxed as income to the recipient since they serve no compensatory purpose: they fail to compensate for losses and instead result in a windfall to the injured party.[13] Because punitive damages are generally related to personal injury or sickness, however, they often are exempt from taxation. Courts construe the exact language of § 104(a)(2) differently and reach divergent results.[14]

Prior to *O'Gilvie v. United States*[15] the majority of circuit courts held that punitive damage awards should be included in gross income and subject to the federal income tax.[16] While the Supreme Court has ruled on related issues involving § 104(a)(2), the proper application of these decisions to the punitive damages dispute remains unclear.

In *United States v. Burke*,[17] the Supreme Court addressed whether the settlement of a back pay claim under Title VII of the Civil Rights Act of 1964 was gross income under § 104(a)(2).[18] In order for § 104(a)(2) to apply, the Court stated that the taxpayer must show that any award received served to redress a "tort-like personal injury."[19] The Supreme Court held that back pay

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11. For a detailed analysis on the taxation of punitive damages, see James Serven, *The Taxation of Punitive Damages:* Horton *Lays An Egg?*, 72 DENV. U. L. REV. 215 (1995).

12. Section 104(a)(2) provides:

> (a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—. . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness . . . .

I.R.C. § 104(a)(2) (1994). Otherwise, subject to additional exceptions, gross income includes "all income from whatever source derived." I.R.C. § 61(a) (1994).

13. Compensatory damages serve only to make the injured party whole, and, therefore, result in no income to the taxpayer, while punitive damages "are a windfall to the recipient and as such should be taxed in full." Serven, *supra* note 11, at 228-29. Under this "return of capital theory," awards that do not result in additional income to the injured party or leave him in a better position than before, should be exempt from tax. *Id.*

14. *See, e.g.*, United States v. Burke, 504 U.S. 229, 233-34 (1992); Wesson v. United States, 48 F.3d 894, 898 (5th Cir. 1995); Roemer v. Commissioner, 716 F.2d 693, 696-97 (9th Cir. 1983).

15. 66 F.3d 1550 (10th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3439 (U.S. Mar. 25, 1996) (Nos. 95-966, 95-977).

16. *See, e.g., Wesson*, 48 F.3d at 902; Hawkins v. United States, 30 F.3d 1077, 1084 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); Reese v. United States, 24 F.3d 228, 235 (Fed. Cir. 1994); Commissioner v. Miller, 914 F.2d 586, 590 (4th Cir. 1990). The Sixth Circuit, however, recently departed from its sister circuits when it ruled that § 104(a)(2) "does not permit a distinction between punitive and compensatory damages." Horton v. Commissioner, 33 F.3d 625, 631 (6th Cir. 1994).

17. 504 U.S. 229 (1992).

18. *Burke*, 504 U.S. at 230.

19. *Id.* at 237. Unlike lower courts, the Supreme Court made no distinction between physical

awards were not excludable from gross income because they did not compensate for a "tort-like personal injury."[20]

Following *Burke*, a number of appellate courts applied its reasoning to the issue of punitive damages taxation.[21] Only one court, the Sixth Circuit in *Horton v. Commissioner*,[22] held that § 104(a)(2) excluded punitive damages from gross income.[23] Relying on *Burke*, the Sixth Circuit found that punitive damages arising from gross negligence resulted from a personal injury and were excludable from gross income.[24]

The Supreme Court recently returned to the punitive damages issue in *Commissioner v. Schleier*.[25] In *Schleier*, the taxpayer excluded from gross income the liquidated damages from a settlement under the Age Discrimination and Employment Act (ADEA).[26] The Court reiterated the *Burke* test: not only must the claim be based on torts or tort-like rights, but it must also be personal in nature.[27]

B. O'Gilvie v. United States[28]

1. Facts

Betty O'Gilvie died of toxic shock syndrome (TSS).[29] Her husband, administrator of her estate, sued International Playtex, Inc., who manufactured the tampons O'Gilvie used when she contracted TSS.[30] The Court awarded the estate actual damages of approximately $1.5 million and punitive damages of $1.35 million.[31] The estate distributed these amounts to the beneficiaries, including the husband and children, who included the punitive damages in their gross income and promptly sued for refunds of the taxes they paid.[32] The children received refunds.[33] The district court held that in the husband's

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and non-physical injuries. *Id.* at 238. The Court established a new "scope of the remedies" analysis to determine whether "tort-like" rights are involved in the dispute. *Id.* at 234-37; *see also* Serven, *supra* note 11, at 254-60 (discussing application of the *Burke* analysis).

20. *Burke*, 504 U.S. at 241-42.

21. *See, e.g.*, *Wesson*, 48 F.3d at 902; *Hawkins*, 30 F.3d at 1084; *Reese*, 24 F.3d at 235; *Miller*, 914 F.2d at 590.

22. 33 F.3d 625 (6th Cir. 1994).

23. *Horton*, 33 F.3d at 632.

24. *Id.* at 631-32.

25. 115 S. Ct. 2159 (1995).

26. *Schleier*, 115 S. Ct. at 2162. The taxpayer, however, did include amounts received as backpay in his gross income. *Id.* Clearly, the amounts received as back pay were not on account of personal injury or sickness. *Id.* at 2164. Any amounts which might have been received as compensation for some psychological harm, however, may have been entitled to exclusion under § 104(a)(2). *Id.*

27. *Id.* at 2167. The Court held that claims under ADEA are not tort-like and, therefore, any recoveries thereunder are not to be excluded from gross income. *Id.*

28. 66 F.3d 1550 (10th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3439 (U.S. Mar. 25, 1996) (Nos. 95-966, 95-977).

29. *O'Gilvie*, 66 F.3d at 1552.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* Two years later the IRS sued to recover these amounts as erroneous refunds. *Id.* All

case, the amounts received as punitive damages were excludable from gross income.[34] The Tenth Circuit reversed the lower court's decision.[35]

2. Decision

The court addressed four factors in its analysis.[36] First, the title of § 104, "[c]ompensation for injuries or sickness," suggests that only compensatory awards are excludable from income.[37] Second, the predecessor statute to § 104 implied that unlike compensatory damages, punitive damages are not a return of capital and are income.[38] Third, the Tenth Circuit considered the Supreme Court cases of *Burke* and *Schleier* and distinguished them from the Sixth Circuit's holding in *Horton*.[39] Finally, the court focused on the policy of narrowly construing any exclusions from income.[40]

With regard to the third factor, the Tenth Circuit noted that the *Horton* court focused solely on the punitive damages claim.[41] The Tenth Circuit found this method erroneous, since *Burke* required a more thorough analysis of the situation.[42] Thus, the *Horton* court considered the first part of the *Burke* test, but did not address whether the punitive damages were received "on account of" personal injury. The Tenth Circuit, therefore, found *Horton* unpersuasive and proceeded to define "on account of," which the Supreme Court had failed to do in both *Burke* and *Schleier*.[43]

In interpreting this phrase, the Tenth Circuit followed four other circuits, holding that punitive damage awards are taxable, and noted that the phrase "on account of" is susceptible to two interpretations. First, the phrase may describe a causal relationship in which punitive damages result from injury.[44] Second, the phrase may describe a causal relationship in which the injury itself determines the damages.[45] The Tenth Circuit looked to the legislative history of §

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parties agreed to be bound by the resolution of Kelly's suit. *Id.*

34. *Id.* at 1553.

35. *Id.* at 1560.

36. Other circuits have focused on numerous factors in making a determination as to the applicability of § 104(a)(2). These factors include: (1) the statutory context and title; (2) the principle that exclusions from income should be construed narrowly; (3) the policy and legislative history of § 104; (4) a Treasury Revenue Ruling addressing this issue; (5) the 1989 amendment to § 104(a)(2); and (6) Supreme Court cases discussing § 104 in other contexts. *Id.* at 1556.

37. *Id.* at 1558.

38. *Id.* (agreeing with the Federal Circuit's analysis in *Reese*, 24 F.3d 228). Other courts hold that the purpose of § 104 is limited to compensatory damages which make the taxpayer whole again. *Id.* Because lost wages awarded due to some physical injury are compensatory and excluded from income, the court noted that the taxpayer is made "more than whole": if she had actually worked for those wages they would be taxable income and additional tax would be payable. *Id.* at 1558-59.

39. *Id.* at 1556-57.

40. *See, e.g., Schleier*, 115 S. Ct. at 2163.

41. *Horton*, 35 F.3d at 361 ("This is the beginning and end of the inquiry."). *Id.*

42. *O'Gilvie*, 66 F.3d at 1557; *see also Schleier*, 115 S. Ct. at 2159 (supporting the Tenth Circuit's interpretation of *Burke*). *Schleier* made it clear that *Burke* should be interpreted as requiring a two-part test: first, whether the injury involved tort-type rights, and second, whether the damages were received on account of personal injuries. *Id.* at 2167.

43. *O'Gilvie*, 66 F.3d at 1557.

44. *Id.* Therefore, punitive damages would be excluded from gross income because ultimately they are awarded on account of a personal injury. *Id.*

45. *Id.* In this case, punitive damages are not excluded because punitive damages are not

104(a)(2) for the proper interpretation of this clause, particularly its 1989 amendment.[46] This examination, however, proved inconclusive.[47] Thus, the Tenth Circuit opted to follow "the default rule that exclusions from income are narrowly construed," and found for the government.[48]

3. Analysis

The Tenth Circuit's decision exemplifies the confusion over punitive damages taxation. Past congressional attempts to correct the problem have only compounded the problem, as reflected by the *O'Gilvie* decision. The Tenth Circuit's decision does not differ in substance from those of other circuit courts that have held punitive damages taxable. The decision rejects the Sixth Circuit's decision in *Horton*, thereby reaffirming the analyses and outcomes of the other courts of appeals. *O'Glivie* is also significant for its application of the Supreme Court's *Schleier* decision, as it clarified the applicable tests in punitive damages analysis.

4. Other Circuits

Since the Tenth Circuit's decision in *O'Gilvie*, the circuits, with the exception of the Sixth Circuit, favor subjecting punitive damages awards to federal taxation by five to one.[49]

II. STATE TAX LIEN PRIORITY

A. *Background*

Generally, a state tax lien merits priority in payment over a federal tax lien if it is perfected, or "choate," before the federal lien comes into existence.[50] The determination of tax lien priority represents another area of

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received based on the injuries, but rather on the unreasonable and outrageous conduct of the defendant. *Id.*

46. *Id.* at 1559. The 1989 amendment to § 104(a)(2) provides that the exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." I.R.C. § 104(a). Congress's use of the double negative has confused many courts. *See* Serven, *supra* note 11, at 260. There are several interpretations of Congressional intent in enacting this amendment and three possible results of the amendment. *Id.* at 262-66. First, punitive damages awarded in connection with non-physical injuries are now taxable while those awarded in connection with physical injuries are tax exempt. *Id.* at 262-63. Second, punitive damages are always taxable. *Id.* at 263-64. Third, Congress only spoke as to the taxability of punitive damages in fully taxable non-physical injuries and made no decision regarding the taxability of punitive damages awarded in cases involving physical injuries. *Id.* at 264-66. The Tenth Circuit stated, "We believe that using the amendment to interpret Congress' intent in 1954 (or 1918) is a questionable practice, particularly because of the long lapse of time and because the legislative history of both the original statute and the amendment are not enlightening." *O'Gilvie*, 66 F.3d at 1559.

47. *O'Gilvie*, 66 F.3d at 1560. The court noted that "good reasons tug each way" in reference to the possible interpretations of the clause based on an analysis of the legislative history. *Id.* The Tenth Circuit, however, held that a determination of which interpretation was more correct was not necessary to decide the outcome of this case. *Id.*

48. *Id.*

49. *Id.; see, e.g., Wesson*, 48 F.3d at 902; *Hawkins*, 30 F.3d at 1084; *Reese*, 24 F.3d at 235; *Miller*, 914 F.2d at 590.

50. Burrus v. Oklahoma Tax Comm'n, 59 F.3d 147, 148 (10th Cir. 1995). The Supreme

taxation troubling the Tenth Circuit, as demonstrated by its decision in *McDermott v. Zion First National Bank.*[51]

In *United States v. City of New Britain,*[52] the Supreme Court stated that when a solvent debtor exists, a federal lien is subordinate to any prior perfected liens.[53] In that case, certain real property was foreclosed by judicial sale, the proceeds of which were insufficient to satisfy both municipal and federal liens.[54] The Supreme Court established a three-part "choateness" test to determine whether a state lien is entitled to priority over a subsequent federal lien.[55] The test states that "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established," the state lien is choate.[56]

Subsequent to the *New Britain* decision, the Tenth Circuit, in *T.H. Rogers Lumber Co. v. Apel,*[57] addressed the issue of lien priority between a claim by the federal government and two mechanics' and materialmen's liens.[58] In *T.H. Rogers,* a federal claim was perfected prior to the mechanic and materialmen's liens; however, the mechanics and materialmen had commenced work on the property to which all liens attached before the federal government had perfected its lien.[59] The state lien holders argued that their liens related to the commencement of work and were entitled to priority over the federal government's claims.[60] The Tenth Circuit held that liens created under state law must be "*enforceable* by summary proceedings [to be] . . . specific and perfected on the date the federal lien was recorded."[61] Since the mechanics' and materialmen's liens were still indefinite (as to amount) and, therefore

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Court has often used the "choateness doctrine" to frustrate the priority of state tax liens. Michael D. McCullogh, Note, *When First in Time Is Not First in Right: The Supreme Court Frustrates Judgment Creditors in* United States v. McDermott, 25 LOY. U. CHI. L.J. 405, 414 (1994).

51. 945 F.2d 1475 (10th Cir. 1991), *rev'd sub nom.* United States v. McDermott, 507 U.S. 447 (1993); *see also* James Serven, *Taxation,* 71 DENV. U. L. REV. 1063 (1994); James Serven, *Taxation,* 69 DENV. U. L. REV. 1037, 1076 (1992); (discussing the Supreme Court and Tenth Circuit *McDermott* opinions). In *McDermott,* the Tenth Circuit held that a prior perfected federal tax lien did not extend to after-acquired property. *McDermott,* 945 F.2d at 1481. Predictably, the Supreme Court reversed. United States v. McDermott, 507 U.S. 447 (1993).

52. 347 U.S. 81 (1954).

53. *City of New Britain,* 347 U.S. at 87 ("[W]ith no question of insolvency involved . . . 'the first in time is the first in right.'"). *Id.* There is no question that where the debtor or estate is insolvent a claim of the federal government, whether for taxes or not, is always entitled to priority. 31 U.S.C. § 3713 (1995).

54. *City of New Britain,* 347 U.S. at 82-83. The state liens were for delinquent real estate taxes and water rent, while the federal taxes secured unpaid federal withholding and unemployment taxes, as well as unpaid insurance contributions. *Id.*

55. *Id.* at 84.

56. *Id.* If the state tax lien is choate when the federal lien is filed, then the state lien is entitled to priority. *Id.* The Supreme Court further addressed the issues in *New Britain* and determined that where a state-created lien is perfected before a federal lien, the federal lien is entitled to priority with respect to after-acquired property. *McDermott,* 507 U.S. at 455.

57. 468 F.2d 14 (10th Cir. 1972).

58. *T.H. Rogers,* 468 F.2d at 15-16.

59. *Id.* at 18-19.

60. *Id.* at 16.

61. *Id.* at 18 (emphasis added).

unperfected at the time the federal lien was perfected, the latter took priority.[62]

B. Burrus v. Oklahoma Tax Commission[63]

1. Facts

On October 7, 1986, the Oklahoma Tax Commission filed a tax warrant against Vernon V. Burrus and his wife for unpaid withholding taxes.[64] On March 23, 1989, and November 16, 1989, the IRS assessed penalties against the Burruses for unpaid taxes.[65] They subsequently sold their house, but the proceeds were insufficient to satisfy both the state and federal tax claims.[66] The IRS acknowledged that the state liens should receive priority for payment, because the state liens pre-dated those of the federal government, provided the state liens were choate when filed.[67]

The Oklahoma State Constitution provides a homestead exemption that prohibits the attachment or forced sale of a principal residence for the satisfaction of a debt.[68] Relying on *T.H. Rogers*, the federal district court added a new "enforceability" element to the *New Britain* three part test to determine the choateness of a nonfederal tax lien.[69] The district court held that because the Oklahoma homestead exemption prevented the state lien from attaching and becoming enforceable, the state lien was not entitled to priority over the federal government's claim.[70]

2. Decision

The Tenth Circuit noted that the *New Britain* test had been satisfied,[71] and rejected the district court's imposition of an additional enforceability requirement.[72] The Tenth Circuit held that the only additional element that may

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62. *Id.* at 18-19.

63. 59 F.3d 147 (10th Cir. 1995).

64. Burrus v. Oklahoma Tax Comm'n, 850 F. Supp. 963, 964 (W.D. Okla. 1993), *rev'd*, 59 F.3d 147 (10th Cir. 1995). A similar warrant was recorded with respect to Mr. Burrus's wife on September 9, 1988. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. OKLA. STAT. tit. 31, § 1(A)(1) (1991). "[T]he following property shall be reserved to every person residing in the state, exempt from the attachment or execution and every other species of forced sale for the payment of debts . . . . The home of such person, provided that such home is the principal residence of such person . . . ." *Id.*

69. *Burrus*, 850 F. Supp. at 964; *see infra* note 82 and accompanying text.

70. *Burrus*, 850 F. Supp. at 965.

71. *Burrus*, 59 F.3d at 149.

72. *Id.* In rejecting this approach the Tenth Circuit stated:

> [W]e interpret T.H. Rogers to mean not that the lien must be immediately enforceable by summary proceedings at the time of filing, but rather that at the time of enforcement, whenever that should occur, a lienholder may satisfy its debt by resort to a summary proceeding because the lien will be both choate and perfected.

Id.

be necessary in proving choateness or perfection is that the lien must attach to an "identifiable piece of property."[73]

The Tenth Circuit then addressed the Oklahoma homestead exemption which provides that no debt shall "attach" to the debtor's principal residence.[74] Because the Tax Commission's lien could not attach to any identifiable piece of property, it appeared incapable of becoming choate.[75] The Tenth Circuit interpreted the word "attachment" in the Oklahoma statute to mean the physical seizure of a principal residence.[76] Therefore, the state lien could attach to the Burrus's principal residence but could not be executed.[77]

3. Analysis

The Tenth Circuit decision failed to consider the body of law, rooted in interpretations of Supreme Court opinions, recognizing the enforceability element. Two courts of appeals' decisions have addressed the issue of enforceability of a lien as a prerequisite to choateness.[78] These cases analyzed similar issues, namely, whether a state tax lien is sufficiently choate and entitled to priority over an IRS lien. The Third Circuit ruled that choateness requires enforceability.[79] That court refused to rule in favor of the IRS because the state lien was enforceable.[80] The Third Circuit relied in part on the federal district court decisions in *T.H. Rogers* and *Burrus*.[81] The Third Circuit also relied on several additional federal court decisions, many of them Tenth Circuit district court opinions.[82] Furthermore, the court cited several United

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73. *Id.*

74. *Id.*

75. *Id.* In order for perfection to occur a lien must first attach to identifiable property. With regard to attachment and perfection, see U.C.C. §§ 9-203 and 9-303 (1995).

76. *Burrus*, 59 F.3d at 150. The court noted that this is the exact harm the homestead exemption was designed to prevent. *Id.* The Tenth Circuit found this interpretation consistent with an earlier decision and a similar Kansas Supreme Court decision. *See* Tillery v. Parks, 630 F.2d 775 (10th Cir. 1980); Homestead Land Title Co. v. United States, 819 P.2d 660 (Kan. 1991). In *Homestead*, the federal district court transferred the case to the Kansas Supreme Court to determine whether a lien for unpaid sales taxes could attach to real property despite state homestead exemption. Homestead Land Title Co. v. United States, No. 90-4116-SAC, 1993 WL 360389, at *3-*4 (D. Kan. Aug. 17, 1993). The Kansas Supreme Court distinguished between the attachment of a tax lien to the homestead and the ability to force the sale of the homestead. *Id.* at *2.

77. "[A] properly filed state tax lien does 'attach' to homestead property for purposes of determining priority . . . even though it cannot be enforced at the time of filing." *Burrus*, 59 F.3d at 150.

78. Monica Fuel, Inc. v. IRS, 56 F.3d 508, 512 (3d Cir. 1995); *see In re* Terwilliger's Catering Plus, Inc., 911 F.2d 1168, 1176 (6th Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991).

79. *Monica Fuel, Inc.*, 56 F.3d. at 513 ("Choateness only requires that the state have a right to enforce its lien in a summary fashion.").

80. *Id.*

81. *Id.* at 512-13. *T.H. Rogers*, as interpreted by the Tenth Circuit, only stood for the proposition that a lien must be enforceable at the time of enforcement, not at the time of filing, and of course, *Burrus* was reversed by the Tenth Circuit.

82. *See Homestead*, 1993 WL 360389, at *3; United States v. Utah State Tax Comm'n, 642 F. Supp. 8, 9-10 (D. Utah 1983). The former case sent a certified question to the Kansas Supreme Court, on which the Tenth Circuit relied to reach its decision in *Burrus*. *See supra* note 76-77 and accompanying text. While the federal district court in *Homestead* recognized that the state sales taxes in that case could attach to the homestead, it also recognized an enforceability element to establishing that a state tax lien is choate. *Homestead*, 1993 WL 360389, at *3. In keeping with this principle, the district court sent another certified question to the Kansas Supreme Court to deter-

States Supreme Court decisions implying that the additional enforceability requirement exists.[83]

The Sixth Circuit also found enforceability to be a prerequisite to choateness.[84] The Sixth Circuit's decision rested on a parallel Supreme Court case,[85] and the Supreme Court's statement that "the choateness rule should be similar to the rule of priorities established for cases where an insolvent debtor is subject to a tax lien."[86]

The decisions of the Third and Sixth Circuits undermine the Tenth Circuit's holding.[87] While the interpretation of enforceability remains unclear, the Supreme Court's statements imply that enforceability should be a requirement in determining if the state lien is choate. The Tenth Circuit's abrupt departure from this interpretation suggests that other courts of appeals are unlikely to follow.

III. ACCUMULATED FUNDING DEFICIENCIES

A. *Background*

The Code requires that an employer who maintains a qualified employee benefit plan must meet minimum funding standards.[88] The employer can meet these standards by ensuring that the qualified plan has accumulated no funding deficiencies.[89] Failure to meet the minimum funding requirements results in

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mine whether the homestead exemption prevented the creditor from foreclosing on its sales tax lien. *Id.* at *4. In Jones v. St. Francis Hosp. & Sch. of Nursing, Inc., 594 P.2d 162, 166-67 (Kan. 1979), the court found that taxes were excepted from the homestead exemption, and that a forced sale could begin against a homestead to satisfy a tax lien. *Id.*; *see In re* Johnson, 872 P.2d 308, 310-11 (Kan. 1994). Therefore, in *Homestead*, the sales tax lien would have been entitled to priority because it was enforceable. With further analysis of the confusing events in *Homestead* and the related Kansas Supreme Court cases, the Tenth Circuit may have become aware of the detailed analysis those courts engaged in and, as a result, the Tenth Circuit may have been persuaded to rule otherwise. Essentially, in ruling against the enforceability element, the Tenth Circuit relied in part on a Kansas case which addressed an issue solely for the benefit of a federal district court which found that the enforceability element existed.

83. *Monica Fuel, Inc.*, 56 F.3d at 512 n.13 (citing *McDermott*, 507 U.S. at 452 n.5 (acknowledging that the lien therein "was perfected . . . in the sense that it was definite as to the property in question, noncontingent, and summarily enforceable")); United States v. Vermont, 377 U.S. 351, 359 n.12 (1964) (acknowledging that the "municipal liens accorded priority in *New Britain* were also characterized as summarily enforceable").

84. "[T]he state lien holder must show that he had the right to enforce the lien at some time prior to the attachment of the federal lien." *Terwilliger's*, 911 F.2d at 1176. Note that this decision barely preceded that of the Tenth Circuit's; therefore, the court may not have had the benefit of reviewing the Sixth Circuit's opinion.

85. *Id.* A state lien holder must be able to enforce the lien prior to attachment of the federal lien. *Id.* Otherwise, "[n]umerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded." *Id.* (quoting United States v. Security Trust & Sav. Bank, 340 U.S. 47, 50 (1950)).

86. *Id.*; *see supra* note 50.

87. Another federal court of appeals addressed this issue and it is reasonable to infer that it recognizes an enforceability element. *See In re* Thriftway Auto Rental Corp. v. Herzog, 457 F.2d 409, 414 n.8 (2d Cir. 1971).

88. I.R.C. § 412(a) (1994).

89. *Id.* In general terms, the accumulated funding deficiency is the amount by which the charges to the standard funding account exceed the credits to such an account. *See id.*

the assessment of a tax equal to ten percent of the deficiency at the end of any plan year.[90] Most employers who fail to maintain the minimum funding standards do so as a consequence of financial hardship.[91] This was the case in In re *CF&I Fabricators*,[92] where the employer failed to meet the minimum funding standards before petitioning for Chapter 11 reorganization.[93]

Pursuant to the Bankruptcy Code, excise taxes accruing before bankruptcy or penalties to compensate for pecuniary losses merit priority payment.[94] While the provisions allowing the tax on accumulated funding deficiencies come under the Internal Revenue Code section "Miscellaneous Excise Taxes," that label is not necessarily determinative of the tax's priority in bankruptcy.[95] The tax may, in fact, be more adequately described as a penalty. The tax should be analyzed under a four-part test adopted by the Ninth Circuit in In re *Lorber Industries*[96] to determine if it is an excise tax or a penalty.[97] The four factors include whether the "tax" is imposed: (1) as an involuntary monetary burden; (2) pursuant to statutory law; (3) for public purposes; and (4) under the police or taxing power.[98]

B. *In re* CF&I Fabricators[99]

1. Facts

The debtors filed petitions for bankruptcy under Chapter 11 to reorganize because of their inability to fund two pension plans.[100] The IRS then filed notice of claims for taxes imposed pursuant to § 4971 and alleged that the taxes, almost $42 million, merited priority status under § 507 of the Bankruptcy Code.[101] The debtors argued that these taxes were penalties and

90. I.R.C. § 4971(a) (1994). Additional taxes equal to the amount of the deficiency are imposed if the deficiency is not promptly corrected. I.R.C. § 4971(b).

91. *In re* CF&I Fabricators, 53 F.3d 1155 (10th Cir.), *cert. granted*, 116 S. Ct. 558 (1995).

92. *CF&I*, 53 F.3d at 1156.

93. *Id.* Chapter 11 of the Bankruptcy Code allows a debtor to file for bankruptcy without surrendering all non-exempt assets to creditors. 4 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE § 20.1, at 3 (6th ed. 1994). Under the automatic stay the debtor receives temporary relief from creditors while the debtor develops a plan for reorganization and repayment of creditors. *Id.*

94. 11 U.S.C. § 507(a)(8)(E), (G) (1994). *CF&I* determined that the priority status afforded these taxes was located at § 507(a)(7)(E), (G). *CF&I*, 53 F.3d at 1156. This Survey will refer to the amended provisions as the texts are virtually identical.

95. "Congress' labeling of [an] exaction as a tax is not determinative of its status for priority in bankruptcy." *CF&I*, 53 F.3d at 1157 (quoting *In re* Cassidy, 983 F.2d 161, 163 (10th Cir. 1992)).

96. 675 F.2d 1062 (9th Cir. 1982).

97. *Lorber*, 675 F.2d at 1066.

98. *Id.* Failing any part of this test leads to a conclusion that the assessment was a penalty rather than a tax. *See infra* note 109 and accompanying text.

99. 53 F.3d 1155 (10th Cir.), *cert. granted*, 116 S. Ct. 558 (1995).

100. *In re* CF&I Fabricators, 148 B.R. 332, 334 (Bankr. D. Utah 1992), *cert. granted*, 116 S. Ct. 558 (1995).

101. *Id.* at 335, 337.

should have been disallowed.[102] The bankruptcy court agreed with the debtors and refused to grant the liens priority status.[103]

2. Decision

The Tenth Circuit affirmed the bankruptcy court's findings and its analysis of the § 4971 tax under the four-part *Lorber* test.[104] The court reinforced the doctrine that the label Congress places on an exaction is not determinative of its status as a tax or penalty.[105] Neither the bankruptcy court nor the Tenth Circuit presented a detailed analysis of the *Lorber* test. Therefore, the application of the facts in this case to that test is provided below.

3. Analysis

The imposition of the tax in *CF&I* resulted from an obligation to which the debtors did not consent; therefore, it meets the first part of the *Lorber* test because it was an involuntary monetary burden.[106] The tax also fulfills the second part of the *Lorber* test because it was imposed pursuant to the Internal Revenue Code. With regard to the third part of the test, however, the tax serves no benefit, such as defraying governmental expenses, to the public.[107] The tax merely serves to insure the adequacy of funding certain employee benefit plans. The bankruptcy court noted that affording the § 4971 tax priority would result in additional harm to the individuals that the tax was designed to protect.[108] Finding that the § 4971 tax could not meet the requirements of the *Lorber* test, the Tenth Circuit concluded that the tax was neither a penalty nor entitled to priority status.[109]

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102. *Id.* Additionally, the debtors came to an agreement with the Pension Benefit Guaranty Corporation (PBGC) to terminate one plan, after which the PBGC would act as successor trustee of the plan and become liable for benefits to plan participants. *Id.* at 336. The debtors objected to many of the taxes, claiming that the plan of reorganization or direction of the bankruptcy court prevented the payment of funds to the plan. *Id.* Therefore, the debtors claimed that it was inequitable for the IRS to continue assessing taxes for the accumulated funding deficiency. *Id.* The bankruptcy court, as well as the Tenth Circuit, addressed additional claims of equitable subordination in this case. *Id.*; *CF&I*, 53 F.3d at 1158. Although beyond the scope of this Survey, the issue of equitable subordination is perhaps the most important issue in this case and was the reason a petition for certiorari has been granted. *Id.* The Tenth Circuit held that a nonpecuniary loss tax penalty claim could be equitably subordinated to the claims of general unsecured creditors. *Id.* at 1159. The Sixth Circuit reached a similar conclusion in light of Congress's express intention to provide priority to tax penalties. *In re* First Truck Lines, Inc., 48 F.3d 210, 212 (6th Cir.), *cert. granted*, 116 S. Ct. 558 (1995). Both circuits held that it was reasonable to allow the bankruptcy court to exercise its discretion in order to ensure fair treatment and an equitable result. *Id.* at 218; *CF&I*, 53 F.3d at 1159.

103. In re *CF&I Fabricators*, 148 B.R. at 343.

104. *CF&I*, 53 F.3d at 1158.

105. *See supra* note 95.

106. *See In re* Farmers Frozen Food Co., 221 F. Supp. 385, 387 (N.D. Cal. 1963).

107. *Lorber*, 675 F.2d at 1066.

108. *CF&I*, 148 B.R. at 339. Affording the IRS's claims priority would be at the expense of unsecured pre-petition creditors which include the members of the pension plans themselves. *Id.* The IRS acknowledged that if the court accepted the *Lorber* analysis, this third prong of the test could not be met. *Id.* at 338. With regard to the last part of the *Lorber* test, the § 4971 tax was clearly imposed pursuant to the federal government's taxing or police powers.

109. *CF&I*, 53 F.3d at 1158. The legislative history of § 4971 further substantiates this hold-

4. Other Circuits

The Sixth Circuit was the only other circuit court to treat the issue presented in *CF&I*.[110] The Sixth Circuit relied on Congress's label of § 4971 as an excise tax as dispositive[111] and refused to consider the *Lorber* test.[112] It rejected the holding that labels are not determinative as to whether a lien is a tax or a penalty and concluded that federal courts do not have unlimited license to challenge Congress's designation of certain taxes.[113]

The Fourth and Fifth Circuits interpreted the priority status afforded § 4941 exactions, albeit in reference to a different code section.[114] They considered whether, for bankruptcy purposes, a court may look beyond Congress's characterization of an exaction. Both circuits held that the characterization of § 4941 exactions as a tax would contradict the very notion of fairness and public policy against punishing innocent creditors.[115]

At least one commentator has stated that it was unfortunate that the Supreme Court did not resolve the circuit split.[116] In light of recent Supreme Court decisions favoring the plain meaning rule,[117] many courts confronting this issue will likely side with the Sixth Circuit's decision. In light of Tenth Circuit precedent, however, *CF&I* was correctly decided and should remain the law until the Supreme Court confronts this issue.

IV. PERFECTION OF FEDERAL TAX LIENS

A. *Background*

When a taxpayer fails to pay assessed taxes, the tax due becomes a lien "upon all property and rights to property" belonging to the taxpayer.[118] Generally, the lien is not perfected and enforceable against third parties until notice has been properly filed pursuant to state law.[119] The Bankruptcy Code

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ing: "The [Employee Retirement Income Security Act] provides new and more effective penalties where employers fail to meet funding standards . . . . [T]he bill places the obligation for funding and the *penalty* for underfunding on the person to whom it belongs—namely, the employer." H.R. REP. NO. 93-807, 93d Cong, 2d Sess. 25 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4694 (emphasis added).

110. *In re* Mansfield Tire & Rubber Co., 942 F.2d 1055 (6th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992).

111. *Mansfield Tire*, 942 F.2d at 1062.

112. *Id.* at 1057. The bankruptcy court in that case applied the four-part test and found that the § 4971 exaction failed the third prong of the test. *In re* Mansfield Tire & Rubber Co., 80 B.R. 395, 398 (Bankr. N.D. Ohio 1987).

113. *Mansfield Tire*, 942 F.2d at 1059-60.

114. *See In re* Kline, 547 F.2d 823 (4th Cir. 1977) (adopting the reasoning of the district court); *In re* Unified Control Sys., 586 F.2d 1036 (5th Cir. 1978). Section 4941 imposes a "tax" for self-dealing between a taxpayer and an exempt foundation. *See* David L. Kwass, Note, *Excise Taxes in Bankruptcy*: United States v. Mansfield Tire & Rubber Co. *Holds Congress to Its Word*, 12 VA. TAX REV. 513, 522 (1993).

115. *Kline*, 586 F.2d at 1038; *Unified Control Sys.*, 586 F.2d at 1037-38.

116. Kwass, *supra* note 114, at 523.

117. *See* United States v. Ron Pair Enter., 489 U.S. 235 (1989).

118. I.R.C. § 6321 (1994).

119. I.R.C. § 6323(a), (f) (1994). Subsection (f) provides that state law determines the proper place for filing, although the subsection does provide some default rules. I.R.C. § 6323(f). Every

provides that a trustee may avoid any unperfected statutory lien against a "bona fide purchaser . . . whether or not such purchaser exists."[120] Federal law looks to the law of the applicable state to determine the rights of a bona fide purchaser.[121]

The Uniform Commercial Code (U.C.C.) grants priority to claims of lien creditors over the claims of unperfected secured creditors.[122] The U.C.C. also states that a filing of notice continues to be effective against the attached collateral even upon transfer of the property.[123]

B. *In re* LMS Holding Co.[124]

1. Facts

On January 25, 1988, the IRS perfected its lien against property held by MAKO, Inc., a corporation which subsequently filed for bankruptcy under Chapter 11.[125] Retail Marketing Corp. (RMC) acquired the property, subject to a tax lien, pursuant to the corporation's reorganization plan.[126] After the transfer occurred, the IRS, with full knowledge of the transaction, chose not to file notice of the tax lien against RMC.[127] RMC then filed for bankruptcy under Chapter 11.[128] The bankruptcy court held that the IRS's failure to file notice of the lien against RMC entitled the trustee to avoid the lien.[129] As a

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state within the Tenth Circuit, with the exception of Utah, has enacted the Uniform Federal Lien Registration Act, which provides that notices of liens on real property are filed in the office of the county clerk where the property is located, while liens on personal property are generally to be filed with the state's secretary of state (where the taxpayer is a corporation). *See* COLO. REV. STAT. § 38-25-102(1)(b), (2)(a) (Supp. 1995); KAN. STAT. ANN. § 79-2614(b), (c)(1) (1989); N.M. STAT. ANN. § 48-1-1(A), (B) (Michie 1995) (liens on personal property are filed in the county where the taxpayer resides); OKLA. STAT. tit. 68, § 3403(B), (C)(1) (1992) (liens on personal property are filed in Oklahoma County); WYO. STAT. § 29-6-204(b), (c)(i) (Supp. 1995). Utah provides that all federal liens are to be filed in the county in which the property subject to the lien is located. UTAH CODE ANN. § 38-6-1 (1994).

Generally, such notice must at least provide the identity of the taxpayer, the tax liability under which the lien arose, and the date of the assessment. Treas. Reg. § 301.6323(f)-1(d)(2) (as amended in 1994). Federal tax liens need not describe the property attached since the obligation becomes a lien on all property of the taxpayer. *In re* LMS Holding Co., 50 F.3d 1526, 1530 (10th Cir. 1995).

120. 11 U.S.C. § 545(2) (1994).

121. *See e.g., In re* McClaim, 447 F.2d 241, 243-44 (10th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (holding that the priority of the trustee is determined pursuant to the law of the state in which the property is located).

122. U.C.C. § 9-301(1)(b), (3) (1995) (providing that generally "an unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected").

123. U.C.C. § 9-402(7) (1995). The official comments state that no new filing is necessary in this case. *Id.* official cmt. 8. "[A]ny person searching the condition of ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it." *Id.*

124. 50 F.3d 1526 (10th Cir. 1995).

125. United States v. LMS Holding Co., 161 B.R. 1020, 1021 (N.D. Okla. 1993), *rev'd*, 50 F.3d 1526 (10th Cir. 1995).

126. *Id.* RMC also agreed to assume all liabilities of MAKO. *LMS Holding*, 50 F.3d at 1526.

127. *LMS Holding*, 161 B.R. at 1021.

128. *Id.*

129. *Id.*

result, the IRS held an unsecured claim.[130] The district court affirmed, holding that the IRS had knowledge of the transfer of assets and was required to file notice of the lien in the name of RMC.[131]

2. Decision

The Tenth Circuit acknowledged that where the identity of a debtor has truly changed, no new filing is necessary.[132] The transfer to RMC was not merely a change in the debtor's identity, but rather a change to an unrelated third party.[133] Furthermore, the Tenth Circuit noted that RMC's assumption of MAKO's tax liability did not justify characterizing RMC as the taxpayer in this matter.[134] The Tenth Circuit's decision hinged on its interpretation of U.C.C. § 9-402(7), which provides that the security interest in collateral continues to be effective even after the collateral is transferred to another party.[135] As a result, the IRS's lien continued to be effective against the property purchased by RMC. The Tenth Circuit reversed the findings of the bankruptcy and district courts.[136] The court also stated that the IRS was not entitled to enforce its lien against property RMC acquired independently of the transaction with MAKO.[137]

3. Analysis

The Tenth Circuit correctly decided that this was not a case of a debtor name change but rather a complete transfer of assets to another entity. While the U.C.C. states that a prior lien remains effective against the transferred property, it makes no reference to extending that lien to additional property of the acquiring party. It would not be surprising if this case came about as the result of an IRS error in filing a financing statement and the agency's woeful attempt to correct an inexcusable mistake.

V. FEDERAL ESTATE AND GIFT TAX DISCLAIMERS

A. *Background*

Taxes are based on the value of a decedent's estate.[138] In arriving at the net taxable value of a decedent's estate, the value of all property transferred to a surviving spouse is deducted from the gross estate.[139] Testamentary transfers, such as a bequest pursuant to the decedent's will, may be disclaimed by

130. *Id.*
131. *Id.* at 1023.
132. *LMS Holding*, 50 F.3d at 1528. The IRS relied on two cases where federal courts held that a new filing was not necessary in the case of a name change of the debtor. *Id.* (citing Davis v. United States, 705 F. Supp. 446 (C.D. Ill. 1989); United States v. Clark, 81-1 T.C.M. (CCH) 9406 (S.D. Fla. 1981)).
133. *Id.* at 1528-29.
134. *Id.* RMC simply remains the transferee in this situation, not the taxpayer. *Id.*
135. For a further discussion of § 9-402(7), see *supra* note 123 and accompanying text.
136. *LMS Holding*, 50 F.3d at 1530.
137. *Id.*
138. I.R.C. § 2001 (1994).
139. I.R.C. § 2056(a) (1994).

the recipient and such property will transfer pursuant to state law.[140] If a recipient of a testamentary transfer disclaims such interest and the property transfers pursuant to state law to the surviving spouse, the estate is entitled to deduct the transfer in arriving at the net taxable estate.[141]

A disclaimer is valid if it meets four requirements. The disclaimer must: (1) be in writing; (2) be received by the transferor or his personal representative within certain time constraints; (3) be made by a person who receives no interests or benefits of the property; and (4) pass such interest *without direction* on the part of the person making the disclaimer.[142]

In the Tenth Circuit, a disclaimed interest passes as though the person making the disclaimer predeceased the decedent.[143] The states generally mandate that when the devisee or legatee is related to the testator and is treated as if having predeceased the testator, all issue of the devisee or legatee take in place of that individual.[144]

B. DePaoli v. Commissioner[145]

1. Facts

Quinto DePaoli, Sr. died, leaving his entire estate to his son Quinto DePaoli, Jr.[146] The son and Soila, Quinto Sr.'s wife, sought to have the probated will set aside so that the property would instead transfer to the mother.[147] The son agreed to accept $600,000 from the estate in return for his decision not to contest the will.[148] The federal tax return for the estate indicated

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140. *See* Estate of Bennett v. Commissioner, 100 T.C. 42, 67 (1993). For code provisions discussing disclaimer, see I.R.C. §§ 2046, 2518 (1994).

141. Treas. Reg. § 20.2056(d)-1(b) (as amended in 1986) (qualifying the transfer for the surviving spouse deduction).

142. I.R.C. § 2518(b) (emphasis added). If the formal requirements of § 2518 are met, the transferred property is treated not as if the property passed from the transferor to the disclaimant then to the ultimate taker, but instead as if the property passed directly from the transferor to the ultimate taker. Grayson M.P. McCouch, *Timely Disclaimers and Taxable Transfers*, 47 U. MIAMI L. REV. 1043, 1057 (1993). As a result, only one gift or estate tax is imposed rather than two separate taxes on two transfers. *Id.* The resulting transfer closely resembles a power of appointment, the major difference being § 2518's formal requirements. *Id.* The two methods of transfer, however, reach strikingly different results. While the use of a disclaimer results in no additional tax, a power of appointment often results in additional taxes. *Id.* at 1057-58; *see also* I.R.C. §§ 2038, 2041 (1994). Some commentators have suggested that disclaimers should be treated as taxable transfers to achieve a more consistent outcome, simplify taxation, and end the problems associated with determining if disclaimers meet the requirements of § 2518. Joan B. Ellsworth, *On Disclaimers: Let's Renounce I.R.C. Section 2518*, 38 VILL. L. REV. 693, 775 (1993).

143. COLO. REV. STAT. § 15-11-801(4)(a) (Supp. 1995); KAN. STAT. ANN. § 59-2293(a) (1994); N.M. STAT. ANN. § 45-2-801(D) (Michie 1995); OKLA. STAT. tit. 84, § 26 (1990); UTAH CODE ANN. § 75-2-801(3) (1993); WYO. STAT. § 2-1-404(a)(ii) (1980 & Supp. 1995). Wyoming is the only state providing that the interest will pass as if the disclaimant predeceased the decedent only if the disclaimant is a residuary beneficiary. WYO. STAT. § 2-1-404 (a)(ii).

144. *See* COLO. REV. STAT. § 15-11-603(2)(a) (1995); KAN. STAT. ANN. § 59-615(a) (1994); N.M. STAT. ANN. § 45-2-603 (Michie 1995); OKLA. STAT. tit. 84, § 142 (1990); UTAH CODE ANN. § 75-2-605 (1993); WYO. STAT. § 2-6-106 (1980).

145. 62 F.3d 1259 (10th Cir. 1995).

146. *Depaoli*, 62 F.3d at 1260.

147. *Id.*

148. *Id.* The $600,000 represents the maximum amount Quinto Sr. could have transferred to

that the entire estate, less the $600,000 transferred to the son, passed to Soila and thus qualified for the surviving spouse deduction.[149] He alleged that he made a qualified disclaimer in which he directed that the property disclaimed be transferred to Soila.[150] The Commissioner denied the marital deduction arguing: (1) that the probated will bequeathed everything to the son; (2) that the disclaimer was invalid due to the son's direction of the property to his mother; and (3) that as a result of the invalid disclaimer, he was liable for gift tax on the property transferred to his mother.[151] Quinto Sr.'s personal representative and the son alleged that the disclaimer was valid because the property would have passed to Soila in accordance with state law even without the son's direction.[152] The Tax Court agreed with the IRS and held the disclaimer invalid.[153]

2. Decision

The Tenth Circuit focused on whether the son's interest would have passed, under state law, to Soila or his issue. The son had two illegitimate children.[154] Under New Mexico law, an illegitimate child is considered the issue of the father if the father has signed a writing that the child is the father's heir.[155] The Tax Court concluded that since the son included his two illegitimate children as dependents on his tax return, this writing was sufficient to meet the statutory requirements.[156] Thus, his interest would have passed to his sons, rather than Soila, without his direction.[157] The Tenth Circuit, however, concluded that the Code's definition of "son" is broader than that of the New Mexico probate code.[158] The court held that the tax returns were not signed with the intent of recognizing the illegitimate children as his issue.[159] Under this interpretation, the disclaimed interest would have passed to Soila pursuant to New Mexico law even without the son's direction, since the illegitimate sons did not qualify as his issue.[160] Thus, the disclaimer was valid under § 2518(b) of the Code.[161]

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his son without his estate incurring any tax liability. I.R.C. § 6018 (1994). As a result, the taxpayer claimed the entire estate would not be subject to tax since all $600,000 qualified for the marital deduction and the remaining $600,000 was exempt from tax.

149. *DePaoli*, 62 F.3d at 1260. The return failed to indicate that the property transferred to Soila as a result of a qualified disclaimer. *Id.*

150. *Id.* at 1260, 1266.

151. *Id.* at 1260-61.

152. *Id.* at 1261.

153. *Id.*

154. *Id.* at 1262.

155. N.M. STAT. ANN. § 45-2-109(B)(2) (Michie 1995).

156. *DePaoli*, 62 F.3d at 1263.

157. *Id.*

158. *Id.*

159. *Id.* at 1264.

160. *Id.* at 1265.

161. *Id.* at 1265. The Tenth Circuit acknowledged that the only issue involving I.R.C. § 2518(b) before them was whether the disclaimer was invalid due to the son's direction of the property to Soila. *Id.* at 1266.

3. Analysis

The Tenth Circuit's decision reflects the importance of examining state intestacy and property laws when considering the federal estate tax. Congress, by enacting the marital deduction, evidenced its intent that transfers of property as a result of death should not be subject to tax. While the disclaimer in this case was invalid, the ultimate transfer of property in *DePaoli* was of the nature of those specifically deemed exempt from tax by Congress.

VI. THE GIFT TAX: SAFE HARBOR RATES DO NOT APPLY TO BELOW-MARKET LOANS

A. *Background*

A federal gift tax is imposed on the transfer of any property by gift.[162] The gift tax affects more than purely gratuitous transfers. For example, it can apply to a sale or exchange of property where the fair market value of the property transferred exceeds the value of the consideration given in exchange.[163] It follows that when a taxpayer gives property in exchange for a promissory note, gift taxes may be imposed to the extent that the fair market value of the property transferred exceeds the fair market value of the note received in exchange. In assessing the fair market value of a promissory note, the IRS considers the face value of the note, the stated interest rate, the appropriate market rate of interest, and the term of the note.[164]

Under I.R.C. § 483, the holder of an installment contract which contains "total unstated interest" may be forced to recognize payments representing principal under contract terms as interest for income tax purposes.[165] Section 483 serves to prevent the avoidance of income taxes, whereby payments received under an installment contract are payments of principal which may be taxed as a capital gain rather than payments of interest taxed as ordinary income.[166] Under this provision, the interest rate applied by the government in assessing fair market value of the installment contract is a published rate regularly determined by the Secretary of the Treasury.[167] If the sum of the payments of principal received under the installment contract terms exceeds the present value of such principal payments and interest discounted at the rate determined by the Secretary, the contract contains unstated interest.[168]

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162. I.R.C. § 2501(a)(1) (1994).

163. I.R.C. § 2512(b) (1994); Commissioner v. Wemyss, 324 U.S. 303, 306 (1945); *see also* Treas. Reg. § 25.2512-8 (as amended in 1992) (excluding transactions made in the ordinary course of business from this provision).

164. Blackburn v. Commissioner, 20 T.C. 204, 207 (1953).

165. I.R.C. § 483(a) (1994).

166. Schusterman v. United States, 63 F.3d 986, 990 (10th Cir. 1995). For a complete discussion of *Schusterman*, see *infra* notes 177-86 and accompanying text.

167. I.R.C. § 483(b) (1994); I.R.C. § 1274(d) (1994). The version of § 483 in place at the time the Schusterman trusts were created provided that the interest rates were determined by the Secretary. *See Schusterman*, 63 F.3d at 989. The amended version simply refers one to § 1274 for determination of the applicable rate rather than to the regulations. I.R.C. § 483(b).

168. I.R.C. § 483(b).

Portions of payments received must be recharacterized: from payments of principal to payments of interest.[169] If the terms of the installment contract provide for an interest rate equal to or greater than the rate determined by the Secretary, no recharacterization would be necessary.[170]

In *Schusterman*, the Tenth Circuit decided whether § 483 applied to the gift tax provisions of the Code. The two circuits that had previously addressed this issue had reached conflicting conclusions. In *Ballard v. Commissioner*,[171] the taxpayer argued that the provisions of § 483 applied to all provisions of the Internal Revenue Code.[172] Thus, a taxpayer complying with the safe harbor rate provisions should not suffer a penalty by the imposition of gift taxes where the safe harbor rate falls below the prevailing market rate of interest.[173] The Seventh Circuit in *Ballard* ruled in favor of the taxpayer.[174] The Eight Circuit Court of Appeals ruled otherwise when presented with a similar argument.[175] Agreeing that § 483 applied to the entire Internal Revenue Code, the Eight Circuit concurred with the tax court's determination that "nothing in the language of § 483 . . . indicates that this section has anything to do with valuation."[176]

B. Schusterman v. United States[177]

1. Facts

The taxpayers, Charles and Lynn Schusterman, transferred stock to five irrevocable trusts in exchange for promissory notes in the principal amount of the fair market value of the stock, $7,954,046.[178] The notes provided for interest at a rate of six percent, which is the safe harbor rate as provided by § 483 and the appropriate treasury regulation.[179] The prevailing market interest rate at that time was eleven and one-half percent.[180] Counsel advised the taxpayers to set the interest rates of the promissory notes equal to the safe harbor rate provided by § 483 to avoid the imposition of any gift taxes by the IRS.[181] The IRS informed them that § 483 did not preclude the assessment

169. *Id.*

170. "In sum, I.R.C. § 483 prevents a seller of property under an installment contract for sale or exchange of property from converting ordinary income (interest) into capital gains (principal)." *Schusterman*, 63 F.3d at 990. The court continued: "The interest rate set by regulation is known as the 'safe harbor' rate because a contract for the sale or exchange of property that employs the interest rate will by definition never contain 'total unstated interest.'" *Id.*

171. 854 F.2d 185 (7th Cir. 1988).

172. *Ballard*, 854 F.2d at 187. Mrs. Ballard must have been relying on the prefatory language of § 483 which states, "For purposes of this *title* . . . [this provision applies to] the sale or exchange of any property." I.R.C. § 483(a)(1) (emphasis added). The word "title" refers to Title 26 of the United States Code, more commonly known as the Internal Revenue Code. *Id.*

173. *Ballard*, 854 F.2d at 187.

174. *Id.* at 189.

175. Krabbenhoft v. Commissioner, 939 F.2d 529, 532 (8th Cir.), *cert. denied*, 502 U.S. 1072 (1991).

176. *Id.* (quoting Krabbenhoft v. Commissioner, 94 T.C. 887, 890 (1990)).

177. 63 F.3d 986 (10th Cir. 1995).

178. *Schusterman*, 63 F.3d at 988.

179. *Id.*

180. *Id.*

181. *Id.*

of gift taxes in this situation and taxed the difference between the value of the stock transferred and the present value of the notes, discounted at the prevailing eleven and one-half percent market interest rate.[182] The taxpayers paid the gift taxes and then sued for a refund.[183] The district court agreed with the findings of the Eight Circuit in *Krabbenhoft* and held in favor of the IRS.[184]

2. Decision

Like the federal district court, the Tenth Circuit sided with the Eight Circuit's holding in *Krabbenhoft*. While recognizing that § 483 applies to all provisions of the Code, the Tenth Circuit agreed that it is irrelevant for purposes of gift tax valuation.[185] The court stated that while the safe harbor rate protects taxpayers from recharacterization of income under § 483, there were no indications that "the safe harbor rate insulates a taxpayer from the adverse gift tax effects of § 2512."[186]

3. Analysis

An examination of the purpose of § 483 leads to the conclusion that the Tenth Circuit reached the correct decision. Section 483 serves only to insure that payments received under an installment sale or promissory note are correctly characterized, and is solely concerned with the income tax consequences of such a transaction. Had the promissory notes in *Schusterman* provided for interest at five percent, § 483 would take effect, recharacterizing payments of principal to payments of interest but would have no bearing on valuation. Since the stated interest rate of the promissory notes met the safe harbor rate, § 483 would have no income tax consequences.

CONCLUSION

The Tenth Circuit continues to apply established tests in reaching well-reasoned conclusions to issues involving federal taxation. Generally, the court appears to favor erring on the side of the taxpayer unless the law conclusively holds to the contrary. While this is an admirable approach to the tax laws, it seems lead to muddy analysis, as applied in *Burrus*, where the area of federal tax liens remains a thorn in the Tenth Circuit's side.

Steven M. Weiser

182. *Id.* This resulted in gift taxes owed of $1,157,127.72. *Id.*
183. *Id.*
184. *Id.* at 988-89.
185. *Id.* at 993.
186. *Id.*

THE UNITED STATES SENTENCING GUIDELINES

INTRODUCTION

During the survey period, September 1994 through September 1995, the Tenth Circuit decided eleven noteworthy cases involving sentencing in federal courts. In each of these decisions, the Tenth Circuit addressed issues of first impression involving the United States Sentencing Guidelines (Guidelines).[1] This Survey contains nine sections.

Part I provides a brief background and history of the Guidelines. Part II discusses the Guidelines application. The remaining Parts (III through IV) survey Tenth Circuit decisions on the following sentencing guideline issues: (1) what conduct a sentencing court may review in making sentencing determinations; (2) how a sentencing court should apply sentencing enhancements for crimes involving "special skill" or "sophisticated means";[2] (3) when the Guidelines limit a sentencing court's discretion to impose a concurrent sentence prior to an undischarged prison term;[3] (4) whether a court must apply a sentence consecutive to a state prison term when a defendant committed the offense while on release or when a defendant used firearms, piercing ammunition, or explosives in committing the crime;[4] (5) under what circumstances a court should apply a sentence enhancement for an offender's misrepresentation that she was acting on behalf of a charitable organization;[5] (6) whether the commencement of trial precludes sentence reductions for substantial assistance;[6] and (7) whether placing a juvenile under the custody of the state Secretary of Social and Rehabilitation Services constitutes a "confinement" for sentence reduction purposes.[7]

I. BACKGROUND

The United States Sentencing Commission (Commission)[8] promulgated the United States Sentencing Guidelines pursuant to the Sentence Reform Act

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1. United States Sentencing Commission, *Guidelines Manual*, (Nov. 1995) [hereinafter U.S.S.G.].

2. *See* U.S.S.G. §§ 3B1.3, 2T1.3(b)(2).

3. *See* U.S.S.G. § 5G1.3(b)-(c).

4. *See* U.S.S.G. § 2J1.7 (Commission of an Offense While on Release); *id.* § 2K2.4 (Use of Firearm, Armor-piercing Ammunition, or Explosive, During or in Relation to, Certain Crimes).

5. *See* U.S.S.G. § 2F1.1(b)(3)(A).

6. *See* U.S.S.G. § 3E1.1(b)(1)-(2).

7. *See* U.S.S.G. § 4A1.2(d)(2)(A).

8. "The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members," three of whom must be federal judges. U.S.S.G. Ch.1, Pt.A(1), intro. comment.; 28 U.S.C. § 991(a) (1994). The Commission is charged with "establish[ing] sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed Guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." U.S.S.G. Ch.1, Pt.A(1), intro. comment.

of 1984 (SRA).[9] The SRA charged the Commission to develop determinant sentencing guidelines that further four "basic purposes of criminal punishment: incapacitation, deterrence, just punishment, and rehabilitation."[10]

The Guidelines represent the culmination of a reform movement aimed at achieving honesty, uniformity, and proportionality in sentencing.[11] Congress sought honesty by curbing the broad sentencing discretion that accompanied the previous indeterminate sentencing system.[12] That system resulted in the imposition of indeterminate sentences, and allowed the parole commission to determine the actual time served.[13] The Guidelines attain uniformity by embracing a "real-offense model" that bases punishment decisions on a defendant's actual conduct rather than on the conviction offense.[14] This model attempts to curb sentencing disparity for "similarly situated offenders."[15] Finally, Congress realized proportionality by establishing different sentences for differently situated offenders according to the relative seriousness of their conduct.[16]

The Guidelines apply to all federal offenses committed on or after the effective date of November 1, 1987.[17] They employ a sophisticated array of empirical, quasi-mathematical formulas for calculating sentences.[18] With the passage of the Guidelines, Congress abolished parole, thereby requiring that convicts actually serve the sentences imposed by the court, less a permissible good behavior reduction of approximately fifteen percent.[19]

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9. The Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, was passed as Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1976, 1987-2040 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1988 & Supp. V 1993) and 28 U.S.C. §§ 991-998 (1988 & Supp. V 1993)).

10. U.S.S.G. Ch.1, Pt.A(2), intro. comment. (The Statutory Mission).

11. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.) (The Basic Approach).

12. *See id.*; David A. Hoffman, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 DUKE L.J. 382, 387-88 (1992); *see also* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 92-93 (1973) (criticizing the indeterminate sentencing system for its "rehabilitative" objective).

13. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

14. For a general discussion about the choice to embrace a real-offense-based model as opposed to a conviction-based scheme, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 925-27 (1990). Through the real-offense mechanism, the Commission sought to prevent prosecutors from "circumventing" the Guidelines by charge bargaining. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278-79 (1989).

15. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

16. *Id.*

17. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 189 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3372; U.S.S.G. Ch.1, Pt.A(2), intro. comment. For an analysis of applying sentencing procedures to offenses committed prior to November 1, 1987, see James L. Slear, Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90*, 79 GEO. L.J. 591, 1162-71 (1991).

18. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.); *cf.* Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992) (arguing that judges retain discretion even under the Guidelines because Congress left intact informal procedures for gathering "facts relevant to sentencing").

19. U.S.S.G. Ch.1, Pt.A(3), intro. comment. (p.s.).

II. APPLICATION OF THE FEDERAL SENTENCING GUIDELINES[20]

The Guidelines consist of a sentencing scheme centered around a 258-cell grid, or "Sentencing Table."[21] Each box contains the presumptive sentencing range, also known as a "heartland": a "set of typical cases embodying the conduct that each guideline describes."[22] The sentencing matrix consists of two axes. An offender's offense level forms the vertical axis and ranges from a low of one to a high of forty-three.[23] An offender's criminal history forms the horizontal axis and ranges in severity from category level I to VI.[24]

Before calculating the applicable sentence under the Guidelines, a judge must first determine the "sentencing range" using this sentencing matrix.[25] To determine the sentencing range, judges must: (1) establish the vertical axis;[26] (2) establish the horizontal axis;[27] and (3) plot the vertical and horizontal axis lines on the sentencing matrix.[28] After determining the sentencing range, judges have limited discretion to consider statutorily permissible departures from the sentencing guideline matrix.[29] Federal law prohibits judges from imposing prison terms that vary from the sentencing guideline matrix more than twenty-five percent or six months, whichever is greater.[30] Thus, offenders with similar criminal histories, convicted of the same crime under similar circumstances, will receive fairly uniform sentences.

A. *Establishing the Vertical Guideline Axis*

Section 1B1.1 of the Guidelines sets forth the steps used in establishing the vertical axis value, or offense level.[31] Establishing the offense level requires consideration of not only conduct constituting an element of the offense charged, but also the totality of the "relevant" criminal conduct.[32] As defined by section 1B1.3, "relevant conduct" includes all "acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the

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20. *See generally* U.S.S.G. Ch.1 (providing a mission statement and philosophical, historical, and other background information); Hoffman, *supra* note 12, at 388-90 (using a money laundering hypothetical to illustrate the application of the Guidelines).

21. U.S.S.G. Ch.5, Pt.A (Sentencing Table), *reprinted infra* app. 1.

22. U.S.S.G. Ch.1, Pt.A(4)(b), intro. comment. (p.s.). The Guidelines require the judge to impose a sentence within this range unless the court finds an aggravating or mitigating circumstance of a kind (or to a degree) not adequately considered by the Commission. *Id.*

23. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

24. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

25. U.S.S.G. Ch.5, Pt.A, comment. (n.1); *see supra* note 21.

26. U.S.S.G. § 1B1.1(a)-(e) (Application Guidelines); *see infra* notes 31-67 and accompanying text.

27. U.S.S.G. § 1B1.1(f); *see infra* notes 68-80 and accompanying text.

28. U.S.S.G. § 1B1.1(g); *see infra* notes 81-83 and accompanying text.

29. U.S.S.G. § 1B1.1(i); *see infra* notes 84-99 and accompanying text.

30. 28 U.S.C. § 994(b)(2) (1994); U.S.S.G. Ch.1, Pt.A(2), intro. comment.

31. U.S.S.G. § 1B1.1(a)-(e).

32. U.S.S.G. § 1B1.3 (Relevant Conduct) (listing "factors that determine the guideline range"); *see also* U.S.S.G. § 1B1.3, comment. (backg'd.) (explaining the difference between the breadth of information relevant in determining the guideline range and that relevant in determining the ultimate sentence under § 1B1.4).

offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" and any harm caused thereby.[33] The scope of "relevant conduct" in a "jointly undertaken criminal activity,"[34] for example, is very broad and includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."[35]

To establish the vertical guideline axis within this broad definitional parameter, judges must first locate the base offense level from the appropriate guideline in Chapter Two and apply any relevant offense-specific and nonoffense-specific adjustments.[36] A judge then gives these classifications numerical weight and applies them to the vertical grid axis.[37]

1. The Base Offense Level

Each statutorily defined federal offense corresponds to one of forty-three base offense levels.[38] To find the corresponding level for a specific offense, a judge must find the applicable "offense guideline section" from Chapter Two of the Guidelines using the Statutory Index in Appendix A.[39] The offense guideline section gives the base offense level for the offense.[40] For example, burglary, an offense covered by section 2B2.1, has a base offense level of seventeen if the offender burglarizes a residence but only twelve if the burglary involves a structure other than a residence.[41]

2. Offense-Specific Adjustments to the Base Offense Level

Each offense guideline section in Chapter Two may contain specific offense characteristics that adjust the base offense level upward or downward.[42] For example, the specific offense characteristics for burglary include: (1) an offender used "more than minimal planning" (two-level increase); (2) the loss exceeded $2,500 (one- to eight-level increase); (3) an offender stole a "firearm, destructive device, or controlled substance" (one-level increase); and (4)

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33. U.S.S.G. § 1B1.3(a)(1)-(2).

34. *See* U.S.S.G. § 1B1.3(a)(1)(B).

35. *Id.*; *see also* U.S.S.G. § 1B1.3, comment. (n.2(c)) (providing examples of "jointly undertaken" conduct for which an offender may be accountable).

36. *See* U.S.S.G. § 1B1.1(a)-(e) (Application Instructions); U.S.S.G. § 1B1.2(b) (Applicable Guidelines) (directing sentencing judge to consult § 1B1.3 when determining the applicable guideline range); *see also* U.S.S.G. § 1B1.1, comment. (n.1(l)) (including "relevant conduct," as defined in § 1B1.3 in the definition of "offense," unless otherwise stated or apparent from the context).

37. *See* U.S.S.G. § 1B1.1(g) (instructing sentencing judge on how to plot the vertical and horizontal axes on the matrix); U.S.S.G. Ch.5, Pt.A, comment. (n.1).

38. *See supra* note 21.

39. U.S.S.G. § 1B.1(a); *see* U.S.S.G. App. A. Each guideline section may cover multiple statutes, while a single statute may reference multiple guideline sections. U.S.S.G. App. A., intro. comment. The introductory commentary to the Statutory Index explains how to determine the correct guideline section when a statute corresponds to multiple guidelines. *Id.*

40. U.S.S.G. § 1B.1(a).

41. U.S.S.G. § 2B2.1(a). Specific adjustments for nominal loss value over $2500 vary from one to eight levels as the amount increases. U.S.S.G. § 2B2.1(b)(2).

42. U.S.S.G. § 1B1.2(b); *see also* U.S.S.G. § 1B1.2, comment. (nn.2-4) (directing a court to determine specific offense characteristics based on the offender's "relevant conduct," defined in § 1B1.3).

an offender possessed a dangerous weapon during the offense (two-level increase).[43]

3. Non-offense-Specific Adjustments to the Base Offense Level

Chapter Three describes non-offense-specific characteristics that may warrant upward or downward adjustments.[44] Part A prescribes victim-related adjustments for cases where the victim was especially vulnerable,[45] or had an official status,[46] where an offender physically restrained a victim,[47] or where an offense could constitute a hate crime.[48] Parts B and C contain adjustments for an offender's role in the offense.[49] The Guidelines increase the sentence if an offender had a significant role in an offense,[50] or abused a position of trust or used special skill.[51] If the offender was an "insignificant participant" in the offense, Part B directs the judge to reduce the offense level.[52] Part C provides sentencing enhancements for offenders who: (1) "willfully obstructed . . . or attempted to obstruct . . . the administration of justice during the investigation, prosecution, or sentencing of the . . . offense";[53] or (2) "recklessly create[d] a substantial [threat] of serious bodily injury to another person [while] fleeing from a law enforcement officer."[54]

For sentencing on multiple counts, the Commission created Chapter Three, Part D, which provides incremental sentence enhancements for "significant additional criminal conduct."[55] Section 3D1.1 outlines the requisite procedure for calculating a single combined offense level which encompasses multiple offenses committed by one offender.[56] The most serious offense determines

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43. U.S.S.G. § 2B2.1 Specific offense characteristics for nominal loss value include the following adjustments: (A) $2,500 or less, no increase; (B) more than $2,500, add 1 point; (C) more than $10,000, add 2 points; (D) more than $50,000, add 3 points; (E) more than $250,000, add 4 points; (F) more than $800,000, add 5 points; (G) more than $1,500,000, add 6 points; (H) more than $2,500,000, add 7 points; and (I) more than $5,000,000, add 8 points.

44. *See* U.S.S.G. Ch.3, Pt.A, intro. comment. (providing that section 3A.1 adjustments are nonoffense-specific and may apply to a wide variety of offenses); U.S.S.G. § 1B1.3(a) (declaring Chapter Three adjustments relevant in determining the guideline range).

45. U.S.S.G. § 3A1.1(b) (establishing a two-level enhancement for offenders who "knew or should have known that a victim . . . was unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct").

46. U.S.S.G. § 3A1.2 (providing for three-level enhancement for offenses against government officers or employees or their family members, and for offenses involving an assault on a law enforcement officer).

47. U.S.S.G. § 3A1.3 (providing for a two-level enhancement).

48. *See* U.S.S.G. § 3A1.1(a) (establishing a three-level enhancement for crimes motivated by the victim's actual or perceived class status).

49. U.S.S.G. Ch.3, Pt.B, intro. comment. (instructing a trial court to determine an offender's role on the basis of all relevant conduct within the scope of § 1B1.3).

50. U.S.S.G. § 3B1.1 (providing sentence enhancements for an offender's role as organizer or leader in crimes committed by multiple offenders).

51. U.S.S.G. § 3B1.3 (providing a two-level enhancement for offenders who abused a position of trust or used a special skill "in a manner that significantly facilitated the commission . . . of the offense").

52. U.S.S.G. § 3B1.2 (providing reductions for offenders who had a minimal or minor role in the offense).

53. U.S.S.G. § 3C1.1 (establishing a two-level enhancement).

54. U.S.S.G. § 3C1.2 (establishing a two-level enhancement).

55. U.S.S.G. Ch.3, Pt.D, intro. comment.

56. U.S.S.G. § 3D1.1 (instructing a sentencing judge to group closely related counts pursuant

the basis for establishing the base offense level,[57] and additional counts increase the offense level.[58]

Section 3D1.2 mandates "grouping" of offenses charged in multiple-count indictments when the offenses "involve substantially the same harm."[59] Section 3D1.3 treats "grouped" offenses as a single combined offense for determining the applicable sentencing range.[60] The range for each group will correspond either to the offense level of the most serious offense or to the range determined by the combined total of Chapter Two and Chapter Three adjustments for the "aggregate" criminal conduct for all offenses.[61] For example, under section (a), counts are "grouped" if they "involve the same victim and the same act or transaction."[62] Therefore, if a defendant kidnaps a victim and assaults the victim during the kidnapping, the counts of kidnapping and assault are grouped for sentencing purposes.[63]

A sentencing judge then makes a final adjustment to the offense level depending on the offender's acceptance of responsibility for the offense.[64] Section 3E1.1(a) provides a two-level sentence reduction for offenders who "clearly demonstrate acceptance of responsibility."[65] Section 3E1.1(b) provides an additional one-level reduction for offenders who also assist the authorities in the investigation or prosection.[66] Offenders qualify for these additional reductions either by providing timely notice of an intention to enter a guilty plea or by timely disclosure of all relevant information pertaining to their role in the offense.[67]

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to § 3D1.2 and then determine the offense level applicable to each group under § 3D1.3-.4).

57. U.S.S.G. Ch.3, Pt.D, intro. comment.

58. *Id.*

59. U.S.S.G. § 3D1.2. Counts involve substantially the same harm:

> When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm . . . .

Id.

60. U.S.S.G. § 3D1.3.

61. *See* U.S.S.G. § 3D1.3(a) (prescribing use of the count creating the highest offense level as the offense level for counts grouped under § 3D1.2(a)-(c)); U.S.S.G. § 3D1.3(b) (prescribing use of the offense level determined by the offender's behavior as a whole as the offense level for counts grouped under § 3D1.2(d)).

62. U.S.S.G. § 3D1.2(a).

63. U.S.S.G. § 3D1.2, comment. (n.3(1)).

64. U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

65. U.S.S.G. § 3E1.1(a). Examples of an offender demonstrating acceptance of responsibility include: "truthfully admitting" the crime; "voluntary payment of restitution" before trial; prompt and "voluntary surrender to authorities"; "voluntary assistance to authorities" in recovering contraband; "voluntary resignation from the office or position held during the commission of the offense"; and "post-offense rehabilitative efforts." U.S.S.G. § 3E1.1, comment. (n.1).

66. U.S.S.G. § 3E1.1(b).

67. *Id.*

B. *Establishing the Horizontal Guideline Axis*

Section 4A1.1 of Chapter Four ("Criminal History and Criminal Livelihood") provides instructions on determining the offender's criminal history category.[68] An offender receives points for each prior sentence.[69] The longer the sentence, the more points a defendant receives.[70] Generally, a defendant receives three points for each prior sentence of more than thirteen months; two points for each sentence between sixty days and thirteen months; and one point for all other prior sentences.[71] A judge calculates the criminal history category by identifying an offender's prior sentences, assigning each a numerical value, and totalling the values.[72] Factors that affect the weight given to each prior sentence in computing the total include: the defendant's age at sentencing;[73] the type of crime;[74] the similarity of the past crime to the current crime;[75] whether the offender is a career offender;[76] whether the offender is an armed career offender;[77] and whether the offender "committed an offense as part of a pattern of criminal conduct engaged in as a livelihood."[78] After totalling the points to determine the proper criminal history category,[79] a judge may further enhance the sentence if the offender committed the instant offense during the period of a prior sentence, during an escape, or within two years of release from incarceration.[80]

C. *Plotting the Vertical and Horizontal Axis Lines on the Sentencing Matrix*

A sentencing judge applies the sentencing matrix to calculate the appropriate guideline range.[81] The intersection of the offense level on the vertical axis and the criminal history category on the horizontal axis identifies the applicable sentencing range in "months of imprisonment."[82] For certain categories of offenses and offenders, Chapter Five of the Guidelines permits the court to

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68. U.S.S.G. § 4A1.1.
69. *See id.*
70. *See id.*
71. *See id.* The Guidelines exclude or limit certain prior convictions from a trial court's sentencing determination, for example: "sentence[s] imposed more than ten years prior to the defendant's commencement of the instant offense" and "adult or juvenile sentence[s] imposed for an offense committed prior to the defendant's eighteenth birthday" occurring five years prior to the defendant's commencement of the instant offense. U.S.S.G. § 4A1.1, comment. (nn.1-3); U.S.S.G. § 4A1.2(d)-(e). *See generally* U.S.S.G. § 4A1.2 (instructing the trial judge on how to compute criminal history).
72. U.S.S.G. § 4A1.1, comment; U.S.S.G. Ch.5, Pt.A, comment. (n.3). Ranges for the six criminal history categories are as follows: category I, 0-1 points; category II, 2-3 points; category III, 4-6 points; category IV, 7-9 points; category V, 10-12 points; and category VI, 13 or more points. *See* U.S.S.G. Ch.5, Pt.A (Sentencing Table), *reprinted infra* app. 1.
73. *See* U.S.S.G. § 4A1.2(d).
74. *See* U.S.S.G. § 4A1.2(b).
75. U.S.S.G. § 4A1.1, comment. (backg'd) (n.6).
76. *See* U.S.S.G. § 4B1.1.
77. *See* U.S.S.G. § 4B1.4.
78. *See* U.S.S.G. § 4B1.3.
79. *Id.*
80. U.S.S.G. § 4A1.1(d)-(e).
81. *See* U.S.S.G. § 1B1.1(f)-(g).
82. U.S.S.G. Ch.5, Pt.A, comment. (n.1).

impose either imprisonment, probation, restitution, or some other sanction or combination of sanctions.[83]

D. *Determining Applicable Departures from the Sentencing Guideline Matrix*

Section 5K2.0 permits departures from the presumptive range in exceptional circumstances.[84] The Guidelines authorize departures only if a judge finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[85] To decide whether the Commission adequately considered a circumstance, a judge must rely entirely on "the sentencing Guidelines, policy statements, and official commentary of the Commission."[86] Chapter 5, Part K, identifies several factors the Commission expressly identified as grounds for departure from the Guidelines, including: a defendant's "unusually heinous, cruel or brutal conduct" toward the victim;[87] an offender's substantial assistance in the prosecution of others;[88] an offender who created or threatened the harm that the criminal statute sought to prevent;[89] and highly provocative behavior by a victim.[90]

Part H further delineates a list of "specific offender characteristics" which may justify a departure from the Guidelines' prescribed sentencing range.[91] Specific offender characteristics include an offender's advanced age[92] or "extraordinary physical impairment."[93] The Commission warned, however, that these characteristics are rarely relevant in establishing a sentence outside the applicable guideline range.[94] Moreover, the Guidelines expressly prevent a sentencing judge from considering the offender's "race, sex, national origin, creed, religion, socioeconomic status,"[95] or "disadvantaged upbringing."[96]

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83. U.S.S.G. § 1B1.1(h) (instructing sentencing court to consider the sentencing options delineated in Chapter Five, Parts B through G); *see* U.S.S.G. §§ 5B1.1, 5D1.1, 5E1.1, 5F1.1 (listing, respectively, circumstances in which a court can impose probation, supervised release, restitution, and other "sentencing options").

84. U.S.S.G. § 5K2.0, p.s. (Grounds for Departure).

85. *Id.* (quoting 18 U.S.C. § 3553(b) (1994)).

86. 18 U.S.C. § 3553(b) (1994).

87. U.S.S.G. § 5K2.8, p.s.

88. U.S.S.G. § 5K1.1, p.s.

89. U.S.S.G. § 5D2.11, p.s.

90. U.S.S.G. § 5K2.10. Other bases for a sentencing departure include: refusal to assist authorities, § 5K1.2, p.s.; abduction or restraint of a victim, § 5K2.4, p.s.; use of weapons or dangerous instrumentalities, § 5K2.6, p.s.; disruption of a governmental function, § 5K2.7, p.s.; concealment of a prior offense by committing an additional offense, § 5K2.9, p.s.; commission of the offense under coercion or duress, § 5K2.12, p.s.; diminished mental capacity, § 5K2.13, p.s.; commission of the offense posed a "significant" risk to public health or welfare, § 5K2.14, p.s.; voluntary admission and disclosure of the offense to authorities, § 5K2.16, p.s.; or the offense resulted in death, § 5K2.1, p.s., serious bodily injury, § 5K2.2, p.s., extreme psychological injury, § 5K2.3, p.s., or extreme property loss, § 5K2.5, p.s.

91. *See* U.S.S.G. § 5H1.1-.11, p.s. (providing policy statements outlining 11 "specific offender characteristics" that may justify a departure from the prescribed guideline range).

92. U.S.S.G. § 5H1.1, p.s. (justifying a sentence departure when an offender is "elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration").

93. U.S.S.G. § 5H1.4, p.s.

94. U.S.S.G. Ch.5, Pt.H, intro. comment.

95. U.S.S.G. § 5H1.10, p.s.

The Guidelines do not authorize any departure in the absence of sufficiently "atypical circumstances or characteristics" that warrant divergence from the required sentencing range.[97] The Sentencing Commission, while not foreclosing the possibility of an atypical circumstance, specifically stated that such circumstances are "extremely rare."[98] A judge's dissatisfaction with the mandatory sentencing range or preference for an unauthorized sentence are inappropriate bases for departing from the Guidelines.[99]

III. DECISIONS LIMITING THE SCOPE OF CONDUCT REVIEWABLE IN MAKING SENTENCING DETERMINATIONS

A. United States v. Warner[100]

1. Facts

Warner received a sentence for unlawful machine gun possession.[101] During the initial sentencing, the trial court improperly allowed a downward departure under the "sporting and collection" exception in section 2K2.1(b)(2).[102] The Tenth Circuit vacated the sentence and remanded for de novo resentencing.[103] On resentencing, the trial court allowed a section 5K2.0 downward departure.[104] The trial court justified the downward departure, in part, because the defendant had already successfully completed a rehabilitation program and a six-month period of home confinement.[105]

2. Decision

The Tenth Circuit reversed the district court's resentencing determination, concluding that it was impermissible to consider evidence of conduct occurring after initial sentencing.[106] Instead, in making de novo resentencing determinations, the trial court may consider only those factors arising out of evidence that the court could have heard at the original sentencing hearing.[107]

In *Warner*, the government asked the court to extend the Fourth and Ninth Circuits' rationales in *United States v. Apple*[108] and *United States v. Gomez-Padilla*,[109] which held that trial courts cannot consider post-sentencing

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96. U.S.S.G. § 5H1.12, p.s.
97. U.S.S.G. § 5K2.0, comment.
98. *Id.*
99. *Id.*
100. 43 F.3d 1335 (10th Cir. 1994).
101. *Warner*, 43 F.3d at 1336; *see* 18 U.S.C. § 922(o) (1994).
102. *Warner*, 43 F.3d at 1340; *see* U.S.S.G. § 2K2.1(b)(2).
103. *Warner*, 43 F.3d at 1336.
104. *Id.* Section 5K2.0 permits departures in exceptional circumstances. *See supra* text accompanying notes 84-96 (discussing § 5K2.0).
105. *Warner*, 43 F.3d at 1336-37. The court also believed that the "unshootable" collectable nature of the gun qualified the defendant for the "lesser harms" departure in § 5K2.11. *Id.*
106. *Id.* at 1336-37, 1340.
107. *Id.* at 1340.
108. 962 F.2d 335 (4th Cir. 1992).
109. 972 F.2d 284 (9th Cir. 1992); *see Warner*, 43 F.3d at 1340 (distinguishing *Apple* and *Gomez-Padilla*).

conduct upon a limited remand for resentencing.[110] The *Warner* court distinguished *Apple* and *Gomez-Padilla* because those cases did not involve fully de novo resentencing.[111]

B. United States v. Gacnik[112]

1. Facts

Three defendants pleaded guilty to conspiring to manufacture explosive materials without a license.[113] Defendants Gade and Sandoval manufactured aluminum flash powder, and then sold the volatile explosive to juveniles.[114]

Gade was in custody for an unrelated charge when law enforcement officials received information that he was manufacturing explosives.[115] The officers obtained a search warrant and returned to Gade's residence to search for the explosives.[116] Meanwhile, unaware of the impending search, defendants Sandoval and Gacnik had concealed the explosive materials.[117] As a result, the district court enhanced Gacnik's conspiracy offense level by two points for obstructing the investigation, pursuant to section 3C1.1.[118]

2. Decision

The Tenth Circuit overturned the trial court's decision to apply section 3C1.1 by looking to the section's plain language. Section 3C1.1 articulates a two-part "nexus requirement": the obstructive conduct must "relate to the offense of conviction" and occur during the investigation.[119] The Tenth Circuit concluded that "obstructive conduct undertaken prior to the investigation . . . [or] prior to any indication of an impending investigation . . . does not fulfill this nexus requirement."[120]

The court expressly disagreed with the Eighth Circuit's holding in *United States v. Dortch*,[121] which read section 3C1.1 more broadly.[122] The Eighth Circuit reasoned that the "offense of conviction may not be what initially attracts police attention," and that an act intended to conceal the "instant offense," even when the offender is aware only of an investigation into another offense, meets section 3C1.1 requirements.[123]

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110. *Warner*, 43 F.3d at 1339; *Gomez-Padilla*, 972 F.2d at 285-86; *Apple*, 962 F.2d at 336.
111. *Warner*, 43 F.3d at 1340.
112. 50 F.3d 848 (10th Cir. 1995).
113. *Gacnik*, 50 F.3d at 850; *see* 18 U.S.C. § 371 (1994).
114. *Gacnik*, 50 F.3d at 851.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*; *see* U.S.S.G. § 3C1.1 (mandating that "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede the administration of justice during the investigation, prosecution, or sentencing of the instant offense," a judge must "increase the offense level by two levels").
119. *Gacnik*, 50 F.3d at 852.
120. *Id.*
121. 923 F.2d 629 (8th Cir. 1991).
122. *Gacnik*, 50 F.3d at 852; *see Dortch*, 923 F.2d at 632.
123. *Gacnik*, 50 F.3d at 852; *see Dortch*, 923 F.2d at 632.

According to the Tenth Circuit, the Eight Circuit overlooked the plain language of section 3C1.1 which provides a sentence enhancement for "willful" obstructive conduct pertaining to "the investigation . . . of the instant offense."[124] Obstructing an investigation into an unrelated offense does not sufficiently relate to the "instant offense" and therefore does not warrant a section 3C1.1 sentencing enhancement.[125] The record must demonstrate that the offender possessed actual knowledge of a possible investigation into the instant offense to fulfill the section 3C1.1 nexus requirement.[126]

C. *Analysis*

The requirement of proof of actual knowledge presents a difficult standard for prosecutors. Moreover, facilitating investigations into criminal conduct and the subsequent apprehension of the offender appear to be the underlying purposes of section 3C1.1. Obstructive conduct not motivated by knowledge of a pending investigation will thwart investigative efforts just as obstructive conduct initiated by an offender's knowledge of the investigation.[127]

Cumulatively, *Warner* and *Gacnik* clarify the parameters for the types of conduct a sentencing court may examine in making sentencing determinations. Post-sentencing rehabilitative conduct no longer justifies a reduced sentence. This outcome removes an incentive for an offender subject to de novo resentencing to engage in post-sentencing rehabilitative conduct. Despite this probable outcome, the Tenth Circuit's decision in *Warner* is consistent with decisions of the Fourth Circuit[128] and the Eighth Circuit.[129]

IV. DECISIONS APPLYING SENTENCE ENHANCEMENTS IN SECTIONS 3B1.3[130] AND 2T1.1(B)(2)[131]

A. United States v. Gandy[132]

1. Facts

Gandy, a licensed podiatrist, pleaded guilty to falsifying health insurance claims.[133] The trial court applied a two-level sentence enhancement under section 3B1.3 because Gandy used his special skill as a podiatrist to falsify

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124. *Gacnik*, 50 F.3d at 852 (citing U.S.S.G. § 3C1.1).
125. *Id.*
126. *Id.*
127. The author acknowledges, however, that some could argue that "willful" requires knowledge that the conduct will thwart any potential effort to investigate the offender's crime, but not that the offender actually knew that the investigation has been initiated.
128. United States v. Bell, 5 F.3d 64, 67 (4th Cir. 1993).
129. United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992).
130. U.S.S.G. § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).
131. U.S.S.G. 2T1.1(b)(2) (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) ("If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.").
132. 36 F.3d 912 (10th Cir. 1994).
133. *Gandy*, 36 F.3d at 913; *see* 18 U.S.C. § 1001 (1994).

Medicare forms for various reimbursable procedures he did not perform.[134] Gandy appealed the enhancement.[135]

2. Decision

The Tenth Circuit applied a two-part test to determine the applicability of the special skill enhancement under section 3B1.3. The offender must "possess a special skill," and must actually employ the special skill to "significantly facilitate the commission or concealment of his offense."[136] The court noted that the commentary to section 3B1.3 defines "special skill" as "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing."[137] Additionally, the section lists physicians among its examples of persons with special skill along with "pilots, lawyers, . . . accountants, chemists, and demolition experts."[138] Gandy did not dispute that his podiatry license qualified as a "special skill," so the first part of the test was undisputed.[139] However, section 3B1.3 also requires that the offender use that special skill to "significantly facilitate the commission or concealment of the offense."[140]

Because the Guidelines fail to define "facilitate," the Tenth Circuit relied upon the common definition of the word: to "make easier."[141] The Tenth Circuit found that the trial court failed to adequately determine whether Gandy actually employed his skill as a podiatrist to make the crime of Medicare fraud easier.[142] The trial court therefore had an insufficient factual basis to justify an enhancement under section 3B1.3.[143]

B. United States v. Rice[144]

1. Facts

Rice, a certified public accountant, was convicted of making false claims for income tax refunds and filing false income tax returns.[145] Rice used various Subchapter S corporations in order to facilitate a "complicated scheme of

134. *Gandy*, 36 F.3d at 913. Section 3B1.3 provides in part:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

U.S.S.G. § 3B1.3.

135. *Gandy*, 36 F.3d at 914.

136. *Id.* at 915.

137. *Id.* at 914 (quoting U.S.S.G. § 3B1.3, comment. (n.2)).

138. *Id.* (quoting U.S.S.G. § 3B1.3, comment. (n.2)).

139. *Id.* at 915.

140. *Id.*

141. *Id.* at 914 (citing *United States v. Young*, 932 F.2d 1510, 1513 (D.C. Cir. 1991)). The D.C. Circuit adopted its definition from WEBSTER'S NEW COLLEGIATE DICTIONARY 410 (5th ed. 1977). *Young*, 932 F.2d at 1513.

142. *Gandy*, 36 F.3d at 915.

143. *Id.*

144. 52 F.3d 843 (10th Cir. 1995).

145. *Rice*, 52 F.3d at 844; *see* 18 U.S.C. § 287 (1994); 26 U.S.C. § 7206(1) (1994).

tax fraud."[146] The trial court calculated Rice's sentence using both section 2T1.1 (Tax Evasion) and section 2F1.1 (Fraud or Deceit), and each calculation resulted in the same total adjusted offense level.[147] The total adjusted offense level included enhancements under three guideline provisions: section 3B1.3,[148] providing an enhancement for use of a "special skill"; section 2T1.1(b)(2),[149] providing an enhancement for using "sophisticated means" in tax evasion crimes; and section 2F1.1(b)(2)(A),[150] providing an enhancement where the defendant used "more than minimal planning" in committing fraud.[151]

2. Decision

Relying on the two-part test established in *Gandy*,[152] the Tenth Circuit affirmed the district court's application of section 3B1.3 for the defendant's use of a special skill.[153] Rice's status as an accountant satisfied step one of the *Gandy* inquiry, since the Commission specifically listed accountants as persons possessing a special skill.[154] As for the second step, the trial court failed to make specific factual findings regarding how Rice used his certified public accounting skills to facilitate tax evasion.[155] Nonetheless, the Tenth Circuit concluded that the record, taken as a whole, demonstrated that Rice's actions satisfied the second step of the *Gandy* inquiry.[156]

The Tenth Circuit then examined the applicability of the sophisticated means enhancement. The commentary to section 2T1.1(b)(2) defines "sophisticated means" as "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case."[157] Because the Tenth Circuit found that Rice's fraud was the "functional equivalent" of simply claiming excessive itemized deductions, the court held that the tax evasion scheme did not constitute "sophisticated means."[158] To categorize this conduct as sophisticated, the court reasoned, would require sentencing courts to apply section 2T1.1(b)(2) to virtually every fraudulent tax return scheme.[159] The Tenth Circuit determined that the Guidelines did not contemplate this result.[160]

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146. *Rice*, 52 F.3d at 844.
147. *Id.*
148. *See* U.S.S.G. § 3B1.3.
149. *See* U.S.S.G. § 2T1.1(b)(2).
150. *See* U.S.S.G. § 2F1.1(b)(2)(A).
151. *Rice*, 52 F.3d 848-50. For a general discussion on sentencing guidelines for multiple counts, see *supra* notes 55-63 and accompanying text.
152. For a discussion of the two-prong test set forth in *Gandy*, see *supra* text accompanying note 136.
153. *Rice*, 52 F.3d at 850.
154. *Id.* (citing U.S.S.G. § 3B1.3, comment. (n.2)).
155. *Id.*
156. *Id.*
157. *Id.* at 849; *see* U.S.S.G. § 2T1.1, comment. (n.4).
158. *Rice*, 52 F.3d at 849. The court relied on examples in the commentary to § 2T1.1 suggesting that a proper "sophisticated means" enhancement requires a level of sophistication associated with the utilization of offshore bank accounts or transactions through corporate shells for tax-evasion purposes. *Id.*; *see* U.S.S.G. § 2T1.1, comment. (n.4).
159. *Rice*, 52 F.3d at 849.
160. *Id.*

Finally, the Tenth Circuit analyzed whether the district court's application of the special skill enhancement, along with either the "sophisticated means" or "more than minimal planning" enhancements, constituted "impermissible double counting."[161] The court concluded that each provision served a distinct purpose.[162] Criminals who use their special talents to commit even the simplest of crimes deserve an upward adjustment under the special skill enhancement.[163] In contrast, the "sophisticated means" and "more than minimal planning" enhancements are intended to punish offenders who use complex criminal schemes.[164] Therefore, the simultaneous application of the special skill enhancement along with one of the other two enhancements did not constitute impermissible double counting.[165]

C. *Analysis*

The Tenth Circuit's determination that the sophisticated means enhancement and the special skills enhancement did not constitute impermissible double counting is somewhat problematic. An offender who engages in a sophisticated criminal scheme most likely possesses a special skill acquired through specialized education, experience, or self-teaching. An expansive interpretation of "special skill" would encompass the common burglar who through experience and self-teaching acquired a particular skill for breaking and entering. While the Tenth Circuit's adoption of such an expansive view is unlikely, the *Gandy* decision supports this conclusion.

V. DECISIONS IMPOSING A CONCURRENT SENTENCE ON A DEFENDANT SUBJECT TO GUIDELINE SECTIONS 5G1.3(B)[166] AND 5G1.3(C)[167]

A. United States v. Johnson[168]

1. Facts

Oklahoma officials arrested Johnson for driving a stolen vehicle.[169] While confined in county jail, Johnson and another prisoner escaped and were recaptured.[170] Johnson pleaded guilty to operating a stolen vehicle and eight

161. *Id.* at 850. The court had defined "impermissible double counting" as using the same conduct to support separate sentencing enhancements having identical purposes. *Id.* at 850-51 (citing United States v. Flinn, 18 F.3d 826, 829 (10th Cir. 1994)).

162. *Id.* at 851.

163. *Id.*; *see* U.S.S.G. § 3B1.3, comment. (backg'd.).

164. *Rice*, 52 F.3d at 851; *see, e.g.*, U.S.S.G. § 2T1.1, comment. (n.4).

165. *Rice*, 52 F.3d at 851.

166. U.S.S.G. § 5G1.3(b).

167. U.S.S.G. § 5G1.3(c), p.s. (providing that in cases not covered by subsections (a) and (b), "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense").

168. 40 F.3d 1079 (10th Cir. 1994).

169. *Johnson*, 40 F.3d at 1080. The escapees fired a volley of gunshots and tossed numerous incendiary devices at state officials during their escape. *Id.*

170. *Id.*

escape-related state law violations.[171] He received various state sentences and the trial court ordered the sentences to run concurrently.[172] Johnson also pleaded guilty to two federal law violations,[173] and the trial court ordered the federal sentence to begin upon completion of the state sentence.[174]

2. Decision

The Tenth Circuit noted that section 5G1.3(b) limits the court's traditionally broad discretion in sentencing defendants.[175] When the offense in question is committed during a term of imprisonment, subsection (a) requires consecutive sentencing.[176] Conversely, subsection (b) requires a concurrent sentence when subsection (a) does not apply and the court fully considers the conduct underlying the undischarged term of imprisonment.[177]

Johnson argued that because the presentence report fully detailed the conduct underlying the undischarged state-related escape sentence, section 5G1.3(b) required the district court to impose a concurrent sentence.[178] The Tenth Circuit rejected this argument and concluded that section 5G1.3(b) applies when an offender is prosecuted in both state and federal court for the same criminal conduct or for different criminal transactions that constitute part of the same course of conduct.[179]

The other issue examined by the Tenth Circuit in *Johnson* involved the trial court's departure from the methodology for applying section 5G1.3(c).[180] The commentary to section 5G1.3(c) instructs the trial court to establish the total punishment for all the prior and instant offenses as if section 5G1.2 (Sentencing on Multiple Counts of Conviction) applied.[181] Thus, the court should calculate a reasonable incremental sentence for the instant

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1082.
175. U.S.S.G. § 5G1.3(b). This subsection provides:

> If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

Id.
176. U.S.S.G. § 5G1.3(a).
177. U.S.S.G. § 5G1.3(b).
178. *Johnson*, 40 F.3d at 1082-83.
179. U.S.S.G. § 5G1.3, comment. (n.2).
180. *Johnson*, 40 F.3d at 1083-84. Subsection (c) permits the trial imposition of a concurrent, partially concurrent, or consecutive sentence prior to the undischarged term of imprisonment "[t]o the extent necessary to achieve a reasonable incremental punishment for the offense." U.S.S.G. § 5G1.3(c).
181. *Johnson*, 40 F.3d at 1083. Application note (3) states:

> To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under § 5G1.2 . . . had all the offenses been federal offenses for which sentences were being imposed at the same time.

U.S.S.G. § 5G1.3, comment. (n.3).

offense.[182] This should result in a combined sentence that approximates the total punishment in accordance with section 5G1.2 had all offenses been federal offenses.[183] Following the Eighth Circuit's reasoning in *United States v. Haney*,[184] the Tenth Circuit in *Johnson* relied upon the methodology in the commentary to section 5G1.3(c) to interpret and explain how courts should apply this provision.[185]

The Tenth Circuit determined that although the trial court should consider subsection (c) in imposing a sentence, a court may depart from the methodology.[186] The Commission itself recognized that sometimes the comprehensive application of subsection (c) would be "impracticable."[187] Certain factors, such as insufficient information about prior offenses, warrant a sentencing court's discretion. [188] In such circumstances, a trial court may employ a simpler sentencing determination method that constitutes the "functional equivalent of more complex computations."[189] In other words, the court may make rough estimates.

A trial court departing from the analysis required by section 5G1.3(c), however, must state its reasons for doing so."[190] In *Johnson*, the Tenth Circuit found that the trial court impermissibly departed from the methodology of section 5G1.3(c) and failed to justify such a departure.[191]

B. United States v. Yates[192]

1. Facts

Charles Yates pleaded guilty to abusive sexual contact with a minor on an Indian Reservation.[193] The trial court sentenced Yates to seven years of confinement with an additional three-year period of supervised release.[194] Yates appealed the sentence, and the Tenth Circuit remanded for resentencing.[195] While the resentencing was pending, Yates received an eighteen-year state court sentence for two counts of criminal sexual penetration and one count of kidnapping.[196]

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182. *Johnson*, 40 F.3d at 1083.
183. *Id.*
184. 23 F.3d 1413 (8th Cir.), *cert. denied*, 115 S. Ct. 253 (1994).
185. *Johnson*, 40 F.3d at 1083. This determination is also consistent with the Sixth Circuit's holding in United States v. Coleman, 15 F.3d 610 (6th Cir. 1994) (holding that a trial court should employ the methodology set forth in the commentary of U.S.S.G. § 5G1.3(c) to determine whether a consecutive sentence results in a reasonable incremental punishment).
186. *Johnson*, 40 F.3d at 1084.
187. *Id.; see* U.S.S.G. § 5G1.3, comment. (n.3) (providing a list of factors for courts to consider in order to "achieve a reasonable punishment").
188. *Johnson*, 40 F.3d at 1084.
189. *Id.*
190. *Id.*
191. *Id.*
192. 58 F.3d 542 (10th Cir. 1995).
193. *Yates*, 58 F.3d at 543.
194. *Id.*
195. *Id.*
196. *Id.*

On resentencing the trial court applied section 5G1.3(c) and ordered the federal sentence to run consecutively with the state term of imprisonment, amounting to a total of twenty-five years of imprisonment.[197] Yates appealed on the grounds that the section 5G1.3 application methodology provides for a seventeen to twenty-one year total combined sentence for the analogous federal offense levels under section 2A1.3.[198]

Yates asserted that since the eighteen-year state sentence fell within this sentencing range, an additional seven years of consecutive imprisonment was unnecessary for a reasonable incremental punishment under section 5G1.3(c).[199] The trial court determined that Yates did not qualify for a concurrent sentence under section 5G1.3(c).[200] Assuming good time credits, the court reasoned, Yates would effectively serve a only nine to twelve years of state imprisonment, rendering his total combined sentence to approximately twenty-two years in length.[201]

2. Decision

The Tenth Circuit held that in applying section 5G1.3(c), courts may consider the actual term of a state sentence rather than the nominal state sentence.[202] This is only permissible, however, if a trial court can reliably determine the real or effective term of state imprisonment.[203] A sentencing judge must make a factual determination on the basis of the available evidence and provide rational explanations for that determination.[204] In *Yates*, the record did not support the trial court's assumption that the real or effective term of the defendant's sentence would constitute only twelve years.[205] The Tenth Circuit noted that application note three in the Guidelines indicates that a lack of information concerning an offender's prior state offense prevents an accurate estimate of the total sentence required by the Guidelines.[206] Therefore, the Tenth Circuit vacated the sentencing decision and remanded the matter for resentencing.[207]

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197. *Id.* Section 5G1.3(c) mandates that a trial court impose a consecutive sentence for the instant offense prior to the undischarged term of imprisonment to the "extent necessary to achieve a reasonable incremental punishment for the instant offense." U.S.S.G. § 5G1.3(c), p.s. If the trial court can achieve a reasonable incremental punishment by imposing a concurrent sentence with the remainder of an unexpired term of imprisonment, a consecutive sentence is not warranted. *See* U.S.S.G. § 5G1.3(c), p.s. (permitting concurrent, partially concurrent, or consecutive sentences to achieve "reasonable incremental punishment").

198. *Yates*, 58 F.3d at 544.

199. *Id.*

200. *Id.*

201. *Id.* at 546-47.

202. *Id.* at 548-49.

203. *Id.*

204. *Id.* at 549.

205. *Id.*

206. *Id.* at 544; U.S.S.G. § 5G1.3(c), comment. (n.3); *see also* United States v. Hunter, 993 F.2d 127, 131 (6th Cir. 1993) (Ryan, J., concurring) (setting forth examples when application of the methodology is impracticable and stating that a trial court should calculate an offender's sentence under section 5G1.3(c) only to the "extent practicable" and in a manner that does not "unduly complicate or prolong the sentencing process").

207. *Yates*, 58 F.3d at 550.

C. *Analysis*

In establishing the section 5G1.3(c) methodology, the Sentencing Commission anticipated the complexity of applying this provision.[208] This complexity, however, does not justify a trial court's refusal to consider subsection (c)'s methodological implications.[209]

The *Yates* and *Johnson* decisions exemplify not only the complexity and arbitrariness of applying section 5G1.3(a)-(c), but also the Tenth Circuit's reliance on the commentary to the Guidelines and the underlying congressional goals. The Tenth Circuit also relied heavily on other circuits to verify the accuracy of their sentencing guideline interpretations.

In *Yates*, the Tenth Circuit required the trial court to determine reasonable incremental punishment based on a preponderance of the evidence.[210] The Tenth Circuit reiterated the holding of the Eighth Circuit in *United States v. Brewer*,[211] that a trial court must make more than a mere educated guess in determining the "likely" real or effective term of imprisonment.[212] The trial court must determine the reasonableness of the incremental punishment pursuant to section 5G1.3(c) upon establishing the real or effective sentence.[213] While no specific criteria exist for making this determination, the trial court must state its findings and explain its rationale for determining the reasonableness of the incremental punishment.[214]

VI. DECISIONS ADDRESSING WHETHER THE APPLICATION OF GUIDELINE SECTIONS 2J1.7[215] AND 2K2.4[216] REQUIRE THE SENTENCING COURT TO IMPOSE ENHANCED SENTENCES CONSECUTIVELY TO A STATE IMPRISONMENT TERM

A. United States v. McCary[217]

1. Facts

An Oklahoma state court sentenced Tommy McCary to 211 months for possession of and intent to distribute methamphetamine.[218] McCary also received a forty-six month federal sentence for possession of a firearm while a

208. U.S.S.G. § 5G1.3, comment. (n.5).
209. *Id.*
210. *Yates*, 58 F.3d at 549.
211. 23 F.3d 1317 (8th Cir. 1994).
212. *Brewer*, 23 F.3d at 1319.
213. U.S.S.G. § 5G1.3.
214. *Id.*
215. U.S.S.G. § 2J1.7 (Commission of Offense While on Release) ("If an enhancement under 18 U.S.C. § 3147 applies, add three levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline . . . ."). *Id.*
216. U.S.S.G. § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) ("In each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment."). *Id.*
217. 58 F.3d 521 (10th Cir. 1995).
218. *McCary*, 58 F.3d at 522.

fugitive of justice,[219] and for knowing possession of a stolen vehicle that had crossed state lines.[220]

On remand, the trial court imposed a seventeen-month enhancement pursuant to section 2J1.7, which applies 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release).[221] The trial court ordered the enhancement to run consecutively with the federal charges and concurrently with the 211-month state court sentence.[222]

2. Decision

The Tenth Circuit vacated the trial court's sentencing decision and remanded the matter for resentencing.[223] Section 3147 requires trial courts to impose an additional sentence of not more than ten years upon a person convicted of an offense while released on another federal charge.[224] The application notes of section 2J1.7 clarify that § 3147 mandates imprisonment in addition to the sentence for the underlying offense.[225] The notes also require that the additional sentence "run consecutively to any other sentence of imprisonment."[226]

The Tenth Circuit held that the phrase "any other sentence of imprisonment" clearly encompasses the state court sentence.[227] The trial court therefore erred in failing to order the § 3147 enhancement to run consecutively to the 211-month state court sentence.[228]

The Tenth Circuit's plain language interpretation is consistent with the holdings of the Eighth Circuit in *United States v. Lincoln*[229] and the Ninth Circuit in *United States v. Galliano*.[230] In *United States v. Wilson*,[231] the Seventh Circuit also held that a trial court must impose a § 3147 enhancement consecutively to a state sentence.[232]

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219. 18 U.S.C. § 922(g)(2) (1994).
220. 18 U.S.C. § 2313(a) (1994).
221. *McCary*, 58 F.3d at 522.
222. *Id.*
223. *Id.* at 525.
224. 18 U.S.C. § 3147(1) (1994).
225. U.S.S.G. § 2J1.7, comment. (n.2) ("Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment.").
226. *Id.*
227. *McCary*, 58 F.3d at 524.
228. *Id.*
229. 956 F.2d 1465, 1473-74 & n.8 (8th Cir.) (holding that pursuant to 18 U.S.C. § 3147 (1988), an offender may not serve a term of such an enhancement concurrently to any other term of imprisonment), *cert. denied*, 506 U.S. 891 (1992).
230. 977 F.2d 1350, 1351 (9th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993).
231. 966 F.2d 243 (7th Cir. 1992).
232. *Wilson*, 966 F.2d at 248.

B. United States v. Gonzales[233]

1. Facts

Defendants Gonzales, Perez, Hernandez-Diaz, and Leon all received sentences ranging from 120 to 147 months for various drug charges, including the "use of a firearm during a drug trafficking offense" pursuant to 18 U.S.C. § 924(c)(1).[234] Each offender also received state sentences stemming from the same incidents.[235] For each offender, the trial court imposed a five-year sentence enhancement under section 2K2.4, which in turn applies 18 U.S.C. § 924(c)(1).[236] The enhanced sentences were to run consecutively with both the federal and state sentences.[237] The defendants, except Leon, appealed, charging that the trial court erred in ordering the federal sentence under § 924(c) to run consecutively with the state offenses.[238]

A provision in § 924(c) requires the imposition of an additional five-year consecutive sentence for persons possessing a firearm "during a crime of violence or a drug trafficking offense."[239] The application notes of section 2K2.4 provide that under § 924(c)(1), a trial court must impose the additional term of imprisonment consecutively to "any other term of imprisonment."[240]

2. Decision

The Tenth Circuit reversed the trial court, although it noted that the trial court's decision was consistent with every circuit that previously had considered the issue.[241] The Tenth Circuit recognized two possible interpretations for the phrase "any other term of imprisonment."[242] The literal interpretation of the phrase encompasses both federal and state sentences.[243] Alternatively, a court could read the phrase to apply only to federal sentences, excluding any consideration of state imposed sentences in applying 18 U.S.C. § 924(c).[244]

Adopting the latter view, the *Gonzales* court relied upon the stated congressional purpose of § 924(c).[245] The *Gonzales* court stated that an offender initially sentenced in state court and serving the state court sentence cannot possibly serve a subsequently imposed federal sentence under § 924(c) prior to the preexisting state sentence.[246]

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233. 65 F.3d 814 (10th Cir. 1995).
234. *Gonzales*, 65 F.3d at 817.
235. *Id.*
236. *Id.* For the text of § 2K2.4, comment. (n.1), see *supra* note 216.
237. *Gonzales*, 65 F.3d at 817.
238. *Id.*
239. *Id.* at 820.
240. U.S.S.G. § 2K2.4, comment. (n.1).
241. *Gonzales*, 65 F.3d at 819.
242. *Id.* at 820.
243. *Id.*
244. *Id.*
245. *Id.*; *see also* S. REP. NO. 225, 98th Cong., 2d Sess. 313-14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 (including a Senate report that reads in part that a defendant must serve the additional sentence prior to the beginning of the sentence for any other offense).
246. *Gonzales*, 65 F.3d at 820. It is implausible to suggest that an offender can serve a federal sentence slated to begin prior to a previously existent state sentence.

The *Gonzales* court also reasoned that a literal reading of the statutory language in § 924(c) produced another absurd result not contemplated by Congress.[247] Upon calculating the defendant's total sentence under the Guidelines, the *Gonzales* court determined that a combined reading of § 924(c) resulted in more than twice the custodial price intended by Congress for the totality of the defendants' criminal conduct in this case.[248] The *Gonzales* court concluded that the prohibition against concurrent sentences under § 924(c) refers only to federal sentences.[249] Under this reading, an offender begins serving the mandatory five-year sentence pursuant to § 924(c) immediately upon the federal court's final sentencing decision.[250] Under this interpretation, the trial court erred in ordering the § 924(c) five-year sentence to run consecutively to the defendants' state court sentences.[251]

C. *Analysis*

After *McCary* and *Gonzales*, the Tenth Circuit's position as to whether application of Title 18 sentencing enhancements requires consecutive state sentencing is unclear. The absence of any clear factual distinctions or policy differences precludes a simple explanation for the Tenth Circuit's inconsistent holdings. The plain language of the Title 18 sentencing enhancements, coupled with the plain language of the Guideline sections that effectuate these enhancements, suggest the accuracy of the *McCary* decision. Further, as previously noted, the vast majority of circuit courts that have addressed the issue agree with the *McCary* approach.[252]

VII. DECISIONS ADDRESSING THE APPLICATION OF SECTION 2F1.1(B)(3)(A)[253]

A. United States v. Frazier[254]

1. Facts

Gregory Frazier was the former president of the National Indian Business Counsel, doing business as the United Tribe Service Center (UTSC), a nonprofit corporation assisting the education of American Indians.[255] The UTSC received funding from the United States Department of Labor (DOL) pursuant to the Job Training Partnership Act.[256] Frazier was convicted of "intentionally misapplying property valued at $5,000 or more and owned by or under the

247. *Id.*
248. *Id.* at 821.
249. *Id.*
250. *Id.* All other federal sentences for any additional substantive offenses begin immediately after the expiration of the mandatory 18 U.S.C. § 924(c) five-year sentence. *Id.*
251. *Id.*
252. *See supra* notes 229-32 and accompanying text.
253. U.S.S.G. § 2F1.1(b)(3)(A) (providing an enhancement for offenses involving a misrepresentation that a defendant was acting on behalf of a charitable organization).
254. 53 F.3d 1105 (10th Cir. 1995).
255. *Frazier*, 53 F.3d at 1108.
256. *Id.*

care, custody or control of the UTSC," under 18 U.S.C. § 666.[257] The trial court imposed a section 2F1.1(b)(3)(A) enhancement on the basis that Frazier committed the offense while acting on behalf of an educational affiliated agency.[258] Frazier appealed the enhancement.[259]

2. Decision

The plain language of section 2F1.1(b)(3)(A) penalizes the offender who "misrepresent[s]" that he "acted on behalf of a governmental agency or a charitable, educational, religious or political organization, or a government agency."[260] The Tenth Circuit used the *Random House Dictionary* to define "misrepresent" as making a false representation that generally involves a "deliberate intention to deceive for either profit or advantage."[261] The phrase "on behalf of" means, in this context, a "representative of, or in the interest or aid of."[262] An offender therefore receives an enhanced punishment if she either (a) falsely claims to represent the organization, or (b) falsely claims to act "in the interest or aid of" the organization.[263]

The *Frazier* court, however, rejected this literal interpretation as overly expansive.[264] Instead, the Tenth Circuit examined Application note four, the Commentary adjoining section 2F1.1(b)(3)(A), and the hypothetical examples they contained, to establish the parameters of conduct intended to fall within the purview of the guideline.[265] The conduct falling within the scope of section 2F1.1(b)(3)(A) is "exploitative conduct which induces victims to act upon their charitable or trusting impulses."[266] The Tenth Circuit determined that section 2F1.1(b)(3)(A) applies only to offenders who misrepresent their authority to act on behalf of a governmental agency or a charitable organization, if the offender's conduct "induces" the victim to contribute funds.[267]

The hypothetical examples accompanying section 2F1.1(b)(3)(A) suggest that the offender must also utilize "exploitive" conduct in furthering the offense of conviction.[268] Section 2F1.1(b)(3)(A) applies, for example, to offenders who seek donations under the guise of fundraising for a parochial school, soliciting contributions for a nonexistent charitable organization, or collecting delinquent student loan funds while posing as a federal collection agent.[269]

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257. *Id.*; 18 U.S.C. § 666 (1994).
258. *Frazier*, 53 F.3d at 1109.
259. *Id.*
260. U.S.S.G. § 2F1.1(b)(3)(A). "If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the Guidelines, increase by two levels." *Id.*
261. *Frazier*, 53 F.3d at 1112.
262. *Id.*
263. *Id.*
264. *Id.* at 1113.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*; U.S.S.G. § 2F1.1, comment. (n.4).
269. *Frazier*, 53 F.3d at 1112; U.S.S.G. § 2F1.1, comment. (n.4).

The defendant, as the former president of an educational organization, misappropriated the organization's DOL grant funds.[270] The defendant did not engage in "exploitive" conduct by affirmatively soliciting contributions from the public.[271] The trial court therefore erred in imposing a section 2F1.1(b)(3)(A) sentencing enhancement.[272]

The Tenth Circuit stated that paragraph four of section 2F1.1(b)(3)(A) applies to offenders who engage in "false pretenses" and "exploit" the generosity of their victims.[273] In adopting this narrow interpretation, the Tenth Circuit specifically rejected the Fourth Circuit's holding in *United States v. Marcum*.[274]

VIII. ACCEPTANCE OF RESPONSIBILITY: DECISIONS ADDRESSING WHETHER THE COMMENCEMENT OF TRIAL PRECLUDES THE APPLICATION OF SECTION 3.E1.1(B)(1)-(2)[275]

A. United States v. Ortiz[276]

1. Facts

Julio Ortiz, when found with the possession of a stolen handgun with a filed-off serial number, pleaded to "unlawful possession of a firearm with an obliterated manufacturer's serial number" under 18 U.S.C. § 922(k).[277] Ortiz asserted that this "acceptance of responsibility" entitled him to a large downward adjustment of his sentence, but the trial court refused to award a sentencing reduction under section 3E1.1(b).[278] Despite the defendant's admitted knowledge of the obliterated serial number, the trial court determined that the commencement of trial before the admission precluded application of section 3E1.1(b)(2).[279]

2. Decision

The Tenth Circuit determined that the trial court, while correct in its reading of section 3E1.1(b)(2), erred in failing to determine the applicability of a section 3E1.1(b)(1) sentencing reduction. The Tenth Circuit noted that section 3E1.1(b) of the Guidelines permits an additional one-level reduction for offenders who assist authorities in the investigation or prosecution of the instant

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270. *Frazier*, 53 F.3d at 1114.
271. *Id.*
272. *Id.*
273. *Id.* at 1112.
274. *Id.* at 1114; *see* United States v. Marcum, 16 F.3d 599 (4th Cir.) (holding that U.S.S.G. § 2F1.1(b)(3)(A) applies where a defendant misrepresents to the public that he was conducting the bingo games wholly on behalf of the charitable organization, when, in fact, he was acting in part for himself and his fellow deputies in skimming the charitable proceeds), *cert. denied*, 115 S. Ct. 137 (1994).
275. U.S.S.G. § 3E1.1(b)(1)-(2) (providing a downward adjustment for an offender's acceptance of responsibility).
276. 63 F.3d 952 (10th Cir. 1995).
277. *Ortiz*, 63 F.3d at 953.
278. *Id.* at 955.
279. *Id.*

offense.[280] Pursuant to that section, an offender assists authorities by: "(1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently."[281]

Application note three provides that the commencement of trial precludes the application of section 3E1.1(b)(2).[282] The Tenth Circuit determined that the commencement of trial, which renders a guilty plea "untimely" under section 3E1.1(b)(2), does not affect the "timeliness" of complete information under section 3E1.1(b)(1).[283] Subsection (1) and subsection (2) are disjunctive;[284] as a result, the Tenth Circuit stated that "language referencing the commencement of trial applies only to section 3E1.1(b)(2)."[285] Therefore, the commencement of trial precludes application of a sentence reduction under section 3E1.1(b)(2) but does not likewise prevent the application of section 3E1.1(b)(1).[286]

B. *Analysis*

The Tenth Circuit's holding is consistent with the First, Fifth, and Ninth Circuits' holdings in *United States v. Tallandino*,[287] *United States v. Tello*,[288] and *United States v. Stoops*,[289] respectively. Generally, conduct qualifying for a sentencing reduction under subsection (b)(1) or (b)(2) occurs during the investigation into the instant offense.[290] Section 3E1.3(b) recognizes "society's legitimate social interest" in defendants who accept responsibility

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280. U.S.S.G. § 3E1.1(b).

281. *Id.*

282. U.S.S.G. § 3E1.1, comment. (n.3). Application Note 3 provides:

> Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

Id.

283. *Ortiz*, 63 F.3d at 956.

284. *Id.*; U.S.S.G. § 3E1.1(b)(1), (2) (allowing a reduction for "(1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently").

285. *Ortiz*, 63 F.3d at 956.

286. *Id.*

287. 38 F.3d 1255 (1st Cir. 1994) (holding that § 3E1.1(b)(1) and § 3E1.1(b)(2) are disjunctive).

288. 9 F.3d 1119 (5th Cir. 1993) (finding that the commencement of trial only precludes an application of § 3E1.1(b)(2)).

289. 25 F.3d 820 (9th Cir. 1994) (holding that the language referencing the commencement of trial applies only to § 3E1.1(b)(2)).

290. U.S.S.G. § 3E1.1, comment. (nn.1-6).

for their actions, the government's need to avoid making trial preparations, and the court's reduction of the number of cases on court dockets.[291]

A sentencing court can apply section 3E1.3(b) in conjunction with section 3E1.3(a).[292] Subsection (a) provides a two-level reduction for offenders who "clearly demonstrate acceptance of responsibility."[293] Application note 1(b) to subsection (a) provides several examples of conduct which indicate a clear acceptance of responsibility, including: "a voluntary payment of restitution prior to the adjudication of guilt"; "a voluntary surrender to authorities promptly after the commission of the offense"; or "a voluntary termination or withdrawal from criminal conduct."[294]

IX. DECISIONS ADDRESSING WHETHER SECTION 4A1.2(D)(2)(A)[295] APPLIES TO A JUVENILE PLACED IN THE CUSTODY OF THE STATE SECRETARY OF SOCIAL SERVICES

A. United States v. Birch[296]

1. Facts

In *Birch*, the defendant received a sentence for committing a violent crime while possessing a firearm.[297] The trial court assessed two criminal history levels for each of the defendant's two prior juvenile convictions pursuant to section 4A1.2(d)(2)(A).[298] The defendant served his juvenile convictions in the custody of the State Secretary of Social and Rehabilitation Services.[299] The defendant appealed on the grounds that the trial court improperly imposed a two-level enhancement under section 4A1.2(d)(2)(A) rather than a one-level enhancement pursuant to section 4A1.2(d)(2)(B).[300]

2. Decision

The Tenth Circuit decided that section 4A1.2(d)(2)(A) requires the imposition of a two-level criminal history adjustment for each juvenile or adult "sentence of 'confinement' of at least sixty days."[301] Section 4A1.2(d)(2)(B) provides a one-point criminal history adjustment for a "juvenile sentence imposed within five years to the defendant's commencement of the instant offense."[302] Subsection (B) does not require the existence of a period of

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291. U.S.S.G. § 3E1.1, comment. (n.6).
292. U.S.S.G. § 3E1.1(b).
293. *Id.*
294. *Id.*
295. U.S.S.G. § 4A1.2. (Definitions and Instructions for Computing Criminal History).
296. 39 F.3d 1089 (10th Cir. 1994).
297. *Birch*, 39 F.3d at 1090.
298. *Id.* at 1095. U.S.S.G. § 4A1.2(d)(2)(a) applies a two-level enhancement for each adult or juvenile sentence resulting in a "confinement" that exceeds 60 days. Johnson contested the court's determination that placement into the custody of the state secretary of Social and Rehabilitation Services constitutes a "confinement" within the purview of the guideline section. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*; *see* U.S.S.G. § 4A1.2(d)(2)(A).
302. U.S.S.G. § 4A1.2(d)(2)(b).

"confinement."[303] The propriety of the trial court's application of subsection (A) depends on whether an offender's commitment to the custody of a state juvenile authority constituted a "confinement."[304] The commentary to section 4A1.2(d)(2)(A), however, fails to define the term "confinement."[305] The Tenth Circuit held that confinement includes a commitment to the custody of a state juvenile authority within the scope of section 4A1.2(d)(2)(A), and affirmed the trial court's sentencing determination.[306]

B. *Analysis*

Guideline sections 4A1.2(d)(2)(A) and (B) provide enhancements for both an offender's adult and juvenile convictions.[307] Section 4A1.2(d) limits the use of juvenile convictions.[308] A sentencing court may only consider an offense committed prior to age eighteen that resulted in the imposition of an adult sentence of imprisonment exceeding thirteen months.[309] Additionally, a sentencing court may not count juvenile or adult offenses occurring more than five years prior to the commencement of the instant offense.[310] These limitations were designed in part to "avoid large sentencing disparities resulting from the differential availability" of juvenile records among jurisdictions.[311]

C. *Other Circuits*

The Tenth Circuit's holding is consistent with the Sixth Circuit's holdings in *United States v. Hanley*[312] and *United States v. Kirby*,[313] and with the Eleventh Circuit's holding in *United States v. Fuentes*.[314] In each of these decisions, the offender's criminal history also included a juvenile conviction for which a state agency obtained custody of the offender.[315]

CONCLUSION

The foregoing discussion demonstrates the complexity of applying the Guidelines' determinative sentencing scheme. Perhaps the complexity explains the pervasive nature of Guidelines issues on the Tenth Circuit's docket sheets.

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303. *Birch*, 39 F.3d at 1095.
304. *Id.*
305. *Id.*
306. *Id.*
307. U.S.S.G. §§ 4A1.2(d)(2)(A), (B).
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. 906 F.2d 1116 (6th Cir.) (concluding that the term "confinement" in § 4A1.2(d)(2)(a) included placement into custody of the state's juvenile authority), *cert. denied*, 498 U.S. 945 (1990).
313. 893 F.2d 867 (6th Cir. 1990) (holding that commitment to the custody of the state's juvenile authority constitutes a "confinement" under U.S.S.G. §4A1.2(d)(2)(a).
314. 991 F.2d 700 (11th Cir. 1993) (finding that the defendant's commitment to a state juvenile authority in excess of 60 days was a "confinement").
315. *Birch*, 39 F.3d 1095; *see Fuentes*, 991 F.2d at 202; *Hanley*, 906 F.2d at 119; *Kirby*, 893 F.2d at 868.

The Tenth Circuit continues to struggle with the Guidelines as the Sentencing Commission continually adopts new amendments and as factual scenarios not contemplated by the Guidelines arise.

In the face of this uncertainty, the Tenth Circuit has generally adopted an extremely restrictive interpretation of Guideline principles. Perhaps, the only exceptions to this conclusion are the Tenth Circuit's holdings in *Frazier*[316] and *Gonzalez*,[317] where the Tenth Circuit abandoned its strict reliance on the plain language of the Guidelines and opted for a more liberal reading of the guideline provisions.

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316. United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995). For a discussion of *Frazier*, see *supra* text accompanying notes 255-74.

317. United States v. Gonzales, 65 F.3d 814 (10th Cir. 1995). For a further discussion of *Gonzales*, see *supra* text accompanying notes 234-52.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category I	II	III	IV	V	VI
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3*a*	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8*b*	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10*c*	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	92-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

a. Probation available (see U.S.S.G. § 5B1.1(a)(1).
b. Probation with conditions of confinement available (see U.S.S.G. § 5B1.1(a)(2)).
c. New "split sentence" available (see U.S.S.G. §§ 5C1.(c)(3), (d)(2)).