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Journal Editors

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Articles

Special Purpose Acquisition Companies: Wall Street's Latest Shell Game,
Daniel J. Morrissey *465*

COVID and Bar Admissions,
Steven R. Smith *527*

Crying Wolves, Paper Tigers, and Busy Beavers—Oh My!: A New Approach to Pro Se Prisoner Litigation,
Justin C. Van Orsdol *607*

Comments

"Alexa, Am I a Murderer?": An Analysis of Whether the First Amendment Protects Smart Speaker Communications,
Josie A. Bates *665*

Mental Health, Law School, and Bar Admissions: Eliminating Stigma and Fostering a Healthier Profession,
Natalie C. Fortner *689*

Is "Touch And Concern" Dead in Arkansas?: A Recent Case and Its Implications for Real Covenants,
Bennett J. Waddell *713*

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Arkansas Law Review
University of Arkansas School of Law
Leflar Law Center, Waterman Hall
Corner of Maple and Garland Avenues
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Telephone: (479) 575-5610

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2022-2023

SPECIAL PURPOSE ACQUISITION COMPANIES: WALL STREET'S LATEST SHELL GAME

Daniel J. Morrissey*

I. INTRODUCTION

Special Purpose Acquisition Companies ("SPACs") have been called "Wall Street's biggest gold rush of recent years."[1] In

* Professor of Law and former Dean, Gonzaga University School of Law. The author would like to thank Marc Steinberg, Wendy Couture, M. Thomas Arnold, Catherine McCauliff, Jay Silver, Agnieszka McPeak, Ann Murphy, Wayne Unger, Hon. Robert Miller, Daniel O'Conner, Brian Cochran, Thomas Geoghegan, and Lance Gotthoffer for their helpful comments. The author would also like to thank faculty research assistant Sharalyn Williams, law student Miles Martin, and faculty assistant Nance Moss for their help in the preparation of this Article. The Article is dedicated to the author's dear niece, Maeve Morrissey, and her parents, Matt and Andrea. Maeve has a strong connection to the University of Arkansas Law School. Her grandfather, Len Bradley, graduated from there with honors in 1981 and served with distinction as an Arkansas District Judge from 1983 to 2020. He also holds an undergraduate degree from the University of Arkansas and was a member of the University's chapter of Phi Beta Kappa. In addition, Maeve's mother Andrea received degrees in English and marketing from the University of Arkansas.

1. Anirban Sen et al., *SEC Eyes Guidance on SPAC Projections, Clarity on Liability Shield*, INS. J. (Apr. 28, 2021), [https://perma.cc/DX32-CRYK]. For earlier articles about SPACs, see also Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs*, 37 DEL. J. CORP. L. 849, 850-51 (2013), and Tim Castelli, Note, *Not Guilty by Association: Why the Taint of Their "Blank Check" Predecessors Should Not Stunt the Growth of Modern Special Purpose Acquisition Companies*, 50 B.C. L. REV. 237, 237-38 (2009). Of late, SPACs have generated considerable interest in the legal academy.

A symposium was held recently at the University of Arkansas at Little Rock William H. Bowen School of Law to discuss the issues that arise there. Symposium, *SPACs: The New Frontier?*, 45 UNIV. ARK. LITTLE ROCK L. REV. (forthcoming 2022). Videos of the presentations include: Beau Duty, *Intro to SPACs*, VIMEO (Feb. 5, 2022, 12:50 PM), [https://perma.cc/R2D2-PV8P]; Beau Duty, *Panel 1: How Recent Litigation Shaped the SPAC Transaction*, VIMEO (Feb. 8, 2022, 10:44 PM), [https://perma.cc/WEP6-F5CA]; Beau Duty, *Panel 2: How the SEC Responded to the SPAC Bubble*, VIMEO (Feb. 9, 2022, 9:10 AM), [https://perma.cc/YU6G-JSES]; Beau Duty, *Banquet Keynote: Ramey Layne of Vinson & Elkins*, VIMEO (Feb. 9, 2022, 11:07 AM), [https://perma.cc/Q8P4-S9JS].

See also Wendy Gerwick Couture, *Ten Top Issues in De-SPAC Securities Litigation,* 45 UNIV. ARK. LITTLE ROCK L. REV. (forthcoming 2022), one of the many strong papers delivered at the Symposium. See Usha Rodrigues & Michael Stegemoller, *Redeeming SPACs* 3-4 (Univ. Ga. Sch. of L., Working Paper No. 2021-09), [https://perma.cc/VN9F-QFGG], for a fine working paper discussing several harms present in SPACs. There, the

reality, they are just another version of an old strategy to exploit a loophole in the federal securities laws that issuers of stock have used to avoid full registration with the SEC, the federal agency set up to administer and enforce the securities laws.[2] The SPAC process circumvents that important protection for investors by taking private firms public through the back door—merging them into shell corporations.[3] Those are companies whose shares are widely held but have no operations or assets.[4]

In recent years, SPACs have been touted as a hot alternative to conventional SEC registration of stock sold in IPOs.[5] That long-accepted approach set up by the Securities Act of 1933 ("Securities Act") mandates that full disclosure of all aspects of those offerings be made in a registration statement filed with the SEC and available to the public.[6] Before sales of those securities can be made, the Commission's staff has the opportunity to review that document to guard investors from deception.[7] To further assure that a registration statement is totally accurate, the Securities Act provides stringent liability for any material falsehoods it might contain.[8]

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authors allow that, while SPACs are nominally public, they are in fact illiquid investments. *Id.* at 32-33. In addition, their shareholders have no meaningful voice. *See id.* at 28-29. The authors conclude, as does this Article, that SPACs only benefit a small group of insiders, not the general investing public. *Id.* at 45-46.

2. See Rodrigues & Stegemoller, *supra* note 1, at 23-24; see also *What We Do*, SEC (Nov. 22, 2021), [https://perma.cc/WHG3-RG27], for the SEC's description of its work and mission.

3. *See* Steven Kurutz, *Ok, What's a SPAC?*, N.Y. TIMES (July 13, 2021), [https://perma.cc/FYY5-ZCM6].

4. *See* Anna-Louise Jackson & Benjamin Curry, *Special Purpose Acquisition Company: What is a SPAC?*, FORBES ADVISOR (Mar. 4, 2022, 8:50 AM), [https://perma.cc/8ZCE-R4R4].

5. *See* Tom Huddleston, Jr., *What is a SPAC? Explaining One of Wall Street's Hottest Trends*, CNBC (Feb. 23, 2021, 11:13 PM), [https://perma.cc/7NSJ-REAN]; see also Daniel J. Morrissey, *The Troubling Tale of How Wall Street Tried to Exploit a Crack in the Structure of Securities Law*, THE HILL (June 25, 2021, 12:00 AM), [https://perma.cc/M5MJ-J95A], for an earlier discussion introducing this SPAC phenomenon.

6. Securities Act of 1933, ch. 38, 48 Stat. 78, §§ 6-7, scheds. A-B (codified as amended at 15 U.S.C. §§ 77f-g, 77aa).

7. Securities Act of 1933 § 8(b), (d), (e) (codified as amended at 15 U.S.C. § 77h(b), (d), (e)).

8. *See* Securities Act of 1933 §§ 5, 11 (codified as amended at 15 U.S.C. §§ 77e, 77k); see also THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 69 (7th ed. 2017), for a summary of this elaborate process for doing a public offering.

This SPAC end run around traditional SEC registration is akin to similar problematic practices that cunning promoters have engineered for decades. The Commission has looked on these practices with a jaundiced eye, identifying each as just another form of stock manipulation.[9] The SEC's skepticism arises because those methods of selling stock avoid traditional, full-blown registration, which is the principal safeguard that the Securities Act has established to deter fraud. These back-door sales are thus accomplished by exploiting an oversight in that otherwise carefully drafted statute.[10]

SPACs are therefore just the latest example of this evasive approach, and this Article will show how they have diminished the protection that the securities laws afford ordinary investors. Specifically, SPACs have been promoted "as the 'poor man's private equity funds.'"[11] They are said to allow "mom-and-pop investors,"[12] who usually don't get access to the most desired IPOs, to have that opportunity by buying into a SPAC shell before it acquires a target.[13] In reality, however, SPACs typically don't offer retail investors that ability. They only allow them to buy such stock after the SPAC insiders have taken their profits and only then at a price that dilutes what they pay for their shares.[14]

This Article will therefore begin by discussing the importance of traditional SEC stock registration.[15] It will then describe the SPAC phenomenon—what a SPAC entails, how it is

9. Leib Orlanski, *Going Public Through the Backdoor and the Shell Game*, 58 VA. L. REV. 1451, 1451-52 (1972).

10. See Daniel J. Morrissey, *The Road Not Taken: Rethinking Securities Regulation and the Case for Federal Merit Review*, 44 RICH. L. REV. 647, 647-50 (2010), for the author's discussion of why registration is crucial to protect investors. He wrote that piece after the financial meltdown of 2008 that occurred because of the collapse of collateralized debt obligations secured only by shaky mortgages. *Id.* at 660-61, 670-71. There, he also questioned whether the disclosure philosophy underpinning the federal securities laws was sufficient to protect investors and looked to the merit-based approach that had historically been employed by state securities regulators. *See id.* at 684-85; *see also infra* notes 31-60, 60-63 and accompanying text.

11. *Special-Purpose Acquisition Company*, WIKIPEDIA (Sept. 16, 2022, 1:39 PM), [https://perma.cc/GU2Y-AZLR].

12. Dave Michaels & Eliot Brown, *SEC Seeks to Curb Lofty SPAC Projections*, WALL ST. J. (Apr. 8, 2021, 7:31 PM), [https://perma.cc/HM3R-YQ3C].

13. Jackson & Curry, *supra* note 4.

14. *See infra* notes 201-08 and accompanying text.

15. *See infra* Part II.

carried out, and the exaggerated claims that have been made for it by its sponsors.[16] With that background, this Article will point out why SPACs' avoidance of traditional SEC registration has been harmful to investors.[17] In light of that, it will explain how recent action by the SEC and the results of a significant academic study have exposed the shortcomings of SPACs and led to an overdue reassessment of their value.[18]

After that, this Article will place SPACs in the context of various shell manipulations that have occurred in recent decades.[19] It will also discuss the substantial liability that many SPAC promoters may now face for fraudulent activity and other violations of the securities laws, such as the sale of unregistered securities and the failure to register under the Investment Company Act.[20] These theories of recovery should reinforce the value of traditional SEC registration, deter any further abuses of that process, and put an end to this harmful practice of "going public through the back door," which has been used most recently by SPACs.

After this Article was written and accepted for publication, the SEC took specific action to formally regulate SPACs by proposing a host of regulations that would cover them.[21] In line with comments made earlier by SEC officials, these proposed rules recognize SPACs as true IPOs and treat them as much as possible like traditional registered offerings of securities. As this piece will discuss in the Epilogue, they will require additional disclosure about many aspects of SPACs, particularly focusing on whether they are giving retail investors who bought into the companies adequate value.[22]

The proposal would also restrict SPACs from using projections about the prospects of those companies, as is done in traditional IPOs, to protect investors from being misled about how

16. *See infra* Part III.
17. *See infra* Part IV.
18. *See infra* Section IV.A, IV.B, IV.C.
19. *See infra* Part V.
20. *See infra* Section IV.E.
21. *See infra* notes 407-08 and accompanying text.
22. *See infra* Part VIII.

those firms will perform in the future.[23] They will also expand the scope of SPAC participants who can be held liable for material falsehoods in the offerings.[24] That is related to an argument made in this Article about many SPAC promoters who are, in effect, functioning as underwriters of the sales of shares in those companies to the public by buying shares from the issuer with the intent to resell them directly or indirectly to ordinary investors.[25]

The Epilogue will also provide updated information about the prevalence of SPACs.[26] The SEC's regulatory initiatives, critical comments from academic studies, and events in the stock market have adversely affected SPACs. For the moment, their frenzy has fizzled. Yet, there are significant lessons to be learned from them that may prove instructive in the future if and when crafty promoters devise similar types of stock manipulation.

II. THE IMPORTANCE OF REGISTRATION

A. The Origins of the Securities Act

As has been cleverly said, the federal securities laws "did not spring full grown from the brow of any New Deal Zeus."[27] English legislation and state securities laws preceded them.[28] Great Britain's Companies Act, enacted in the nineteenth century, had already gone beyond the requirement that firms seeking capital must not just avoid fraud but had mandated that they make certain disclosures.[29] And in the United States, after the Panic of 1907, President Theodore Roosevelt unsuccessfully asked Congress for legislation "to prevent at least the grosser forms of

23. Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 11048, Exchange Act Release No. 94546, Investment Company Release No. 34594, 87 Fed. Reg. 29,458 (proposed Mar. 30, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249, 270).

24. *Id.*

25. *See infra* Part VI.

26. *See infra* notes 410-12, 440-41 and accompanying text.

27. LOUIS LOSS ET AL., SECURITIES REGULATION 4 (6th ed. 2019).

28. *Id.*; *see also* Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 20 (1983).

29. LOSS ET AL., *supra* note 27, at 7.

gambling in securities and commodities, such as making large sales of what men do not possess and 'cornering' the market."[30]

But in the early part of the twentieth century, the first legislation regulating the issuance of securities came from the states.[31] These regulations were designed to protect citizens of those jurisdictions from securities offerings that did not give appropriate value to investors."[32] They came to be called "blue sky laws" because they targeted promoters who were raising money with such aggressive fraud that it was said "they would sell building lots in the blue sky in fee simple."[33] To counter that, the first state securities law enacted in Kansas required that anyone selling securities had to receive a permit from the State's bank commissioner.[34] That official had authority to deny the permit if he believed the offering lacked merit.[35]

Even though most states swiftly enacted such laws, they proved inadequate to police what had become a national market for the sale of securities.[36] But after the financial speculation and

30. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 395-96 (1990).

31. LOUIS LOSS & EDWARD M. COWETT, BLUE SKY LAW 3-5 (1958).

32. *See id.* at 7-10.

33. The term apparently first appeared in Thomas Mulvey, *Blue Sky Law*, 36 CAN. L. TIMES 37, 37 (1916).

34. Investment Companies—Providing for Regulation and Supervision, 1911 Kan. Sess. Laws 210, 212.

35. *Id.* The Kansas Bank Commissioner could deny a permit when, among other reasons, the offering contained provisions that were "unfair, unjust, inequitable or oppressive to any class of contributors," or the company did "not intend to do a fair and honest business, and in his judgment [did] not promise a fair return on the stocks, bonds or other securities." *Id.* Many of the state blue-sky laws followed the Kansas model and typically gave state officials the power to determine whether offerings to their citizens were "fair, just and equitable." Mark A. Sargent, *Blue Sky Law: The Challenge to Merit Regulation—Part I*, 12 SEC. REGUL. L.J. 276, 276 (1984); *see also* Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1284-86 (2004). In practice this gave almost unlimited discretion to state officials to deny issuers the right to sell securities to the citizens of their states—often on the grounds that they were too speculative. *See generally* Mark A. Sargent, *supra*, at 279-80; James S. Mofsky, *Blue Sky Restrictions on New Business Promotions*, 1969 DUKE L.J. 273, 273-74, 285.

36. Di Trolio, *supra* note 35, at 1289-90. When federal legislation governing the sale of securities was enacted in the 1930s, those laws specifically did not preempt the blue-sky provisions. *Id.* at 1292-93. As a result, a dual system arose involving both state and federal securities laws. *Id.* Over the years, however, there was substantial criticism that this was duplicative and unduly burdensome on the process of capital formation. *Id.* at 1294. In 1996, with the passage of the National Securities Market Improvement Act, Congress dramatically restricted the power of states to regulate securities. *See* National Securities

subsequent market crash of the 1920s led to a devastating economic downturn, momentum built for federal legislation. The Senate Finance Committee held highly publicized hearings on the wrongdoing involving investments that were spearheaded by Ferdinand Pecora,[37] and another congressional committee made this finding in 1933: "Whatever may be the full catalogue of the forces that brought to pass the present depression, not least among these has been this wanton misdirection of the capital resources of the Nation."[38]

As a renowned observer described the resulting situation, the whole system of "[i]nvestment bankers, brokers and dealers, [and] corporate directors . . . all found themselves the object of criticism so severe that the American public lost much of its faith in professions that had theretofore been regarded with a respect that had approached awe."[39] When President Franklin Roosevelt ("FDR") took office in March 1933, the Great Depression had hit hard. As he put it forcefully in his inaugural address,

> [T]here must be an end to a conduct in banking and in business which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. . . . [T]here must be a strict supervision of all banking and credits and

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Markets Improvement Act of 1996, Pub. L. No. 104-290, sec. 102, § 18, 110 Stat. 3416, 3417-18 (codified as amended at 15 U.S.C. 77r) (amending Securities Act of 1933, ch. 38, 48 Stat. 78, § 18, 48 Stat. 85 (codified at 15 U.S.C. § 77r)).

The new law not only excluded securities listed on a national securities exchange from state registration, but it also exempted the states from having power to review offerings that are exempt as federal private placements under the SEC's Regulation D. Securities Act of 1933 § 18(a), (b)(1), (4). The state's authority to approve sales of securities is therefore limited to only the smallest and most limited offerings. *See* Securities Act of 1933 § 18(a), (b) (limiting states' abilities to regulate significant categories of securities). State securities agencies do, however, maintain the power to investigate and enforce their anti-fraud laws. Securities Act of 1933 § 18(c).

37. See S. REP. NO. 73-1455, at 1-3 (1934), for the report of these hearings; *see also Subcommittee on Senate Resolutions 84 and 234*, SENATE HIST. OFF., [https://perma.cc/K58H-CGR3] (last visited Oct. 5, 2022). As one commentator summed up his findings: "It [the committee] indicted a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money." James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959).

38. H.R. REP. NO. 73-85, at 2-3 (1933).

39. Landis, *supra* note 37, at 30.

> investments; there must be an end to speculation with other people's money.[40]

And so, to restore investor confidence and get needed capital flowing to businesses, FDR made it a top priority to enact a law that would regulate the sale of securities.[41] At first there was "wide demand" for radical reform—the creation of a government agency that would have control over "not only the manner in which securities could be issued but the very right of any enterprise to tap the capital market."[42]

President Roosevelt, however, adopted a more measured approach. In an early message to Congress, he said the federal government should not take any action approving or guaranteeing the soundness of any issuance of securities.[43] Instead, he proposed a system where every offering of securities "shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public."[44]

FDR's approach was in line with the position long advocated by then Supreme Court Justice Louis Brandeis that businesses ought to be regulated by a mechanism that would require all their important operations to be laid bare to public scrutiny.[45] After an earlier version of financial reform legislation proved inadequate, Roosevelt's team turned to Harvard Law Professor Felix Frankfurter, a protégé of Brandeis, for another

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40. Franklin D. Roosevelt, U.S. President, First Inaugural Address (Mar. 4, 1933).

41. *See* Landis, *supra* note 37, at 30.

42. *Id.* Those views for a blue-sky-like federal review of the merits of securities offerings also found their way into the original version of the legislation, which provided for the revocation of the issuer's registration upon a finding "[t]hat the enterprise or business of the issue, or person, or the security is not based upon sound principles, and that the revocation is in the interest of the public welfare," or that the issuer "[i]s in any other way dishonest" or "in unsound condition or insolvent." Federal Securities Act, H.R. 4314, 73d Cong. § 6(c), (e), (f) (1933). That outlook would be echoed strongly in an article written by then law professor William O. Douglas, which he wrote after the passage of the Securities Act of 1933. William O. Douglas, *Protecting the Investor*, 23 YALE REV. 521, 522-24 (1934); *see also infra* notes 61-63 and accompanying text.

43. H.R. REP. NO. 85-73, at 2 (1933).

44. *Id.*

45. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). As Justice Brandeis had written in his influential book, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.*

draft.[46] Frankfurter accomplished that with the aid of his top students during a weekend of intense work.[47]

B. Registration—The Heart of the Securities Act

The centerpiece of Frankfurter's proposed statute was the requirement that those who sell securities must first file a registration statement with a public authority[48] and only be able to market them after a waiting period.[49] Unlike the state blue-sky laws, the federal legislation was premised on disclosure.

The government would, thus, not have the power to pass on the quality of particular offerings, but an overseeing commission could keep them from being sold if the information in the registration was false or inadequate.[50] The proposed statute also contained criminal penalties and civil liability for such materially misleading information.[51]

Even though a group of New York lawyers, led by John Foster Dulles, told Congressman Sam Rayburn, who was sponsoring the legislation, that the proposed statute "undermine[s] our financial system,"[52] the Securities Act quickly worked its way through the legislative process.[53] It was passed by both Houses of Congress and was signed into law by President Roosevelt as one of the hallmarks of his first 100 days in office.[54] The law was then hailed as the "Truth in Securities Act."[55]

As a well-respected treatise summed up the central thrust of that legislation: "This Act is concerned by and large with the initial distribution of securities . . . . Securities that are offered to

46. *See* Landis, *supra* note 37, at 30-33; LOSS ET AL., *supra* note 27, at 309. See generally BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982), for an interesting study of the relationship between Brandeis and Frankfurter and their attempts to influence public policy.

47. Landis, *supra* note 37, at 33-34.

48. Securities Act of 1933, ch. 38, 48 Stat. 78, § 5(c) (codified as amended at 15 U.S.C. § 77e(c)).

49. Securities Act of 1933 § 8(a).

50. Landis, *supra* note 37, at 34-35.

51. Securities Act of 1933 §§ 11, 15, 24.

52. Landis, *supra* note 37, at 40.

53. *See id.* at 41-49.

54. *Id.* at 49.

55. HAZEN, *supra* note 8, at 18; Milton H. Cohen, "*Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1340 (1966).

the public through the mails or the channels of interstate commerce must be registered with the SEC by the issuer."[56] It then went on to describe how that operates:

> The Commission's sole function is to ensure that the registration statement is accurate and complete. A prospectus containing the basic information in the registration statement must be made available to the buyer. Civil and criminal liabilities are imposed for material misstatements or omissions in the registration statement or prospectus.[57]

To justify these provisions, another well-regarded commentator described the following as the two goals of the Securities Act: "(1) to provide investors with adequate and accurate material information concerning securities offered for sale and (2) to prohibit fraudulent practices in the offer or sale of securities."[58] He then elaborated on that, saying, "The

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56. LOSS ET AL., *supra* note 27, at 379. The Act, however, contains exemptions from registration. The most significant of these are for small or limited offerings, for non-public offerings (private placements), and for offerings directed just to residents of the same state where the issuer exists by incorporation or otherwise (intrastate offerings). Securities Act of 1933, 15 U.S.C. §§ 77c(a)(11), 77c(b), 77d(a)(2). Section 28 of the Act also gives the Commission the power to exempt other offerings from registration. Securities Act of 1933 § 77z-3.

The SEC has issued safe-harbor regulations delineating the scope of these exemptions and continually expanded them over the years. Regulation D is the safe harbor for small, limited offerings and for non-public offerings. 17 C.F.R. §§ 230.504, .506 (2021). Today, its Rule 504 exempts offerings up to $10 million under Section 3(b). 17 C.F.R. § 230.504. Its Rule 506 exempts 4(a)(2) offerings, the so-called private placements. 17 C.F.R. § 230.506. And the Commission's Rules 147 and 147A exempt the so-called intrastate offerings. 17 C.F.R. §§ 230.147, .147A (2021). See *Private Placements—Rule 506(b)*, SEC (Apr. 28, 2022), [https://perma.cc/7Q6E-7NTX], for the latest version of the SEC regulations for the private placement exemption, *Exemption for Limited Offerings Not Exceeding $10 million—Rule 504 of Regulation D*, SEC (Apr. 28, 2022), [https://perma.cc/YXQ4-3C9T], for the latest version of the SEC regulations governing the exemption for small or limited offerings, and *Intrastate Offerings*, SEC (Sept. 6, 2022), [https://perma.cc/GTN3-24H6], for the current SEC safe-harbor regulations governing the intrastate exemptions. See Press Release, SEC, SEC Harmonizes and Improves "Patchwork" Exempt Offering Framework (Nov. 2, 2020) [hereinafter Press Release], [https://perma.cc/788B-SV6L], for the SEC's general discussion about how it has recently harmonized these exemptions.

A modified form of registration exists under the SEC's Regulation A, which is, strictly speaking, an exempt offering. 17 C.F.R. § 230.251 (2021). It can now be used by companies under certain conditions to raise up to $75 million. 17 C.F.R. § 230.251(a)(2). See Press Release, *supra*, for the SEC's discussion of the amendments to Regulation A.

57. LOSS ET AL., *supra* note 27, at 379.

58. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 4.1, at 125 (7th ed. 2018).

registration framework of the Securities Act seeks to meet these goals by imposing certain obligations and limitations upon persons engaged in the offer or sale of securities."[59]

C. Early Criticism of Registration and Its Ultimate Acceptance

Despite this elaborate new regime that the Act established to prevent fraud in the sale of securities, critics on the left quickly argued that the new law did not go far enough. Two commentators derided the Act's disclosure philosophy, saying "a promoter may ask the public to invest in a hole in the ground so long as he does not describe it as a uranium strike without supporting geological data."[60]

Along those lines, then law professor William O. Douglas criticized the law's seemingly minimal approach, saying that investors would not understand disclosures made in a registration statement or, even worse, would ignore them out of speculative enthusiasm.[61] What was needed in the regulation of corporate finance, he wrote, was "a more thoroughgoing and comprehensive control."[62] Beyond that, Douglas even advocated for government direction of the capital markets, which would place control "in the hands not only of the new self-disciplined business groups but also in the hands of governmental agencies whose function would be to articulate the public interest with the profit motive."[63]

The financial community also continued to object to many of the Act's provisions, claiming they would impede capital formation.[64] A year after the Act took effect, no large company

59. *Id.*

60. LOSS & COWETT, *supra* note 31, at 36-37.

61. Douglas, *supra* note 42, at 523-24.

62. *Id.* at 529.

63. *Id.* at 531. Douglas, however, would go on to become the third Chairman of the SEC and have an illustrious career after that as a Supreme Court Justice. His autobiography, *Go East Young Man*, has an interesting chapter about his years at the SEC. WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN 257-96 (1974); see also Daniel J. Morrissey, Book Review, 7 PEPP. L. REV. 491 (1979-1980) for the author of this Article's review, which he first published as a law student.

64. Seligman, *supra* note 28, at 2.

had yet filed a registration statement.[65] The first Chairman of the SEC, Joseph P. Kennedy, and his General Counsel, John J. Burns, therefore had to sell the Act's registration process by going to Bethlehem Steel Co. to persuade its executives to file such a statement rather than doing a private placement.[66]

Corporate America's hostility to registration continued in the post-war era. In 1953, when Dwight Eisenhower became the first Republican President since the Securities Act's inception, he appointed Ralph Demmler, a leading corporate lawyer from Pittsburg, as the first GOP Chairman of the SEC.[67] Under Demmler, the Commission undertook no new initiatives but continued in operation, contrary to the long-time desire of many on Wall Street.[68]

Nevertheless, in the decades after World War II, there was tremendous growth in the securities business.[69] As one commentator described the ramifications of that, "The revival of a strong new issues market in the post-World War II period . . . undercut arguments that the mandatory corporate disclosure system or its enforcement by the SEC in any significant sense obstructed new securities flotations, at least by large corporations."[70] By the late 1950s, there was such a rush of registration statements that it resulted in a delay in their filing so the SEC could have time to clear them.[71]

D. The Supreme Court Affirms the Securities Act and Its Registration Requirement

Along those lines, the Supreme Court was supportive of the Securities Act and its registration requirements. In an opinion in the early 1950s, it upheld the Securities Act, stating that it was

65. Milton V. Freeman, *A Private Practitioner's View of the Development of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 18, 18 (1959).

66. *Id.*

67. ANNE M. KHADEMIAN, THE SEC AND CAPITAL MARKET REGULATION 58-59 (1992).

68. *Id.*; *see also* RALPH H. DEMMLER, THE FIRST CENTURY OF AN INSTITUTION 180-88 (1977) (offering an account of this time from the perspective of practicing attorneys in a firm).

69. Seligman, *supra* note 28, at 2.

70. *Id.*

71. Freeman, *supra* note 65, at 19.

designed "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions."[72] It reemphasized that again in a later opinion, stating, "the purpose[] of the Securities Act [is] to promote full and fair disclosure of information to the public in the sales of securities."[73] In that same decision, it called the registration requirements "the heart of the [Securities] Act."[74] More recently, it has described registration as the "linchpin of the Act," ensuring that companies issuing securities make "'full and fair disclosure' of material information" relevant to a public offering.[75]

E. What Registration Entails

The preparation of a registration statement is therefore a substantial undertaking, requiring not only the active participation of the company's officials but also the skills of sophisticated counsel, accountants, and investment bankers.[76] Since liability for material falsehoods in a registration statement is stringent and actionable against a host of individuals connected with the offering, great care must be taken in its preparation.[77] This usually includes an elaborate "due diligence" investigation to

72. SEC v. Ralston Purina Co., 346 U.S. 119, 124, 126-27 (1953). In that case, the Supreme Court was called on to interpret the private placement exemption from registration for sales of securities that did not involve a public offering. *Id.* at 120. The company was claiming it for sales of shares to a large number of "key employees." *Id.* at 121-22. Many of them, however, were not upper echelon officials or working at the firm's headquarters. *Id.* at 120-21. The Court therefore ruled that the exemption would not apply to those sales but only to offerees who could "fend for themselves," those who did not need the disclosure compelled by a registration statement so they could have access to the full truth about the investments offered to them. *Id.* at 124-26.

73. Pinter v. Dahl, 486 U.S. 622, 646 (1988).

74. *Id.* at 638.

75. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 178, 193 (2015). The *Omnicare* decision is significant because it holds that statements of opinion can be actionable under Securities Act § 11 when the company does not actually believe what it sets forth or if it omits facts in conflict with that which a reasonable investor would want to know. *Id.* at 185-86, 189. This section does, however, generally provide protection from liability for optimistic statements. *See id.* at 195. A noted author, however, offered well-taken critical comments of that position, stating, "Corporate directors and officers should not be accorded the same protection as pre-owned automobile salespersons." MARC I. STEINBERG, RETHINKING SECURITIES LAW 33-34 (2021).

76. See generally HAZEN, *supra* note 8, at 116-23, for a good description of all that this entails.

77. *See* Securities Act of 1933, 15 U.S.C. § 77k(a).

make sure all its representations are accurate and that it omits no material facts.[78]

As one treatise described these procedures:

> A first time registrant for an initial public offering (IPO) can expect a long and rigorous preparation process. The amount of time involved will necessarily depend upon the size and complexity of the offering but it is wise to assume that an IPO will involve a six to twelve month process.[79]

The Securities Act set up a three-stage procedure governing the registration and sale of securities that, with some modification, is in effect today.[80] First, to ensure there is no pre-selling of the issuance, no offers or sales of securities can be made until a registration statement is filed with the SEC.[81] Then a

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78. *See* Securities Act of 1933 § 77k(b)(3) (providing, in essence, that no persons among the potential defendants shall be liable unless they were negligent in its preparation). *Escott v. BarChris Constr. Corp.* is the seminal case on this. 283 F. Supp. 643, 682-83 (S.D.N.Y. 1968). *Escott* provided that a "due diligence" investigation is designed to establish that the defendants were not so negligent and clarified that the statute sets out different standards for performance obligations with respect to portions of the registration statement that were prepared on the authority of an expert and segments that were not. *Id.*

79. HAZEN, *supra* note 8, at 116.

80. See MARC I. STEINBERG, SECURITIES REGULATION § 4.02, at 223-243 (7th ed. 2017), for a good discussion of the framework of this process; see also STEINBERG, *supra* note 75, at 93-97, for a recently published, award-winning book by the same author that, among other things, contains his thoughtful comments about the registration process. He notes that the SEC has continued to support the transaction-based approach to securities registration which, absent an exemption, requires that every offer or sale of securities must follow that procedure. *See id.* at 93. He goes on to compliment the SEC saying, "To a large extent, the Commission has met its objective of designing a flexible and progressive transaction-based Securities Act registration system, thereby avoiding the adoption of a company-based registration regimen that inevitably would have raised uncertainties and novel applications." *Id.* In other words, according to the distinguished commentator, the SEC has rightly stuck with the tried-and-true registration process. *See id.* at 93-94.Professor Steinberg elaborates on his general approval of the Commission's approach saying, "In its determination to maintain a transaction-based Securities Act registration framework while making necessary adjustments, the SEC has made the correct decision. With the improvements made, the registration framework functions in a relatively efficient manner and generally provides investors with adequate safeguards." *Id.* at 94.

81. *See* Securities Act of 1933 § 77e(c). In 2005, the Commission, using its rule-making power, liberalized the activities that certain companies may undertake while in registration. Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52056, Investment Company Act Release No. 26993, 70 Fed. Reg. 44,722 (Aug. 3, 2005) (amending 17 C.F.R. §§ 220, 228, 229, 230, 239, 240, 243, 249, 274); *see, e.g.*, 17 C.F.R. § 230.163-.163(a) (2020) (allowing certain companies to make statements throughout the registration process and certain communications conducted within a specified time period before a registration statement is filed that do not constitute "offers to sell"). *But see* Joseph

waiting period ensues, during which the issuer can make offers using written materials, such as a preliminary prospectus.[82]

During that time, the SEC may review the registration statement, particularly if it is a company's first time or a novel offering, and send the issuer a letter of comment requesting changes to make its disclosure more meaningful.[83] After the Commission's staff is satisfied with the amendments that the issuer makes in response to its criticism, the SEC may accelerate the effective date of the registration statement, which allows sales of the securities to be made.[84]

F. The Enduring Relevance of the Securities Act and Registration

From the 1960s on, the SEC has been an active agency dedicated to its important role of protecting the integrity of our capital markets.[85] As one observer put it on the SEC's 60th Anniversary in 1994:

> No agency is perfect, and the SEC has had its ups and downs over the years. . . . [But] [t]he SEC is one important reason why the securities industry is in so much better shape than

F. Morrissey, *Rhetoric and Reality: Investor Protection and the Securities Regulation Reform of 2005*, 56 CATH. U. L. REV. 561, 605-07 (2007) (arguing that the SEC went too far with those reforms and neglected its mission of protecting investors).

82. *See* Securities Act of 1933 §§ 77b(a)(10), 77e(a)-(b); *see also* STEINBERG, *supra* note 80, at 234-35.

83. See HAZEN, *supra* note 8, at 136-38, for a discussion of how that process works in practice.

84. *See* Securities Act of 1933 §§ 77e(a), 77h(a).

85. *See* SEC, ". . . GOOD PEOPLE, IMPORTANT PROBLEMS AND WORKABLE LAWS": 50 YEARS OF THE U.S. SECURITIES AND EXCHANGE COMMISSION 44-47 (1984) (an autobiography published on the Commission's 50th anniversary). However, not everyone has been enamored with the SEC. One former Commissioner, Roberta Karmel, wrote a critical book about it. *See* ROBERTA S. KARMEL, REGULAITON BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA 15 (1982). Homer Kripke, a law professor, has also been a frequent critic of the Commission. *See, e.g.*, Homer Kripke, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 8-9 (1979). In the late 1970s, however, the author of this Article heard Professor Kripke state that the securities markets had much more integrity than before the securities acts were passed and the SEC was created in the 1930s.

> other financial service industries, and why U.S. securities markets are the best securities markets in the world.[86]

And during this period the SEC has continued to emphasize the important role that registration plays in achieving its mandate to protect investors. As it says on its website, "A primary means of accomplishing these goals [investor protection] is the disclosure of important financial information through the registration of securities."[87]

III. THE SPAC PHENOMENON

A. Going Public Through the Back Door

Yet, despite the Securities Act's avowed purpose to protect ordinary investors from fraudulent public offerings through registration requirements, for some time, various issuers have been circumventing that process. SPACs are just the most recent

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86. David L. Ratner, *The SEC at Sixty: A Reply to Professor Macey*, 16 CARDOZO L. REV. 1765, 1779 (1995). However, after the financial crisis of 2008, it became apparent that the SEC's enforcement efforts had been woefully inadequate to police the capital markets. See Daniel J. Morrissey, *After the Meltdown*, 45 TULSA L. REV. 393, 409, 413-17 (2010), for the author's description of that and the Commission's attempts to reinvigorate its important responsibility. One of the most egregious failings by the Commission was that it did not catch a decade long, multi-billion dollar Ponzi scheme run by Bernard Madoff. See Daniel J. Morrissey, Book Review, 44 SEC. REGUL. L.J. 193 (2016) (reviewing HELEN DAVIS CHAITMAN & LANCE GOTTHOFFER, JPMADOFF: THE UNHOLY ALLIANCE BETWEEN AMERICA'S BIGGEST BANK AND AMERICA'S BIGGEST CROOK (2016)), for the author's review of a fine book about that and Madoff's connection with the world's largest bank, J.P. Morgan.

87. *The Laws that Govern the Securities Industry*, SEC, [https://perma.cc/Y3D5-ZS65] (last visited Oct. 5, 2022). The SEC has responded to criticism that the registration process may be unduly burdensome for issuers that are already public and small companies. *See* Seligman, *supra* note 28, at 58-61. It has therefore streamlined this process to make it less costly and easier for them. *Id.* (discussing such initiatives geared towards companies with large assets and significant numbers of shareholders). The SEC has also reduced the disclosure requirements in registration statements for companies with assets of less than $25 million that are going public. Small Business Initiatives, Securities Act Release No. 6949, Exchange Act Release No. 30968, 57 Fed. Reg. 36,442 (Aug. 13, 1992). In addition, as has been discussed, the Securities Act contains exemptions from registration where its costs may be exceeded by its benefits and where state officials may effectively police these offerings for fraud. *See supra* note 56 and accompanying text. Since the 1980s, the Commission has been expanding these by amending its safe-harbor rules such as Regulation D, Rule 147 and Rule 147A. *See supra* note 56 and accompanying text; Susan E. Satkowski, Note, *Rule 242 and Section 4(6) Securities Registration Exemptions: Recent Attempts to Aid Small Businesses*, 23 WM. & MARY L. REV. 73, 74-75 (1981).

version of that questionable way to take a company public. This evasion of the registration requirement has often worked as follows.

A promoter acquires a defunct shell, but one that still has public shareholders.[88] Lawyers and accountants are then hired to settle outstanding creditors' claims and bring the company current with the periodic filings that the Securities Exchange Act of 1934 requires to be made with the SEC.[89] The promoter then uses small brokerage firms to create an over-the-counter trading market in the company's shares.[90]

The activated shell is then sold to a private company, which becomes public by being merged into the shell.[91] That can be accomplished a number of ways, such as by a reverse merger, a share exchange, or by the sale of the private firm's assets to the shell.[92] Typically, the arrangement results in the owners of the private company owning the lion share of the shell's stock, which is then a liquid asset for them just as if their firm had done a registered IPO.[93]

Unlike registration, this procedure of going public through the back door is done with minimum SEC oversight. The Commission's attitude about the process, however, is problematic since the Securities Act does not specifically prohibit it and it is usually done in technical compliance with legal requirements. Yet, one commentator has said that the Commission "frowns

88. *See* Marvin Dumont, *Reverse Mergers: Advantages and Disadvantages*, INVESTOPEDIA (May 18, 2022), [https://perma.cc/85XL-LA8J].

89. See HAZEN, *supra* note 8, at 328-33, for an overview of the annual and quarterly reports that public companies are required to file with the SEC under the Securities Exchange Act of 1934. To avoid duplicative filings, the SEC, under its integrated disclosure regime, now allows these to be used to satisfy much of the registration requirements for the offer and sale of securities. *Id.* at 125-26.

90. See SEC v. N. Am. Rsch. & Dev. Corp., 424 F.2d 63, 66-67 (2d Cir. 1970), for an example of how this can be used to manipulate the price of a stock.

91. *Id.* at 67.

92. *See* Orlanski, *supra* note 9, at 1451 nn.1-2; *Going Public Through the Backdoor*, NASDAQ, [https://perma.cc/K9LU-MZYW] (last visited Oct. 5, 2022) (providing a definition of this phrase).

93. See Orlanski, *supra* note 9, at 1451-52, 1458-60, for the classic article on this process. In February 2003, Douglas Siddoway gave a fine presentation on this topic at the Northwest Securities Institute. Douglas Siddoway, Nw. Sec. Inst., Uses and Abuses of "Reverse Merger" Transactions in the U.S. (Feb. 21, 2003).

upon" this practice and, in certain situations, has sought injunctive and regulatory action to stop, or at least curb, it.[94]

Along those lines, certain jurisprudence that the SEC has promulgated about compliance with the securities laws is relevant. The Commission often prefaces its safe-harbor administrative rules with statements that they are "not available to any person with respect to any transaction or series of transactions that, although in technical compliance with [a particular rule], is part of a plan or scheme to evade the registration requirements of the Act."[95]

Because of the SPAC frenzy, it is time to take another look at that questionable practice and ask a crucial question: Does such a loophole in the Securities Act really exist that makes this procedure legal? In other words, is a SPAC a legitimate alternative to a conventionally registered IPO that does not violate either the letter or the spirit of the Securities Act?

B. How SPACs Operate

The SPAC process works like this: promoters set up a shell corporation without any assets or business and raise cash by selling its shares in an SEC-registered IPO.[96] The SPAC's avowed purpose is to search for a private company, a target to merge with in a process called "de-SPACing." SPACs typically have two years to do that.[97]

When such a combination is proposed, SPAC shareholders can opt to redeem their shares, typically for a good profit, rather than continue as shareholders in the surviving company.[98] A reverse merger then takes place between the SPAC, or one of its subsidiaries, and the target.[99] The SPAC, or its sub, survives, but it usually takes the name of its target and allows the target

94. Orlanski, *supra* note 9, at 1451-52.

95. 17 C.F.R. § 230.144 (2022) (this section is titled, "Persons deemed not to be engaged in a distribution and therefore not underwriters.").

96. *What is a SPAC?*, CB INSIGHTS (Apr. 5, 2022), [https://perma.cc/KS9Z-X4H7].

97. *Id.*; Jackson & Curry, *supra* note 4.

98. Michael Klausner et al., *A Sober Look at SPACs* 3, (Stanford L. & Econ., Working Paper No. 559, 2020), [https://perma.cc/G8VZ-9MKS].

99. *See* Dumont, *supra* note 88; *What is a SPAC?*, *supra* note 96.

company's management to continue to run the business.[100] As a result, the target company's shareholders get stock in the SPAC, whose shares are already trading in the open market.[101] That turns the formerly private company into a public one and makes the equity held by its owners a liquid asset.[102]

SPACs have proliferated because they were thought to be cheaper and faster than having private companies go public in the conventional manner by an SEC-registered offering.[103] In addition, they were claimed to offer more opportunity for disclosure about those companies' prospects than allowed in traditional registration statements because the proxy documents used in the merger could contain projections.[104] They were also said to have less potential for liability under the securities laws since shareholders of the target who were offered stock in the SPAC could not be deceived because they would likely have knowledge of any falsehoods about the SPAC's operations contained in the proxy documents.[105]

Additionally, SPAC advocates claimed that SPACs afforded access to the public market for firms that otherwise might have difficulties with critical comments from the SEC's staff.[106] Those comments were more likely to arise when companies filed a full-blown registration statement rather than the abbreviated one allowed for issuance of stock in a merger.[107] SPACs were encouraged by the Trump administration and others as a way for

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100. *What is a SPAC?*, *supra* note 96; *How Special Purpose Acquisition Companies (SPACs) Work*, PWC, [https://perma.cc/884T-4VAR] (last visited Oct. 5, 2022).

101. Dumont, *supra* note 88.

102. *See Special-Purpose Acquisition Company*, *supra* note 11.

103. Julie Young, *Special Purpose Acquisition Company (SPAC)*, INVESTOPEDIA (June 30, 2022), [https://perma.cc/PL6B-LS8K]; Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), [https://perma.cc/38C8-68BA].

104. *See* Michaels & Brown, *supra* note 12; Klausner et al., *supra* note 98, at 42-45.

105. *See* Klausner et al., *supra* note 98, at 42-45.

106. *See* Ralph V. De Martino, *Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association Takes Aim at SEC Proposed SPAC Rules*, NAT'L. L. REV. (June 21, 2022), [https://perma.cc/AGL3-X2MF].

107. *See* E. Peter Strand, *Minimizing SEC Comments and Managing the Review Process for Form S-4 Registration Statements*, NELSON MULLINS (Sept. 24, 2014), [https://perma.cc/B8A5-PCS4]. Registration of securities issued in a merger is done on an S-4 registration statement. Will Kenton, *SEC Form S-4 Defined*, INVESTOPEDIA (May 7, 2021), [https://perma.cc/HW2U-YHRE].

companies "to go public before they became so-called unicorns," private firms valued at more than $1 billion.[108] There were therefore more publicly traded start-up companies offering opportunities for retail investors.[109]

C. SPACs Become Big Time

Companies in different sectors have used SPACs. Some were highly visible firms like Richard Branson's Virgin Galactic.[110] Others were early-stage tech companies focusing on finance, health care, or electric vehicles.[111] Joby Aviation, which is developing an all-electric aircraft for commercial passengers, is a good example.[112] When it was profiled on PBS's NOVA series on May 26, 2021, Joby's founder noted that it was preparing to go public by a SPAC.[113] SPAC promoters therefore have claimed that SPACS have revived the market for IPOs of small and emerging growth companies, which has been languishing for the last twenty years.[114]

The SPAC spectacle has been growing steadily over the last decade, with some calling it a "bubble" or a "hype."[115] By 2020, it had become a "frenzy,"[116] with SPACs raising as much money in that one year as they did the entire decade before.[117] By

108. Michaels & Brown, *supra* note 12.

109. Steven Davidoff Solomon, *In Defense of SPACs*, N.Y. TIMES: DEALBOOK (June 12, 2021), [https://perma.cc/LA4Z-LVZK].

110. Young, *supra* note 103.

111. *See* Michaels & Brown, *supra* note 12; *What is a SPAC?*, *supra* note 96; Amrith Ramkumar, *SPAC Insiders Can Make Millions Even When the Company They Take Public Struggles*, WALL ST. J. (Apr. 25, 2021, 4:51 PM), [https://perma.cc/L3DK-FNQJ].

112. *Joby Aviation to be Featured in NOVA Documentary, "Great Electric Airplane Race" Airing May 26 on PBS*, BUS. WIRE (May 25, 2021, 8:03 AM), [https://perma.cc/22GQ-LUJE].

113. *Id.* Press Release, Joby Aviation, Inc., *Joby Aviation Announces Closing of Business Combination with Reinvent Technology Partners to Become Publicly Traded Company* (Aug. 10, 2021, 4:05 PM), [https://perma.cc/XZ65-87BZ].

114. *See* Solomon, *supra* note 109.

115. Klausner et al., *supra* note 98, at 2. As one commentator put it in the Wall Street Journal about other factors contributing to this surge, "With interest rates on the floor and investors chasing young companies, this is a dream scenario for SPACs." Peter Santilli & Amrith Ramkumar, *SPACs Are the Stock Market's Hottest Trend. Here's How They Work.*, WALL ST. J. (Mar. 29, 2021, 5:30 AM), [https://perma.cc/L2E7-V6EY].

116. Michaels & Brown, *supra* note 12.

117. Klausner et al., *supra* note 98, at 2.

October 21, 2020, there were 290 SPACs with $86.5 billion in cash in some form of development—either doing an IPO, searching for a target to merge with, or in the process of consummating such a combination.[118]

D. Big Claims for SPACs

Along those lines, a good description of the benefits said to come from SPACs appeared in a recent profile of Chamath Palihapitiya, one of their major promoters.[119] There he touted them as disruptive mechanisms of the new economy that can bring riches to investors and entrepreneurs from non-privileged backgrounds.[120] He also critiqued our current system of capital formation, saying, "We don't have capital markets that can support young, high-growing, fast companies in a way that really builds for the future of America . . . ."[121]

Accordingly, the piece described how Palihapitiya convinced a group of mutual fund managers to invest in the Virgin Galactica SPAC by telling them the space tourism company would be "helping mankind reach for the heavens."[122] In his pitch, however, he did not say that the company had burned through almost a billion dollars and never made a deadline it set for itself in its fifteen-year history.[123]

When Virgin Galactic did go public by its SPAC, its stock price soared, making Palihapitiya very wealthy.[124] Yet, its revenue forecasts have never been hit, and even though the company's founder, Sir Richard Branson, has gone into space, it is uncertain if Virgin Galactic will ever be able to put its tourist-customers there.[125]

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118. *Id.*

119. Charles Duhigg, *The Pied Piper of SPACs*, NEW YORKER (May 31, 2021), [https://perma.cc/R7J3-FN87].

120. *See id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Duhigg, *supra* note 119.

125. *Id.*

Another high-profile SPAC backer and promoter, Alec Gores, has created thirteen of them.[126] Gores made billions in private equity during the last decade and since then has turned his attention to SPACs, with some of his recent deals involving diverse companies such as Luminar Technologies, a self-driving car firm, and Hostess Brands, Inc., the Twinkie maker.[127] Gores has become so totally involved with SPACs that he has even given up hosting his weekly poker game, where "the buy-in was sometimes $1 million."[128]

IV. THE PUSH BACK

A. SPACs Get Stopped

But in spring 2021, the bloom came off the SPAC rose, and SPACs pretty much ground to a halt.[129] Two factors accounted for that. First, a series of releases from the SEC's staff announced that it would give SPACs increased scrutiny.[130] Additionally, an impressive academic study appeared that revealed serious flaws with SPACs.[131] It showed that many of their claimed advantages over traditional SEC registration just didn't pan out.[132] And perhaps more significantly, the study showed SPAC sponsors and other insiders often benefited at the expense of the retail investors in the new public companies that emerged.[133]

The first SEC caveat came from the Commission's Office of Investor Education and Advocacy ("OIEA"), cautioning the public to beware of making decisions based on celebrity

126. Maureen Farrell, *The Man with More SPACs Than Anyone*, WALL ST. J. (May 4, 2021, 4:34 PM), [https://perma.cc/5ZEZ-4EUJ].

127. *Id.*

128. *Id.*

129. Yun Li, *SPAC Transactions Come to a Halt Amid SEC Crackdown, Cooling Retail Investor Interest*, CNBC (Apr. 22, 2021, 9:35 AM), [https://perma.cc/52JA-DSWG]; Solomon, *supra* note 109; see Haimavathi V. Marlier et al., *Five Key Takeaways from the SEC's Evolving Response to the SPAC Boom*, MORRISON FOERSTER (Apr. 22, 2021), [https://perma.cc/Y5XT-9LHP], for a good discussion of how the SEC's positions on SPACs evolved from merely educating investors to alerting them about serious problems.

130. Marlier et al., *supra* note 129; Li, *supra* note 129.

131. *See* Klausner et al., *supra* note 98, at 3.

132. *Id.*

133. *Id.* at 31.

involvement in SPACs.[134] Among the prominent individuals taking part in them were some famed professional athletes like Shaquille O'Neal, Stephen Curry, and Serena Williams.[135]

In its statement, the OIEA warned that "[c]elebrities, like anyone else, can be lured into participating in a risky investment," but they may be better able to bear the resulting losses than less-wealthy people.[136] Most tellingly, the OIEA also alerted the public that SPAC sponsors typically get their equity on more favorable terms than general investors who come later in the open market.[137] Those promoters therefore have motives to complete the resulting business combination on conditions that enrich themselves rather than later participants in the venture.[138]

Shortly thereafter came statements from the SEC's Acting Chief Accountant ("ACA"), Paul Munter, and its Division of Corporate Finance ("Corp. Fin.") that detailed a host of securities law considerations that should concern SPAC organizers.[139] The ACA highlighted numerous accounting matters that specifically pertained to SPACs as well as special provisions about its internal controls and corporate governance.[140] He also called attention to auditing issues there, including the independence of the public accountants of those firms.[141]

On the same day that Munter published his admonitions about SPACs, the Commission's Division of Corporation Finance issued its own initial statement warning about particular

134. *Celebrity Involvement with SPACs—Investor Alert*, SEC (Mar. 10, 2021), [https://perma.cc/66EC-KYSZ].

135. Sophia Kunthara, *Athletes and Celebrities Join the SPAC Boom, SEC Takes Notice*, CRUNCHBASE NEWS (Mar. 11, 2021), [https://perma.cc/QX7D-CK82].

136. *Celebrity Involvement with SPACs—Investor Alert*, *supra* note 134.

137. *Id.*

138. *Id.*

139. Paul Munter, *Financial Reporting and Auditing Considerations of Companies Merging with SPACs*, SEC (Mar. 31, 2021), [https://perma.cc/X7MM-X6BM]; *Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies*, SEC (Mar. 31, 2021), [https://perma.cc/WS3Y-FX35].

140. Munter, *supra* note 139. Among them, Munter cited Section 404(a) of the Sarbanes-Oxley Act, which requires public companies to conduct annual evaluations of their internal controls. *Id.*

141. *Id.* Munter warned that when a private audit client prepares to go public through a SPAC, the company should determine whether the continuance of that relationship would be appropriate given the importance of auditor independence. *Id.*

provisions of the securities laws that are applicable to SPACs.[142] Those include restrictions on shell companies, like SPACs, and other relevant rules pertaining to their books, records, and internal controls.[143] It also noted problems that SPACs might encounter in being listed on national securities exchanges because of these exchanges' rules on corporate governance and other standards designed to ensure such companies have sufficient public floats and investor bases to promote a fair and orderly market.[144]

B. Coates's Public Statement and His Joint Statement with Munter on SPAC Warrants

But the most telling statements by SEC officials came soon after those—one by the Acting Director of Corp. Fin., John Coates,[145] and another jointly published by him and the ACA.[146] Coates began his statement ominously by noting the "baseless hype" surrounding SPACs and the "sheer amount of capital pouring into" them.[147] He then described the SPAC phenomenon and pledged that the SEC's staff would continue "to look carefully at" activity by SPACs.[148]

Coates next focused on the disclosures typically made in the de-SPACing phase, where the private company is merged into the SPAC.[149] He noted claims being made by SPAC promoters that there is more latitude for companies to include projections in these disclosures and that liability concerns are less than in a typical registered offering.[150] As to the former, he acknowledged

142. *See Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies*, *supra* note 139.

143. *Id.* Shell companies have either "[n]o or nominal assets" or "[a]ssets consisting solely of cash and cash equivalents." 17 C.F.R. §§ 230.405, 240.12b-2 (2020).

144. *See Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies*, *supra* note 139 (citing N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL §§ 102.00, 301.00-315.00, 802.01; NASDAQ, U.S. RULEBOOK ser. 5300, 5400, 5500, 5600).

145. John Coates, *SPACs, IPOs and Liability Risks Under the Securities Laws*, SEC (Apr. 8, 2021), [https://perma.cc/EYM7-6MCH].

146. John Coates & Paul Munter, *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs")*, SEC (Apr. 12, 2021), [https://perma.cc/26VG-E74G].

147. Coates, *supra* note 145.

148. *Id.*

149. *See id.*

150. *Id.*

that the Private Securities Litigation Reform Act ("PSLRA") permits forward-looking statements in certain situations.[151] This gave reason for some to assert that, while they are not allowed in a conventionally registered IPO, they are permissible in a de-SPAC merger.[152]

Yet, said Coates, that attitude may be giving SPAC sponsors less of an incentive to protect investors by doing adequate due diligence on the target and making appropriate disclosures.[153] He also noted that these risks might be even higher than in conventional IPOs because of "potential conflicts of interest in the SPAC structure."[154]

Coates also pointed out that the PSLRA safe harbor for projections is inapplicable where contrary facts cutting against them may be known.[155] In such a case, protection from liability would not be available because those statements would be made with actual knowledge of the falsehoods or without a reasonable belief in their accuracy.[156] And most significantly, that safe harbor is specifically not available to "blank check" companies—which of course is what a SPAC is, a firm with no assets.[157]

Coates's other comments came in regard to claims that SPACs offer less potential for liability than traditional IPOs. A registration is required in the typical de-SPAC merger process because the SPAC exchanges its shares for those owned by the stockholders of the target.[158] Yet, said Coates, the stringent liability for falsehoods in a registration statement under the

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151. *See* Coates, *supra* note 145; *see also* Securities Act of 1933, 15 U.S.C. § 77z-2; Securities Exchange Act of 1934, 15 U.S.C. § 78u-5.

152. Coates, *supra* note 145.

153. *Id.*

154. *Id.*

155. *See id.*

156. *Id.* In *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, the Supreme Court similarly found that situations where issuers gave opinions under those circumstances would constitute violations of the anti-fraud provisions of the federal securities laws. 575 U.S. 175, 176 (2015).

157. Securities Act of 1933, 15 U.S.C. § 77z-2(b)(1)(B); Securities Exchange Act of 1934, 15 U.S.C § 78u-5(b)(1)(B); *see also* Securities Act of 1933 § 77g(b)(3) (defining a "blank check company" as "any development stage company that . . . (A) has no specific business plan or purpose; or (B) has indicated that its business plan is to merge with an unidentified company or companies").

158. *See* ANNA T. PINEDO, DISCUSSION OF SEC'S PROPOSED RULES ON SPACS, SHELL COMPANIES, AND PROJECTIONS 12 (2022), [https://perma.cc/2BSU-27U5].

Securities Act is said to be less in a SPAC than in a traditional IPO.[159]

Two reasons have been given for this that affect the standing of shareholders in the target to sue. First, the owners of the target who are offered shares in the SPAC merger may be aware of the material misstatements or omissions pertaining to their company in the registration statement.[160] Second, after the SPAC shares are sold in the market, the subsequent purchasers may not be able to trace their shares to ones that came from the false registration statement as required by the Securities Act.[161]

While those technical issues might lessen the potential for liability in a SPAC registration statement, Coates cautioned that it would still be present.[162] And in a merger, which uses proxy materials, there is also such potential liability for falsehoods, which courts have predicated on a negligence standard.[163] Coates noted that legal accountability may be present there as well for breaches of fiduciary duty under state corporate law.[164]

What Coates called "the upshot of this" is that the whole SPAC transaction, which includes the merger with the target, is really an IPO—filtering SPAC's public shares not only to the target's shareholders but ultimately into the secondary market.[165]

159. *See* Coates, *supra* note 145.

160. *See* Securities Act of 1933 § 77k(a).

161. *See* Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076, 1080 n.4 (9th Cir. 1999). As one court put it, Section 11(a) requires, "[i]f there is a mixture of pre-registration stock and stock sold under the misleading registration statement, a plaintiff [to] either show that he purchased his stock in the initial offering or trace his later-purchased stock back to the initial offering." *Id. But see* Pirani v. Slack Techs., Inc., 13 F.4th 940, 944, 948-49 (9th Cir. 2021) (holding that "[i]n a direct listing," where there are existing shares in the market under Rule 144, a plaintiff may not be barred from suit because some securities of the same nature as those issued in the registration statement are already in the market).

162. *See* Coates, *supra* note 145.

163. *Id.* (citing Beck v. Dobrowski, 559 F.3d 680, 682 (7th Cir. 2009)).

164. *Id.* (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993); *In re* Transkaryotic Therapies, Inc., 954 A.2d. 346, 357-63 (Del. Ch. 2008)).

165. Coates, *supra* note 145.

And he drove home the need to consider a SPAC to be a full-blown public offering with these emphatic remarks signaling Corp. Fin.'s resolve to review registration statements in those mergers as diligently as those made in traditional IPOs:

> An IPO is where the protections of the federal securities laws are typically most needed to overcome the information asymmetries between a new investment opportunity and investors in the newly public company. . . . [I]t remains true that IPOs are understood as a distinct and challenging moment for disclosure. . . . [T]he public knows nothing about this private company. Appropriate liability should attach to whatever claims it [the company going public] is making.[166]

While stating he was neither "pro- [n]or anti-SPAC," Coates concluded that, since many of the original SPAC investors redeem or sell their shares before the merger, they are not the ultimate public owners of the company.[167] Rather the ultimate public owners are the stockholders who come into the company by such business combinations. They would include shareholders remaining in the SPAC or those who buy stock in the aftermarket. A de-SPAC therefore is every bit as much an IPO as a conventional one. It is the "real IPO," as Coates called it.[168] His clear implication was that questionable projections and lessened liability are just as inappropriate in a SPAC as in a traditional registered offering.

Just a few days after Coates's comments were released, Munter and Coates came out with another even more relevant statement that threw a hard wrench into SPAC transactions.[169] It dealt with how they account for warrants typically sold to insiders during the SPAC's IPO.[170] Those contracts give their holders the right to buy shares in the entity at a price that is fixed when that

166. *Id.*
167. *Id.*
168. *Id.*
169. *See* Coates & Munter, *supra* note 146.
170. *See id.*; *see also* Michael C. Labriola et al., *SEC Addresses Accounting Treatment for SPAC Warrants*, WILSON SONSINI (Apr. 20, 2021), [https://perma.cc/X8UF-MQ77].

stock is issued.[171] As such, warrants can be quite valuable if the price of the SPAC's shares increases.

SPACs have accounted for them as equity, but Coates and Munter maintain that if the warrants are transferable, as they typically are, they should be considered liabilities of the company.[172] This is because if the warrant holders were to exercise their rights, companies would have to repay them in cash.[173] They should therefore be expenses of the SPAC and would have to be revalued in every earning period.[174]

The financial statements of almost all previous such offerings could then arguably be false and misleading—resulting in the need for them to be restated.[175] And accounting for warrants as costs could change positive earnings into negative ones, which would be extremely disturbing to the way SPACs have been marketed. Those modifications could severely hurt investor confidence in SPACs. As one commentator said about such accounting changes, doing restatements of company financials "shows poorly to the outside and" goes counter to "the level of public trust you really want."[176]

C. The Academic Study

But a study done by distinguished professors at Stanford University and New York University struck an even more telling blow to SPACs.[177] Those scholars did a detailed analysis of their structure and costs. Their results were alarming to the SPAC industry because the professors found that SPACs would be unsustainable if their post-merger shareholders truly understood them.[178] As they are now structured, those stockholders typically

171. *What You Need to Know About SPACs—Updated Investor Bulletin*, SEC (May 25, 2021), [https://perma.cc/J89G-EW4U].

172. Coates & Munter, *supra* note 146.

173. Robert Freedman, *As SEC Ramps Up SPAC Rules, Lawsuits Could Follow*, CFO DIVE (May 10, 2021), [https://perma.cc/4UFC-EVYZ].

174. *See* Coates & Munter, *supra* note 146.

175. Davina K. Kaile, *SPAC FAQs: SEC Staff Statement on Accounting Issues for SPAC Warrants*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Apr. 26, 2021), [https://perma.cc/SL8X-8EL8].

176. *See* Li, *supra* note 129.

177. *See* Klausner et al., *supra* note 98, at 3-5.

178. *See id.* at 4.

see a substantial dilution in their investments and are really subsidizing the target companies that go public. By contrast, the study showed that the insiders and promoters of SPACs usually do quite well by selling or redeeming their shares prior to the merger.[179]

The professors refuted four advantages touted for SPACs: (1) that they are less expensive to do than traditional IPOs; (2) that they offer more effective pricing and are cheaper; (3) that they afford a way of going public to firms shut out of the traditional process; and (4) that they are a "'poor man's' private equity," allowing retail investors to benefit by putting their funds into start-ups.[180] The study concluded that all those claims were overstated—blowing the whistle on what they called the SPAC "bubble" and the SPAC "hype."[181]

The study did find that SPACs have some advantages over SEC-registered offerings in terms of regulatory leniency and better valuations of companies that may be hard to accurately price in a traditional IPO.[182] Yet the authors suggested that those benefits might be achieved through other mechanisms that would not have the disadvantages that they describe as inherent in the way SPACs are done.[183]

Chief among those is the dilution that SPACs' post-merger investors suffer, which results in large part from the arrangements that its sponsors make when they form them. Those promoters may be private equity firms, prominent business people, or others with no particularly relevant experience.[184] Rarely are they "mom-and-pop" investors as claimed by SPAC advocates.[185] The study thus gave the lie to the SPAC marketing claim that those offerings are a "'poor man's' private equity."[186] It therefore found that even though some retail investors may purchase shares

179. *See id.* at 3.
180. *Id.*
181. *Id.* at 2-3.
182. Klausner et al., *supra* note 98, at 5.
183. *Id.* at 5, 50-52.
184. *Id.* at 6.
185. *Id.* at 5.
186. *Id.*

of a SPAC later and hold them through the merger, "SPACs [are not] instruments of financial democracy."[187]

Rather, the initial investors in these offerings are a SPAC Mafia who "often have little intention to remain" with the company through its merger.[188] They are richly rewarded, however, for their efforts in starting up the SPAC corporation and selling its shares to make a public shell. To that end, they receive a block of shares, called the "promote," for a nominal price.[189] This inside deal typically amounts to 25% of the SPAC's IPO proceeds and 20% of its post-IPO equity.[190]

This stock is issued as part of units that the SPAC typically sells to its promoters for $10 each.[191] These units also include warrants, giving the holders the right to purchase stock at $11.50 per share.[192] Sometimes the units also have rights that can be exchanged for one-tenth of a share at no cost if the SPAC merges with a target.[193]

When a SPAC proposes such a combination, its shareholders have a right to redeem their stock for its IPO price plus interest.[194] Often, well over two-thirds of the SPAC's original shares are redeemed, but the stockholders get to keep their warrants and rights, which can be quite valuable.[195] SPACs often replenish cash paid out in those redemptions, funding them by selling additional shares in private placements.[196]

When the SPAC merges with the target, the shareholders of that formerly private firm then own most of the equity in the newly restructured public company.[197] The cash that the target receives most often comes from new investors in the SPAC or

187. Klausner et al., *supra* note 98, at 13.
188. *Id.* at 11.
189. *Id.* at 5-7.
190. *Id.* at 6.
191. *Id.* at 7.
192. Klausner et al., *supra* note 98, at 7.
193. *Id.*
194. *Id.*
195. *Id.* at 7, 9.
196. *Id.* at 9. The title of a piece by one commentator summed up how these SPAC investors do so well: *SPAC Insiders Can Make Millions Even When the Company They Take Public Struggles*. Ramkumar, *supra* note 111.
197. Dumont, *supra* note 88; Klausner et. al., *supra* note 98, at 9.

from SPAC sponsors.[198] In the latter case, those early investors often receive side payments to induce them not to redeem their shares.[199]

The upshot of this, the study found, is that financing the SPAC and its merger with the target are often two unrelated transactions.[200] Characterizing SPACs as private equity therefore is incorrect unless they are seen as private equity with a convenient exit option that enriches its sponsors.[201] Likewise, later SPAC investors cannot really be seen as participating in private equity because the role of such shells is to be vehicles for turning private companies into public ones, not to provide start-up financing to new firms.

When the study did the math on this process, it found SPAC sponsors do quite well from their "promotes" and redemptions. Considering the value of the warrants and the rights they receive, redeeming shareholders get a risk-free 11.6% annualized return.[202] Sometimes, this can be even more lucrative. Grab Holdings Inc., a food sharing and delivery service in Southeast Asia, hit $40 billion in a SPAC megadeal, giving its organizers "90% of the promote in return."[203] And information on how such promotes get distributed is murky.[204]

If the SPAC cannot find a target to merge with in two years, of course, all that potential gain evaporates—with the sponsors merely getting their original investment back with modest interest.[205] SPAC promoters therefore have a strong motivation to bring such a combination about.[206]

But what about the shareholders who remain in the SPAC after the merger? There are heavy costs for them, the study found, that water down their investments. As it succinctly amplified,

198. Klausner et al., *supra* note 98, at 10, 15.

199. *Id.* at 15.

200. *Id.* at 17.

201. *See id.* at 16.

202. *See id.* at 24.

203. Juliet Chung & Amrith Ramkumar, *As SPAC Creators Get Rich, How Incentives Are Shared Remains Murky*, WALL ST. J. (Aug. 3, 2021, 3:50 PM), [https://perma.cc/Q7AP-UA78].

204. *Id.*

205. Jackson & Curry, *supra* note 4.

206. Klausner et al., *supra* note 98, at 20.

"[T]he sponsor's promote, the underwriting fee for redeemed shares, and the warrants and rights included in publicly issued units create an overhang of dilution for the SPAC's eventual merger, and the redemption right amplifies that dilution."[207]

In addition, the warrants and rights take value away from the SPAC's unredeemed remaining stock, and the more shares that are so bought back, the greater the dilution the remaining shares suffer.[208] In a hypothetical analysis of that, where the study postulated a 50% redemption rate, it found the value of post-merger shares fell from $10 to $6.67—a loss of one-third of their worth.[209]

The study did allow, however, that SPACs with high-quality sponsors could ultimately produce good post-merger returns for the remaining shareholders. First, fewer shareholders might redeem their stocks, or more private investment might come in.[210] Second, the involvement of such high-quality organizers might add value because of their continuing relationship with the new firm.[211]

If either of those scenarios happened, as the study put it, the sponsors "could fill the dilution hole created by the inevitable dilution still built into the SPAC structure."[212] The study found, however, that the post-merger performance of the 2019-2020 cohort of companies that it selected was "weak" vis-à-vis returns earned on other stock indices.[213] And it discovered the same was true for SPACs from prior years.[214] From that, it drew this conclusion: "[T]he source of SPACs' poor performance is the dilution embedded in their structure."[215]

The post-merger SPAC stockholders therefore not only subsidize gains for their sponsors but also pick up the tab for the target going public. As the study summed up, "It is hard to believe that SPAC shareholders will continue for long to buy and

207. *Id.* at 26.
208. *Id.*
209. *Id.* at 32.
210. *Id.* at 33.
211. Klausner et al., *supra* note 98, at 33-34.
212. *Id.* at 34.
213. *Id.* at 35.
214. *Id.* at 54.
215. *Id.* at 37.

hold shares through mergers that leave them bearing the costs of the SPAC structure."[216]

Trying to discover the answer to why SPACs persist, the study found that the business press often portrays them "as efficient new vehicles that allow investors to profit from providing companies better and cheaper paths to the public markets than previously available."[217] But not only is such profitability largely illusive for post-merger shareholders, the study also found that SPACs are not really any cheaper or preferable to traditional SEC-registered IPOs.[218]

To that end, it went on to debunk the regulatory advantages SPACs are said to have. The study found they offer no cheaper compliance costs than traditional public offerings, they afford no greater price or deal certainties, and they are not quicker to accomplish than SEC-registered issuances.[219]

One often-cited advantage is that SPACs may include projections because they are provided in joint merger statements made by the SPAC and the target.[220] The PSLRA permits them under certain circumstances for companies that are already public but not in traditional registration statements.[221]

But the study, like the analysis by Corp. Fin. official Coates, saw that as a "loophole for SPACs" that "undermines" protections for investors in companies that make initial offerings to the public.[222] Given Coates's recent statement firmly equating SPACs to IPOs, the SEC will now certainly be taking a hard look at any such forward-looking statements made in SPAC filings.[223]

The study concluded by noting that once the hidden costs and liabilities of SPACs are better known, the "craze" may end.[224] In fact, it was a regulatory "loophole" that was never intended,[225] and SPAC regulation should be brought "up to the level of IPO

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216. Klausner et al., *supra* note 98, at 39.
217. *Id.* at 40.
218. *Id.* at 3-4.
219. *Id.* at 48.
220. *See, e.g.*, *id.* at 42-43.
221. *See supra* note 151 and accompanying text.
222. Klausner et al., *supra* note 98, at 43.
223. *See infra* notes 422-26.
224. Klausner et al., *supra* note 98, at 54-57.
225. *Id.* at 55.

regulation,"[226] as Corp. Fin. now seems inclined to do.[227] They may then continue in a more straightforward manner if the high sponsor costs are adjusted and if their proponents can justify them as having some benefits over traditional IPOs.[228]

To that end, one of the academic study's principal authors, Law Professor Michael Klausner of Stanford University, sees some possible promise in SPACs once the public learns their costs and true risks.[229] In that regard, he gave this opinion about their future: "I would be in favor of a SPAC in which the sponsor's compensation is lower and tightly tied to shareholder returns."[230]

Another commentator defended SPACs more broadly, arguing that they make it possible for certain companies to go public that would have a hard time doing so in a traditional IPO.[231] Those would include firms that are quite risky and may not show profits for a number of years—or those that are "too cutting-edge to be easily understood."[232]

D. SPACs After the Fall

As of summer 2021, however, SPACs seemed if not dead in the water at least barely treading it. The regulatory concerns noted by the SEC's staff certainly prompted that, but market activity has accounted for much of trend's decline as well. Shares in many companies connected to SPACs have fallen precipitously in recent months,[233] perhaps indicating increased investor understanding that these stocks may not be great deals.[234] One commentator ascribed that to "a bitter reality check" arising from

226. *Id.*
227. *See infra* notes 413-14.
228. Klausner et al., *supra* note 98, at 57.
229. Duhigg, *supra* note 119.
230. *Id.*
231. *Id.*
232. *Id.*
233. Bansari Mayur Kamdar & Medha Singh, *SPAC Boom Fizzles as Investors Cash Out on Big Names*, REUTERS (Dec. 23, 2021, 5:37 AM), [https://perma.cc/T2DW-EAQE]; Ramkumar, *supra* note 111 (stating that while investors in one SPAC "have suffered steep losses[,] [p]romoters of the SPAC still stand to make millions").
234. See Ivana Naumovska, *The SPAC Bubble Is About to Burst*, HARV. BUS. REV. (Feb. 18, 2021), [https://perma.cc/A38K-2SQU], for an earlier prediction that this was bound to happen.

market awareness of "unpredictable revenue and growing pains" from these start-ups.[235]

Because of this sea-change, CEOs of companies have been turning down merger solicitations from SPACs. At the end of May 2021, there were more than 400 SPACs searching for targets who have become progressively more reluctant to entertain their bids.[236] As one CEO said, "It's gone from being a bona fide alternative path to an IPO to 'We don't really want to be a punch line.'"[237]

Another said this about his reluctance to hear overtures from SPACs: "It feels like a shortcut . . . . I got increasingly more uncomfortable."[238] Accordingly, CEOs now say they are inclined to look in the direction of more traditional start-up financing such as venture capital and private equity.[239]

The trend also hit so-called "Green SPACs," those that pledged to merge with environmentally friendly businesses such as companies focused on renewable energy vehicles.[240] They had done well but waned in summer 2021.[241] One commentator noted that many of those businesses were speculative, and many were not transparent about achieving the lofty goals they professed.[242]

SPAC promoters were thus looking at returning money to their investors and forfeiting the funds they put up to get their SPACs up and running. In that case, one commentator described this even more disappointing result for SPAC sponsors: "In that scenario, they also don't get the deeply discounted shares that let

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235. Heather Somerville, *For Startup Leaders, SPACs Have Lost Their Allure*, WALL ST. J. (May 23, 2021, 9:00 AM), [https://perma.cc/5D2P-XDSZ]. One prominent SPAC deal that collapsed involved Topps Co., the famed baseball card company which had agreed to merge in April 2021 with a SPAC called Mudrick Capital Acquisition Corp. II. Matt Grossman, *Topps SPAC Merger Collapses After Loss of MLB Trading-Card Deal*, WALL ST. J. (Aug. 20, 2021, 11:03 AM), [https://perma.cc/8KCE-BT8C]. Topps aborted later in the summer after Major League Baseball and its players' association made an exclusive licensing agreement with another firm, Fanatics Inc. *Id.*

236. Somerville, *supra* note 235.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See* Justin Scheck, *Green SPACs Struggle After Years of Success*, WALL ST. J. (June 17, 2021, 5:30 AM), [https://perma.cc/8HXY-X6YD].

241. *Id.*

242. *Id.*

them make several times their initial investment, on average."[243] Yet another observer noted that trend could be reversed, "particularly if some strong deals draw investors back into the space."[244]

After the critical statements by Corp. Fin. and ACA, the SEC's staff took action that has contributed to SPAC activity grinding to a virtual halt. By mid-May 2021, it had only approved a half-dozen SPAC proxy statements as opposed to the hundreds that were filed in the first few months of 2021.[245] It also published a lengthy investor bulletin to educate ordinary investors about all aspects of SPACs.[246] Pointedly, it described how their promoters purchase equity on more favorable terms than ordinary investors and will benefit more from SPACs in the ultimate business combination.[247]

Congress has also gotten into the act with Senator John Kennedy (R.-La) introducing legislation to require more disclosure in SPAC transactions, specifically targeting the deals that their promoters get.[248] In late May, new SEC Chairman Gary Gensler appeared before a subcommittee of the House Appropriations Committee and testified that the Commission's staff is preparing new rules or guidelines for SPACs.[249]

In his remarks, Gensler questioned if the real story about SPACs is being told, particularly regarding who is benefiting there and whether investors are being appropriately protected.[250] Echoing the concerns of academic research, he asked whether retail shareholders in SPACs truly understand the risks they are taking and the dilution they may suffer.[251] As of late summer and

243. Amrith Ramkumar, *SPAC Pullback Pressures Creators to Find Quality Mergers*, WALL ST. J. (June 1, 2021, 4:47 PM), [https://perma.cc/4VXF-CAZC].

244. *Id.*

245. Freedman, *supra* note 173.

246. *What You Need to Know About SPACs—Updated Investor Bulletin*, *supra* note 171.

247. *Id.*

248. *See* Chris Prentice, *U.S. Congress to Hold Hearing on SPACs, Ramping Up Scrutiny*, REUTERS (May 21, 2021, 9:52 AM), [https://perma.cc/3JXE-V8EJ].

249. Dave Michaels, *SEC Weighs New Investor Protections for SPACs*, WALL ST. J. (May 26, 2021, 4:01 PM), [https://perma.cc/7GMM-XHKM].

250. *Id.*

251. *Id.* Shortly after Gensler's testimony, the author of this Article had a conversation with Congressman Brad Sherman (D-CA), who is on the House Subcommittee on Financial

fall 2021, there were still some SPAC deals being done.[252] The most prominent was one involving former President Donald Trump that was under investigation by the SEC.[253]

E. Fraud and Other Issues in SPACs

In addition to those concerns about the dilution that ordinary investors are likely to face in SPACs, those vehicles can pose even greater dangers such as outright fraud. They may also involve breaches of fiduciary duties by their sponsors, who might conceal material information that impairs shareholder redemption rights. The way they are structured may also violate the Investment Company Act[254] and the Investment Advisers Act.[255]

Such frauds are well exemplified by a case involving a SPAC currently in litigation.[256] A private equity firm set up a SPAC as a shell corporation that raised over $1 billion through an IPO.[257] It then identified two oil-and-gas companies, AMH and Kingfisher, to acquire.[258] Although the two were technically

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Services. Sherman told the author he was amazed at the profits SPAC insiders make on these deals. The congressman, however, indicated that he believed the SEC would be on top of these issuers to protect investors.In more recent remarks, Chairman Gensler expressed those concerns even more strongly. *See* Benjamin Bain, *Gensler Warns Executives Against Using SPACs to Shirk U.S. Rules*, BLOOMBERG (Dec. 7, 2021, 12:03 PM), [https://perma.cc/Z49G-75U3]. About SPACs he said, "Private companies are thinking this is an alternative way to go public." *Id.* He went on to state, "These three core tenants about disclosure, marketing and gatekeepers to ensure that the protections in the traditional IPO market are comparable here and that we don't have some imbalance or what people might call an arbitrage between the two approaches." *Id.*

252. *See* Kate Kelly, *SPACs Went Up, Then Down, But They're Not Out*, N.Y. TIMES: DEALBOOK (Aug. 21, 2021), [https://perma.cc/8XN2-R3GU]. One involved the notorious WeWork that previously had failed to complete an IPO because of, among other things, self-dealings by its founder, Adam Neumann. Andrew Ross Sorkin et al., *WeWork Hits the Stock Market*, N.Y. TIMES: DEALBOOK (Oct. 21, 2021), [https://perma.cc/TUE2-H7JM].

253. *See infra* notes 293-95 and accompanying text.

254. *See* Investment Company Act of 1940, 15 U.S.C. §§ 80a-3, -7; see Daniel J. Morrissey, *Are Mutual Funds Robbing Retirement Savings?*, 14 N.Y.U. J.L. & BUS. 143 (2018), and Daniel J. Morrissey, *Mutual Funds Keep Winning at the Expense of Their Investors*, 47 SEC. REGUL. L.J. 1 (2019), for articles by the author on that topic.

255. *See generally* Investment Advisers Act of 1940, 15 U.S.C. § 80b-3.

256. *See* Camelot Event Driven Fund v. Alta Mesa Res., Inc., No. 4:19-CV-957, 2021 WL 1416025, at *11-12 (S.D. Tex. Apr. 14, 2021).

257. *Id.* at *1-2.

258. *Id.* at *2.

separate entities, they were deeply connected by overlapping ownership and operations.[259]

The SPAC's management saw great things coming from their recent acquisition and were planning to take Kingfisher public.[260] The two companies were to be merged into the SPAC through a transaction that was valued at $3.8 billion.[261] It solicited proxies for shareholder approval, stating, among other claims for future success, "that AMH and Kingfisher were poised for accelerating growth immediately following the [merger]."[262]

To that end, the proxy materials had all kinds of estimates and projections that were said to be based upon the "observable trends and capabilities, as well as economically justified assumptions regarding the expected cash flows of" the two companies.[263] It also asserted that the target had appropriate policies and practices regarding its estimates of oil and gas reserves.[264] The SPAC's shareholders approved the merger, and the surviving company became known as Alta Mesa, with AMH and Kingfisher as its subsidiaries.[265]

But less than two months after that, bad news came out and kept on coming.[266] Alta Mesa first announced that the production estimates in its "[p]roxy had been dramatically reduced."[267] More disappointing information followed, including another downward adjustment in AMH's production estimate.[268] Then, just ten months after the merger, Kingfisher announced that its EBITDA, the earnings from its core operations, were almost 80% less than projected in the proxy.[269]

The company next revealed that it had "ineffective internal control over [its] financial reporting due to an identified material weakness."[270] Alta Mesa ended up writing down its assets by

259. *Id.*
260. *Id.* at *2.
261. *Camelot*, 2021 WL 1416025, at *2-3.
262. *Id.* at *3 (alteration in original).
263. *Id.*
264. *Id.*
265. *Id.* at *4.
266. *Camelot*, 2021 WL 1416025, at *4.
267. *Id.*
268. *Id.*
269. *Id.* at *5.
270. *Id.*

$3.1 billion even though it had valued them at $3.8 billion in the merger.[271] Correspondingly, the company's stock plunged.[272] In the bankruptcy proceeding that followed, the firm's assets were sold for just $320 million, less than 10% of what their worth was stated to be in the merger documents.[273]

Investigation supported by information from confidential witnesses revealed that management of AHM and Kingfisher had engaged in wide-spread fraudulent practices to create an appearance that the companies had more oil reserves than they actually did.[274] They also showed that those executives had "temporarily inflate[d] production in a manner Defendants knew would undermine the long-term viability of [AMH's] wells."[275]

Suits by shareholders of the SPAC followed against a number of Alta Mesa's executives and board members as well as two individuals who were executives of the SPAC that became Alta Mesa.[276] The actions alleged fraud both in the sale of securities under Section 10(b) and in proxy solicitation under Section 14(a) of the Securities Exchange Act of 1934.[277] The court sustained those claims, refusing to dismiss the case under Federal Rule of Civil Procedure 12(b)(6).[278] It also upheld causes of action against three business entities alleged to be control persons of those defendants.[279]

The Delaware Chancery, in addition, has weighed in for the first time on SPACs, applying what it called its "well-worn fiduciary principles."[280] The class action there involved a fairly typical SPAC whose sponsor got shares for a nominal price and then went public for $10 per share.[281] The SPAC then merged

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271. *Camelot*, 2021 WL 1416025, at *5.
272. *See id.*
273. *Id.* at *7.
274. *See id.* at *7-8.
275. *Id.* at *7 (second alteration in original).
276. *Camelot*, 2021 WL 1416025, at *10-11.
277. *Id.* at *9-10.
278. *Id.* at *8-9, *12.
279. *Id.* at *12.
280. *In re* Multiplan Corp. S'holders Litig., 268 A.3d 784, 792 (Del. Ch. 2022); see also Daniel J. Morrissey, *M&A Fiduciary Duties: Delaware's Murky Jurisprudence*, 58 VILL. L. REV. 121, 126-28 (2013), for the author of this Article's views on those principles.
281. *See In re Multiplan*, 268 A.3d at 791.

with a target, and few of its shareholders redeemed their stock before the merger.[282]

The complaint alleged that the SPACs promoters were fiduciaries for those shareholders and that they had violated their duties by withholding information from the shareholders about how the target's largest customer was building an in-house platform to compete with it.[283] That allegedly impaired the public shareholders' rights to redeem their stock.[284] After the merger, the shares declined several dollars below the $10 price that shareholders originally paid per share.[285] "By contrast, the founder shares, which converted into shares of the post-merger entity, were pure upside to the SPAC's insiders."[286] The Chancellor allowed those claims to go forward against the SPAC's sponsor, directors, and controlling shareholder.[287]

Other pending challenges to SPACs involve claims that they are investment companies, and their sponsors are investment advisors, but that they have not registered under federal acts which govern those entities and individuals.[288] Those Acts regulate companies whose primary business is investing in securities.

In the theory of liability advanced there, SPACs are set up, as their name states, to acquire other companies.[289] They hold securities like assets of the U.S. government and shares in money market funds while they search for target companies.[290] The SPAC insiders take their compensation by way of their ownership interest in those companies, many times getting interests in those firms of at least 20% of their equity.[291] Since those SPAC promoters are therefore running investment companies, these

282. *Id.* at 791-92.
283. *Id.* at 792.
284. *Id.*
285. *Id.* at 792, 798.
286. *In re Multiplan*, 268 A.3d at 792.
287. *See id.* at 792, 799-800.
288. *See, e.g.*, Verified Direct & Derivative Complaint for Breach of the Investment. Co. Act of 1940 and the Investment Advisers Act of 1940 at 2, 20-21, Assad v. E.Merge Tech. Acquisition Corp., No. 1:21-CV-07072 (S.D.N.Y. Aug. 20, 2021).
289. *See id.* at 4.
290. *See id.*
291. *See id.* at 4-5.

suits seek to rescind their compensation because it is taken in violation of those Acts.[292]

In addition, one prominent SPAC involves a company that has planned to merge with a social media firm owned by former President Donald Trump.[293] Senator Elizabeth Warren (D-Mass.) asked the SEC to investigate whether Trump and his companies "may have committed securities violations by holding private and undisclosed discussions about the merger as early as May 2021, while omitting this information in [SEC] filing and other public statements."[294] The Commission is following up on that.[295]

V. SEC ACTION ON SIMILAR MANEUVERS

A. Early SEC Response to Going Public Without Registration

But beyond such fraud, breaches of fiduciary duty, and other claims, the biggest challenge to SPACs may be that they aren't really a new phenomenon, just a more recent version of the questionable practice of "going public through the back door." To understand them better, some historical perspective is helpful, particularly from earlier cases regarding entities similar to SPACs and multi-stage transactions that violate the letter and spirit of the registration requirement.

Back in the late 1960s, the SEC became aware that a number of private companies were using shells to create a trading market in their stock.[296] They would sell their shares to the shells in what was purported to be an exempt private placement, and then the shells would pass that stock on to its public shareholders as a stock dividend.[297] That was done in reliance on an earlier Commission opinion which said those transactions were not sales

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292. *Id.* at 4-5.

293. Dan Mangan, *Trump SPAC Under Investigation by Federal Regulators, Including SEC*, CNBC (Dec. 7, 2021, 12:47 PM), [https://perma.cc/R6AQ-RNPT].

294. *Id.* (alteration in original).

295. *See id.*

296. *See* Orlanski, *supra* note 9, at 141-52.

297. HAZEN, *supra* note 8, at 263.

because they were not distributions for value, as sales are defined in Section 2(a)(3) of the Securities Act.[298]

In response, the SEC issued a release to address this rash of indirect stock distributions. It questioned "the issuance by a company, with little, if any, business activit[ies], of its shares to a publicly owned company in exchange for what may or may not be nominal consideration," which was followed by a spin-off of those shares by the public company.[299] Looking at the total transaction, it found that the distribution of the spun-off shares "does not cease at the point of receipt by the initial distributees of the shares but continues into the trading market involving sales to the investing public at large."[300]

The SEC therefore recognized that this indirect dispersal of stock would lead to sales of those securities to public investors who would need the information registration provides. In assessing the totality of that process, the SEC took the position that the shell was an underwriter.[301] It was getting the shares of the private company and passing them on to its stockholders, who would then resell them in the market.

The shell was thus a conduit, taking stock "purchased from an issuer with a view to . . . distribution," which is the statutory definition of underwriter under Section 2(a)(11) of the Securities Act.[302] Because an underwriter was involved, the Section 4(1) exemption was not available, and the entire transaction constituted an illegal sale of unregistered securities.[303]

In the same release, the Commission also warned about a more direct pattern of shell manipulation by unscrupulous promoters that was similar to what was occurring when public companies spun off their shares.[304] The SEC then followed up on that by bringing several litigated actions to stop practices that exemplified that wrongdoing.

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298. *Id.* at 260.

299. Spin Offs and Shell Corporations, Securities Act Release No. 4982, Exchange Act Release No. 8638, 34 Fed. Reg. 11,581 (July 2, 1969).

300. *Id.*

301. HAZEN, *supra* note 8, at 263 n.86.

302. *See* SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738, 740 (2d Cir. 1941).

303. *Id.* at 741.

304. Spin Offs and Shell Corporations, 34 Fed. Reg. at 11,581.

One was a classic "pump and dump."[305] There, promoters found an inactive shell, fraudulently "dress[ed] up" its assets as having "enormous potential value," and sold them to public investors without registration.[306] The court realistically analyzed this as "a new offering."[307] It held that the promoters were its underwriters and thus could "find no comfort in the Section 4(1) exemption."[308] That, it held, was "intended to cover everyday trading between members of the investing public," not situations, like in this case, involving a distribution to the public by "an issuer, underwriter or dealer."[309]

In addition to enjoining the defendants from violations of the anti-fraud provisions of the Securities Acts, the court therefore also found they had violated the registration requirements.[310] Citing the primary purpose of the Act as "the protection of 'those who do not know market conditions from the overreachings of those who do,'" the court enjoined many of the participants in the scheme from engaging in the sale of unregistered securities as well as from violating the anti-fraud provisions of the securities laws.[311]

About the same time the Commission brought another case, *SEC v. Harwyn Industries Corp.*, that involved the other situation it discussed in the release—taking companies public by spinning off their shares.[312] There, a public company actively acquired private companies seeking to go public.[313] The public company then held those corporations as subsidiaries and distributed some of their shares to its stockholders so that a trading market for them would ensue.[314]

Because of that, the court ruled that the closely held firms, the subsidiaries of the public company, were making

305. *See* SEC v. N. Am. Rsch. & Dev. Corp., 424 F.2d 63, 66-67, 74 (2d. Cir. 1970).
306. *Id.* at 66-67, 71.
307. *Id.* at 72.
308. *Id.*
309. *Id.* at 71.
310. *See N. Am. Rsch. & Dev. Corp.*, 424 F.2d at 70-80.
311. *Id.* at 66, 82.
312. 326 F. Supp. 943, 945 (S.D.N.Y. 1971); *see also supra* note 304 and accompanying text.
313. *Id.* at 945.
314. *Id.* at 945-46.

unregistered, non-exempt sales of their securities.[315] They received value when they sold their shares to the public company with a view to having them publicly traded.[316] And the unregistered sales of those shares by the stockholders of the public company were done for value too and thus were also in violation of the registration requirement.[317]

Shortly after that, the SEC brought another case, *SEC v. Datronics Engineers, Inc.*, that involved a similar pattern of using an existing public company, Datronics Engineers, Inc. ("Datronics"), to create a trading market in the shares of private firms.[318] There, Datronics entered into agreements with a number of closely held companies that provided they would be merged into either an existing subsidiary of Datronics or a new one.[319] The shareholders of the private company would receive a majority of the stock in those subsidiaries or new corporations.[320]

Datronics would then distribute the shares of those subsidiaries to its public shareholders without filing a registration statement for them.[321] The appellate court held this scheme involved a sale of the stock of the closely held companies because a trading market for them began promptly.[322] Furthermore, Datronics and its officials, who received some of those shares, benefited from that process.[323] Each of the private companies thus became public, and the purchasers of their shares in the resulting trading market were not afforded the protection of registration.[324]

Therefore, not only did the merged corporations violate the Securities Act's registration requirement as issuers of those spun-off securities but Datronics did so as well. The court held it was both a co-issuer and an underwriter in all those transactions, purchasing the private companies' shares with a view to

315. *Id.* at 953, 955.
316. *Id.* at 954.
317. *Harwyn Indus. Corp*., 326 F. Supp. at 954.
318. *See* 490 F.2d 250, 253-54 (4th Cir. 1973).
319. *Id.* at 253.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Datronics Eng'rs, Inc.*, 490 F.2d at 253-54.
324. *Id.*

distributing them.[325] As such, Datronics, an issuer and underwriter of securities, could not claim the Section 4(1) exemption from registration.[326]

B. Rule 145

Those attempts to use dividends of the stock of subsidiaries to go public without registration may have led the Commission more broadly to revise its earlier position that exchanges of stock in certain corporate combinations do not constitute a sale. As has been said, the SEC had traditionally found no sale of securities there even though they were "disposed of for value," as Section 2(a)(3) of the statute defined that event.[327] Registration was therefore not needed.

This "no sale theory" was based on the highly formalistic theory that this just involved "corporate acts," that there was no volitional action by the individual shareholders.[328] But in 1972, the SEC changed its view, realizing the shareholders whose approval would be requested for these transactions would thereby be sold securities.

The Commission took care of this problem by promulgating Rule 145.[329] It allowed that the registration of this stock, exchanged for other shares, could be done on Form S-4, which

325. *Id.* at 254.

326. *Id.* at 253.

327. *See, e.g.*, Isquith v. Caremark Int'l, Inc., 136 F.3d 531, 533-34, 537 (7th Cir. 1998) (finding that a spin-off did not require registration). Among other things, there the parent had received a no-action letter from the SEC to that effect, and the court found there was no sale of the securities because it was akin to a stock dividend. *Id.* at 533-34. The Commission's Division of Corporation Finance has given its opinion that a spin-off does not require Securities Act registration if these conditions are met: (1) shareholders of the parent corporation "do not provide consideration for the spun-off shares," (2) the spun-off shares are distributed pro rata to the parent corporation's shareholders, (3) adequate information about the subsidiary and the spin-off is provided by the parent corporation to both the stockholders and the securities trading markets, (4) the parent corporation has a valid business purpose justifying the spin-off, and (5) if the parent corporation elects to spin off restricted securities, it has held them for a requisite period of time. SEC Staff Legal Bulletin No. 4 (Sept. 16, 1997), [https://perma.cc/85EB-FMDK].

328. 17 C.F.R. § 230.133 (1968), *rescinded*, Registration of Certain Transactions Involving Mergers, Consolidations and Acquisitions of Assets, Securities Act Release No. 5316, Exchange Act Release No. 9804, Investment Company Act Release No. 7405, 37 Fed. Reg. 23,631 (Nov. 7, 1972).

329. 17 C.F.R. § 230.145 (2013).

was specifically designed for issuances of shares in corporate combinations.[330] There, the registrants could use the proxy statements required to solicit approval of a merger as registration statements as well.

The SEC's changed position as to the merging corporations brought to light a subtler issue—who is an underwriter in these transactions? Under the statutory definition of that term in Section 2(a)(11), underwriters could include affiliates of the issuer at the time of the merger.[331] If they or those selling for them could be considered engaged in a distribution, they would thus be underwriters precluded from using the Section 4(a)(1) exemption from registration.

That issue was muddied a bit, however, in 2007 when the Commission did away with the presumptive underwriter doctrine, which restricted all affiliates that were parties to such transactions from selling their shares.[332] In its new approach, the SEC said that sales by these affiliates would not be part of a distribution if they were made in compliance with certain requirements of Rule 144.[333] However, that repeal of the presumptive underwriter doctrine did not apply to shell companies created solely for the purpose of effectuating a business combination involving another company.[334]

C. Use of Shells When Multiple Players Are Involved

More recently, courts have also ruled that defendants using shells to go public cannot insulate themselves from the registration requirements through dealings that involve layers of participants. An important decision there, *SEC v. Cavanagh*,

330. *See id.*

331. *See* HAZEN, *supra* note 8, at 259.

332. *Id.*

333. Revisions to Rules 144 and 145, Securities Act Release No. 8869, 72 Fed. Reg. 71,546 (Dec. 6, 2007). Securities Act Rule 144 allows affiliates of companies to sell their securities in certain conditions without being deemed underwriters. 17 C.F.R. § 230.144 (2022). Under Rule 145(c), affiliates of an issuer engaged in one of these mergers will not be underwriters if they sell in compliance with Rule 144(d)'s volume limitations and make their sales in ordinary brokerage transactions. HAZEN, *supra* note 8, at 259. Other requirements of Rule 144 apply to those sales as well. *See id.*

334. HAZEN, *supra* note 8, at 259.

premised its holding on the integration doctrine.[335] That securities law jurisprudence allows courts to scrutinize purportedly separate dealings and view them as a single transaction.[336]

The central figure in *Cavanagh* was what the court called a "malevolent investment banker," who with a lawyer and a broker-dealer agreed to raise capital for a company in need of funds.[337] Instead of doing that, however, they obtained a large block of the company's stock right before they merged the company into a public shell that they secretly controlled.[338] Some of those shares were then purchased by three Spanish entities in what were alleged to be private sales made by the company's management.[339] The defendants then sold the other shares they owned in the merged company on the public market at inflated prices, gaining over $5 million from "small, on-line investors."[340]

The defendants argued that their sales were exempt under 4(1) because they did not involve an underwriter.[341] To that end, one of them claimed "he was no longer an affiliate of the" issuer "because he had resigned" his position "as an officer and director."[342] The court, however, considered all the various actions by the defendants involved in forming the shell, capitalizing it, and merging it into the public company.[343] In that light, it held that the purposes of the Securities Act were best

335. 1 F. Supp. 2d 337, 364 (S.D.N.Y. 1998), *aff'd*, 155 F.3d 129 (2d. Cir. 1998).

336. See Daniel J. Morrissey, *Integration of Securities Offerings—The ABA's "Indiscrete" Proposal*, 26 ARIZ. L. REV. 41, 54, 56 (1984), for an earlier article by this author on that doctrine as it applies to purportedly separate offerings that are each allegedly exempt from registration. The integration doctrine there combines those multiple offerings if they are done for the same purpose or are part of a single plan of financing. *Id.* at 56. The result is that many times the total integrated offering does not qualify for an exemption from registration. *See id.* at 43-44, 76-77.For the SEC's latest statement about the integration doctrine, simplifying its application, see generally 17 C.F.R. §§ 227.100-.504 (2016); 17 C.F.R. §§ 230.251-.263 (1992); 17 C.F.R. §§ 230.500-.508 (1982); 17 C.F.R. §§ 229.10 -.1305 (1982). There, the Commission created broader safe harbors than had existed before that to prevent exempt offerings from being integrated in a number of situations.

337. *Cavanagh*, 1 F. Supp. 2d at 344.

338. *See id.* at 344, 350.

339. *Id.* at 365, 368-69.

340. *Id.* at 341.

341. *Id.* at 361.

342. *Cavanagh*, 1 F. Supp. 2d at 361.

343. *See id.* at 360-84 (considering claims under Securities Act of 1933, 15 U.S.C. §§ 77f, 77j, 77q).

served by treating them as having been "jointly conceived and jointly consummated."[344]

To do that, the court applied what it called "an 'integrated' analysis" to determine whether exemptions from registration are improperly claimed for separate transactions which are "actually part of a larger offering for which no exemption is available."[345] Applying that outlook, the court scrutinized the merger with the shell company and the alleged private sales of stock to the Spanish entities.[346] Those were then transferred to the defendants for their sale, and therefore, the whole process did not involve separate transactions.[347] They were really one in the minds of the defendants who designed them.

As such, the court found they "were so interconnected that one would not have happened without the other."[348] In the words of an earlier SEC release on the integration doctrine, all the sales were "part of a single plan of financing, and shared the same general purpose."[349] Following that logic, the court concluded that whether a violation of the registration requirement occurred depended on "the implications of these events for investors who ultimately bought or sold the shares that were made available to the public as a result of these transactions."[350]

Since the shares of the individuals who ultimately purchased them were not registered, they received no honest information about the offering. And using the integration analysis, the court found the defendants were control persons of all those dealings, and thus it ruled that their sales involved underwriters precluding their use of the 4(1) exemption.[351] Since a distribution of securities was occurring, their sales were not exempt and therefore violated the registration requirement.[352]

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344. *Id.* at 364 (quoting SEC v. N. Am. Rsch. & Dev. Corp., 424 F.2d 63, 70-71 (2d Cir. 1970)).

345. *Id.* at 363 (quoting LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 278 (3rd ed. 1995)).

346. *Id.* at 364-65.

347. *Cavanagh*, 1 F. Supp. 2d at 365.

348. *Id.* at 364.

349. *Id.* at 365; *see also* Non-public Offering Exemption, Securities Act Release No. 4552, 27 Fed. Reg. 11,316 (Nov. 16, 1962).

350. *Id.* at 365-66.

351. *Id.* at 361-62, 366-67.

352. *Cavanagh*, 1 F. Supp. 2d at 367.

SEC v. Lybrand exemplifies another significant use of a shell corporation to evade registration where the court considered all the transactions involved in the sale of shares to the public.[353] There, defendants Richard and Debra Kerns and Charles Wilkins formed shell corporations, distributing their shares to family members and friends.[354] They then arranged for the stock of one of these shells to be publicly traded and negotiated the sale to another defendant, Peter Lybrand.[355] Lybrand advised them to manipulate the price of the shares by engineering various fraudulent transactions like match orders, which they did.[356] The Kernses and Wilkins then transferred the shares of those shells to Lybrand, who continued to manipulate them.[357]

Among other things, the SEC charged the Kernses and Wilkins with being underwriters of the sale of the shells' stock to the public.[358] Those defendants responded they had only made "private sales" to Lybrand and, furthermore, that they were not engaged in the public distribution of stock because they had made substantial compliance with Rule 144.[359]

The court, however, focused on the broad definition of underwriters as "all persons who might operate as conduits for securities being placed into the hands of the investing public" and who thereby sell for an issuer in a distribution.[360] It also noted that the statutory definition of underwriter equates control persons with their issuers and thus makes their sales ineligible to claim the 4(1) exemption.[361]

With that background, the court found that the Kernses and Wilkins were underwriters because they had engaged in a distribution by transferring the shares of their shell corporation to Lybrand.[362] To support that, it specifically cited *Cavanagh* to the

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353. *See* 200 F. Supp. 2d 384, 386 (S.D.N.Y. 2002), *aff'd on other grounds*, *sub nom*. SEC v. Kern, 425 F.3d 143 (2d Cir. 2005).

354. *Id.* at 387.

355. *Id.* at 388.

356. *See id.* at 389-90.

357. *Id.* at 390.

358. *See Lybrand*, 200 F. Supp. 2d at 391-92.

359. *Id.* at 392.

360. *Id.* at 393 (quoting 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 431 (4th ed. 2002)).

361. *Id.* at 393.

362. *Id.* at 393-96.

effect that "the sales and transfer should be viewed as part of a single transaction for each entity."[363]

The court also held that those actions could not be exempt under the criteria of Rule 144 because, among other things, the defendants' argument was "nothing more than an extension of their claim that they did not acquire the shell corporations' securities 'with a view to' participating in a distribution."[364] Like *Cavanagh*, the court thus found that shell organizers who are indirectly involved in the sale of their unregistered shares to the public violate the Securities Act.[365]

VI. SPAC PROMOTERS AS UNDERWRITERS

A. Sales by SPAC Insiders

Under the theories developed in cases like *Cavanagh*, *Lybrand*, and their predecessors that also involved manipulation of shells, SPAC promoters may be exposed to liability as underwriters. If that is so, their sales of SPAC stock would not be exempt from registration under the current version of Section 4(1), 4(a)(1). Absent another exemption, such unregistered sales violate Section 5 of the Securities Act, which requires that all offers and sales of securities be registered with the SEC.[366] In these situations, buyers of shares have the right to bring a civil action to rescind their purchases.[367]

The Securities Act is designed so that in the initial distribution of securities by issuers the public is protected by a registration process. As has been said, it must provide them all the information they need to make an investment decision.[368] As two renowned early commentators said about the purpose of that legislation: "All the Act pretends to do is to require the 'truth about securities' at the time of issue, and to impose a penalty for

363. *Lybrand*, 200 F. Supp. 2d at 396.
364. *Id.* at 394.
365. *Id.* at 395, 397-98.
366. Securities Act of 1933, 15 U.S.C. § 77e(c).
367. Securities Act of 1933 § 77*l*(a).
368. *See supra* notes 72-75 and accompanying text.

failure to tell the truth. Once it is told, the matter is left to the investor."[369]

In addition, the Act presupposes that issuers make their sales through underwriters who act as conduits for securities placed in the hands of public buyers.[370] They are intermediaries who facilitate the transfers of securities. The House and Senate hearings thus made clear that the registration requirement covers not only the issuer but those in control of it and their agents.[371] As such, underwriters are an integral part of the selling process, and their inclusion in the registration requirement is necessary so that members of the public are given full information about the investments they are offered.[372]

As has been said, Section 2(a)(11), the statutory definition of an underwriter, sets forth three ways individuals or entities can fall into that category: (1) by buying from the issuer with a view towards distribution; (2) by directly or indirectly participating in an underwriting effort; (3) and by selling securities on behalf of a control person or operating as the controlling entity.[373] The sales by SPAC promoters seem to fit into both the first and third of those provisions.

Using the logic of cases like *Cavanagh* and *Lybrand*,[374] SPAC sponsors can be seen as participants in selling stock of the target companies in the process called de-SPACing. That constitutes a de facto public distribution of their shares. SPAC promoters are the initial stockholders in the SPAC, purportedly providing its start-up capital. They may purchase those shares from the SPAC in an SEC-registered offering, but most likely they have received their block of shares in an exempt private placement at a deep discount or for a nominal price.[375]

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369. William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171 (1933).

370. *See* HAZEN, *supra* note 8, at 222.

371. Robert J. Ahrenholz & William E. Van Valkenberg, Note, *The Presumptive Underwriter Doctrine: Statutory Underwriter Status for Investors Purchasing a Specified Portion of a Registered Offering*, 1973 UTAH L. REV. 773, 777.

372. *See* HAZEN, *supra* note 8, at 222.

373. Securities Act of 1933, 15 U.S.C. § 77b(a)(11).

374. *See* SEC v. Cavanagh, 1 F. Supp. 2d 337, 337-38, 371-72 (S.D.N.Y. 1998); SEC v. Lybrand, 200 F. Supp. 2d 384, 392, 394-95 (S.D.N.Y. 2002).

375. *See What You Need to Know About SPACs—Updated Investor Bulletin*, *supra* note 171.

As has been discussed, those SPAC sponsors often exercise their rights to have their shares redeemed by the SPAC before its merger with the private target company.[376] Subsequently, that stock, now owned by the SPAC, becomes shares of the merged company that is created in the de-SPACing process.[377] Since the SPAC's stock is already trading in the public market, the shares that the promoters sell back to the SPAC most likely end up there, where they are bought by the investing public.[378]

Not only does the SPAC process evade the registration requirement by taking private companies public through the back door, but the promoters of those SPACs therefore also appear to be underwriters in those offerings. They take their shares from the SPAC in its IPO or in a private placement with a view to reselling them back to the SPAC before its merger with the target. Those sales are made without registration but look to their introduction into a trading market without their ultimate public purchasers having the benefit of registration. As the *Cavanagh* case held, this indirect sale to the public through a multi-staged approach, if done without registration, violates Section 5 of the Act.[379]

Using the integration doctrine, *Cavanagh* found that the purportedly separate sales involved in such a transfer to the public were in effect a single transaction.[380] As has been described, earlier cases like *Harwyn* and *Datronics* involved using spin-offs to bring about unregistered sales to public purchasers.[381] Like the sales by SPAC sponsors, spin-offs were also accomplished through such a multi-stage technique that the courts found violated the Securities Act.[382]

As one authority noted, the Act places great emphasis on who the ultimate purchasers of the securities will be, rather than the nature of the person acting to transmit them.[383] In such

376. *See supra* note 195 and accompanying text.

377. *See supra* notes 96-101 and accompanying text.

378. *See supra* notes 165-68 and accompanying text.

379. *See Cavanagh*, 1 F. Supp. 2d at 364-67.

380. *Id.* at 363-65.

381. *See supra* notes 312-26 and accompanying text.

382. *See* SEC v. Harwyn Indus. Corp., 326 F. Supp. 943, 945-46, 954-55 (S.D.N.Y. 1971); SEC v. Datronics Eng'rs, Inc., 490 F.2d 250, 253 (4th Cir. 1973).

383. HAZEN, *supra* note 8, at 222.

situations, the intent of the SPAC sponsors at the time they resell their shares back to that entity should be irrelevant because they most likely know then that their shares will be resold in the public market. They are therefore underwriters because they have taken their securities with a view to such an ultimate distribution.

That result is further supported because the selling SPAC sponsors have been instrumental in forming that shell with the purpose of merging it into a private target. In the words of *Cavanagh*, all those actions "were so interconnected that one would not have happened without the other."[384] The SPAC shareholders have thus taken their shares from the issuing SPAC with obvious knowledge that, when they resell the shares, they will end up in the public market.

In addition to finding SPAC sponsors to be underwriters because of their role in transmitting shares to the public, the alternate application of that term would apply here as well.[385] SPAC promoters are certainly control persons of such entities. As such, individuals such as brokers, who sell for them in connection with a distribution, are underwriters too. Since an underwriter is then part of the transaction, the 4(a)(1) exemption will not apply to anyone involved, such as the selling SPAC sponsors.[386]

The more recent *Lybrand* case is also on point.[387] It adopted a broad definition of underwriters as "all persons who might operate as conduits for securities being placed into the hands of the investing public."[388] In *Lybrand*, certain defendants, after manipulating the shares they owned and arranging for a public market for them, then transferred the shares to another individual who sold them to the public.[389] Like *Cavanagh*, the *Lybrand* court integrated that entire activity, holding that all those sales and transfers should be viewed as a single transaction involving the sale of unregistered securities.[390]

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384. *See Cavanagh*, 1 F. Supp. 2d at 364.
385. *See supra* notes 360-61 and accompanying text.
386. *See* SEC v. Chinese Consol. Benevolent Ass'n., 120 F.2d 738, 741 (2d Cir. 1941).
387. *See* SEC v. Lybrand, 200 F. Supp. 2d 384, 397-98 (S.D.N.Y. 2002).
388. *Id.* at 393 (quoting HAZEN, *supra* note 360, at 431).
389. *See Lybrand*, 200 F. Supp. 2d at 390-91, 393.
390. *Id.* at 395-96.

The same pattern is evident in sales by SPAC promoters. They sell their shares back to the SPAC knowing that a large number of them will find their way into the public market. And the logic of *Lybrand* precluding the applicability of Rule 144 applies here too. A holistic view of the actions of the SPAC promoters indicates that they have taken their shares with a view to participating in their ultimate distribution through the merged company to the investing public. Therefore, they cannot be the isolated sales that Rule 144 exempts because they are part of a plan to sell a larger number of securities to the public.

B. The Presumptive Underwriter Doctrine of Rule 145

As has been discussed, Rule 145 reversed the SEC's previous position that exchanges of stock in mergers did not require registration.[391] In 1972, the Commission did that about-face, stating that in such situations where stockholder approval is required, there would indeed be a disposition of a security for value (i.e., a sale).[392] The SEC allowed, however, that registration there could be done by Form S-4, which uses the proxy statements required to solicit shareholder approval for a merger.[393]

Up until 2007, the Commission also maintained that any affiliates of an issuer who sold securities coming from a Rule 145 transaction would be engaged in a distribution and therefore considered underwriters, necessitating the registration of their securities. But in amendments to Rule 145 promulgated that year, the SEC excluded those making such "downstream" sales from underwriter status so long as the transactions were made under the volume limitations of Rule 144(d) and in ordinary brokerage transactions.[394]

391. *See supra* Section V.B.

392. *See supra* notes 327-29 and accompanying text.

393. *See* SEC, FORM S-4: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, at 2-3 (2022), [https://perma.cc/P6S3-U3RT].

394. *See supra* notes 332-33 and accompanying text.

But in an important proviso, the Commission added in Rules 145(c):

> However, based on our experience with transactions involving shell companies that have resulted in abusive sales of securities, we believe that there continues to be a need to apply the presumptive underwriter provision to reporting and non-reporting shell companies and their affiliates and promoters. We are amending Rule 145 to eliminate the presumptive underwriter provision except when a party to the Rule 145(a) transaction is a shell company.[395]

However, Rule 145(c), which contains that provision, carves out an exemption when the company without assets or operations is created solely for the purpose of a business combination involving a non-shell company.[396] That would seem to apply in a SPAC situation because the shell there is created to merge with a target company that has real operations and assets.[397]

Even without that saving exemption, however, the prohibition on downstream sales would not seem to apply to SPAC sponsors because they usually sell their shares before the merger occurs.[398] Yet the logic of Rule 145 and its original concept of the presumptive underwriter present important background to support the arguments made above that the SPAC sponsors are indeed underwriters.

As pointed out, SPAC promoters obviously control such an issuer.[399] Under the statutory definition of underwriter in Section 2(a)(11), they are therefore deemed tantamount to the issuer so that anyone who sells for them in connection with a distribution is an underwriter.[400] The section 4(a)(1) exemption therefore does not apply to anyone involved in that transaction. Since an underwriter is involved in such sales, which include the control persons themselves, those individuals are liable for the sale of unregistered securities because they are part of the entire transaction.

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395. 7 J. WILLIAM HICKS, EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933 § 5:10 (2022).

396. 17 C.F.R. § 230.145(c) (2013).

397. *See supra* notes 96-100 and accompanying text.

398. *See supra* notes 194-95 and accompanying text.

399. *See supra* note 351 and accompanying text.

400. *See supra* note 373-74 and accompanying text.

In addition, given the approach taken by *Cavanagh* and *Lybrand*, the volume limitation exemption adopted from Rule 144 in 2007 should be not controlling here.[401] Those cases used integration to combine sales by various participants in shell manipulations.[402] That appears to be exactly what is happening when numerous members of the SPAC Mafia together bail out and reap substantial profits before the de-SPACing process, which dilutes the investments of the remaining shareholders.

VII. CONCLUSION

The SPAC phenomenon should therefore occasion a reaffirmation of the importance that securities sold to the public be first registered and reviewed by a federal agency acting in the public's interest. In addition to all their other problems, SPACs are merely the latest version of "going public through the back door"—a cunning maneuver that stock promoters have used for years to sidestep the important protection that registration provides for investors.

What the academic study calls a "loophole"[403] appears to have been at best an oversight in the Securities Act. The SEC has, over the years, fought to close or at least restrict it. It certainly violates the spirit of that law and likely even its letter because underwriters are precluded from using the 4(a)(1) exemption.[404]

And so, the role that SPAC organizers and promoters play in bringing about this dubious practice makes them both control persons and underwriters.[405] Considering the total impact of these transactions, they are underwriters of their SPACs' shares that are sold to the public and also are control persons of the entire venture. That makes those who sell for them underwriters as well. Under both theories, therefore, the 4(a)(1) exemption is unavailable.

The SPAC promoters thus have no exemption from registering their transactions and are making sales of their

401. *See supra* notes 334, 363-65 and accompanying text.
402. *See supra* notes 345-49, 363 and accompanying text.
403. *See supra* note 225 and accompanying text.
404. *See* SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738, 741 (2d Cir. 1941).
405. *See supra* notes 351-52, 360-62 and accompanying text.

securities in violation of the securities laws. Their purchasers, using the remedy of Section 12(a)(1), can therefore rescind their sales and obtain recovery from those SPAC sponsors who have violated Section 5 by selling unregistered securities.

VIII. EPILOGUE

After this Article was written and accepted for publication, two significant events occurred impacting the future of SPACs. First, as Chairman Gensler indicated in his congressional testimony,[406] on March 30, 2022, the Commission published new proposed rules governing SPACs.[407] Its intent is generally in line with the position Corp. Fin. Director Coates took in his earlier remarks equating SPACs with traditional IPOs, and the proposal would bring SPAC regulation up to match the level of IPO regulation.[408] In addition, the SEC buttressed its proposal with recommendations made in fall 2021 from its Investor Advisory Committee and its Small Business Capital Formation Advisory Committee, which highlighted the inadequate disclosures that often occur in SPAC offerings.[409]

Second, by summer 2022, investor appetite for SPACs appeared to be dead in the water. As one commentator noted, the "regulatory crackdown," as well as the market's volatility, hit SPACs hard.[410] Another commentator agreed, stating "General market volatility in 2022 and an uncertain market environment resulting in losses in the public markets have . . . dampened enthusiasm for SPACs."[411] Thus, while there were 613 SPAC IPOs in 2021, by October 2022, there had only been about 80.[412]

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406. *See supra* note 249 and accompanying text.

407. Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 11048, Exchange Act Release No. 94546, Investment Company Release No. 34594, 87 Fed. Reg. 29,458 (proposed Mar. 30, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249, 270).

408. *See supra* notes 165-68, 226 and accompanying text.

409. Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. at 29,462-63.

410. Yun Li, *SPACs Wipe Out Half of Their Value as Investors Lose Appetite for Risky Growth Stock*s, CNBC (June 27, 2022, 2:01 PM), [https://perma.cc/Y926-AVMS].

411. *Id.*

412. *Summary of SPACs*, SPAC ANALYTICS, [https://perma.cc/5LBH-2VUZ] (last visited Oct. 2, 2022).

In announcing the new SPAC proposal, Chairman Gensler was quite explicit about his intent to treat SPACs as much as possible like regular registered public offerings.[413] To that end, he quoted one of Aristotle's key principles of jurisprudence: "Treat like cases alike."[414] No doubt his attitude was shaped by an astounding fact that the Commission's release pointed out—more than half the public offerings in 2020 and 2021 were done as SPACs, raising more than $83 billion and $160 billion, respectively.[415]

SPACs then appeared on their way to swallowing up the finely calibrated securities regulation system, described above,[416] that the SEC had established under the Securities Act to oversee and control public offerings. As Chairman Gensler stated, the proposal's intent was to reverse the SPAC's trend of undercutting that process because it "would strengthen disclosure, marketing standards and gatekeeper and issuer obligations by market participants in SPACs, helping ensure that investors in these vehicles get protections similar to those when investing in traditional IPOs."[417]

The Commission's proposed regulations have several significant aspects. First, they would require specific disclosures regarding compensation paid to SPAC sponsors, conflicts of interests, dilution, and the fairness of the transactions to unaffiliated investors.[418] SPACs are a process where, as has been pointed out, unaffiliated investors appear to be unfairly subsidizing transactions that enrich the promoters of those entities and the shareholders of the target companies.[419] This may be similar to the dilution public investors experience when buying stock in traditional IPOs. But the Commission and state

413. Joel L. Rubinstein et al., *SEC Proposes Rules to Regulate SPACs*, WHITE & CASE (Apr. 18, 2022), [https://perma.cc/2FRV-6K5C].

414. *Id.*

415. Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 11048, Exchange Act Release No. 94546, Investment Company Release No. 34594, 87 Fed. Reg. 29,458 (proposed Mar. 30, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249, 270).

416. *See supra* Sections II.E, II.F.

417. Rubinstein et al., *supra* note 413.

418. Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. at 29,464.

419. *See supra* notes 194-99 and accompanying text.

regulators have worked to keep that at reasonable levels. In addition, the SPAC sponsors may have every incentive to find a merger partner who may be unsuitable for the interests of their unaffiliated shareholders.[420]

Along those lines, the new regulations would also require disclosure about whether the SPAC believes that the de-SPAC transaction is fair to investors.[421] In addition, the proposal would not allow the use of forward-looking statements.[422] SPACs would be defined as blank-check companies, so they would not be eligible to use such statements under the PSLRA[423] and could not "make bullish forward-looking statements about the firms they plan to merge with."[424] As has been pointed out, abuses have occurred there involving unjustified forecasts about the prospects of the target companies.[425] SPACs would thus be brought more in line with the practice of traditional IPOs, where the Commission has historically looked on projections with a jaundiced eye as ways to potentially deceive eager investors.[426]

Along the lines this Article has advocated, the proposal would also expand liability. The private target companies would be made co-registrants in these transactions and would thus also be responsible for false or misleading statements in those documents.[427] And the new rules would specifically make underwriters of the SPAC's IPO also underwriters of the de-SPACing process.[428] They would thus have due diligence

420. *See supra* notes 205-06 and accompanying text. As has been described, if the SPAC's promoters fail to identify a merger partner in two years, they miss out on their lucrative "promotes" and redemptions, and merely get back their original investment with modest interest.

421. Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. at 29,463.

422. *Id.*

423. *Id.*

424. Yun Li, *Goldman Sachs Is Shrinking Its SPAC Business Amid Regulatory Crackdown and Market Turmoil*, CNBC (May 9, 2022, 4:07 PM), [https://perma.cc/M5ZM-DJVK].

425. *See, e.g.*, *supra* notes 260-86 and accompanying text.

426. *See supra* notes 150-53, 220-23 and accompanying text.

427. Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. at 29,479.

428. *Id.* at 29,486.

obligations there to make sure public investors are told the full truth about the offering.[429]

On that point, one Commissioner, Allison Herren Lee, went further in her statement supporting the proposal and made this remark: "[T]here are a number of participants in the de-SPAC transaction that may also be subject to statutory underwriter liability if they participate in the distribution."[430] In a general sense, this echoes the argument of this Article that advocates for SPAC sponsors' potential liability as underwriters.[431]

The proposal also contains a safe-harbor rule that SPACs could avail themselves of to claim they are not investment companies and thus not subject to the Investment Company Act of 1940.[432] To qualify for the safe harbor, they would have to meet certain conditions about their length of time, assets, and business purpose.[433]

The Commission approved the issuance of the proposal in a 3-1 vote.[434] The dissenting Commissioner Hester M. Peirce said she would have supported sensible disclosure requirements for SPACs but claimed the new regulations were "designed to stop SPACs in their tracks" by imposing "a set of substantive burdens."[435] Her concerns were supported by critical comments that the Business Law Section of the American Bar Association ("ABA") made about the proposal. While generally approving of enhanced disclosure requirements, the ABA objected to the mandate for a fairness opinion and the additional underwriter liability provided by the proposal.[436]

It also argued that projections in these mergers were often quite useful for investors who want to place their money with

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429. *Id.*

430. Allison Herren Lee, Comm'r, SEC, Statement on the Proposal to Enhance Investor Protections in SPACs (Mar. 30, 2022), [https://perma.cc/J623-7TNT].

431. *See supra* Part VI.

432. Special Purpose Acquisition Companies, Shell Companies, and Projections, 87 Fed. Reg. at 29,497.

433. *Id.* at 29,498-501.

434. De Martino*, supra* note 106.

435. Hester M. Peirce, Comm'r, SEC, Damning and Deeming: Dissenting Statement on Shell Companies, Projections, and SPACs Proposal (Mar. 30, 2022), [https://perma.cc/VU6U-9YM7].

436. De Martino, *supra* note 106.

unseasoned companies.[437] It therefore said the Commission's restriction on such forecasts would "create[] a level of uncertainty regarding potential and actual liability that adversely affects these transactions as viable capital-raising and capital markets alternatives."[438] The law firm White & Case LLP issued its own list of critical comments also arguing that the proposal would "have a chilling effect on the SPAC market and thereby undermine one of the SEC's core missions of facilitating capital formation."[439]

But as of summer 2022, the SPAC frenzy appeared to have ended. As one report noted in May, "After a year of issuance explosion in 2021, there are now more than 600 SPACs searching for an acquisition target,"[440] and Goldman Sachs tellingly stated, "We are reducing our involvement in the SPAC business in response to the changed regulatory environment."[441]

As this Article has argued, this is a good result. SPACs have been vehicles to evade provisions of the Securities Act that have been carefully crafted to give public investors the protection they need from fraud. Using a merger with a corporate shell to "go public through the backdoor," if not strictly illegal, has a long history of being an unsavory practice.[442]

The SEC's proposal should close that rear entry to the capital markets or at least put SPACs on equal footing with the traditional way to do an IPO. As this Article has described, that process is in line with the intent of the great securities law reforms of the 1930s that have served our financial system well by giving investors confidence that they are being treated honestly.

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437. *See* Letter from Fed. Regul. of Sec. Comm. of the Bus. L. Section of the Am. Bar Ass'n to Vanessa A. Countryman, Sec'y, SEC 1, 54-55 (June 17, 2022), [https://perma.cc/R7MC-TZM7] (stating that it authored the letter "in response to the request for public comments by the" SEC regarding the proposed rules).

438. *Id.* at 3.

439. Rubinstein et al., *supra* note 413.

440. Li, *supra* note 424.

441. *Id.*

442. *See* Orlanski, *supra* note 9, at 1451-52.

COVID AND BAR ADMISSIONS

Steven R. Smith*

INTRODUCTION

The COVID-19 pandemic, killings of George Floyd and others, and civil unrest created dislocation, hardship, and uncertainty. For millions of people, it included deaths in family, unemployment, and serious mental and physical illness.[1] Graduates of professional schools preparing to take licensing examinations faced unexpected obstacles in meeting licensing standards for their chosen professions. It quickly became apparent, for example, that the usual licensing examination arrangements were problematic.[2] The question for licensing authorities in 2020 was what accommodations would be appropriate to take account of the disruptions applicants faced while fully protecting the public's interest in careful licensing.

The core purpose of licensing is public protection, so the public interest appropriately plays the central role in licensing.[3] The public appears to overwhelmingly support a licensing examination before admission to the bar, even during a

* Dean Emeritus and Professor Emeritus, California Western School of Law. Comments are most welcome SRS@CWSL.edu. I am grateful to William Aceves, Michael Ariens, Laura Padilla, Laura Rothstein, and Lera Smith, and others for their helpful suggestions, and to Greg Schneiders, and the staff and members of the National Conference of Bar Examiners for their information and assistance in obtaining data used in the Article. I am also grateful for the encouragement of James White, Antonio Garcia, and John O'Brien.

1. *See Grieving Family Members Reflect on 2 Million Deaths from COVID-19: Interviews with Those Who Lost Fathers During the Pandemic*, WHO (May 11, 2020), [https://perma.cc/V66H-K3W6]; *see also* EMILY HEWLETT ET AL., TACKLING THE MENTAL HEALTH IMPACT OF THE COVID-19 CRISIS 2 (2021), [https://perma.cc/4ZGB-D8GP].

2. Elinor Aspegren, *Want to Be a Doctor? A Lawyer? COVID-19 Cases Are Rising, but These High-stakes Exams Are In-person Only*, USA TODAY (July 28, 2020, 2:31 PM), [https://perma.cc/Z8GN-BUTL].

3. *See* SUZANNE HULTIN, THE STATE OF OCCUPATIONAL LICENSING: RESEARCH, STATE POLICIES AND TRENDS 5 (Oct. 11, 2017), [https://perma.cc/FS42-HS7V].

pandemic.[4] Almost every jurisdiction in the United States[5] has determined that passing a bar examination is a standard of public protection.[6] The broader issues of the appropriateness of a bar examination are legitimate but not the issue for the COVID emergency.

The options for states included canceling the summer examination, adjusting the test to avoid the risk of COVID, delaying it, or giving it in a different format (e.g., online).[7] States could also allow short-term, supervised practice before a delayed test.[8] Finally, they might grant one class of students a license without examination, the diploma privilege.[9]

Part I of this Article provides background on the bar admission problems raised by COVID and social unrest. Part II reviews the several bases for testing alterations in 2020. Part III describes what states did in summer 2020, and Part IV focuses on one of those accommodations, the diploma privilege. Part V

4. For example, only 5% of participants, in what appears to be a solid public opinion poll, supported a diploma privilege, and it increased to only 6% even as an accommodation for the COVID problems. GREG SCHNEIDERS & WEN-TSING CHOI, PRIME GRP., BAR EXAM OMNIBUS SURVEY 3, 6 (2020), [https://perma.cc/38BA-YCGV].

5. "States" or "jurisdictions" in this Article to refer to all of the fifty states plus the District of Columbia. They do not include Guam, Northern Mariana Islands, Palau, Puerto Rico or Virgin Islands ("Off-shore Jurisdictions"), which the NCBE often includes in its data.

6. Wisconsin for many years has had a diploma privilege, limited to graduates of the two Wisconsin law schools. Even Wisconsin, however, requires bar passage for graduates of other law schools. *See Diploma Privilege*, UNIV. OF WIS.-MADISON L. SCH., [https://perma.cc/8SSU-Z8AF] (last visited Oct. 6, 2022). New Hampshire also has a relatively small number of students in the "Daniel Webster Scholar Honors Program" who are excused from taking the examination. A portion (about twenty students) of the University of New Hampshire class is selected during the first year based on a holistic evaluation and a minimum three-point grade average. There is an ongoing evaluation of the students in the program. *Daniel Webster Scholar Honors Program*, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., [https://perma.cc/23C8-35GU] (last visited Oct. 6, 2022). Because this is limited to a relatively small portion of a single law school, I do not refer to New Hampshire as having a diploma privilege. *See also* Michael T. Kane & Joanne Kane, *Standard Setting 101: Background and Basics for the Bar Admissions Community*, BAR EXAM'R, Fall 2018, at 9, 9-17.

7. *Bar Exam Modifications During COVID-19: 50-State Resources*, JUSTIA (Oct. 2020), [https://perma.cc/QPP6-UDAE].

8. *See, e.g.*, *Supervised Practice Program Begins for Bar Exam Applicants After Pandemic Exam Delays*, FLA. SUP. CT. (Aug. 28, 2020, 8:50 AM), [https://perma.cc/K7YR-GMYF].

9. *See* Sam Skolnik, *D.C. Allows Law School Grads to Skip Exam During Pandemic*, BLOOMBERG L. (Sept. 24, 2020, 1:51 PM), [https://perma.cc/JV5K-L9PP].

analyzes the 2020 accommodations in terms of the public interest. Part VI examines the outcomes of those accommodations, and Part VII describes the 2021 bar admissions. Part VIII considers the impact of law schools' participation in the bar testing debates and the "disconnect" between some law schools and bar admission authorities.

I. COVID, DISRUPTION, AND LICENSING

The first-known case of COVID in the United States was in mid-January 2020, with the first non-travel-related infection diagnosed at the end of February.[10] By then, it was clear that the pandemic was spreading quickly. The President declared a national emergency on March 13.[11] Law schools and other educational institutions closed regular operations and moved to online instruction.[12] The concern was justified, as illustrated below in Figure 1 demonstrating the level of infection during March. "Total" refers to cumulative cases, hospitalizations, and deaths. The following data is as of March 6 (the first day the government reported data from all states), March 13 (declaration of emergency), and the end of March:[13]

Figure 1

Date	Total Cases	Total Hospitalizations	Total Deaths
3/6/2020	445	N/A	26
3/13/2020	3,450	N/A	57
3/31/2020	196,965	18,155	4,331

Figure 1: The level of COVID infection during March.

10. Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January-February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 680 (2020).

11. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

12. *See* Pradeep Sahu, *Closure of Universities Due to Coronavirus Disease 2019 (COVID-19): Impact on Education and Mental Health of Students and Academic Staff*, CUREUS (Apr. 4, 2020), [https://perma.cc/CGT5-VCSZ].

13. *Totals for the U.S.*, ATL.: THE COVID TRACKING PROJECT, [https://perma.cc/2WKY-2C72] (last visited Oct. 6, 2022).

The pandemic interfered with bar preparations.[14] National bar preparation services provided online instruction in place of some in-person lectures.[15] The final semester of study was, of course, also disrupted as law schools completed the semester online.[16] Closing law school libraries, for example, was a problem for some bar applicants in finding space conducive to productive study. Graduation and final semester celebrations were virtual or scrapped.

The murder of George Floyd on May 26, 2020, ignited demonstrations and protests that spread nationwide.[17] Throughout the summer, the Black Lives Matter movement and many other groups carried a call for reforming the police and for social justice.[18] For many bar applicants, these events, coupled with the unknowns of COVID, interfered with summer bar preparation.[19]

Uncertainty was a significant challenge both for students and bar examiners preparing for bar examinations. The February 2020 examination was held as scheduled, but it became apparent that the July 2020 examination would require modifications.[20] The virus, and understanding of it, ebbed and flowed over time and location, and the accommodations for the summer examination shifted, which was disruptive and frustrating for applicants.[21]

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14. *See* Abigail Johnson Hess, *'Literal Hell'—How the Pandemic Made the Bar Exam Even More Excruciating for Future Lawyers*, CNBC (Aug. 19, 2020, 5:40 PM), [https://perma.cc/U4LE-DDC5].

15. For example, BARBRI provided updates beginning in March announcing adjustments that included its bar preparation instruction online, beginning on March 11, 2020. Mike Sims, *COVID-19 Summer 2020 Update*, BARBRI (Mar. 11, 2020), [https://perma.cc/TXB6-5TWK] ("The entire BARBRI course will be available online and on-demand this summer, as it has in the past. You won't need to attend a classroom.").

16. *See New Research: Law Schools and the Global Pandemic*, THOMSON REUTERS INST. (Dec. 16, 2020), [https://perma.cc/NMA3-G2ET].

17. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), [https://perma.cc/XR94-C42U].

18. *See, e.g.*, Haley Byrd & Devan Cole, *Movement for Black Lives Unveils Sweeping Police Reform Proposal*, CNN (July 7, 2020, 3:30 PM), [https://perma.cc/M4GW-XPZC].

19. *See* Beth Kaimowitz, *Black Lives Matter and the Bar Exam*, L. SCH. ACAD. SUPPORT BLOG (June 14, 2020), [https://perma.cc/G2HA-45WE].

20. *See Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

21. *See COVID-19 Information Continues to Evolve: What's New and What Has Changed?*, UC DAVIS HEALTH (Aug. 26, 2020), [https://perma.cc/P6Q3-JRNZ]; Craig

The first concern affecting the Summer 2020 examination was the safety of test takers.[22] Theoretically, it was possible to make an examination safe through rigorous social distancing, separate facilities, filtration, and cleaning. However, bar examiners and courts in several states determined it had become practically impossible to administer a safe, in-person July test.[23]

The second concern was with preparation for the examination.[24] Because bar preparation courses and study facilities were disrupted, it could take many applicants longer than usual to prepare for the test. Of course, preparation was delayed considerably for those applicants who became ill. In addition, the emotional and psychological disruption of the virus, social unrest, and uncertainty about the bar examination disrupted bar study.[25]

There were also financial concerns. Postponing the examination could delay employment for some applicants. There would likely be an immediate loss of income for those who already had a job beginning upon bar passage. For others, it might delay the process of looking for a job. Fortunately, the federal government suspended loan repayments.[26] No payments were

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Kopp, *Online Bar Exam Delay Causing Lawsuits, Frustration*, THE LEGAL EXAM'R (Sept. 15, 2020), [https://perma.cc/52XX-XXY7].

22. *See, e.g.*, *Chief Judge Approves Temporary Authorization Program*, N.Y. CTS. (Apr. 28, 2020), [https://perma.cc/8MCD-JWEK].

23. At one time, several states said that they were limiting, or might limit, the number of test takers in the July exam. *July 2020 Bar Exam: Jurisdiction Information*, NAT'L CONF. OF BAR EXAM'RS (June 18, 2020), [https://perma.cc/NQ9G-MEB5]. This is an earlier form of the status reports of NCBE. *See also* Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, UNLV WILLIAM S. BOYD SCH. OF L. (Mar. 22, 2020), [https://perma.cc/S2MQ-SVVA].

24. The Multistate Bar Examination ("MBE") is an anchor of the bar examination in all the admitting American jurisdictions except Louisiana. For test security and psychometric reasons, it is ordinarily administered nationally on the same days in July and February. Deviating from that practice could pose significant challenges in maintaining examination reliability. *See* Sam Skolnik, *Covid-19 Forces Bar Exam Prep Companies to Alter Courses*, BLOOMBERG L. (June 24, 2020, 3:50 AM), [https://perma.cc/WTW9-VRAT].

25. *See supra* text accompanying notes 19 and 21.

26. Zack Friedman, *Federal Student Loan Payments Will Be Suspended Through September 30*, FORBES (Mar. 28, 2020, 12:09 PM), [https://perma.cc/2AM9-SN2X].

due, and no interest accrued on most federal student loans from March 20, 2020 to December 31, 2022.[27]

Finally, some advocates argued graduates were urgently needed to fill positions in the legal profession.[28] Postponing the examination would delay licensing, not reduce the number of graduates licensed. Thus, the argument was that even a brief delay in licensing would leave critical legal positions unfilled.[29]

II. LICENSING AND BAR ADMISSIONS EXIST TO PROTECT THE PUBLIC

A. Protecting the Public

States have long relied on an examination in bar admissions as an essential protection for the public.[30] The bar examination, legal education, and character and fitness requirements have been the standard.[31] Ideally, COVID accommodations could be

27. The Department of Education, Congress, and the President suspended loan federal student payments, stopped collections on defaulted loans, and set a zero-interest rate for loans. *See COVID-19 Emergency Relief and Federal Student Aid*, FED. STUDENT AID, [https://perma.cc/757Z-MWE3] (last visited Oct. 7, 2022).

28. A group of scholars suggests that "it is urgent to maintain the flow of new lawyers into the legal system." Angelos et al., *supra* note 23. Similar points are made in letters to state courts. Letter from Annette E. Clark, Dean, Seattle Univ. L. Sch., to Debra L. Stephens, C.J., Washington Sup. Ct. (June 10, 2020) [hereinafter Seattle Letter], [https://perma.cc/4PXS-7MYB]; Petition for Emergency Rule Waiver at 17, 19-20, *In re* Temp. Waiver of the Bar Exam Requirement for Admission to the Bar and Provision of Emergency Diploma Privilege (No. ADM10-8008) (Minn. June 22, 2020) [hereinafter Minnesota Petition], [https://perma.cc/3L47-Y223]; *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, MEDIUM: PUB. RTS. PROJECT (Aug. 11, 2020), [https://perma.cc/4V45-3NTZ] (showing the signatures of individual public interest organizations).

29. *See* Angelos et al., *supra* note 23.

30. The traditional argument for licensing lawyers is that bad lawyers hurt clients, and that it is often difficult for members of the public to know the competency of a lawyer. An even stronger argument is that when someone selects a bad lawyer, it may very well impose significant harms (negative externalities) on others—clients, the courts, and society. Poorly constructed transactions and documents, or badly handled litigation, for example, result in opposing parties having additional risks of things going wrong and additional costs of time or their own lawyers' time to correct the mistakes of the other party's lawyer. In addition, courts, administrative agencies, and the legal system pay a price when inept lawyers submit unnecessary or badly constructed materials and arguments. *See* HULTIN, *supra* note 3.

31. Lawyer licensing in the United States almost universally includes these three parts: character and fitness review, education, and testing. Although there have been arguments about each of these three elements of licensing, they are consistent with the other licensed,

narrowly tailored to deal with the exigencies of 2020 without reducing the protection for the public.

There are, of course, debates about licensing—whether there should be licensing of lawyers,[32] how the bar examination protects the public interest,[33] and how the bar examination should be structured to maximize the public interest.[34] These are important questions, but they are not the right ones for the 2020-2021 examinations. The courts and other bar admission authorities have determined for decades that the bar examination process is an integral part of the commitment to the public to ensure basic competence.[35] Even in accommodating for disabilities,[36] the examination is virtually never waived. The relevant question for COVID accommodations was only what short-term modifications (consistent with the obligations to the public) were necessary considering the pandemic, with larger issues of the bar examination relevant for another day.

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learned professions. *See* NAT'L CONF. OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at vii-viii, ix-x (Judith A. Gundersen & Claire J. Guback eds., 2022).

32. *See* CLIFFORD WINSTON ET AL., FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 5 (2011); Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS 367, 383 (2013).

33. *See* Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883, 922 (2017); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RSRV. L. REV. 1191, 1231 (1995); Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 50-51 (2015).

34. *See* Andrea A. Curcio et al., *How to Build a Better Bar Exam*, N.Y. STATE BAR ASS'N J., Sept. 2018, at 37, 37, 41; Joan W. Howarth & Judith Welch Wegner, *Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383, 398 (2019); Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 3-4 (2019).

35. *See* Curcio et al., *supra* note 34, at 38.

36. *See* LAURA F. ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW 322 (4th ed. 2020).

B. The Public's View

The public polling organization, Prime Group,[37] with the assistance of YouGov,[38] conducted a public-opinion survey regarding the bar examination and pandemic accommodations in September 2020.[39] It was part of an omnibus survey in which a polling company combined questions from many clients and administered it to a panel of participants selected to represent the U.S. population.[40] In the 2020 survey, of which bar examination questions were a part, there were 1,135 U.S. adult participants.[41]

The National Conference of Bar Examiners ("NCBE") commissioned the survey.[42] A commissioned survey raises the possibility that the funding source manipulated the sample, questions, or results.[43] With the permission of NCBE, Mr. Greg Schneiders, the CEO of Prime Group, agreed to a telephone conversation about the survey.[44] The following summarizes that conversation. NCBE paid for the survey and participated in the

37. *What We Do*, PRIME GRP., [https://perma.cc/2XBZ-THSA] (last visited Oct. 7, 2022). Prime Group is an experienced provider of commercial and governmental survey research. *See also Online vs. Telephone: A Tale of Two Survey Methodologies*, PRIME GRP., [https://perma.cc/8MB7-VMVP] (last visited Oct. 7, 2022). It is primarily involved with developing questions for surveys and interpreting the results. It generally does not actually conduct the survey itself. Because telephone surveys have proven to be increasingly limited, Prime Group primarily relies on online surveys.

38. *RealTime Omnibus*, YOUGOV, [https://perma.cc/4AQC-4G8D] (last visited Oct. 7, 2022). YouGov conducts the actual public opinion surveys (generally omnibus surveys) as described on its website. In the case of the NCBE survey, it took the questions to be asked and imbedded those questions in a longer survey on several different topics and multiple clients and gave the survey to a panel of participants. *See infra* notes 44-48 and accompanying text.

39. SCHNEIDERS & CHOI, *supra* note 4, at 1.

40. *Our Panel*, YOUGOV, [https://perma.cc/DMG8-3DMM] (last visited Oct. 7, 2022). YouGov indicates that it has more than 17 million people worldwide who have agreed to participate in its panels. I understood that the U.S. panel, from which the 1,135 were selected, had between 2 and 3 million participants. SCHNEIDERS & CHOI, *supra* note 4, at 2.

41. SCHNEIDERS & CHOI, *supra* note 4, at 2.

42. *National Survey Finds Support for Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (Sept. 30, 2020), [https://perma.cc/EK4G-5SJD].

43. Alice Fabbri et al., *The Influence of Industry Sponsorship on the Research Agenda: A Scoping Review*, 108 AM. J. PUB. HEALTH 9, 9 (2018).

44. Telephone Interview with Greg Schneiders, CEO, Prime Grp. (Oct. 5, 2020). Mr. Schneiders was very direct in answering my questions. I am most grateful to Mr. Schneiders as well as the NCBE for the opportunity to learn more about the process of developing the questions and conducting the survey.

construction of the questions.[45] It did not, however, have any role in the selection of the panel or know who was in the panel.[46] Because it was an omnibus survey, the bar examination questions were embedded in an extensive survey with questions from many different clients of YouGov.[47] Mr. Schneiders indicated that it would have been impossible for NCBE to influence the outcome of the survey in any way that is not apparent from the face of the questions and the introduction to the questions.[48] Thus, this survey appeared to be a straightforward use of opinion polling as it is routinely practiced today by many educational, business-oriented, and governmental organizations.

The bar examination survey had two substantive questions plus one demographic question.[49] The questions were introduced by a brief statement (set out in the notes) that a bar examination is generally required for a license but that the health and safety challenges of COVID caused states to consider other options.[50]

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. SCHNEIDERS & CHOI, *supra* note 4, at 2, 5, 8.
50. The survey stated:

> Until the Coronavirus (COVID-19) outbreak, every state, except one, required lawyers to pass a bar exam before being licensed to practice law. Bar exams have traditionally been held in person and supervised. But the health and safety challenges brought on by the outbreak have caused some states to consider allowing law school graduates to become licensed to practice law without taking and passing a bar exam.

See infra Appendix I. Question One:

> Which of the following options would you favor to deal with the challenges brought on by the Coronavirus (COVID-19) outbreak?
>
> a. Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines
>
> b. Require a bar exam but allow for online or other remote testing even if it cannot be supervised
>
> c. Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law
>
> d. Don't know.

Id. at 2. Question Two:

> [O]nce the Coronavirus (COVID-19) outbreak has passed and social distancing rules no longer apply, which of the following options would you favor?

The first question sought participants' preference on what bar admissions should require in light of COVID.[51] There were three substantive options (require an in-person bar exam,[52] allow remote testing even if not supervised,[53] and permit licensing without a bar exam for accredited law school graduates)[54] in addition to a "[d]on't know" option.[55] A second question asked for the preferred bar admission option following the pandemic.[56]

The major results are presented in Figure 2 and in more demographic detail in Appendix I.[57] The results unequivocally favored requiring a bar examination.[58] Only 6% preferred the diploma privilege accommodation, with approximately 80% preferring a bar examination, either in-person (60%) or online (19%).[59] If "[d]on't know" responses are removed, those

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a. Return to the traditional practice of requiring lawyers to take the bar exam in-person and supervised

b. Require the bar exam but allow lawyers to take it online or through other remote testing even if it cannot be supervised

c. Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law

d. Don't know.

Id. at 5. Question Three (demographic):

Which, if any, of the following apply to you? Please select all that apply.
a. I teach or have taught law

b. I am a practicing lawyer

c. I am a lawyer not currently practicing

d. I am not a lawyer but am employed in the field of law

e. I am currently a law student

f. None of these.

Id. at 8.

51. SCHNEIDERS & CHOI, *supra* note 4, at 2.

52. "Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines[.]" *Id.*

53. "Require a bar exam but allow for online or other remote testing even if it cannot be supervised[.]" *Id.*

54. "Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law[.]" *Id.*

55. *Id.*

56. SCHNEIDERS & CHOI, *supra* note 4, at 5.

57. *Id.* at 3, 4, 6-8; *see also infra* Appendix I.

58. *Id.* at 2, 5.

59. *Id.* (approximately 15% responded "[d]on't know").

preferring a bar examination were 93% and those favoring a license without testing were 7%.[60]

Some differences can be observed among the nineteen demographic factors in the table in Appendix I.[61] It was especially apparent that the acceptability of the online examination, which ranged from 10% to 38% as the preferred option, depended on the age cohort.[62] Part of that range may be attributed to a complication in the "online" option. That option stated, "Require a bar exam but allow for online or other remote testing *even if it cannot be supervised*[.]"[63] Thus, the option required both acceptance of an online test and accepting it unsupervised. It is impossible to tell whether the absence of supervision was unacceptable to the public or whether the concept of an online test itself was objectionable (even if well supervised). A second issue is the ambiguity of "cannot be supervised," which was likely unclear to some participants. It probably meant reasonable measures to avoid cheating, but it may mean something more chaotic for people who do not follow testing.

One conclusion, however, was clear. Among all demographic groups, there was little enthusiasm for a diploma privilege even during COVID.[64] Support for that option was 3% to 13% among demographic groups, with 6% for all participants.[65] The support for a diploma privilege as the post-COVID preferred option dropped slightly to 5%.[66]

All surveys have limitations. This was the opinion of the public at a point in time; it did not include every possible option (e.g., apprenticeship-supervised practice); the introduction was only a very brief statement of the issues and could not describe the considerations in detail; 12% to 15% of responses were "[d]on't know"; and of course, like most surveys, people might change their minds if given more information. Nonetheless, the

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60. *See id.*

61. *See* SCHNEIDERS & CHOI, *supra* note 4, at 3-4; *see also infra* Appendix I.

62. *See id.*

63. *Id.* at 2-4 (emphasis added).

64. *See id.* at 2, 5 (The option was to "[e]liminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed.").

65. *Id.* at 3-4.

66. SCHNEIDERS & CHOI, *supra* note 4, at 5 (showing that the online examination without supervision fell to 13.5%.).

public sentiment about the importance of the bar examination was clear. The public's expectations are that a well-supervised bar examination is a necessary assurance of licensing. Which of the following options found below, in Figure 2, would you favor to deal with the challenges brought on by the Coronavirus (COVID-19) outbreak?

Figure 2

OPTIONS TO DEAL WITH COVID CHALLENGES				
	Total	Age		
	All	18-34	35-44	55+
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	42%	58%	74%
Require a bar exam but allow for online or other remote testing even if it cannot be supervised	19%	32%	20%	10%
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	7%	7%	4%
Don't know	15%	19%	15%	12%

Figure 2: Taken from the table in Appendix I.[67] *All tables are from the Prime Group Bar Exam Omnibus Survey.*[68]

III. WHAT STATES DID: ANALYSIS OF ACCOMODATIONS

A. This Time It's Different

There are severe disruptions for some individuals during every administration of the bar examination. An applicant may have appendicitis or the flu just before the exam; others have

67. *See infra* Appendix I.
68. *See* SCHNEIDERS & CHOI, *supra* note 4.

family members who are ill, dying, or who may have been involved in a serious car accident; and some have severe emotional disruptions, unexpected delays, or interruptions in studying and taking the examination—all beyond their control. There is strong compassion for each of these, as there was for 2020 test takers. There can be no significant accommodation for these individual circumstances, and applicants are often delayed from taking the examination until the next administration.[69] It was different this time because so many applicants were all adversely affected in a similar way, so practical options were uniquely available.[70]

There were several ways of accommodating the 2020 bar exam difficulties. From the public's perspective, the bar admissions process should not have been meaningfully less protective of the public interest in 2020 than in 2019 or 2023. Consistent with that principle, states were generally cautious about tailoring accommodations narrowly to the circumstances of the pandemic.[71] We next turn to the six categories of 2020 bar accommodations: cancelation, special arrangements for social distancing and safety, change of dates (including multiple dates), remotely administered examinations, limited supervised practice rules, and the diploma privilege.[72] A handful of states provided a reduction in the minimum bar passage score.[73]

In considering the alternatives, applicants, states, and the NCBE faced rapidly changing circumstances that required some states to shift the accommodations based on new data about COVID and the options for testing.[74] That made it difficult for

69. *See, e.g.*, STATE BAR OF CAL., REQUEST FOR REFUND OF FEES PURSUANT TO COMMITTEE OF BAR EXAMINERS REFUND POLICY (n.d.), [https://perma.cc/9QA8-92VK]; TEX. RULES GOVERNING ADMISSION TO THE BAR, R. 18.

70. *See* Angelos et al.*, supra* note 23, at 2-5 (noting that an early list of options included postponing the examination, giving an online examination, administering the examination in small groups, emergency diploma privilege, the diploma privilege "[p]lus" (additional courses, externship, CLE, or the like), and supervised practice).

71. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

72. See *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7, for additional information and links to court orders.

73. *See* Leslie C. Levin, *The Politics of Bar Admission: Lessons from the Pandemic*, 50 HOFSTRA L. REV. 81, 106, 122, 126 (2021).

74. *See id.* at 98-99.

applicants,[75] of course, but it was also a trying time for anyone involved in the examination process.

B. Cancel the Summer 2020 Exam

Because of the rapidly changing circumstances and difficulty giving an examination, one possibility was to cancel the Summer 2020 examination. The cancelation would maintain the usual quality assurance practices, and the consequences to the public of a six-month delay in licensing would probably not be significant. A well-supervised, temporary practice rule could ameliorate a potential shortage of new legal talent. For many bar applicants, however, the delay of six months would be a serious disruption. It would mean preparing for a 2021 examination, and a delay in receiving results, beginning their careers, starting to receive earnings, and getting on with life. It is worth noting that nearly every state gave applicants a cancelation *option* by eliminating fees for postponing the test until a later administration.[76]

Cancelation would have had the advantage of being the safest option regarding the health of applicants and staff. From an examination perspective, a single, uniform-date, in-person test provides the most reliable, scalable, and secure examination. It reduces the likelihood of cheating, loss of question security, and statistical anomalies. It would provide substantial time for preparation, study, and calming the situation. From the NCBE and examiners' standpoint, it would be the most inexpensive and administratively simple solution. It would not require multiple sets of questions and would avoid the risks of nonstandard examinations.

One state did cancel the 2020 examination. On July 24, the Delaware Supreme Court announced that the September examination was canceled and would not be rescheduled.[77] The

75. *See* Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 14 (2020) (providing an especially vivid description of the dislocations and problems encountered by students planning to take the bar in summer 2020, although less understanding of the problems faced by those responsible for the bar admissions process).

76. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

77. Press Release, Delaware Sup. Ct., Delaware Supreme Court Cancels In-person 2020 Bar Exam (July 24, 2020), [https://perma.cc/5AEY-6PU8].

court noted that as of July, it was "unclear" what the state of the pandemic would be in September, and that uncertainty led to the cancelation.[78] It said that "[i]n lieu" of the examination, it had instructed the bar examiners to develop a temporary limited practice rule (which the court adopted on August 12).[79] One irony of Delaware canceling the July examination was that it is the only state that does not have a February test, so its cancelation was for a year.[80] Strangely, there was relatively little negative comment about the Delaware decision.[81] Somehow, canceling the test seemed more acceptable than offering a delayed or online test.[82]

As other states demonstrated, however, this least accommodating approach was unnecessary to protect the public interest. Fifty other jurisdictions found reasonable ways of providing a test consistent with usual public protection while allowing applicants the opportunity to be admitted reasonably close to the regular schedule.[83]

C. Facilities Safety Arrangements

Thirty states gave in-person examinations in the summer or fall.[84] Of the thirty, thirteen gave it exclusively in July, and six exclusively in September or October.[85] Seven gave in-person examinations on two dates, and four gave an online test as an additional option to the in-person exam.[86] In many of these states, applicants also had the option of waiting for a 2021

78. *Id.* (noting that about 60% of Delaware applicants are from out of state).

79. *Id.*

80. *Bar Exam Results by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (Sept. 30, 2022, 11:50 AM), [https://perma.cc/YG2S-FWQX].

81. *See* Levin, *supra* note 73, at 117-18.

82. *See id. But see* AM. BAR ASS'N, RESOLUTION 10G 6 n.10 (Aug. 3-4, 2020), [https://perma.cc/6GHH-KWHL] ("[T]here is concern that bar applicants in Delaware may be 'in limbo' for an extended period of time due to the cancellation of the July 2020 in-person bar examination . . . .").

83. *See Persons Taking and Passing the 2020 Bar Examination*, BAR EXAM'R, Spring 2021, at 24, 24-25.

84. *See July 2020 Bar Exam: Jurisdiction Information, supra* note 23.

85. *See id.*

86. *See id.*

examination.[87] States giving in-person tests took special precautions regarding sanitation and social distancing.[88]

D. Dates of Examinations

Most states with in-person tests offered examinations in September or October as the only testing date or as an alternative to July.[89] The multiple dates were possible because NCBE provided additional tests for September 9-10 and September 30-October 1, as well as the NCBE online examination.[90]

Providing for a summer date plus two fall dates was a vital accommodation. It took some time pressure off applicants and allowed options for states. Multiple tests required considerable time and expense to produce and administer.[91] It also required that the NCBE have sufficient examination questions to provide additional sets of reliable testing components.[92]

E. Online (Remote) Examination—The Backup Called Upon

The most intriguing accommodation (and risky, from a testing standpoint) was the online examination. NCBE constructed an online test for states to use October 5-6, 2020, as "an emergency option should administering the in-person bar exam not be possible."[93] A total of twenty-four states gave online examinations; nineteen gave the NCBE October 5-6 examination (four were an option to the in-person examination).[94] Five states gave their own online tests on various dates from July through October.[95]

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87. *Id.*

88. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

89. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

90. Levin, *supra* note 73, at 92.

91. *See* Joanne Kane & April Southwick, *The Testing Column: Writing, Selecting MBE Items: A Coordinated and Collaborative Effort*, BAR EXAM'R, Spring 2019, at 46, 46-47.

92. Levin, *supra* note 73, at 89 nn.56-57.

93. *NCBE COVID-19 Updates*, NAT'L CONF. OF BAR EXAM'RS (June 1, 2020, 4:00 PM), [https://perma.cc/7C47-UC9Y].

94. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

95. *Id.*

The NCBE online test was shorter than the standard test.[96] It had only 100 multiple choice, three essays, and one performance question in four, ninety-minute testing sessions.[97] States could use all these NCBE tests or use only some of them. A risk of this test included the possibility of cheating. States tried to prevent cheating by, among other things, conducting remote video monitoring of test takers, often assisted by artificial intelligence.[98] It was these functions that created some of the problems with remote administration.[99]

The online option raised some additional considerations, including helping some applicants find reliable web access. A few courts specifically requested that law schools assist applicants with those arrangements.[100]

One day in the not-too-distant future, bar examinations will be given online, but they will not be the examinations of 2020.[101] It turned out to be a practical option in the 2020 pinch.

F. Limited or Supervised Practice

Delaware was not alone in granting a temporary limited practice rule.[102] Thirty states, including most states that did not offer a July examination, adopted some form of supervised

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96. *NCBE COVID-19 Updates*, *supra* note 93.

97. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

98. Sam Skolnik & Jake Holland, *Cheating Scandal Aside, New Remote Bar Looks a Lot Like Old One*, BLOOMBERG L. (Feb. 1, 2021 5:30 AM), [https://perma.cc/NPB3-BJEL].

99. Jason Kelley, *ExamSoft Flags One-Third of California Bar Exam Test Takers for Cheating*, ELEC. FRONTIER FOUND. (Dec. 22, 2020), [https://perma.cc/VYR4-PD32]; Gabriel H. Teninbaum, *Report on ExamSoft's ExamID Feature (and a Method to Bypass It)*, 4 J. ROBOTICS A.I. & L. 293, 293 (2021).

100. Letter from Jorge E. Navarrete, Clerk & Exec. Officer, California Sup. Ct., to Alan K. Steinbrecher, Tr., State Bar of California (July 16, 2020) [hereinafter California Letter], [https://perma.cc/U88H-ALSG]; Administrative Order at 5-6, *In re* the Oct. 2020 Md. Bar Examination & Option for Temp. Supervised Prac. of L. (Md. Aug. 28, 2020) [hereinafter Maryland Order], [https://perma.cc/2J6Z-BPUG].

101. *See* TESTING TASK FORCE, NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 3-5 (2020), [https://perma.cc/8WR2-7HGE] (the examination given in 2020 did not take advantage of the advanced testing techniques that technology currently allows; however, serious proposals have been made to move toward a more technologically savvy testing platform).

102. *See* Order at 1, *In re* Certified Ltd. Prac. Privilege for 2020 Del. Bar Applicants (Del. Aug. 12, 2020), [https://perma.cc/7NU6-KYAB].

practice.[103] Ten states that gave a July in-person examination also provided a temporary practice rule.[104] Temporary practice had the advantage of reducing pressure on those applicants who chose to wait until 2021 to take the test.

The rules varied among the temporary practice states.[105] One version relied on the existing student practice rules of the state.[106] These rules generally provided some form of supervision by a licensed attorney.[107] They also usually required that the applicant had registered to take the bar in the state.[108] Most rules provided that the temporary license ended after a defined period or if the graduate did not take, or failed, the bar examination.[109]

Well-supervised temporary practice made applicants available to firms and organizations faster than if they took the examination and had to wait for results or delayed taking the examination. A key to protecting the public was ensuring careful supervision.

G. Accommodations by Law Schools

In seeking extraordinary accommodations from courts and bar examiners, many law schools and faculty spoke movingly about the complex emotional and personal circumstances and

103. *See July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23 (the only states with no July bar examination or diploma privilege that did not offer a limited practice privilege were Hawaii, New Mexico, Maine, and New Hampshire).

104. *See id.*

105. *See Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

106. *See id.*

107. *Id.*

108. *Id.*

109. *See* Rebecca White Berch & Ruth V. McGregor, *COVID-19 and Bar Exams—ABA's Proposal Strikes a Needed Balance*, BLOOMBERG L.: INSIGHTS (May 21, 2020, 3:01 AM), [https://perma.cc/MU4H-4XQ5]; *see also* Erwin Chemerinsky & Jennifer Mnookin, *Making the Case for Provisional Bar Licenses in the Coronavirus Pandemic*, LAW.COM (Apr. 8, 2020, 7:11 PM), [https://perma.cc/63Y5-RCAQ]. Apparently, Dean Chemerinsky and other deans later changed their minds; he is quoted in June as emailing 2020 Berkeley law graduates that "[W]e support diploma privilege for all graduates of ABA-accredited law schools . . . without ever needing to take the bar exam." Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 8:28 AM), [https://perma.cc/C99B-MZ69]. Of course, circumstances changed over time.

financial burdens 2020 graduates faced.[110] Given the extraordinary problems they described, it was reasonable for schools to take dramatic steps to support their 2020 graduates. They might, for example, have done a combination of any of the following: (1) made counseling and therapy available, stayed constantly connected with graduates preparing for the bar, and ensured that each graduate had good places to study; (2) provided individual financial counseling, student loan guidance, and short-term loan assistance; (3) helped students find temporary supervised practice; (4) provided intensive placement services to connect students with employers.

A few courts noted that law schools have facilities and connections that could assist students, especially in studying for and taking online examinations.[111] Some law schools provided substantial assistance to their graduates,[112] but it would have been better if more law schools had publicly offered to undertake such aid. Law schools are seldom shy about announcing good deeds, so the absence of more public information about their assistance to graduates is surprising. Law schools, of course, had financial challenges and were busy planning for current students and getting an entering class for the fall. Nonetheless, the intensity of the emergency they have described to the courts suggests that helping recent graduates should have been a priority.

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110. *See* Stephanie Francis Ward, *Jurisdictions with COVID-19 Related Diploma Privilege Are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020, 3:16 PM) [https://perma.cc/W94Q-LHJG].

111. *See* Maryland Order, *supra* note 100, at 1. The Maryland Court of Appeals, for example, noted that "law schools and other entities have space that can provide a quiet location without distraction for those taking a remote examination" and ordered the board of bar examiners to assist "law schools . . . to provide testing locations for those applicants" who need quiet, connected locations and "to develop protocols for such test locations, publicize the availability of those locations to applicants, and facilitate, to the extent practicable, the ability of applicants to take the examination at such locations." *Id.* at 5-6. The California Supreme Court also urged law schools to help students who might struggle with the facilities to take the remote exam. California Letter, *supra* note 100, at 1-2 ("The court strongly encourages law schools to assist those graduates who lack internet access at home, or who have home environments not amenable to two days of uninterrupted examination, by employing the same and similar measures, including the use of school facilities and equipment, that schools have utilized to allow students to complete the Spring 2020 semester.").

112. Gabriel Kuris, *The Impact of the Coronavirus on Legal Education*, U.S. NEWS & WORLD REP. (June 14, 2021, 9:01 AM), [https://perma.cc/FGC6-PVPN].

H. Diploma Privilege[113]

Five states adopted a July 2020 diploma privilege as an accommodation.[114] The privilege allowed graduates a permanent license to practice law without formal post-law school testing.[115] Given the divergence from what the standard licensing process has long considered an essential element of public protection, we will look at this accommodation in detail below.

IV. DIPLOMA PRIVILEGE

The diploma privilege became popular in America in the nineteenth century and declined in the twentieth century,[116] leaving Wisconsin as the only state with the privilege.[117]

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113. "Diploma privilege" means that a state offers a broadly based admission to the bar without examination because an applicant has graduated from an approved law school. *Diploma Privilege: What Is It & Which States Offer It?*, UWORLD LEGAL, [https://perma.cc/5KPQ-5UWV] (last visited Oct. 7, 2022). Under this definition, the New Hampshire Daniel Webster program is not a broad-based program (it applies to only a relatively small proportion of a single law school). *See Daniel Webster Scholar Honors Program*, *supra* note 6. Most diploma-privilege states have a variety of requirements beyond graduation. *See Diploma Privilege: What Is It & Which States Offer It?*, *supra*. Utah is included as a 2020 diploma privilege state even though it requires 360 hours of supervised practice (instead of the bar examination). *See infra* notes 124, 127 and accompanying text. Louisiana has a modest CLE and mentoring requirement. *See infra* notes 173-74 and accompanying text. D.C.'s program is admission without examination, again substituting a much longer supervised practice (three years) without a specific number of hours. *Diploma Privilege: What Is It & Which States Offer It?*, *supra*.

114. The five states are those that provided a diploma privilege as an accommodation for the 2020 examination. A sixth state, Wisconsin, offers the diploma privilege, but it was not an accommodation for COVID. *See Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113.

115. *Id.* Initial licensing in law is, for most lawyers, realistically the only opportunity to ensure basic competency. Much of what lawyers do is not publicly visible. It is difficult for licensing authorities to know about, and act against, practitioners providing inadequate legal services. There is no re-testing throughout a lawyer's career. Disbarment or other significant licensing discipline in law is rare. The initial law license is, for all practical purposes, for life. *See* David Barnhizer, *Abandoning an "Unethical" System of Legal Ethics*, 2012 MICH. ST. L. REV. 347, 380.

116. The diploma privilege began in Virginia in 1842, and by 1890 it was adopted in 16 states. After 1920, however, the privilege was increasingly discredited. Only a few states still had it by the 1950s, and in the 1980s four states dropped the privilege, leaving only Wisconsin since then. *See* Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39-42 (1974); *see also infra* note 117 and accompanying text.

117. *Diploma Privilege, What Is It & Which States Offer It?*, *supra* note 113. Wisconsin Supreme Court Rule 40.03 applies only to applicants receiving a J.D. "from a law

Wisconsin limits its privilege to in-state schools, raising some unresolved constitutional issues.[118] The diploma privilege is popular with law schools and graduates and was their preferred pandemic accommodation.[119]

A. The Five States Offering the Diploma Privilege as an Accommodation

Five jurisdictions adopted "temporary"[120] diploma privileges for 2020.[121] Wisconsin, of course, has an ongoing diploma privilege.[122]

All five states require applicants to complete all requirements for licensing except the bar examination (e.g., complete law school, character and fitness evaluations, and professional responsibility examination).[123] All of these states require something other than a diploma, so all are "diploma plus" in some way. The five rules were quite different and are described (in the author's view) approximately in descending order of protection for the public.

Several courts and justices estimated the effect of a diploma privilege in granting licenses to applicants who would have failed the licensing examination. This Article has added estimates for some other states. These are rough estimates based on failure rates from past examinations, usually the Summer 2019

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school in this state that is fully, not provisionally, approved" by the ABA. WIS. SUP. CT. R. § 40.03. Wisconsin has only two law schools. *Wisconsin Law Schools*, JUSTIA, [https://perma.cc/7ZFG-7QCE] (last visited Oct. 7, 2022).

118. Vikram David Amar, *Why It Is Unconstitutional for State Bars, When Doling out Bar-Exam Seats, to Favor In-State Law Schools*, JUSTIA: VERDICT (May 21, 2020), [https://perma.cc/85D8-ZDGF] ("This diploma privilege is unconstitutional; it is facially discriminatory without any non-parochial justification."); Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 168, 185 (2020) ("[A] diploma privilege limited to graduates of in-state schools raises serious Dormant Commerce Clause questions.").

119. Skolnik, *supra* note 109.

120. *Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113 (the reference to these as "temporary" diploma privileges may be confusing; these applicants are granted permanent licenses to practice law, and "temporary" means only that other years' applicants will not have the same privilege).

121. *Id.*

122. *Id.*

123. See *id.* for a summary of the requirements for licensing.

examination. For a variety of reasons, the estimates should be taken as approximations.

1. Utah

The Utah Supreme Court adopted a Utah diploma privilege on April 22, 2020, the first court to provide the privilege and perhaps the only court to do so without dissent.[124] The rule provided that Qualified Candidates "shall be admitted to the Utah Bar without passing the Utah Bar Examination."[125] Qualified Candidates were those who graduated by June 30, 2020, and completed an application for the Utah bar by April 1, 2020.[126] They also were required to do 360 hours of "[s]upervised [p]ractice" by the end of 2020.[127]

The rule did several things to narrow the potential risk to the public. First, it provided that only graduates of law schools with a 2019 first-time bar passage rate of 86% "(rounded to the nearest whole number)" or higher were eligible.[128] This avoided an in-state-related preference problem noted with Wisconsin.[129] The two Utah law schools in 2019 had pass rates near or above 90%, and Utah's total first-time passing rate for 2019 was 85.88% (86% rounded up).[130] Most American Bar Association ("ABA") law

124. *See* Levin, *supra* note 73, at 118-120 (providing an account of the deliberations in Utah).

125. Order for Temporary Amendments to Bar Admission Procedures During COVID-19 Outbreak at 1, 3, *In re* Emergency Modifications to Utah Sup. Ct. Rules of Prof. Prac., Rules Governing Admission to the Utah State Bar (Utah Apr. 21, 2020) [hereinafter Utah Order], [https://perma.cc/93JG-DAL7].

126. *Id.* at 1-2 ("Late or incomplete applications will not be accepted.").

127. *Id.* at 2-4 (there is a lengthy description of the "Supervised Practice" requirement in Section III of the rule. The basic description is: "All time spent in any activity related to developing the Qualified Candidate's legal competence (whether paid, unpaid, pro bono, or low bono) shall be counted toward the 360-hour requirement . . . .").

128. *Id.* at 1.

129. *See* Amar, *supra* note 118 (providing a benefit limited only to in-state residents or in-state law schools raises a serious constitutional question which, I noted earlier, has been raised with the Wisconsin diploma privilege).

130. *Individual School Bar Passage Reports*, AM. BAR ASS'N, [https://perma.cc/NW86-EQU8] (last visited Oct. 7, 2022) (select "Brigham Young University" in the "Select School" box; then select "2020" in the "Select Year" box, which will have 2019's data; lastly, select "Generate Report"; repeat these same steps, but change to "Utah, University of" in the "Select School" box). ABA 509 data indicates that the 2019 pass rate (February and July examinations combined for all jurisdictions) was 89.523% for BYU and 90.41% for the University of Utah. *Id.*

schools would not have met the 86% standard.[131] Projecting only from 2019 results, it may be that ten to fifteen applicants[132] who would have failed the Utah bar examination were instead admitted because of the privilege.

An additional protection was that repeat takers were not eligible.[133] By requiring that registration be completed before the court announced the privilege, it avoided the possibility of applying for a license knowing there was a privilege. Finally, the rule required 360 hours of supervised practice *before* the license was granted, which must have been completed in 2020.[134]

2. Oregon

At the request of the deans of three Oregon law schools, the Oregon Supreme Court, by a margin of 4-3, adopted a diploma privilege for summer 2020 bar admission.[135] The order's (whereas clauses) explanation is that "the spread of the COVID-19 virus represents an extraordinary burden to applicants

131. The 86% bar-passage rate standard poses its own internal inconsistency because of the variability of minimum passing scores around the country. A school located in a jurisdiction with a relatively low minimum passing score likely has a passing rate that would differ from what it would be if the school's bar passage rate were measured by the relatively high minimum passing score of another jurisdiction. See *id.* to compare other minimum passing scores around the country. See also Utah Order, *supra* note 125, at 1, for a general understanding of the Utah 86% standard.

132. *See Individual School Bar Passage Reports*, *supra* note 130. The total number of failures (first-time takers) from the two Utah law schools on both administrations of the Utah bar in 2019 was nine applicants. *See id.* (subtract the total of number of passers from total takers for each school in the "Details 2019" box and combine the two numbers (five for University of Utah, and four for Brigham Young University) to show the nine total failures). A total of thirty-eight non-Utah law schools' first-time takers failed the bar in 2018 (out of approximately 170 non-Utah takers), but many of these probably came from law schools that would not qualify for the privilege because of the 86% passage rule.

133. Utah Order, *supra* note 125, at 1-2. In addition, the candidate cannot be taking any other bar examination in July 2020. *Id.*

134. *Id.* at 3. Both the applicant and the attorney must certify the hours worked in fulfilling this requirement. *Id.* at 8.

135. Order Approving 2020 Attorney Admissions Process at 1-2, *In re* 2020 Att'y Admissions Process (Or. June 30, 2020) (No. 20-012) [hereinafter Oregon Order], [https://perma.cc/28VL-3AU3]. Stephanie Francis Ward, *Oregon Is Third State to Grant Diploma Privilege, While Tennessee Cancels Its July UBE*, ABA J. (June 30, 2020, 10:40 AM), [https://perma.cc/A2LF-84A6].

registered for the July 2020 Oregon Bar examination and that burden has had a significantly unequal impact on applicants."[136]

The diploma privilege applied to the 2020 graduates from the three Oregon law schools (regardless of their bar passage rates), and out-of-state schools with 2019 passage rates of "86[%] (rounded to the nearest whole number)."[137] The 2019 total first-time pass rates for Oregon schools were: University of Oregon 86%, Willamette 82%, and Lewis & Clark 81%—thus, two of the three would not meet the 86% requirement.[138] About one-third of the ABA law schools nationally would qualify for the diploma privilege under the 86% rule.[139] The substantial benefit to in-state schools may raise a constitutional problem as noted in Wisconsin.[140] The privilege did not include repeat takers.[141] From the perspective of the public, that is a good thing. The July 2019 repeater pass rate was only 27%.[142]

The court also lowered the minimum passing score, only for the July 2020 exam, from 137 to 133 (on the 200-point scale),[143] moving Oregon from high-average to low-average range nationally.[144] The rule did not require any form of supervised practice.[145] An applicant meeting the conditions was "a fully

136. Oregon Order, *supra* note 135, at 1.

137. *Id.* at 2.

138. *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "University of Oregon" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data; repeat the process and select "Willamette" and "Lewis & Clark").

139. The Oregon Bar posted a list of the law schools meeting the 86% rule. *Changes to the OSB Admissions Process for 2020*, OR. STATE BAR (July 1, 2020), [https://perma.cc/9TY9-4UBJ]; *see also List of ABA-Approved Law Schools*, AM. BAR ASS'N, [https://perma.cc/T274-Q7TM] (last visited Oct. 7, 2022). Ironically, it counted the Wisconsin and Marquette graduates admitted via the diploma privilege as "persons taking a bar examination for the first time in 2019." Oregon Order, *supra* note 135, at 2.

140. Amar, *supra* note 118, at 168; Angelos et al., *supra* note 118, at 168.

141. The rule requires that applicants have "[g]raduated in 2020," and February 2020 examination takers would have graduated in December 2019 at the latest. *See* Oregon Order, *supra* note 135, at 2.

142. *2019 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools*, NAT'L CONF. OF BAR EXAM'RS [hereinafter *2019 First-Time Takers and Repeaters from ABA Schools*], [https://perma.cc/CJ6A-UHQW] (last visited Oct. 7, 2022).

143. COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 31, at 32 (technically, the rule reduces the passing score from 274 to 266 on NCBE's 400-point scale.).

144. *See id.* at 20.

145. *See* Oregon Order, *supra* note 135, at 2.

licensed member of the Bar with the same rights and responsibilities as other Bar members."[146]

This combination of accommodations is puzzling. The "whereas clause" explanation was that COVID-19 imposed an enormous burden on applicants, some more than others.[147] That, along with possible oversubscription for the July examination, would explain offering multiple testing dates or the October remote examination as an option to any taker (Oregon offered an in-person examination in July and an online examination in October.)[148] Nor is it clear why out-of-state law schools needed to meet the 86% standard, but in-state schools did not (and two of the three did not).[149] The reason for the temporary reduction in the minimum pass score is also unclear, that is, why it was needed in addition to the diploma privilege. Oregon did not require any supervised practice before licensing.[150]

Projected from 2019 results, perhaps forty applicants[151] would not have passed the July 2019 examination and would have become "a fully licensed member of the Bar."[152] However, that number should be reduced somewhat to reflect the temporary lowered minimum passing score.

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146. *Id.* at 3.

147. *Id.* at 1.

148. The order says that those "currently registered for the July 2020 Oregon Bar examination may . . . [s]it for the July 2020 Oregon Bar examination." *Id.* at 3.

149. Derek T. Muller, *Three Curiosities of Oregon's Diploma Privilege Rule for the 2020 Bar Exam*, EXCESS OF DEMOCRACY (June 30, 2020), [https://perma.cc/TJ65-7SJ7].

150. *See* Oregon Order, *supra* note 135, at 2.

151. *See 2019 First-Time Takers and Repeaters from ABA Schools, supra* note 142, at 22. About fifty first-time takers from ABA schools failed the bar examination in July 2019, but some of these would have been from out-of-state schools without the 86% bar passage rate (and those would not be admitted via the diploma privilege), leading to an estimate of forty applicants who would have failed the examination, but will instead be admitted to practice.

152. Oregon Order, *supra* note 135, at 3.

3. District of Columbia[153]

The District of Columbia Court of Appeals, in a 4-3 decision, created a diploma privilege with supervised practice on September 24, 2020.[154] The rule also established a temporary practice rule.[155] The court determined that a temporary practice rule "will not address all of the difficulties that applicants face in light of the pandemic."[156] It suggested that its diploma privilege rule had some "conditions intended to safeguard the public's interest in the competence and good character of those [admitted] to practice."[157]

The diploma privilege applied to applicants who received a J.D. degree from an ABA school in 2019 or 2020, completed an application to take "a bar examination . . . to be administered in this jurisdiction in 2020 or 2021,"[158] had not taken the bar examination or been admitted elsewhere (precluding retakers), demonstrated character and fitness, and passed the professional responsibility examination.[159] Significantly, anyone admitted under the rule must practice for three years "under the direct supervision" of a member of the D.C. bar.[160] The supervisor must "take[] responsibility for the quality of the person's work and

153. Some argue that D.C. should not be included in this list of diploma privilege because it has a substantial supervised practice requirement, which replaces a bar examination. *See* Derek T. Muller, *Would You Rather Take the Bar Exam, or Work 6000 Hours as an Apprentice?*, EXCESS OF DEMOCRACY (Sept. 28, 2020), [https://perma.cc/6KS4-6668]. I do include it as a diploma privilege because it has a broad-based admission without examination.

154. Order at 2 (No. M269-20) (D.C. Cir. Sept. 24, 2020) [hereinafter D.C. Order], [https://perma.cc/6E5G-PBX8].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 4.

159. D.C. Order, *supra* note 154, at 4.

160. *Id.* at 6. There are a number of requirements for the supervising attorney. The attorney must be an:

> [E]nrolled, active member of the D.C. Bar who (a) has practiced law in the District of Columbia for at least five years; (b) is in good standing . . . (c) is the person's employer, works for the person's employer or law firm, or works for a non-profit organization in the District of Columbia that provides legal services to people of limited means . . . and (d) takes responsibility for the quality of the person's work and complaints concerning that work.

Id.

complaints concerning that work."[161] In addition, those admitted via the diploma privilege must "for three years after admission, [provide] prominent notice in all business documents that the person's practice is supervised by one or more D.C. Bar members and that the person was 'admitted to the Bar under D.C. App. R. 46-A (Emergency Examination Waiver).'"[162]

The lengthy supervision requirement, with another attorney "tak[ing] responsibility" for the quality of work,[163] was a meaningful quality assurance mechanism. In addition, the notice of special admission provision is a partial response to the question of "how is the public to know" that a diploma privilege attorney did not go through the usual testing procedures.[164] These provisions are significantly beyond the supervision required by other diploma privilege jurisdictions.

Three judges issued a separate statement, essentially in dissent.[165] They felt that the remote examination and expanded practice privilege were sufficient accommodations.[166] They also noted that the court's rule did not require admittees to attest that they completed the three years of practice under supervision.[167]

The D.C. bar admissions office indicates that 114 applications were "received by the initial deadline of April 30, 2021," for participation in the Emergency Examination Waiver (with the supervised practice).[168] After three years of supervised practice, that number might decrease.

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161. *Id.*

162. *Id.* at 7.

163. *Id.* at 6.

164. A question about this public information rule is what "business documents" refers to in the rule ("prominent notice in all business documents"). *See* D.C. Order, *supra* note 154, at 2, 4.

165. Chief Judge Blackburne-Rigsby, and Judges Glickman and Thompson filed this "Separate Statement." In addition to saying that the case had not been made for a diploma privilege, they also indicated that if there were to be such a privilege, "it should be for those applicants who certify that they have experienced significant hardship relating to the pandemic that has made taking the October 2020 remote bar examination infeasible." *Id.* at 7 (separate statement of Blackburne-Rigsby, Glickman, and Thompson, JJ.).

166. *Id.*

167. D.C. Order, *supra* note 154, at 6-7. *But see* Utah Order, *supra* note 125, at 8 (requiring both the bar applicant and the supervising attorney to certify the successful completion of the supervised-practice requirement).

168. Email from Doug Buchanan, Dir. of Media and Pub. Rels., D.C. Cts., to Steven R. Smith, Author (Oct. 27, 2022, 11:58 AM) (on file with author).

4. Louisiana

On July 22, 2020, the Louisiana Supreme Court, in a 4-3 decision, granted the diploma privilege to graduates of ABA law schools registered for the Summer/Fall exam.[169] The court had earlier scheduled remote examinations for August 24 and October 10.[170] There was no formal opinion, but there were clauses that noted COVID placed extraordinary burdens on applicants and made in-person examinations impractical.[171] A news release provided additional information. It recounted the problems with an in-person examination and that "the [c]ourt considered but rejected issuing a mandate that the bar examination be taken remotely for first-time test takers."[172]

The order allowed graduates to be licensed as soon as practicable. It required that, by the end of 2021, applicants take twenty-five Continuing Legal Education ("CLE") credits (the 12.5 credits required for all newly admitted attorneys, plus 12.5 in any area).[173] Participation in a mentoring program was also required.[174] The news release said that the CLE hours and mentoring program "will serve as guardrails to ensure the competency and integrity of the newly-admitted attorneys during their first year of practice."[175] Chief Justice Johnson acknowledged the court's "responsibility to ensure the competency and integrity of the legal profession. In my opinion, today's limited one-time Order . . . fulfills this responsibility."[176] The court thanked the Louisiana law deans, bar examiners, and state bar association for "bringing this solution to fruition."[177]

169. Order at 2 (La. July 22, 2020) [hereinafter Louisiana Order], [https://perma.cc/6PYC-BSGQ]; Levin, *supra* note 73, at 128-29.

170. Louisiana Order, *supra* note 169, at 3; *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

171. Louisiana Order, *supra* note 169, at 1.

172. Press Release, Louisiana Sup. Ct., Louisiana Supreme Court Announcement Regarding 2020 Bar Examination (July 22, 2020) [hereinafter Louisiana Press Release], [https://perma.cc/46TZ-5XHQ].

173. Louisiana Order, *supra* note 169, at 2-3.

174. *See id.*

175. Louisiana Press Release, *supra* note 172, at 1.

176. *Id.* at 2.

177. *Id.* at 3.

Each of the three dissenting justices wrote opinions. Justice Hughes, "respectfully" dissenting, noted that the court had "ignored [the] objective recommendations" of the bar examiners but expects the examiners to "oversee the window dressing for automatic admission."[178] Justice Genovese "vehemently" dissented.[179] He noted that an examination should be required "to insure competency in the practice [of] law and for the protection of the public in general," and that "over 100 bar applicants will be given a license to practice law when they should not have been. What other professions are allowing a professional license without testing?"[180] Justice Crain also dissented, writing: "Today we follow 'the deans of the four Louisiana Law Schools' whose students, for the first time, would have been tested by someone other than their respective law schools."[181] He noted that "[t]he bar examination acts to protect the public from basic incompetency," and asked whether the medical and accounting professions are "handing out licenses . . . without testing competency."[182] He concluded, "we have done an incalculable disservice to the public, [and] our profession."[183]

The Louisiana order applied to any ABA law graduate.[184] It did not have limits, as Utah and Oregon's orders did for out-of-state schools, based on 2019 passing rates.[185] Such a provision may have been problematic in Louisiana, where, in 2018 and 2019, one in-state school had first-time total passing rates of only

178. Louisiana Order, *supra* note 169, at 5 (Hughes, J., dissenting).
179. *Id.* at 6 (Genovese, J., dissenting).
180. *Id.* at 7.
181. *Id.* at 8 (Crain, J., dissenting).
182. *Id.*
183. Louisiana Order, *supra* note 169, at 9.
184. *Id.* at 2 (majority opinion).
185. Oregon Order, *supra* note 135, at 2; Utah Order, *supra* note 125, at 1.

60% to 64%.[186] The order did, however, preclude repeat takers from receiving the diploma privilege.[187]

At the time of the decision, one justice on the Louisiana court had resigned, so the chief justice had appointed a retired judge as a justice *pro tempore* who voted for the diploma privilege.[188] The news media noted that the fourth justice voting to grant the diploma privilege had a daughter scheduled to take the bar examination who became eligible for the diploma privilege because of the rule.[189]

5. Washington

The Washington Supreme Court, "by majority" vote, adopted a rule allowing the diploma privilege for those registered for the Summer 2020 exam.[190] The broad rule applied to anyone who graduated from any ABA law school regardless of its bar

186. *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "Louisiana State University" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data; repeat and select "2019" as the year for the 2018 data; repeat the process and select "Tulane University," "Loyola University-New Orleans" and "Southern University" as the school). The national passing rates for first-time takers from law schools in the district in 2018 (and 2019): LSU 89% (83%), Tulane 74% (76%), Loyola 76% (65%), and Southern 60% (63%). *Id.*

187. Louisiana Order, *supra* note 169, at 2.

188. Levin, *supra* note 73, at 128-29 n.367 ("The Chief Justice appointed a retired judge, James Boddie . . . ."); *see also* Josh Blackman, *Louisiana Supreme Court Justice Who Cast Deciding Vote for Diploma Privilege Has Daughter Who Will Receive Diploma Privilege*, VOLOKH CONSPIRACY (Aug. 7, 2020, 6:45 PM), [https://perma.cc/AB8J-DU4N].

189. Andrea Gallo & John Simerman, *A Supreme Court Justice Voted to Let Law Grads Forgo the Bar Exam. Among Them: His Daughter*, NOLA.COM (Aug. 7, 2020, 2:23 PM), [https://perma.cc/2PV4-M22P]. This was Justice John Weimer. *Our Views: Justice John Weimer's Decision on Bar Exam Helps Daughter, but Doesn't Help Court's Reputation*, ADVOC. (Aug. 16, 2020, 6:00 AM), [https://perma.cc/J6TC-GQDN] ("Weimer said in a statement that his vote was not affected by personal considerations, and that he 'disclosed the fact my daughter is a law school graduate to anyone I spoke to regarding the exam.' The statement did not say with whom he had spoken.").

190. Order Granting Diploma Privilege & Temporarily Modifying Admission & Practice Rules at 1-2, *In re* Statewide Response by Wash. State Cts. to the COVID-19 Pub. Health Emergency (Wash. June 12, 2020) (No. 25700-B-630) [hereinafter Washington Order], [https://perma.cc/79MZ-ZSMD]. The vote was not announced. The rule provides that it applies to those "who are currently registered for either the July or September 2020 bar examination and who have received a Juris Doctorate degree from an ABA accredited law school."

passage rate.[191] Most significantly, it applied to repeaters.[192] Washington was the only state to apply the privilege to repeat takers.[193] There was no supervised practice requirement. Thus, it did not have the public protection built into the Utah rule or even the more modest protections of the Oregon rule. Washington gave in-person examinations in July and September for those who chose to take the test or did not meet the criteria stated in the rule.[194]

In addition, Washington also lowered the minimum passing score from 270 to 266.[195] It later extended the change to February and July 2021.[196]

Based on 2019 bar results, Washington may have licensed nearly 150 attorneys who would have failed the bar exam.[197] Most of those (over 100) would be first-time takers,[198] but perhaps forty-five had failed the bar examination at least once and then would have failed it again in 2020.[199] Albeit, due to the lowered minimum passing score, these projections should be lowered somewhat. The three in-state schools had first-time Washington (and national) bar passing rates as follows: University of Washington, 88% (84%); Gonzaga, 77% (76%); and Seattle, 73% (71%).[200] The Washington rule allowed graduates from some very weak out-of-state schools to use the

191. *See id.*

192. *Id.* ("The diploma privilege option will be available to applicants currently registered to take the examinations who are taking the tests for the first time and those who are repeating the tests.").

193. *Compare* Washington Order, *supra* note 190, at 1-2, *with* Utah Order, *supra* note 125, at 1-2, *and* Oregon Order, *supra* note 135, at 1-2, *and* D.C. Order, *supra* note 154, at 3-4, *and* Louisiana Order, *supra* note 169, at 2.

194. *July 2020 Bar Exam: Jurisdiction Information, supra* note 23.

195. *Id.*

196. *Minimum Scores: Minimum Passing UBE Score by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/GW7M-97MY] (last visited Oct. 8, 2022).

197. *See 2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 151.

198. *See id.* The 2019 July results for Washington were that out of 486 takers, 103 did not pass.

199. *See id.* In 2019 in Washington, there were seventy-three repeat takers, of whom twenty-nine did pass and forty-four did not pass. This is a pass rate of 40%. That is, 60% of repeat takers would have failed the bar examination again but will be admitted through the diploma privilege.

200. *Bar Passage Outcomes*, AM. BAR ASS'N, [https://perma.cc/7XUW-KWQD] (last visited Oct. 8, 2022).

privilege.[201] And—most puzzling—it allowed those who had already failed the bar one or more times to be admitted through the privilege (repeat takers had about a 40% probability of passing the examination, based on 2019).[202] The rule limited the privilege to ABA-accredited graduates and precluded new registrants after the court adopted the rule.[203]

All five states gave at least one examination.[204] Each thus expected bar examiners would be able to offer testing and applicants would be ready and able to take the examination.

B. Examples of Opinions Declining the Diploma Privilege

Many states received requests or formal motions for a 2020 diploma privilege.[205] Of the forty-five states that did not adopt a diploma privilege for 2020, seventeen courts provided some statement denying the requests for a privilege.[206] Many of the courts that denied requests for a diploma privilege did not issue formal orders with opinions.[207] The following are examples of courts describing the reasons for their decisions.

1. Montana

On July 14, 2020, the Montana Supreme Court unanimously issued an order and opinion responding to requests to grant a diploma privilege to 2020 graduates.[208] The court reviewed the steps the bar examiners had taken to provide for a reasonably safe

201. *See* Washington Order, *supra* note 190, at 1-2.

202. *Id.*; *2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 151.

203. *See* Washington Order, *supra* note 190, at 1-2.

204. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

205. NAT'L CONF. OF BAR EXAM'RS, BAR ADMISSIONS DURING THE COVID-19 PANDEMIC: EVALUATING OPTIONS FOR THE CLASS OF 2020, at 2 (2020), [https://perma.cc/B76N-QBTY].

206. The NCBE tabulates the states with formal action as Alaska, California, Connecticut, Florida, Idaho, Illinois, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, and Tennessee. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

207. *Id.* An example is Texas. *See infra* text accompanying notes 273-78.

208. *In re* Rules for Admission to the Bar of Mont., No. AF 11-0244, 2020 Mont. LEXIS 2083, at *1 (Mont. July 14, 2020).

test and the fact that it had provided for "a one-year provisional license to recent law school graduates" with supervision.[209]

The court also recounted the history of Montana dropping the diploma privilege in 1980, when it found that the "public [was] not being properly protected" by the privilege.[210] In reviewing the interests of the public, the court noted that a diploma privilege would result in fourteen or fifteen applicants being "admitted to the practice of law in this State who would otherwise not be admitted."[211] The Montana court focused on other examination accommodations that would protect applicants and the public.[212]

2. Minnesota

The Minnesota court asked for public comments on requests from graduating law students that the court adopt a diploma privilege for summer 2020.[213] Minnesota had already developed several accommodations for the examination and a supervised practice rule at the time.[214] Minnesota has (is tied for) the lowest minimum pass score in the country, at 130.[215]

In a 6-1 decision, the court recognized the special challenges facing 2020 bar applicants and accommodations the bar

209. *Id.* at 2-3. The court noted that one commenter "argued that the personal presence of a supervising attorney was an unachievable requirement" to the Office of Public Defender.

210. *Id.* at 3-4 (quoting *In re* Proposed Amends. Concerning Bar Examination, 609 P.2d 263, 265 (Mont. 1980)).

211. *Id.* at 5.

212. *Id.*

213. Minnesota Petition*, supra* note 28, at 3. See Levin, *supra* note 73, at 107-09 for a discussion of events in Minnesota.

214. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23. It had announced that it would offer the Summer examination both in July and September, and applicants were able to delay a summer bar registration to February or July 2021 (without additional fee).

215. This is on a 200-point scale (260 on the 400-point UBE scale). COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 31, at 32. Technically, Wisconsin has a minimum score one point lower, 129, but it is primarily a diploma privilege state. In July 2019, it had a total of only eighty-one first-time takers.

examiners had made.[216] The dissent by Justice Thissen[217] was the only formal dissent found by the author in the states denying the diploma privilege request. Her dissent did not include a statement of reasons.[218]

The court concluded that a diploma privilege could "unintentionally[] exacerbate some challenges. Further, we conclude that now more than ever public confidence and trust in the competency of Minnesota's lawyers must be honored, and thus we decline to discard a longstanding requirement for admission to the Minnesota bar, even temporarily."[219]

3. Nebraska

The Nebraska Supreme Court, in a *per curiam* opinion, without dissent, on July 11, 2020, denied the request for a diploma privilege for 2020.[220] The court recognized the challenges of the pandemic and noted it had extended the "senior certified law student status" (temporary practice).[221]

The court considered the petition for a diploma privilege and its "obligation to protect the public."[222] It noted: "The purpose of the bar examination is to ensure minimum competence of those admitted to the practice of law."[223] It then estimated what a

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216. Order Denying Petition for Proposed Temporary Waiver of Bar Examination Requirements & Provision of Emergency Diploma Privilege at 3 (No. ADM10-8008) (Minn. July 14, 2020) [hereinafter Minnesota Order], [https://perma.cc/83NS-J22P]. Justice Thissen dissented and would have allowed the diploma privilege for those who graduated "from an accredited law school by June 2020." *Id.* at D-1 (Thissen, J., dissenting). Minnesota had already made several accommodations to the circumstances, including changes in the examination, permitting delays in the examination, and special individual accommodations. In addition, a temporary practice rule had been adopted.

217. *Id.*

218. *Id.*

219. *Id.* at 3. The court cited an earlier decision in which it discussed bar admission: "We use a two pronged test—graduation from an accredited law school plus passage of the bar examination—to determine whether an attorney should be admitted to practice." Minnesota Order, *supra* note 216, at 1 (quoting *In re* Hansen, 275 N.W.2d 790, 798 (Minn. 1978)).

220. Order at 4, *In re* Petition for Waiver of the Bar Examination Requirement for Admission to the Bar & Provision of Emergency Diploma Privilege (No. S-20-0495) (Neb. July 11, 2020) [hereinafter Nebraska Order], [https://perma.cc/VL2R-9BN7].

221. *Id.* at 2.

222. *Id.* at 3.

223. *Id.*

diploma privilege would mean, saying that "the average pass rate for the last two Nebraska Bar Examinations was 63[%] overall, with an average pass rate of 72.2[%] for those who obtained diplomas from Nebraska's law schools."[224] Essentially, this meant that 37% of the bar applicants failed the examination, and a diploma privilege would have had the effect of granting them a license to practice.[225] "Granting the diploma privilege would place the public at risk from lawyers who did not meet the minimum qualifications."[226]

4. California

The California Supreme Court received many calls for a diploma privilege, which would be even more complicated than in most states because California allows a wide range of groups to take the bar examination. In addition to ABA schools, state-accredited and even unaccredited schools can do so, as can those reading law and some graduates of foreign law schools.[227] The court cited this as one reason not to grant a diploma privilege.[228] As adopted in other states (applying the privilege to ABA law schools), it would exclude "nearly four dozen California law schools."[229] The court provided for an October online examination and permanently lowered the minimum passing score from 1430 to 1390 (approximately 139 on the NCBE 200-

224. *Id.*

225. Nebraska Order, *supra* note 220, at 3.

226. *Id.* at 3.

227. *Education*, THE STATE BAR OF CAL., [https://perma.cc/DDE5-9XWR] (last visited Oct. 8, 2022).

228. California Letter, *supra* note 100.

229. *Id.* The California Supreme Court issued a brief order, without opinion, in September. *In re* Temp. Waiver of the Bar Exam Requirement for Admission to the State Bar of Cal. & Provision of Emergency Diploma Privilege, No. S264358, 2020 Cal. LEXIS 6777, at *1 (Cal. Sept. 23, 2020).

point scale).[230] It also directed the state bar to establish a temporary supervised provisional license program.[231]

An emergency is generally no time to make permanent changes to such complex things as minimum scores. However, the court and a Blue-Ribbon Commission had been studying the minimum-score issue for some time.[232]

5. Florida

On September 3, 2020, the Supreme Court of Florida issued a *per curiam* decision rejecting the request for a diploma privilege,[233] with Justice Labarga recused.[234] The court noted that inadequate attorneys cause "extreme harm" to members of the public and undermine the legal system's foundations.[235] The court restated that it has determined that graduation from law school is insufficient to protect the public and, therefore, has long required a passing score on the bar examination.[236] It also rejected the diploma privilege plus the supervised-practice proposal:[237]

> This Court also does not believe that the completion of six months of supervised practice can sufficiently substitute for the passage of a comprehensive Bar examination that would allow the Court to fulfill its constitutional duty to evaluate a

230. The California Supreme Court later decided to apply the new passing score retroactively to those who received the new passing score (1390) or above between July 2015 and February 2020. To be licensed, applicants are required to complete 300 hours of supervised practice. Administrative Order 2021-01-20, *In re* Request for Approval of Proposed Amends. to the Cal. Rules of Ct. (No. S266547) (Cal. Jan. 28, 2021) [hereinafter California Order] (en banc), [https://perma.cc/455F-CBR4].

231. *Id.* at 6.

232. *Blue Ribbon Commission on the Future of the Bar Exam*, THE STATE BAR OF CAL., [https://perma.cc/7QE8-KGYW] (last visited Oct. 8, 2022).

233. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 857 (Fla. 2020).

234. *Id.* at 856; Dara Kam, *Florida Supreme Court Refuses to Drop Bar Exam Requirement*, NEWS 4 JAX (Sept. 4, 2020, 5:00 AM), [https://perma.cc/Y5MS-DPP7]. Justice Labarga did not give any reason for his recusal, and I found no press report explaining the reasons for it.

235. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 854 (Fla. 2020).

236. *Id.* at 855.

237. *Id.*

> Bar applicant's knowledge and skill before admitting the applicant to the unrestricted practice of law.[238]

Although joining the court's opinion, Justice Lawson also issued a concurring opinion to recognize the extraordinary work of the state's Board of Bar Examiners.[239] He noted the difficult circumstances in which these volunteers worked hundreds of hours to provide a safe and effective testing opportunity for all applicants.[240] There had been some harsh criticism of the Board[241] and Justice Lawson may have been responding to that criticism.

6. Alaska

On November 6, 2020, in a unanimous opinion, the Alaska Supreme Court issued an opinion explaining the basis for its earlier denial of a request for a diploma privilege.[242] The court noted that the bar examination is meant to ensure that admittees "service the public well and avoid harm" to the public.[243] It reported that "[a]pproximately 45% of applicants of the last two bar examinations in Alaska failed to pass the examination; all of them are graduates of accredited law schools."[244] This suggested that granting a diploma privilege would not protect the public from those applicants who have not "demonstrated minimum competency to practice law."[245]

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238. *Id.*

239. *Id.* at 856-57 (Lawson, J. concurring).

240. *In re* Petition to Amend the Rules of the Sup. Ct. Relating to Admissions to the Bar & the Rules Regulating the Fla. Bar, 301 S.W.3d 854, 856-57 (Fla. 2020).

241. *Id.* at 856.

242. Carr v. Alaska Bar Ass'n, 475 P.3d 269, 269 (Alaska 2020) ("On August 28, 2020 we denied applicants' request to be admitted to practice law in Alaska without passing a bar examination. We now explain the basis of our decision.").

243. *Id.* at 270.

244. *Id.*

245. *Id.* (quoting Press Release, Betsy AuBuchon, Clerk, Missouri Sup. Ct., Clerk of Court's Statement Regarding July Bar Examination (July 9, 2020), [https://perma.cc/WRU5-TKP7]).

7. Other States

In most states, there was no formal court opinion responding to diploma privilege requests. Because the existing rules of all states (except Wisconsin) required bar passage, maintaining the status quo of the bar examination required no action. There were many orders from bar examiners and courts adjusting the examination dates, providing for the online test, and the like.[246] However, there were relatively few specific orders regarding diploma privilege requests, and even fewer formal opinions.[247]

In a few states, the court's decision was delivered by a statement of the clerk of the court, the bar examiners, or the state's chief justice.[248] The most interesting of the letters was Chief Justice Burdick's letter to the "Members of the Idaho State Bar," rather than petitioners or applicants.[249] It read like an opinion, except for the salutation and the "[s]incerely" in place of "it is so ordered."[250] It clearly represented the decision of the Idaho court.[251] It addressed the argument for a diploma privilege made by "[s]ome students and law faculty."[252] It noted that:

> [T]he Idaho bar exam typically has a pass rate of approximately 70[%]. A diploma privilege program would mean approximately 30[%] of those who could not pass this basic hurdle of competency would be allowed to practice law. We do not believe that granting diploma privilege under such circumstances upholds our duty to the citizens of Idaho.[253]

246. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

247. *See, e.g.*, Order at 1, *In re* Diploma Privilege for 2020 Ill. Bar Applicants (No. M.R. 030451) (Ill. July 16, 2020), [https://perma.cc/3XUC-4GDM].

248. *See, e.g.*, Press Release, AuBuchon, *supra* note 245; Letter from Roger Burdick, C.J., Idaho Sup. Ct., to Members of the Idaho State Bar (July 20, 2020) [hereinafter Idaho Letter], [https://perma.cc/T35W-VCDC].

249. Idaho Letter, *supra* note 248, at 1.

250. *Id.* at 1-2.

251. The letter referred to various actions of the court and noted, "After deliberation, . . . the Court has made the decision" to administer the examination in July. "The Court . . . understands some graduates" have safety concerns, so the online examination will also be given. *Id.* at 2.

252. *Id.*

253. *Id.* The chief justice also noted the importance of the Uniform Bar Examination and the ability to transfer scores among states. The diploma privilege would interfere with the UBE.

Connecticut Chief Justice Richard Robinson wrote a decision letter to Glenn Holmes, an applicant (with copies to other interested parties, including the law school deans) regarding the diploma privilege for Connecticut.[254] It seemed to reflect only the chief justice's decision, not the whole court's. The chief justice concluded: "Based on all of the information I have reviewed, I cannot at this time conclude the online process . . . along with the accommodations that are and will be offered, will not be sufficient to produce a fair and equitable examination process . . . ."[255]

The Clerk of the Supreme Court of Missouri issued a statement on July 9, 2020 describing the decision of the court.[256] That statement noted that the Missouri Supreme Court had concluded that the diploma privilege would not adequately ensure "the core function of licensure, which is to protect the integrity of the profession and the public from those who have not demonstrated minimum competency to practice law."[257] While it was not a formal decision, the court apparently intended this to be a statement of reasons by a unanimous court.[258]

In Tennessee, the deans of the law schools supported the privilege, while the Board of Law Examiners and Board of Professional Responsibility opposed it.[259] In a *per curiam* (apparently unanimous) opinion, the Tennessee court noted its "duty to protect the interests of the public and the administration of justice."[260] It, therefore, "respectfully denied" the petition for a diploma privilege.[261]

In rejecting the diploma privilege, the Maryland Court of Appeals called on law schools to help with problems identified

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254. Letter from Richard A. Robinson, C.J., Connecticut Sup. Ct., to Glenn Holmes (Aug. 31, 2020), [https://perma.cc/NQT8-B75B].

255. *Id.* at 1.

256. Press Release, AuBuchon, *supra* note 245.

257. *Id.* The July 11, 2020, Nebraska opinion noted above was apparently the first *formal* opinion of the year denying the diploma privilege. Nebraska Order, *supra* note 220.

258. *Id.*

259. Order at 1-2, *In re* Petition for Emergency Rule Waiver (No. M2020-00894-SC-BAR-BLE) (Tenn. July 21, 2020) [hereinafter Tennessee Order], [https://perma.cc/5VQD-8GV7].

260. *Id.* at 3.

261. *Id.*

with remote examinations.[262] "[L]aw schools . . . have space that can provide a quiet location without distraction for those taking a remote examination."[263] It ordered the bar examiners to assist law schools in "provid[ing] testing locations" for applicants "who lack a quiet location without distraction."[264]

Finally, the Ohio Supreme Court unanimously summarized the two points commonly made by courts declining the requests for a diploma privilege in a short statement.[265] First is the duty to the public interest.[266] "It is the court's obligation to protect the public and the integrity of the profession through oversight of the profession and its practitioners. The purpose of the bar examination is to ensure minimum competence of those admitted to the practice of law."[267] Second, with the changes in testing procedures, an online opinion, and a temporary practice rule, "the court has taken steps to minimize the concerns raised [about the examination] while continuing to carry out its responsibility to promote the integrity of the legal profession."[268]

Two states, Hawaii[269] and North Carolina,[270] that denied the diploma privilege did provide for a temporary reduction in the usual minimum passing score on the bar examination. Neither released an opinion explaining the basis for a temporary reduction in the score. Perhaps the reason was an assumption that the disruption might artificially lower the scores on the bar examination, and the lower minimum score would account for that. Two diploma-privilege states (Oregon and Washington)

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262. Maryland Order, *supra* note 100, at 4-5.

263. *Id.* at 5.

264. *Id.* at 5-6.

265. *In re* Petition to Amend Rule I of the Sup. Ct. Rules for the Gov't of the Bar of Ohio, 2020-Ohio-3860, 150 N.E.3d 103, 103 (Ohio 2020).

266. *Id.*

267. *Id.*

268. *Id.* at 2.

269. *Supreme Court Announces Further Adjustments to Bar Exam in Response to COVID-19 Pandemic*, HAW. STATE JUDICIARY (July 24, 2020), [https://perma.cc/XG4C-AS5Q].

270. The bar examiners announced, on July 24, 2020, that the minimum passing score for the July 2020 and February 2021 North Carolina Bar Examinations was reduced from 270 to 268. N.C. BD. OF L. EXAM'RS, PASSING SCORE REDUCED FOR JULY 2020 AND FEBRUARY 2021 NORTH CAROLINA BAR EXAMINATIONS 1 (n.d.), [https://perma.cc/DV9U-SLAQ].

also had temporary reductions in the minimum passing score.[271] As well, recall California's permanent reduction discussed earlier in this Article.[272]

8. The Strange Case of Texas

Texas is not listed as among the states to have formally considered the diploma privilege. Still, as Michael Ariens has documented, Texas had a challenging time working through the request.[273] Texas canceled the Summer examination and offered applicants two options—an in-person test and a remote test.[274] Professor Ariens noted that two members of the court favored a diploma privilege, and two favored an apprenticeship leading to licensure.[275] A fifth justice favored either of those two options.[276] The majority of the court did not agree on an option, so the court adopted neither of the non-examination admission options.[277]

Of course, that decision had consequences for the applicants—but it also had implications for the public. Based on the 2020 actual bar results for Texas, 352 applicants who failed the examination (first time) would instead have been licensed with a diploma privilege, and 334 more if repeaters were included (as in Washington).[278]

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271. Washington Order, *supra* note 190, at 2; Oregon Order, *supra* note 135, at 3.

272. *See supra* note 230 and accompanying text.

273. Michael Ariens, *Texas Supreme Court's Failure to Offer Alternative Licensure Option Unnecessarily Hinders Our State's Future Lawyers*, TEX. LAW. (July 7, 2020, 5:10 PM), [https://perma.cc/X5PC-E2NB].

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See 2019 First-Time Takers and Repeaters from ABA Schools*, *supra* note 151; *2020 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools*, BAR EXAM'R, Spring 2021, at 36, 36. Of course, if some applicants (who would have been eligible for a diploma privilege had it been offered) did not take the test in 2020, these numbers would likely be higher.

V. THE ARGUMENTS AND THE CONSEQUENCES

A. The Pandemic Arguments for a Diploma Privilege

Most of the courts providing COVID diploma privileges did not write formal explanations. Therefore, the bases of the actions of the five courts are sketchy: "the extraordinary barriers facing applicants"[279] and "in consideration of the public health threat currently posed by the novel infectious coronavirus."[280] The statements of advocates suggest additional bases for the privilege:[281] the examination could not be given safely, the pandemic and social upheaval interfered with concentration and study (especially true for disadvantaged graduates), delays were expensive for some graduates,[282] new attorneys were necessary to

279. Washington Order, *supra* note 190, at 1 ("WHEREAS, the court recognizes the extraordinary barriers facing applicants currently registered to take the bar examination in either July or September 2020, or the limited license legal technician (LLLT) examination in July 2020.").

280. Utah Order, *supra* note 125, at 1.

281. Among these is the advocacy letter by Dean Annette Clark (Seattle, to the Washington Supreme Court on behalf of that faculty). Seattle Letter, *supra* note 28, at 1-3. While they requested the diploma privilege for their students, they did not recommend or request a broad rule applying to out-of-state students or to those who had previously failed the bar exam. *Id.* at 2. The petition of students in Minnesota seeking the diploma privilege is another example of the advocacy for the privilege. Minnesota Petition, *supra* note 28, at Exhibit A. The petition includes thirteen individual statements from applicants describing the disruption, emotional trauma, and difficulties concentrating and studying that they faced. A third example is the three Oregon deans who wrote to the Oregon Supreme Court making similar points. Letter from Marcilynn A. Burke, Dean, Univ. of Oregon Sch. of L., Brian Gallini, Dean, Willamette Univ. Coll. of L., and Jennifer J. Johnson, Dean, Lewis & Clark L. Sch., to the Oregon Sup. Ct. (June 15, 2020) [hereinafter Oregon Letter], [https://perma.cc/TY9J-HCNA].

282. *See, e.g.*, *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28, at 1-4; Minnesota Petition, *supra* note 28, at 3-4; Oregon Letter, *supra* note 281, at 1-3.

"address . . . immediate legal needs,"[283] and "graduates are ready and able to be excellent practitioners."[284]

1. Safety, Preparing, and Loss of Income

The first concern—safety—was addressed by bar examiners in several ways, including canceling the bar examination, strictly following health guidelines, making special arrangements for vulnerable applicants, giving the examination on multiple dates, and providing an online test.[285] These accommodations had the advantages of reducing the physical risk to applicants but still protecting the public by continuing the regular assessment of basic preparation to begin law practice. Bar examiners, courts, and the NCBE were often roundly criticized for going ahead with the bar examination.[286] As we will see, the results of the Summer examination seem to suggest that examiners were able to provide reasonably safe and successful tests both in person and online.[287]

The second concern was that the current environment was such that some students could not study effectively, recognizing that the difficulty affected some students more than others. The basic accommodation adopted by many states was to allow applicants to delay the examination or give the option of a delay for two or three months.[288] In the alternative, states generally allowed an applicant to roll over their application to February.[289]

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283. Minnesota Petition, *supra* note 28, at 16. These graduates are also needed to "assist communities most affected by the pandemic and civil unrest." *Id.* 19. For example, regarding the third point, "Our state needs well-trained, compassionate lawyer-leaders—now. Each day that passes in this new reality uncovers a host of exacerbated and novel legal issues. Our graduates can assist on the front lines of helping to address the complex and evolving legal needs of Oregon's citizens." Oregon Letter, *supra* note 281, at 3; *see also* Minnesota Petition, *supra* note 28, at 16; *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28, at 2-3.

284. Seattle Letter, *supra* note 28, at 2 ("Our graduates are ready and able to be excellent practitioners."); Oregon Letter, *supra* note 281, at 3 ("As Oregon law school deans, we are confident that our graduates are practice ready.").

285. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7.

286. *See, e.g.*, NAT'L CONF. OF BAR EXAM'RS, *supra* note 205, at 1, 6-8.

287. *See infra* note 338 and accompanying text.

288. Sam Skolnik, *States Pressured to Waive Bar Exam for New Lawyers in Pandemic*, BLOOMBERG L. (June 30, 2020, 8:28 AM), [https://perma.cc/AA7E-U4AV].

289. *Bar Exam Modifications During COVID-19: 50-State Resources*, *supra* note 7 (for example, Alabama, Florida, Iowa, Minnesota, Mississippi, and Virginia allowed for a rollover).

In short, in most states, there were accommodations that, in effect, allowed additional time for study and some of the distractions of the spring and summer to diminish.

The third concern was that applicants might lose income because of delays in taking the bar or receiving results. A decision (by the applicant or state) to delay the test could result in a loss of income. Most states not offering a July examination made accommodations for this issue by implementing temporary supervised practice rules.[290] Applicants with positions lined up could start the job early because finding a supervisor was relatively easy.[291] Law schools may have helped find supervisors for those without a job arrangement. Many of those taking a bar examination in September or October undoubtedly used the additional time to study. With the student practice rule, even they could consider starting supervised work earlier than typical years. The temporary practice rule was imperfect but provided some accommodation for financial concerns. With solid supervision, there should be limited risk to the public. The suspension of student loan payments and interest accumulation was a significant economic benefit to graduates.[292]

Law schools concerned about the financial distress of potential delays in the bar examination may have offered 2020 graduates help to find appropriate supervised positions. There were surprisingly few public reports of schools aggressively undertaking these steps.[293]

2. Immediate Need for New Lawyers

Some scholars, applicants, and advocates argued that there was an additional concern—that 2020 graduates were needed

290. Skolnik, *supra* note 288.

291. *See, e.g.*, Jim Ash, *Supervised Practice Program Ground Rules Explained*, FLA. BAR (Sept. 3, 2020), [https://perma.cc/4SZQ-6RK2].

292. *See COVID-19 Loan Payment Pause and 0% Interest*, FED. STUDENT AID, [https://perma.cc/R4WB-35QK] (last visited Oct. 8, 2022).

293. *See COVID-19: How Law Schools Are Adapting*, NAT'L JURIST (Oct. 22, 2020, 8:22 AM), [https://perma.cc/8BNW-GMDE].

immediately to fill legal positions.[294] The need for new lawyers is most acute among government, public interest organizations, and small firms (having either ten or less lawyers or twenty-five or less lawyers).[295] In granting a diploma privilege, the D.C. Court of Appeals noted that "many commenters argue that emergency changes to the bar-admission process are needed to increase the number of attorneys who can provide pro bono representation to help deal with legal problems created or worsened by the COVID-19 pandemic."[296]

Of course, this concern referred only to a temporary delay in licensing graduates, not a permanent reduction in the number of attorneys. The brief effect on licensing would have been between the usual licensing schedule (about November 2020) and when 2020-delayed licensing occurred (depending on the state, between November 2020 and early 2021).[297]

Neither the immediate supply nor the effective demand for new attorneys suggested a significant new-attorney deficiency.[298] In addition to the attorneys licensed by examination or diploma privilege in the summer 2020 bar-admissions cycle, temporary

294. Those seeking the diploma privilege "throughout the nation said lawyers were needed more than ever." Mike Stetz, *Bar Exam Blues*, NAT'L JURIST, Jan./Feb. 2021, at 12, 12-15; Griggs, *supra* note 75, at 19-20.

295. Claudia Angelos et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), [https://perma.cc/4W5Q-U43Z].

296. D.C. Order, *supra* note 154, at 3. The court turned the argument into an expectation of those obtaining the diploma privilege: "[t]he court expects those who are permitted to practice law under these emergency rules to make a concerted effort to provide such pro bono assistance." *Id.* It would be an interesting study the compare the level of pro bono service by newly admitted attorneys in 2020 with 2018-2019.

297. *See ABA Urges States that Cancel Bar Exam Due to COVID-19 to Consider Alternatives for Law Grads*, AM. BAR ASS'N (Apr. 7, 2020), [https://perma.cc/ZQP9-5QTF].

298. Some shortages of attorneys, especially in larger firms, occurred generally later in 2021 and 2022 after any delay in licensing from summer 2020 was past and in some cases was in the lateral hiring market. *See* Stephanie Francis Ward, *2020 Law School Grads Having Harder Time Finding Jobs, Data Shows*, ABA J. (Apr. 20, 2021, 3:57 PM), [https://perma.cc/RVA6-RHEB].

practice rules provided legal talent.[299] Law firms that temporarily downsized increased the pool of available lawyers.[300]

In 2020 and early 2021, there did not appear to be a shortage of new lawyers. The ABA placement data show that 2020 graduates had a lower employment rate in "law jobs" (77.4%) than 2019 graduates (80.6%).[301] There was little indication that nonprofit organizations, governments, or small and medium sized law firms seeking new lawyers could not fill those roles because of delayed licensing.[302]

Proponents also suggested that during COVID, the disadvantaged would have increased legal needs.[303] That was likely true. However, unless new graduates were primarily involved in pro bono work, their presence in the legal workforce would not have had much impact on that increased need. There must be an "effective demand" for legal services.[304] Legal assistance to the disadvantaged generally requires funded-lawyer positions (e.g., government-funded or nonprofits), substantial pro bono, or very low-bono services.[305] Significant unmet legal needs

299. With such a rule, even those who would have failed the bar examination were instead eligible for temporary practice under supervision. This supply of legal talent came with limitations in that some applicants would have been studying for a later examination, and stae temporary practice rules required supervision. *See* Teresa J. Schmid, *Guide to Supervising 2020 Bar Applicants*, AM. BAR ASS'N: STUDENT LAW. (June 1, 2020), [https://perma.cc/4ENU-DBP5].

300. Felicia M. Hamilton, *How Recent Law School Graduates Can Earn Money During COVID-19*, AM. BAR ASS'N (Oct. 9, 2020), [https://perma.cc/UN98-2KZV]; *Pay Cuts, Layoffs, and More: How Law Firms Are Managing the Pandemic*, AM. LAW. (July 31, 2020, 05:00 AM), [https://perma.cc/9PPZ-J2H9] (providing a firm-by-firm response of law firms to the economic challenges of COVID-19).

301. Ward, *supra* note 298.

302. In 2020, "Many firms have reduced pay, have eliminated and furloughed employees due to shutdowns, and have decreased the demand for new associates. Firms once positioned to welcome new associates have now deferred and rescinded offers." Over the course of 2021, however, there was increased demand for legal services, and for lawyers. JAMES W. JONES & MILTON C. REGAN, JR, 2022 REPORT ON THE STATE OF THE LEGAL MARKET (2022) [https://perma.cc/24J7-9C4W] (last visited Oct. 19, 2022); Sara Merken, *New Law Firm Data Shows 'Skyrocketing' Demand for U.S. Lawyers*, REUTERS (May 19, 2021), [https://perma.cc/A2UE-ADJJ] (last visited Nov. 2, 2022).

303. Brett Milano, *HLS Clinics and Students Fight for the Most Vulnerable Amid Covid-19*, HARVARD L. SCH. (Apr. 11, 2020), [https://perma.cc/9V49-8B3U].

304. "Effective demand" essentially requires the ability to pay for a demanded service or good. That would include paid-for legal services or pro bono services. Tejvan Pettinger, *Effective Demand*, ECON. HELP (Dec. 23, 2018), [https://perma.cc/44E6-Y49X].

305. *Free Legal Help*, AM. BAR ASS'N, [https://perma.cc/2FM9-E7SB] (last visited Oct. 8, 2022).

have been documented for decades,[306] despite the regular bar admission of new graduates each year.[307] Regrettably, there were few reports of states with the diploma privilege (compared with other states) enjoying an outpouring of immediate pro bono due to the speedy admission of applicants.[308]

3. "*Practice Ready*"

The claim that the diploma privilege is warranted because, upon graduation, "graduates are ready and able to be excellent practitioners,"[309] goes to the heart of a problem. Presumably, law schools do not (or should not) graduate many students unless they demonstrably have the basic skills to start in the profession. However, bar examiners disagree that all graduates from law schools are ready, as evidenced by the fact that too many students who graduate do not pass the bar examination a couple of months later.[310] This disconnect will further be analyzed later.[311]

306. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 12 (2017), [https://perma.cc/5L95-29LK].

307. *New Report Shows Most Law School Grads Passing Bar*, AM. BAR ASS'N, [https://perma.cc/7RHJ-XARM] (last visited Oct. 8, 2022). High quality automated legal services will become a way of providing low-cost advice (not necessarily lawyers). Christian Sundquist, *The Future of Law Schools: COVID-19, Technology, and Social Justice*, 53 CONN. L. REV. ONLINE, Dec. 2020, at 1, 16-19. An example of such services is SixFifty, a collaboration between BYU and a Silicon Valley law firm (Wilson Sonsini), that in response to the COVID challenges developed a free online program to help homeowners with mortgage relief ("Hello Lender") and a paid online program to help businesses safely reopen in COVID ("Return to Work"). SIXFIFTY, [https://perma.cc/9BLV-6QED] (last visited Oct. 8, 2022).

308. Stephanie Francis Ward, *How are Things Working Out for 3 Utah Law Grads Seeking Diploma Privilege?*, ABA J. (Sept. 1, 2020, 9:08 AM), [https://perma.cc/N6WW-TNM2].

309. Seattle Letter, *supra* note 28, at 2; Oregon Letter, *supra* note 281, at 3.

310. Karen Sloan, *Bar Exam Pass Rate Dropped Last Year for First-time Testers*, REUTERS (Apr. 26, 2022 12:46 PM), [https://perma.cc/U7NA-5D32]. Using Seattle University School of Law as an example, in 2019, its nation-wide bar passage rate was 71.27% (72.73% in Washington State). *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "Seattle University" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data). That means that bar examiners found more than a quarter of these graduates did not meet admissions standards (were not yet ready).

311. *See* discussion *infra* Section III.B.2.

B. Unintended Consequences

Dropping a diploma privilege island into the sea of traditional bar passage requirements has consequences. Those seeking the privilege identified the intended benefits, but the unintended consequences of the privilege were not always recognized. We look at three of those consequences.

1. Competence and Public Confidence

An unintended risk of the diploma privilege is licensing attorneys who have not demonstrated minimum competency. With a diploma privilege, those who would not have passed the bar examination (the usual measure of basic readiness) were granted a license to practice law.[312] A "spot" (single year) diploma privilege may present an additional risk to the public. The public generally relies on the standard bar admissions process (including bar passage) as part of basic quality assurance.[313] That process, however, was not applied to diploma privilege admittees. Those seeking legal services in Washington, Louisiana, or Oregon, for example, will have no way of knowing that these applicants were not subject to the usual quality assurance mechanism in the state.[314]

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312. For example, in Washington State 21% of ABA graduates did not pass the July bar examination on the first attempt. REGUL. SERVS. DEP'T, WASH. STATE BAR ASS'N, 430 CANDIDATES PASS SUMMER 2019 WASHINGTON STATE BAR EXAM 1 (2019), [https://perma.cc/F6D9-AZVL]. Beyond that, the Washington rule allows those who have already failed the examination (and 40% to 50% of ABA repeat-takers fail the bar examination again) to be admitted to practice law. Joe Patrice, *State Retreats From Diploma Privilege Policy Despite EVERYTHING WORSE NOW!*, ABOVE THE L. (Feb. 2, 2021, 1:13 PM), [https://perma.cc/63XQ-CQ9G]; Curcio et al., *Bar Exam Repeaters Shouldn't Be Pushed to Back of the Line*, BLOOMBERG L.: INSIGHTS (June 1, 2020, 3:01 AM), [https://perma.cc/8SFE-HCQP]. In Louisiana, 24% of takers did not pass the July bar on the first attempt, and in D.C. it was 22% (based on 2019 data.) *LSU Law Students Achieve Louisiana's Highest Pass Rate on July 2019 Bar Exam*, LSU L. (Oct. 4, 2019), [https://perma.cc/42VU-C4YN]; *First-Time Exam Takers and Repeaters in 2019*, BAR EXAM'R, [https://perma.cc/JD39-Z2AL] (last visited Oct. 8, 2022).

313. *Bar Admission*, YALE L. SCH., [https://perma.cc/4T6K-8FTB] (last visited Oct. 8, 2022).

314. *See, e.g.*, *No Bar Exam, No Problem—Except for the Public*, OREGONIAN (July 1, 2020 6:57 AM), [https://perma.cc/RN7B-7CLD]. There, a newspaper urged the Oregon State Bar to inform the public:

The public may understand the risks of a diploma privilege. In the 2020 polling data described earlier, only 6% of the respondents approved granting a law license without a bar examination, even during the pandemic disruption.[315]

2. Outcomes and Accreditation

Bar passage is an important form of outcome assessment in American legal education. The public, the profession, law school applicants, accrediting agencies, the Department of Education, and law schools themselves take account of bar passage.[316] For accreditation, bar passage can also be an important check on poor academic programs.[317]

The issue created by the diploma privilege was complicated by the Section of Legal Education and Admissions to the Bar's puzzling application of the bar-passage standard to the diploma privilege. The bar-passage standard is the primary outcome measure in ABA accreditation.[318] The standards require that 75% of graduates of a law school sitting for a bar examination must pass a bar examination within two years of graduation.[319] The

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With this decision, the court and the Oregon State Bar should at the very least ensure transparency surrounding this change. Lawyers who are admitted to the bar based on their diploma should have to disclose to clients that they did not take the bar exam. In addition, the Oregon State Bar should include a notation in its public membership directory indicating whether someone has been admitted to the bar based on their diploma.
Id.

315. SCHNEIDERS & CHOI, *supra* note 4.

316. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-314, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL ACCREDITATION 2-4, 9-10, 14 (2007); Gabriel Kuris, *Law School Applicants and the Bar Exam*, U.S. NEWS & WORLD REP. (Aug. 22, 2022), [https://perma.cc/4NSM-SBA5].

317. *Council Enacts New Bar Passage Standard for Law Schools*, AM. BAR ASS'N, [https://perma.cc/4M75-RP8V] (last visited Oct. 8, 2022).

318. Cassandra Sneed Ogden & E. Christopher Johnson Jr., *The ABA Bar Passage Standard, One Year Later*, DIVERSITY & BAR, May/June 2009, at 1, 2.

319. On its face, Standard 316, the bar passage standard, is clear that diploma privilege should not be included in those taking or passing the bar examination. Standard 316 provides, "At least 75[%] of a law school's graduates in a calendar year *who sat for a bar examination* must have *passed a bar examination* administered within two years of their date of graduation." AM. BAR ASS'N, 2022-2023 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 27 (2022) (emphasis added). Both the numerator and denominator of the three-fourths requirement are, therefore, clearly set out, as "who sat for a bar examination" (denominator) and "passed a bar examination" within two years (numerator). It is not clear that the Council took formal action to grant what amounted to a

informal interpretation significantly advantaged schools with bar passage problems which had students take the bar in diploma-privilege states (described in the notes).[320] The consequence of these decisions might well turn a law school with a (2019) 50% state (38% national) first-time passage into a (2020) 90% local (70% nationwide) rate.

This was not a hypothetical issue. In two of the five jurisdictions granting the diploma privilege, a law school was at risk of failing the 75% two-year requirement.[321] In a third state, there was a law school with a *first-time* bar passage rate of 71%, although it clearly complied with the two-year provision of Standard 316.[322]

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variance from Standard 316. The provisions for variances are outlined in Standard 107. *Id.* at 9. However, it also appears that the Section has treated the Wisconsin diploma privilege (for Marquette and the University of Wisconsin) as having "sat for a bar examination" and "passed a bar examination." *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "University of Wisconsin" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data; repeat the process and select "Marquette University" as the school).

320. Although there is apparently no official Council action to grant a variance to Standard 316, the ABA seems to be enforcing the Standard much differently than it is written by counting diploma privilege admittees as "bar examination takers" and "bar examination passers." Melissa Heelan, *Diploma Privilege Award Counts as Bar Passage, ABA Says*, BLOOMBERG L. (Dec. 23, 2020, 10:56 AM), [https://perma.cc/TR6Z-AECW] ("The District of Columbia, Washington state, Oregon, Louisiana, and Utah admitted 2020 law school graduates to the bar without having passed the bar exam. They had to meet certain qualifications and will be counted as having passed, Adams said," referring to William Adams, the Managing Director of the Section of Legal Education and Admissions to the Bar); Stephanie Francis Ward, *Pandemic Problems May Be Defense for Law Schools Not Meeting Bar Passage Standard*, ABA J. (Nov. 23, 2020, 8:53 AM), [https://perma.cc/P4P3-XMYU] ("Mary Lu Bilek, a council member who is on the committee and is dean of the City University of New York School of Law, clarified that recent graduates admitted by diploma privilege will be viewed as having passed a bar exam.").

321. In D.C., the University of the District of Columbia had a first-time bar passage rate of 38% and an "ultimate" bar passing rate of 64%. In Louisiana, Southern University had a first-time passing rate of 63% and an ultimate passing rate of 76%. These data are from the ABA 509 information reported in 2020. *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "District of Columbia" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data; repeat the process and select "Southern University" as the school).

322. Seattle University had a 71% overall first-time passing rate, but an ultimate (two-year) passing rate of 92%. *See id.* (choose "Bar Passage Outcomes" from the menu; then select "District of Columbia" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data).

3. Precedents

A diploma privilege is extremely valuable to applicants (ask third-year students).[323] Of course, they cannot pay for it, but there is a powerful incentive to seek it. It is likely that, in some of the five jurisdictions granting a 2020 variance, the precedent of giving the privilege, partly based on disruption and difficulty studying and concentrating, will be back. Bar examiners would, of course, claim that the 2020 accommodation was based on other things, notably the problem with in-person examinations and a desire to reduce the number of in-person test takers. No court granting a diploma privilege for summer 2020 considered it a precedent for a similar privilege in the Winter or Summer 2021 examinations, although COVID disruptions continued.[324]

It is hard to argue that a bar examination could not have been given in 2020. In fact, every state except Delaware gave a summer test.[325] The bases for the privilege were disruption, difficulty studying for and taking the examination, and emotional upset. Courts should be able to sort out precedent claims, but that may be difficult.

In every bar examination cycle, some applicants suffer events with terrible disruption to their lives. These problems have an emotional impact like the level described by students in 2020. In other cases, the pressure of a high-stakes test triggers significant emotional issues. In states offering the diploma privilege, the question may arise of whether individual students in the same position, as a practical matter, as many applicants in 2020, should be treated the same way—offered the diploma privilege as an option.

Students with some disabilities may, in those states offering the 2020 diploma privilege, raise the issue of whether the privilege is a legitimate accommodation to be considered under

323. A website, "United for Diploma Privilege: Fighting for Diploma Privilege for All," provides resources for organizing for the diploma privilege. Its position is that the emergency diploma privilege should be available for J.D. and LL.M. graduates, including those who have previously failed. It provides some resources for those seeking the privilege. UNITED FOR DIPLOMA PRIVILEGE, [https://perma.cc/8JY5-6A73] (last visited Oct. 8, 2022).

324. Sam Skolnik, *Over 1,000 New Lawyers Get Licenses Without Taking Bar Exam*, BLOOMBERG L. (Jan. 4, 2021, 5:50 AM), [https://perma.cc/TM94-3GRC].

325. *Bar Exam Modifications During Covid-19: 50 State Resources*, *supra* note 7.

federal and state disability laws (including the Americans with Disabilities Act). Those laws require individualized consideration.[326] The claim might be that in 2020, the state bar admissions process determined that the diploma privilege is an appropriate accommodation. The state granted licenses to hundreds of applicants based primarily on uncertainty, distraction, and emotional reaction to the circumstances, all of which made studying for and taking the examination more difficult.

Imagine a bar applicant in 2024 who has an emotional condition everyone agrees qualifies as a disability. There is strong expert evidence the condition involves unusual emotional distress, intensely aggravated by anxiety-producing situations, particularly preparing for and taking high-stakes examinations. The condition causes difficulty in concentrating, studying, and writing. Experts believe this condition is even more severe than was the case with the typical applicant during the Summer 2020 test. Because the state offered the diploma privilege in 2020, the applicant argues (and the experts agree) that the privilege would be a better accommodation than extra time, a separate room, a later examination, or the like.

Bar examiners and possibly state courts would have to decide how to address such requests on the merits. Should it become a federal court disability case, the applicant would suggest that the state had already given the diploma privilege to "hundreds of applicants" based partly on emotional upset that made preparing for and taking the examination difficult. The state did not have to offer the diploma privilege for mental distress and upset. Having chosen to offer the privilege, however, the state cannot now apply the privilege in a discriminatory manner by refusing to grant it when a disability causes intense emotional upset. Therefore, the state established the privilege as an acceptable accommodation in extreme circumstances.

The examiners would probably claim that granting the diploma privilege was a one-time emergency measure (not hundreds of times, just hundreds of people) and was related to the

326. *A Guide to Disability Rights Law*, ADA.GOV (Feb. 2020), [https://perma.cc/4QR2-JM87].

test's safety and the disruption. Therefore, the state did not establish the privilege as an available accommodation any more than working from home during COVID made it an accommodation.

Considering both the reluctance of courts to require extraordinary accommodations[327] and deference to licensing agencies,[328] federal courts might not be inclined to favor the applicant. Given the value of obtaining the privilege, those hoping to achieve it might well raise it. The precedent of a diploma privilege in response to extreme circumstances could trouble the bar admissions process, in a few states, for some time. The unintended consequences invite a focus more clearly on *why* less dramatic options than the diploma privilege would not meet the specific goals in the current circumstance.

VI. WHAT HAPPENED: OUTCOMES IN THE SUMMER 2020 EXAMINATIONS

A. Examinations

In summer and fall 2020, fifty jurisdictions, even those with diploma privileges, offered examinations of some sort.[329] Virtually all states allowed applicants to roll over their applications to a later date without penalty.[330] Here is a summary of the 2020 Fall examinations: one state (Delaware) canceled the examination; thirty-six jurisdictions delayed the examination, either by offering multiple testing dates or by postponing the testing date for all test takers; thirty jurisdictions gave at least one in-person examination; twenty-six states gave *only* in-person examinations (some multiple dates); and nineteen jurisdictions gave *only* online examinations.[331]

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327. *See* ROTHSTEIN & IRZYK, *supra* note 36, at 322.

328. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty-Year Retrospective*, 36 J. COLL. & UNIV. L. 843, 857-59 (2010).

329. *July 2020 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS. (Oct. 7, 2020, 2:53 PM), [https://perma.cc/5ZVR-ANQZ]. In these calculations, only the fifty states plus D.C. are included. "Off-shore jurisdictions" are not included in these numbers.

330. *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

331. *July 2020 Bar Exam Status by Jurisdiction, supra* note 329.

There was some reduction in the number of test-takers in summer 2020 compared with summer 2019. This Article estimates that there were almost 5,000 fewer bar takers (from ABA schools) in summer 2020 than in summer 2019.[332] That difference was likely made up of an estimated 3,600 non-U.S. law degrees (because of the COVID limitations by summer), and perhaps 1,400 diploma privilege (2020) graduates.[333] Interestingly, the February 2020 examination (before COVID issues) had more than 2,000 fewer takers than the February 2019 examination.[334] Each year a significant number of J.D. graduates do not take the bar examination immediately after graduation.[335]

1. In-Person Examinations

Given predictions of substantial COVID transmission and related illness in 2020 tests, there were surprisingly few reports of health problems,[336] and no confirmed COVID transmission resulted from the 2020 in-person tests.[337] It is impossible to know whether there were unknown or unreported transmissions, either because of symptomless infections or attribution to another

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332. There were 46,370 people who sat for the bar in July 2019, while there were 41,375 people who sat for the bar in July 2020. *2019 Statistics*, BAR EXAM'R (Fall 2020), [https://perma.cc/68MN-E5AG]; *2020 Statistics*, BAR EXAM'R (Spring 2021), [https://perma.cc/3BTV-GN9X].

333. Skolnik, *supra* note 324.

334. There were 21,935 people who sat for the bar in February 2019. *2019 Statistics*, *supra* note 332. There were 19,409 people who sat for the bar in February 2020. *2020 Statistics*, *supra* note 332.

335. *Why Do People Skip the Bar Exam After Graduation*, JD ADVISING, [https://perma.cc/H4T9-XTQT]. For most schools there are graduates who do not take the bar examination in the same year in which they graduate, or perhaps not at all. Graduation in December does not account for all of the delayed takers. The ABA reports the number of non-takers from each graduating class in the 509 Required Disclosures Bar Passage Outcomes. *See Individual School Bar Passage Reports*, *supra* note 130.

336. Derek T. Muller, *It Appears the July 2020 Bar Exam Did Not Spread Covid-19 Among Any Test-takers*, EXCESS OF DEMOCRACY (Sept. 3, 2020), [https://perma.cc/Q3GG-VGRG]. North Carolina apparently had some testing personnel not following safety protocols. In Colorado, one test-taker who had a normal temperature during the bar examination tested positive shortly after the examination. It was not publicly reported that anyone was infected with COVID following either of these incidents. Stephanie Francis Ward, *Test-Takers Express Safety Concerns, Fears from In-Person Bar Exam—Including Lack of Masks, Unclean Bathrooms*, ABA J. (Aug. 10, 2020 8:57 AM), [https://perma.cc/ZXE7-ZMRQ].

337. Muller, *supra* note 336.

source of infection. The information available suggests that the in-person safety accommodations were generally implemented successfully.[338]

2. Online Examination

The online bar examination (at least the one offered by NCBE) turned out to have the largest number of takers for the 2020 Summer/Fall bar.[339] Nearly 30,000 applicants sat for the NCBE online bar.[340] There were some problems with this examination, including lost internet connections, various computer issues,[341] some health issues (including a delivery during the test),[342] and problems with the artificial intelligence software used in some places to detect cheating.[343] Except for the last of these, it appears that difficulties were not out of the range of the usual number of issues during an in-person examination or were handled with dispatch.[344] Of course, dealing with

338. For example, Derek Muller noted many responses to his earlier column and followed up acknowledging that existing data could not prove that there was no transmission related to the in-person tests. Derek T. Muller, *What We Don't Know About the July 2020 Bar Exam and Covid-19: A Lot*, EXCESS OF DEMOCRACY (Sept. 8, 2020), [https://perma.cc/RJ6H-YKQE].

339. *2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or Octobe*r, NAT'L CONF. OF BAR EXAM'RS (Oct. 7, 2020), [https://perma.cc/2P46-TQWQ].

340. This does not include takers from the five states that gave their own online examinations. *Id.*; *see also COVID-19: Implications for 2020 Statistics*, BAR EXAM'R, [https://perma.cc/5RXP-BLBV] (last visited Oct. 8, 2022).

341. The NCBE indicated that ExamSoft reported that customer support requests were mostly routine and "those actually dealing with technical issues were proportionately low." *2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or Octobe*r, *supra* note 339.

342. Marie Innarelli, *Technical Difficulties: Mixed Reviews of First Ever Online Bar Exam*, J. HIGH TECH. L.: BLOG (Nov. 23, 2020), [https://perma.cc/VN4D-EKC3] ("Brianna Hill, a recent law graduate living in Chicago, continued taking the exam despite her water breaking as to not be disqualified for moving outside the vision of artificial intelligence. A mere 24 hours after giving birth she finished the remaining section of the exam in a hospital bed.").

343. *See* Kelley, *supra* note 99; Teninbaum, *supra* note 99.

344. The NCBE summarized the online examination as follows:

98% of applicants who had downloaded the exam files started their exams as planned. Of the 2% who did not start the exam, less than 0.3% had technical issues that required additional action, with the most common technical issue being user devices that did not meet the published minimum system requirements. The other 1.7% were either 'no-shows' (didn't

examination problems remotely is likely to be more complicated than in-person resolution. In any event, the examination appeared to be essentially a "success," with glitches."[345] Because NCBE could not equate the remote test with the usual NCBE tests,[346] it seemed likely that the transfer of test scores from state to state would not be allowed for the online test. This was mostly resolved when fourteen states (including D.C.) agreed to accept score transfers from the NCBE online test among themselves.[347]

In three states that gave both online and in-person exams, those taking the in-person exams had higher pass rates than online takers.[348] This was perhaps because the academically stronger students had an incentive (jobs) to take the earlier (in-person) exams.

Many seeking a diploma privilege argued that an online examination was not a legitimate alternative because it was

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attempt to launch the exam), chose not to take the exam prior to test day, or were determined to be ineligible to test by their jurisdiction.

*2020 Bar Exam Process Comes to an End: Approximately 38,000 Applicants Took Bar Exam in July, September, or Octobe*r, *supra* note 338.

345. Karen Sloan, *States Say the Online Bar Exam Was a Success. The Test-Taker Who Peed in His Seat Disagrees*, LAW.COM (Oct. 7, 2020, 3:40 PM), [https://perma.cc/8FC6-DH3U] (suggesting that the answer to the question of whether the "online bar exam [was] a rousing success, or an epic failure" is it "depends on whom you ask").

346. The equating from exam to exam is a statistical method of standardizing the scaling of tests so that the passing score remains the same across test administrations. One test is not "harder" or "easier" than another in terms of the passing score. NCBE routinely uses it to maintain an even scoring required across tests. So, for example, it does not matter whether an applicant takes the test in 2016 or 2018, in the spring or in the fall—the same level of performance is required on all of those tests. The NCBE explains this process as follows:

> This statistical process adjusts raw scores on the current examination to account for differences in difficulty as compared with past examinations. Equating makes it possible to compare scaled scores across test administrations because any particular scaled score will represent the same level of knowledge/performance from one test date to another. Equating helps to ensure that no examinee is unfairly penalized or rewarded for taking a more or less difficult form of the test. Because the adjustment of scores during equating is examination-specific (i.e., based on the level of difficulty of the current examination as compared to previous examinations), it is not possible to determine in advance of the test how many questions an examinee must answer correctly to achieve a specific scaled score.

Multistate Bar Examination, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/N4PB-XVKP] (last visited Oct. 8, 2022).

347. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

348. Stephanie Francis Ward, *Did Bar Candidates Who Had a Choice Do Better on In-Person or Remote Exams?*, ABA J. (Feb. 9, 2021 9:58 AM), [https://perma.cc/G9U2-L8SQ].

untried and would not work.[349] Others said that many applicants would not have adequate access to internet connections to take the test or even to study, which would likely result in failing the bar examination.[350]

Thus, the online bar examination was a bold undertaking. It was new, and in addition to testing issues (question quality, scaling problems, the potential for remote cheating), there were significant potential technical problems of simultaneously giving the examination to tens of thousands of takers. That there were as few problems as there apparently were was a great tribute to NCBE, bar examiners, and the flexibility and patience of applicants.

There were, however, real problems with some of the five[351] state-developed online tests.[352] State-written questions generally do not undergo the development and quality-check processes that NCBE employs.[353] Other issues were evident in Michigan's first online bar examination, administered in July.[354] A cyberattack or glitch in the ExamSoft program running the online test caused some takers to be locked out of the test for a short time.[355] Indiana, scheduled to offer an online examination shortly after Michigan, changed its plans and instead opted to email questions to applicants for an open-book (without proctoring) test.[356]

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349. *Diploma Privilege: What Is It & Which States Offer It?*, *supra* note 113.

350. Claire Newsome & Catherine Perrone, *The Inequity and Technology Behind an Online Bar Exam*, JURIST (July 18, 2020, 2:41 PM), [https://perma.cc/5G74-MNVV].

351. The five states were Michigan (July 28), Indiana (August 4), Nevada (August 11-12), Louisiana (August 24 and October 20), and Florida (October 13). *July 2020 Bar Exam: Jurisdiction Information*, *supra* note 23.

352. *See* Stephanie Francis Ward, *State's Online Bar Exam Is Delayed After Tech Glitch*, ABA J. (July 28, 2020, 2:05 PM), [https://perma.cc/E2ZR-28CC]; Stephanie Francis Ward, *Indiana Changes Online Bar Exam Again After 'Repeated and Unforeseen Technical Complications'*, ABA J. (July 29, 2020, 2:37 PM), [https://perma.cc/UFD5-2GEP]; Alan Gassman, *Over 1,000 Young Lawyers Are Stranded As Florida Bar Exam Is Canceled On 72 Hours Notice*, FORBES (Aug. 17, 2020, 8:47 PM), [https://perma.cc/6FHP-7NSB].

353. *NCBE COVID-19 Updates*, *supra* note 93.

354. *See* Karen Sloan, *Michigan Blames Cyberattack for Online Bar Exam Woes*, LAW.COM (July 29, 2020), [https://perma.cc/8C8W-SY2H].

355. *Id.* (Test-takers could not access their passwords to start the second part of the examination).

356. *Id.*

3. Testing Results

There was concern that the disruptions of the spring and summer would preclude many students from preparing well for the bar examination, and those burdens would fall especially hard on disadvantaged and minority applicants. As a result, commentators expected pass rates to decline.[357] In fact, in forty-one states, passing rates increased in 2020 compared with 2019.[358] Rates remained the same in two states and fell in seven states.[359] Detailed data is available online and in Appendix II.[360]

There are several possible explanations for this increase. For one thing, for the online and state-developed tests, it was impossible for NCBE to scale the scores[361] and, therefore, impossible for NCBE to equate the Summer 2020 test to earlier tests.

NCBE was, however, able to scale and equate the three standard NCBE in-person examinations.[362] Those equated scores should represent equivalent standards for comparing 2020 exams with other years. The Summer MBE national means were meaningfully higher than the previous four years.[363] Most in-person takers sat in July 2020 (5,678 takers) when the mean score was 146.1 (compared to 141.1 in 2019).[364] In September, there were fewer takers (1,811), and the mean score was 142.7; and in October, an even smaller number (417), with a low mean score of 137.2.[365] That would calculate the collective mean to be approximately between 144 and 145 compared with 141 in 2019, according to the author's back-of-an-envelope calculation.

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357. Muller, *supra* note 336.

358. *See infra* Appendix II.

359. *Id.*

360. *See infra* Appendix II.

361. See Susan C. Chase et al., *The Testing Column: Scaling, Revisited*, BAR EXAM'R, Fall 2020, at 68, 68 for a good review of the importance and nature of scaling.

362. *The Multistate Bar Examination (MBE)*, BAR EXAM'R, [https://perma.cc/TG3P-CTRT] (last visited Oct. 8, 2022).

363. *Id.*

364. *Facts & Figures*, BAR EXAM'R, Fall 2020, at 10, 10-11.

365. *Id.*; *see also Statistics: July, September, and October 2020 MBE*, BAR EXAM'R, [https://perma.cc/M8ZE-TJDD] (last visited Oct. 8, 2022) (explaining the small number of takers, especially in October, may limit the comparability to earlier years).

Five jurisdictions formally lowered their minimum passing score. California's change was permanent.[366] Hawaii and North Carolina had temporary reductions,[367] and two states (Oregon and Washington) not only had diploma privileges but also temporarily reduced the passing score for those who took the test.[368] It is hard to know the effect of these reductions in comparing summer 2020 to 2019 passing rates, but they almost certainly made a difference, as California illustrates.[369] Rhode Island did not lower its score until 2021.[370]

The passing data do not demonstrate that the greater-than-usual stress applicants undoubtedly faced through the summer substantially reduced their bar examination performance. That seems true both for the in-person (equated) and online (not equated by NCBE) examinations.

B. Temporary Practice and the Concern About a Shortage of New Lawyers

Another accommodation, in about thirty jurisdictions, was permitting temporary supervised practice. There is limited national data on the details of the practice rules.

C. Diploma Privilege

The number of applicants accepting the diploma privilege was as follows: Louisiana 409, Oregon 240, Utah 130, and Washington 498, for a total of 1,277 (plus D.C.).[371] All states granting the diploma privilege gave examinations.[372] Some

366. Sam Skolnik, *Bar Exams May Soon Be Easier to Pass*, *as States Eye Changes*, BLOOMBERG L. (Mar. 29, 2021, 5:01 AM), [https://perma.cc/N74V-CD3R].

367. Debra Cassens Weiss, *Several States Consider Lowering Cut Scores on Bar Exam, Making It Easier to Pass*, ABA J. (Mar. 21, 2021, 11:37 AM), [https://perma.cc/S7VD-TMUD].

368. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

369. See Stephanie Francis Ward, *California Releases Bar Exam Results, and Like Many Jurisdictions Sees Increase in Pass Rates*, ABA J. (Jan. 11, 2021 12:49 PM), [https://perma.cc/ZU53-RJMF] for additional detail for several states.

370. *See supra* text accompanying note 366.

371. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, BAR EXAM'R, Spring 2021, at 44,

372. *See id.* at 44-45.

applicants likely chose to take the test because of portability or personal or employment concerns. Privilege states collectively might have tended toward higher scores because applicants likely to fail the exam would sensibly have been most likely to accept the privilege. On the other hand, a significant number of repeaters would tend to pull down the passing percentage. Washington gave the diploma privilege to repeat takers,[373] which would have increased the passage rate by excluding repeaters from those taking the test.

D. Bar Admissions

In 2020, the number of new bar admissions increased from the 2019 level. In 2019, 38,464 candidates were admitted by examination.[374] In 2020, there were 39,324 admitted by examination, and 1,277 admitted via the diploma privilege, for a total of 40,601 (plus the D.C. diploma privilege).[375] There were, however, substantial variations among states in the increase or decrease in admittees.[376] A significant part of the increase in those admitted by examination related to a change in the minimum passing score in California.[377]

The number of attorneys admitted by UBE score transfer increased from 3,434 in 2019 to approximately 5,000 in 2020.[378] This was not generally an increase in the total number of attorneys, however, because virtually all of the score-transfer admittees passed a bar examination and were accounted for by the state in which they took the test.[379] Thus, the problems and accommodations did not decrease the number of newly admitted attorneys, including those admitted by examination.

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373. Washington Order, *supra* note 190, at 2.

374. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44. The figures do not include the five jurisdiction the NCBE reports noted earlier.

375. *Id.* at 44-45. The figures for 2019 and 2020 both exclude diploma privilege admission in Wisconsin. In Wisconsin, 327 applicants in 2019 and 299 applicants in 2020 were admitted via the diploma privilege.

376. *See id.* at 44-45.

377. *See id.*

378. *Id.* at 45.

379. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

The results reported in this section suggest that neither outlier accommodation was necessary. Courts did not need to cancel the test for a year, nor did courts need to displace the examination with the diploma privilege. The former unnecessarily harmed applicants; the latter unnecessarily removed a standard protection for the public. Forty-four states demonstrated that there were difficult but workable alternatives (but some alternatives were better than others).[380]

VII. THE 2021 EXAMINATIONS

The Spring 2021 examination (February 23-24) was administered under circumstances that were in some ways more challenging than the July exam. The weeks leading up to the February dates had substantially higher COVID infections and COVID-related deaths than in the weeks before the July dates.[381] Although COVID vaccines became available before the end of 2020, few potential February test-takers received a vaccination before that examination.[382] Mutations in the virus made matters worse.[383] Studying for the February examination was upended by COVID and by the election and post-election events, demonstrations, Capitol violence, and the political/social circumstances.[384]

States' potential accommodation options remained about the same as they were in the summer: canceling the test, social distancing/safe-testing in-person arrangements, delaying the test, giving a remote-online test, using multiple dates for the

380. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44-45. The forty-four include all the states except the five diploma privilege states and Delaware, the one state that canceled the test. *See Persons Taking and Passing the 2020 Bar Examination*, *supra* note 83. Wisconsin is not included in the count because it did not disrupt its ordinary admission process (the diploma privilege) but did not have an examination either. *Admissions to the Bar by Examination and Transferred UBE Score, 2016-2020*, *supra* note 371, at 44-45.

381. *See Trends in Number of COVID-19 Cases & Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://perma.cc/T6RB-QB7U] (last visited Oct. 9, 2022).

382. *See CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 16, 2022), [https://perma.cc/KQE6-P28S].

383. *See id.*

384. *See* Lisa Mascaro & Matthew Daly, *Capitol Siege by Pro-Trump Mob Forces Questions, Ousters*, ASSOCIATED PRESS (Jan. 7, 2021), [https://perma.cc/FS8X-SDU6].

examination, providing temporary limited practice rules, and offering a diploma privilege.

However, unlike the summer, states focused on safe practices for in-person and online examinations as accommodations.[385] All jurisdictions, except Delaware, offered a February test.[386] Sixteen jurisdictions gave in-person examinations,[387] and thirty-four gave remote, online tests.[388] Both the in-person and online examinations were on February 23-24.[389]

The number of test takers in the winter examination is usually less than half the number in summer.[390] This made social distancing, sanitation, and facilities arrangements more manageable for the February test. The logistics of the online examination were somewhat easier as well. And, of course, NCBE and many states had the experience of the October online examination to help guide the February online testing. There were still many challenges for test takers and test givers, but there were no published reports suggesting large-scale problems with the February tests.

There was little public discussion of delaying the administration of the February examination or proving multiple examination dates,[391] which may reflect the success of both the

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385. *February 2021 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (Jan. 12, 2021), [https://perma.cc/V82B-8TGK].

386. *Id.* Delaware does not offer a winter test. When it announced that it was not offering the Summer examination, it essentially canceled for a full year. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

387. *February 2021 Bar Exam Status by Jurisdiction*, *supra* note 385 (Those states were Alabama, Alaska, Arkansas, Hawaii, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming).

388. *Id.* (Those jurisdictions were Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana (February 9), Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin).

389. *Id.* Louisiana set its date as February 9. Several states have examinations lasting two-and-a-half or three days, including Nevada, Ohio, and Pennsylvania, all of which used February 25, 2021, for the extended test.

390. *See 2019 Statistics Snapshot*, BAR EXAM'R, [https://perma.cc/J88U-8EPW] (last visited Oct. 9, 2022). For the 2019 examinations, the numbers were 21,935 takers in February and 46,370 takers in July. *Id.*

391. *February 2021 Bar Exam Status by Jurisdiction*, *supra* note 385.

in-person and online administrations in summer and fall 2020. Those states that were going to offer a temporary, limited practice rule had done so earlier. Three jurisdictions, Hawaii, North Carolina, and Washington, continued temporary reductions in the minimum passing score announced in the summer.[392] Rhode Island reduced its minimum score to 270 beginning with the February test.[393]

Some called for the possibility of a diploma privilege as an accommodation,[394] but there was little serious discussion of it for the February examination. The five jurisdictions that offered the privilege in the summer did so only for that examination and did not extend it for the February takers.[395]

In July 2021, all states gave bar examinations.[396] Twenty-two jurisdictions gave in-person examinations, and twenty-nine gave remote examinations.[397] Bar examiners and courts were familiar with the steps necessary to provide relatively safe in-person and remote (online) tests. The in-person examinations, by all accounts, were a relatively routine administration apart from the COVID protocols that were in place, designed to comply with

392. *COVID-19: Implications for 2020 Statistics*, *supra* note 340.

393. Order at 1-2, *In re the Rhode Island Bar Examination (Reduction of Minimum Passing Score)* (R.I. Mar. 25, 2021), [https://perma.cc/EP6P-E6WQ] (reducing the minimum passing score from 276 to 270, on the 400-point scale, beginning with the February 2021 examination). This is a permanent reduction. *Id.* California permanently reduced its minimum passing score in 2020 with some retroactive application of the new score. California Order, *supra* note 230, at 1.

394. For example, the Washington ACLU asked the Washington Supreme Court to allow the diploma privilege because of the ExamSoft monitoring and face recognition technology. Letter from Michele Storms, Exec. Dir., Washington ACLU, and Jennifer Lee, Tech. & Liberty Manager, Washington ACLU, to Steven C. Gonzalez, C.J., Washington Sup. Ct., and others (Jan. 19, 2021), [https://perma.cc/CU6W-255K]. The University of Washington School of Law dean and others had requested the renewal of the diploma privilege for February. Letter from Mario L. Barnes, Dean, Univ. of Washington Sch. of L., to Steven C. Gonzalez, C.J., Washington Sup. Ct. (Feb. 1, 2021), [https://perma.cc/GF2R-G469].

395. Stephanie Francis Ward, *Jurisdictions with COVID-19-Related Diploma Privilege are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020 3:16 PM), [https://perma.cc/W94Q-LHJG].

396. The figures reported in this section do not include "Off-Shore Jurisdictions" which are included in NCBE data.

397. *July 2021 Bar Exam Status by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (May 18, 2021), [https://perma.cc/NX42-2MZA].

the medical and public health guidelines.[398] There were no publicly reported examples of COVID transmission from those examinations.

The online examinations, however, were problematic nationwide, primarily because ExamSoft-based software shut down or did not upload properly for some users.[399] The California State Bar did a careful study of the problems. It concluded that approximately 2% of California takers had "meaningful" loss of time or content because of technology, and 31% of takers "experienced one or more technical issues related to the software memory utilization."[400] However, 99% of test takers reported no problems being able to restart a section without losing time or content.[401] Ultimately, California adjusted the scores of those negatively impacted by the problem.[402] It also allowed those who had technical issues and did not pass the exam to waive the fee for a future examination.[403] Most states did not adopt a similar adjustment process.[404]

The July 2021 examination outcomes are generally comparable with Summer 2019 examinations (the last "normal" or pre-COVID year).[405] However, there were substantial variations in a few states.[406] There were approximately 500 more

398. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (June 1, 2021), [https://perma.cc/AW55-R64U].

399. Stephanie Francis Ward, *Technical Problems Again Plague Remote Bar Examinees, Who Blame Software Provider*, ABA J. (Aug. 5, 2021 11:27 AM), [https://perma.cc/YT7V-T4GR].

400. *State Bar Concludes Investigation on July Bar Exam Technological Issues*, THE STATE BAR OF CAL. (Sept. 27, 2021), [https://perma.cc/5CRM-REB6].

401. *Id.*

402. THE STATE BAR OF CAL., SCORING ADJUSTMENTS FOR APPLICANTS NEGATIVELY AFFECTED DURING THE JULY 2021 CALIFORNIA BAR EXAM 1-2 (2021), [https://perma.cc/JRQ8-NQB9]. The examiners determined that 2,429 "examinees experienced negative impacts" and rescored their examinations. *Id.* at 1.

403. *Id.* at 2.

404. *See Bar Exam Modifications During COVD-19: 50 State Resources* , *supra* note 7.

405. Stephanie Francis Ward, *Are Remote Learning and Burnout to Blame for Declining Bar Pass Rates?*, ABA J. (Nov. 16, 2021, 3:37 PM), [https://perma.cc/FK5N-GJAP].

406. In seven states, for example, the passing rate increased five or more percentage points (for all takers in a state), and in eleven states, the passing rate dropped by five percentage points or more. These data are calculated by comparing the Summer 2019 NCBE passage data with the preliminary passing data for Summer 2021. *Compare Persons Taking and Passing the 2019 Bar Examination*, NAT'L CONF. OF BAR EXAM'RS,

takers in 2021 (45,334 in 2019 and 45,872 in 2021).[407] In July 2021, seventeen states had the same passage rates or within one percentage point of July 2019; seventeen had increased passage rates of greater than 1%; seventeen had decreased passage rates of greater than 1%.[408] The Multistate Bar Examination mean scores were slightly lower in 2021, going from 141.1 in 2019 to 140.4 in 2021.[409]

The NCBE announced on June 1, 2021, that it was not planning to offer an online examination after the Summer 2021 test.[410] That was with the expectation that COVID was declining. With the success of in-person jurisdictions, an online test was not essential. But COVID again proved unpredictable, and by early 2022, there was an extraordinary surge, especially with the Omicron variant.[411] In announcing that it would not provide an online test, NCBE did recognize that things could change and indicated "restrictions by . . . public health authorit[ies]" could require adjustments again.[412] In that case, it was "committed to working with that jurisdiction on a solution that will enable its candidates to take the bar exam."[413] By January 15, 2022, Nevada announced that it was moving to a remote test consisting of "seven Nevada essay questions and two Nevada performance test questions."[414] That is, not NCBE or multiple-choice questions.[415]

[https://perma.cc/5BTU-MUEH] (last visited Oct. 9, 2022), *with Bar Exam Results by Jurisdiction*, *supra* note 80.

407. *Statistics*, BAR EXAM'R, [https://perma.cc/2RYS-UXLW] (last visited Oct. 9, 2022).

408. These data were derived from the data described in the previous footnote. *Id.* Three states are counted as no change because the 2021 rates were not available from NCBE (Hawaii, Kansas, and Michigan). *Id.*

409. *NCBE Releases National Means for July MBE, August MPRE*, NAT'L CONF. OF BAR EXAM'RS (Sept. 15, 2021), [https://perma.cc/G27G-TXDB].

410. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (June 1, 2021), [https://perma.cc/BZ57-BYPL].

411. Julie Bosman et al., *Covid Rises Across U.S. Amid Muted Warnings and Murky Data*, N.Y. TIMES (July 18, 2022), [https://perma.cc/W8VF-G3ZB].

412. *NCBE Anticipates Return to In-Person Testing for February 2022 Bar Exam*, *supra* note 410.

413. *Id.*

414. Steven Lerner, *COVID Concerns Force Nevada's February Bar Exam Online*, LAW360 (Jan. 7, 2022, 3:37 PM), [https://perma.cc/LT9J-V9QH].

415. *Id.*

VIII. LAW SCHOOLS, THE COVID ACCOMMODATIONS, AND THE FUTURE

A. Active Participation

Law schools were active participants in the discussions of the diploma privilege and other accommodations for the Summer 2020 bar examinations. They filed petitions, letters, statements, and comments to state supreme courts and bar examiners.[416] Some sought to involve state legislators and governors.[417] Deans, faculties, and faculty members (and, of course, students) provided input.[418] Some national organizations and a handful of bar associations also advocated for alternative licensing.[419] The AALS and Section of Legal Education and Admissions to the Bar did not formally do so. Thousands of individual students and recent graduates also signed motions, petitions, and comments.

Overwhelmingly, the law school advocacy favored the diploma privilege option.[420] Although the emphases varied, the arguments were essentially those outlined earlier. Few statements seriously dealt with the core purpose of the bar examination in protecting the public.

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416. *See infra* note 417 and accompanying text; Levin, *supra* note 73, at 95-96.

417. Such was the case in the State of New York, where the fifteen law school deans signed a letter to the governor, legislative leaders, and others, seeking action beyond the court of appeals. Letter from Deans of New York Law Schools to Andrew Cuomo, Governor, and others (July 17, 2020), [https://perma.cc/6HCS-FPAJ]. They wrote that they "urge that New York adopt a diploma privilege in the swiftest way possible. . . . We have repeatedly advocated on behalf of our graduates before the Court of Appeals . . . . [T]he excessive delay in making a final determination on such an exam places an undue burden on our graduates . . . ." *Id.* This was taken by some quarters to be a "[D]emand," which may have represented journalistic excess. Staci Zaretsky, *New York Law Deans Demand Diploma Privilege for Law School Graduates Instead of Bar Exam*, ABOVE THE L. (July 20, 2020, 2:32 PM), [https://perma.cc/QC4V-V58S]; *see also* Levin, *supra* note 73, at 110-15 (detailing the political struggle in New York).

418. Levin, *supra* note 73, at 95-97.

419. Several organizations collectively promoted the diploma privilege for 2020. *See An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28. The ABA House of Delegates, in August 2020 (after the July in-person examination), did recommend that states "establish temporary emergency measures to expeditiously license recent law school graduates" and included among the options "a form of diploma privilege." RESOLUTION 10G, *supra* note 82.

420. *An Open Letter from Public Interest Legal Organizations Supporting Diploma Privilege*, *supra* note 28.

B. Impact

It is difficult to know what impact the law schools' participation had in the accommodation discussions. In some respect, the direct effects appear to be limited—only five (10%) of the jurisdictions adopted a diploma privilege accommodation for the 2020 Summer examination and none for more than that one examination.[421]

The indirect impacts are impossible to determine. The description of the difficulties facing applicants may have made examiners and courts more inclined to adopt such accommodations as temporary practice rules, multiple examination dates, or (in a few states) a lowered passing score. Several courts went out of their way to acknowledge discussions with deans and others.[422]

On the negative side, some examiners or courts might have seen law schools' efforts as ignoring the public interest and essentially lobbying for students and institutional interests. They may have seen the arguments as opportunistic or inconsistent with the bar examiners' experience. Bar examiners who feel a strong obligation to the public may dislike being the "bad guys" in arguing against law schools' sympathetic portrayal of applicants. During the most challenging testing situation they had ever faced, some state bar examiners and their staffs may have felt that law schools or faculty were taking unnecessary swipes at them.

Among other audiences, the reaction was probably mixed. Most students in the 2020 Spring graduating class likely appreciated their law schools' efforts to promote the diploma privilege, although the efforts were generally unsuccessful. Law schools that went the extra mile to support graduates who needed assistance during preparing for and taking the bar—finding internet connections, places to study, counseling, and the like—may be the most appreciated.

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421. Skolnik, *supra* note 324.

422. *E.g.*, Louisiana Order, *supra* note 169, at 1; Louisiana Press Release, *supra* note 172, at 3.; Nebraska Order, *supra* note 220, at 2; Tennessee Order, *supra* note 259, at 1.

C. The Future of Bar Admissions

An especially optimistic note is the interest in improving the bar admissions process. The issues include whether there should be licensing, what kind of licensing there should be, where a bar examination should be required, and what role supervised apprenticeships might play. These discussions may have been partially encouraged by the debate about accommodations associated with COVID. In addition, there are broader concerns about bar admissions, including the significant issue of racial-ethnic disparities in first-time bar passage.[423] The reform efforts include a thorough ongoing reform study of NCBE to create a substantially revised bar examination (NextGen Bar Exam).[424] Many scholars are making interesting suggestions regarding bar admission.[425] In addition, preparation for the test may be improving. AcessLex is experimenting with a comprehensive,

423. For example, ABA bar passage data demonstrate meaningful differences among ethnic groups in bar passage. The 2019 testing (first-time takers), for example, showed 85% pass rates for white applicants; 79% for applicants of two or more races; 74% for Asian applicants, 72% for Hawaiian applicants, 69% for Hispanic applicants, and 61% for Black applicants. AM. BAR ASS'N, SUMMARY BAR PASS DATA 1 (2021), [https://perma.cc/XB3D-K6VB]. These differences call for considerable effort to understand and seek to correct the underlying causes of them. Some of that work is underway, but it is only a beginning. *See, e.g.*, ACCESSLEX INST., ANALYZING FIRST-TIME BAR EXAM PASSAGE ON THE UBE IN NEW YORK STATE 7 (2021), [https://perma.cc/V857-E2P3].

424. The NCBE has had a task force for several years working on the future of the bar examination. The task force has recently made its recommendations. TESTING TASK FORCE, NAT'L CONF. OF BAR EXAM'RS, OVERVIEW OF PRELIMINARY RECOMMENDATIONS FOR THE NEXT GENERATION OF THE BAR EXAMINATION 2 (2020), [https://perma.cc/8WR2-7HGE]. The NCBE website has details about the various stages of this lengthy and complex effort. *See NextGen Bar Exam of the* Future, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/F7NU-CDLD] (last visited Oct. 9, 2022). At the core of the recommendations are an "[i]ntegrated exam that assesses both knowledge and skills holistically"; a single, combined score (not different scores on different parts); eight foundations concepts (essentially course areas, e.g., torts, evidence, and business associations) and seven skills (e.g., issue spotting and analysis, legal writing, investigation and evaluation); and a computer-based test. The NCBE Board has adopted those principles. *NCBE Board of Trustees Votes to Approve Testing Task Force Recommendations*, NAT'L CONF. OF BAR EXAM'RS (Jan. 28, 2021), [https://perma.cc/YX2T-7DZR].

425. *E.g.*, DEBORAH JONES MERRITT & LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 4-5, 8 (2020), [https://perma.cc/CL3N-V7ZK]; Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1, 12-13 (2019); Griggs, *supra* note 34, at 61-64.

inexpensive bar review system,[426] and many schools are creating increasingly sophisticated academic support services.

The range of discussion is promising and productive, at least to the extent the proposals genuinely begin from the proposition that it is the public interest that is the primary purpose of licensing and bar admissions. The process must ensure that the public has good-quality lawyers and is protected from inadequate legal practitioners. The process is also intended to ensure the public that it can rely on the bar admission process. The public opinion survey discussed earlier suggests there would be a long road to travel to provide that assurance without a bar examination.[427]

D. Addressing the Disconnect

Law schools, bar examiners, and courts should not wait for the NextGen process. They should consider the "disconnect" between some law schools and bar admissions authorities. The disconnect is an apparent disagreement between law schools and bar examiners regarding who is adequately prepared to begin law practice. Law schools presumably graduate only students they believe are ready to enter the profession. Yet, a couple of months after graduation, when graduates take the bar examination, bar admissions authorities find many of them are not ready. It varies significantly from school to school, but on average, 25% of law graduates do not pass the bar examination on the first attempt.[428]

Examinations given in law school and by bar examiners are in many ways similar—a range of multiple choice and essays.[429] NCBE is undoubtedly better technically at creating and testing reliable examinations than faculty, but that likely does not explain the difference.[430] Nonetheless, law schools and bar examiners

426. *Our Story*, HELIX BAR REV., [https://perma.cc/727H-7EMF] (last visited Oct. 9, 2022); Karen Sloan, *A Longer, Cheaper Bar Exam Prep Program Looks to Upend the Industry*, REUTERS (Sep. 7, 2021), [https://perma.cc/D59W-TNKS].

427. SCHNEIDERS & CHOI, *supra* note 4.

428. *New Report Shows Most Law School Grads Passing Bar*, *supra* note 307.

429. *Bar Exams*, AM. BAR ASS'N, [https://perma.cc/NA5T-87GK] (last visited Oct. 9, 2022).

430. Bar examiners note that the purposes and validation of law school examinations and bar examinations differ. For example, NCBE notes that it does validation studies related to practice and also says, "No such validation process is done on law school curricula or course work, and the purpose of law schools is to educate, not to protect the public by

generally rank students roughly in a similar order. That is, bar passage in most law schools is correlated with law school relative GPA or class rank.[431]

Complaints about the bar exam's reliance on memorization are probably not the answer to the disconnect. For example, Stanford students do significaly better on the California bar than Golden Gate students,[432] but probably not because Stanford students memorize so much more law. Furthermore, law school examinations commonly depend on doctrinal detail. Nor is it likely that the different outcomes can be explained by the fact that the bar examination is a comprehensive examination (multiple subjects), and law schools generally give single-subject tests.

The difference in law school bar outcomes may be where to draw the passing line. In effect, some law schools may draw the basic competency line (appropriate to enter the profession) lower than examiners. For some schools, less than 10% of graduates fail on the first attempt, while for others, 30%, or even 50% of graduates initially fail the bar exam. The latter schools might work with bar examiners to determine why, shortly after graduation, bar examiners determine that so many of their graduates are not yet ready to be admitted to practice. National legal education, NCBE, and others might productively prepare studies and reports on the different expectations of some schools

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ensuring competence to practice under a general license." NAT'L CONF. OF BAR EXAM'RS, *supra* note 205, at 5-6.

431. This applies to law schools in which there are a meaningful number of bar failures. In a school with a very high passage rate (e.g., if 90% first-time takers pass, there may not be a sufficiently large number of failures for the strong correlation to hold). For most schools, however, there is a strong correlation. Nicholas L. Georgakopoulos, Bar Passage: GPA and LSAT, Not Bar Reviews 4 (Aug. 10, 2013) (unpublished manuscript), [https://perma.cc/M9R5-65YC] ("The finding here that law school grades relate strongly to bar passage is consistent with some prior findings that law school grades relate strongly with bar passage and career success."). LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 24 (1998), [https://perma.cc/6W2Q-4GAK] (law school GPA had the highest correlation with bar passage). Dozens of law schools have done local bar studies. In my experience, they commonly find a strong correlation (usually the strongest correlation of the factors examined) between bar passage and law school grade point average.

432. *See Individual School Bar Passage Reports*, *supra* note 130 (choose "Bar Passage Outcomes" from the menu; then select "Stanford" as the school and "2020" as the year; then click the "Generate Report" icon to download a PDF report of the 2019 data); Lyle Moran, *2 Law Schools Found to Be out of Compliance With ABA's Bar Passage Standard*, ABA J. (Dec. 20, 2021, 12:43 PM), [https://perma.cc/9A4G-VR5G].

and bar examiners about the minimum qualifications to obtain a law degree and be licensed.

Law schools and the bar admissions process share the task of providing society with the next generation of the legal profession. Changing technology, globalization, and innovation make providing for society's legal needs more challenging. Law schools and bar authorities have a great challenge of creating for society a profession that is well-educated, technically solid, sophisticated, diverse, creative, and compassionate. The disconnect interferes with meeting that challenge.

CONCLUSION

Several themes emerged from the pandemic bar examinations that were not initially obvious as the debate was raging. First, there were many heroes. Many graduates prepared carefully and successfully for the bar under challenging conditions. Because of rapidly changing circumstances, states sometimes delayed decisions, and more than once changed directions on how they would give the examination.

Bar examiners (the many volunteers and staff) and state high courts also deserve credit for their extraordinary efforts in searching for the right accommodations. Because of rapidly changing circumstances, many states had to adjust plans in midstream. They sometimes came in for undue criticism. States might have taken the Delaware approach—simply canceling the bar examination—but they did not and too often received harsh words for their efforts. At the national level, NCBE in summer/fall 2020 gave three in-person bar examinations equated to earlier ones.[433] It also developed and delivered the first online bar examination.[434] In summer 2022, all of 2021, and winter 2022, NCBE offered both the usual in-person and online tests.[435] All of this took great effort, used a vast number of questions, and (in the case of the online test) was surrounded by risks.

Heroic law schools helped their students find study spots before the examination, Wi-Fi connections for the online test,

433. *See supra* notes 89-90 and accompanying text.
434. *NCBE COVID-19 Updates*, *supra* note 93.
435. *See supra* discussion Section III.C. and Section V.II.

exceptional support in finding temporary practice jobs, counseling, and the like. Schools that undertook substantial support in the face of their other problems from COVID are heroes.

If there were heroes, there were also some unfortunate moments in the COVID discussion. Too often, there was not a genuine focus on the primary reason for the licensure of attorneys: protecting the public and assuring the public of the quality of new attorneys.[436] Regrettably, the courts offering a COVID diploma privilege generally did not write opinions explaining how the public purpose of licensing was being protected. The public opinion survey suggests that the public is unenthusiastic about bar admission without testing.[437] Perhaps they feel as many of us would if state agencies gave lifetime licenses, without testing, to new dentists, electrical contractors, financial advisors, optometrists, and truckers.

Beyond COVID is the broader policy question of how the public interest in bar admission can be best promoted in the future. Fortunately, many parts of the profession have been considering that question. The expertise of legal educators can be of great benefit in the licensing process, with the recognition that the primary purpose of licensing is genuinely the public's best interest.

436. *See supra* discussion Part V.

437. SCHNEIDERS & CHOI, *supra* note 4.

APPENDIX I: OPINION SURVEY ON THE BAR EXAMINATION[438]

The following statement provided an introduction to the two questions:

> Until the Coronavirus (COVID-19) outbreak, every state, except one, required lawyers to pass a bar exam before being licensed to practice law. Bar exams have traditionally been held in person and supervised. But the health and safety challenges brought on by the outbreak have caused some states to consider allowing law school graduates to become licensed to practice law without taking and passing a bar exam.[439]

Options to Deal With COVID Challenges

Which of the following options would you favor to deal with the challenges brought on by the Coronavirus (COVD-19) outbreak?

		Gender		**Age**			**Region**			
	Total	**M**	**F**	**18-34**	**35-44**	**55+**	**NE**	**MW**	**S**	**W**
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	59%	61%	42%	58%	74%	50%	63%	60%	64%
Require a bar exam but allow for online or	19%	20%	19%	32%	20%	10%	21%	20%	18%	20%

438. SCHNEIDERS & CHOI, *supra* note 4.

439. Greg Schneiders provided the wording of the introduction as well as the questions. E-mail from Greg Schneiders, CEO, Prime Grp., to author (Feb. 11, 2021, 2:24 EST) (on file with author).

other remote testing even if it cannot be supervised										
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	7%	5%	7%	7%	4%	11%	4%	6%	3%
Don't know	15%	14%	16%	19%	15%	12%	18%	13%	16%	13%

		Race/Ethnicity				**Education**				**Law Conn-ection**	
	Total	**Wh.**	**Bl.**	**His.**	**Oth-er**	**No HS/ HS grad**	**Some Col-lege, 2-yr**	**4-yr**	**Post grad**	**N**	**Y**
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	60%	66%	49%	54%	47%	56%	61%	65%	62%	62%	43%
Require a bar exam but allow for online or other remote testing even if it cannot	19%	18%	20%	21%	26%	17%	19%	22%	24%	17%	38%

be supervised											
Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	6%	5%	3%	10%	10%	6%	7%	6%	5%	5%	13%
Don't know	15%	12%	27%	15%	17%	21%	13%	8%	9%	16%	6%

Options for When Outbreak Passed

[O]nce the Coronavirus (COVID-19) outbreak has passed and social distancing rules no longer apply, which of the following opinions would you favor?

		Gender		**Age**			**Region**			
	Total	**M**	**F**	**18-34**	**35-44**	**55+**	**NE**	**MW**	**S**	**W**
Return to the traditional practice of requiring lawyers to take the bar exam in-person and supervised	70%	69%	70%	51%	68%	83%	62%	75%	68%	72%
Require a bar exam but allow lawyers to take it online or through other remote testing even if it cannot be supervised	13%	14%	13%	25%	14%	5%	16%	13%	13%	13%

Eliminate the bar exam requirement and allow anyone who graduates from an accredited law school to be licensed to practice law	5%	6%	4%	7%	6%	3%	8%	2%	6%	4%
Don't know	12%	11%	13%	17%	12%	9%	14%	10%	13%	11%

		Race/Ethnicity				**Education**				**Law Conn-ection**	
	Total	**Wh.**	**Bl.**	**His.**	**Oth-er**	**No HS/ HS grad**	**Some Col-lege, 2-yr**	**4-yr**	**Post grad**	**N**	**Y**
Continue to require supervised in-person bar exams with masks and social distancing, and compliance with all other local health guidelines	70%	79%	51%	61%	51%	61%	72%	79%	78%	72%	48%
Require a bar exam but allow for online or other remote testing even if it cannot be supervised	13%	9%	22%	18%	24%	14%	13%	12%	12%	11%	33%
Eliminate the bar exam requirement	5%	4%	3%	7%	12%	5%	6%	4%	4%	4%	11%

and allow anyone who graduates from an accredited law school to be licensed to practice law											
Don't know	12%	9%	24%	15%	13%	19%	9%	4%	6%	13%	7%

A third question sought the demographic information report in the charts above. That question stated as follows:

> Which, if any, of the following apply to you? Please select all that apply.
>
> a. I teach or have taught law
> b. I am currently a law student
> c. I am a practicing lawyer
> d. I am a lawyer not currently practicing
> e. I am not a lawyer but am employed in the field of law
> f. None of these

The third question, in which participants were asked whether they had any involvement with the law, produced the following results. Approximately 90% indicated no involvement with the law. Those reporting some involvement with the law were as follows (in order of frequency):

a. I am not a lawyer but am employed in the field of law [3.1%]
b. I am a lawyer not currently practicing [2.5%]
c. I teach or have taught law [2.5%]
d. I am a practicing lawyer [1.6%]
e. I am currently a law student [1.6%]

It is important to note that applicants were asked to "select all that apply." Therefore, a single participant could mark more than one kind of involvement. For example, a practicing lawyer might once have been an adjunct teacher and an LL.M. student. For that reason, the number of individuals "involve[d] with the

law" cannot be determined by adding the numbers for each of the responses in the question.

Several of these subgroups of "involvement with law" seem high. That is particularly true of the answer choice "I am currently a law student." With a U.S. population of about 210 million for individuals 18 and older, even the most generous definition of a law student would struggle to reach 1.6% of the general population. Prime Group speculated this inflated number is in part due to the possibility those invited to participate in this part of the omnibus survey may have been especially attractive to law students.

APPENDIX II: PASSING RATES SUMMER 2020 COMPARED WITH SUMMER 2019[440]

Juris-diction	Taking 2020	Passing 2020	% Passing 2020	Taking 2019	Passing 2019	% Passing 2019	2020 v. 2019
ME	125	108	86%	130	67	52%	34%
AK	50	40	80%	57	32	56%	24%
AR	220	177	80%	210	127	60%	20%
NY	5,150	4,320	84%	10,071	6,536	65%	19%
NM	337	301	89%	212	152	72%	17%
HI	111	88	79%	167	104	62%	17%
IN	511	398	78%	457	296	65%	13%
WY	47	40	85%	59	43	73%	12%
NH	88	66	75%	105	66	63%	12%
OR	281	243	86%	367	277	75%	11%
MS	117	91	78%	156	105	67%	11%
CA	8,723	5,292	61%	7,764	3,889	50%	11%
WV	150	116	77%	168	113	67%	10%
NC	668	555	83%	783	568	73%	10%
VA	600	508	85%	637	479	75%	10%
MI	723	508	70%	641	394	61%	9%
DC	1,682	1,290	77%	1,799	1,241	69%	8%
CT	400	270	68%	303	182	60%	8%
KY	323	240	74%	357	238	67%	7%
RI	72	48	67%	72	43	60%	7%
MO	601	506	84%	670	523	78%	6%

440. Data are listed in order of percentage passage increase from 2019 to 2020 Summer Exam scores.

CO	642	499	78%	731	525	72%	6%
WI	132	91	69%	121	78	64%	5%
MN	546	452	83%	557	435	78%	5%
NE	166	139	84%	156	124	79%	5%
MA	1,323	1,015	77%	1,377	985	72%	5%
MT	83	71	86%	99	80	81%	5%
OH	958	741	77%	885	647	73%	4%
TN	677	507	75%	700	497	71%	4%
SC	384	276	72%	444	303	68%	4%
IL	2,157	1,615	75%	1,963	1,392	71%	4%
ID	144	99	69%	142	93	65%	4%
OK	268	215	80%	308	238	77%	3%
AZ	584	404	69%	521	345	66%	3%
NV	304	195	64%	313	191	61%	3%
ND	58	44	76%	82	60	73%	3%
PA	1,252	949	76%	1,270	928	73%	3%
IA	162	134	83%	190	152	80%	3%
GA	1,234	829	67%	1,178	769	65%	2%
MD	804	564	70%	838	573	68%	2%
WA	108	75	69%	628	430	68%	1%
NJ	1,407	931	66%	787	521	66%	0%
TX	2,152	1,466	68%	2,898	1,985	68%	0%
KS	134	113	84%	100	85	85%	-1%
AL	473	273	58%	486	298	61%	-3%
VT	56	32	57%	76	46	61%	-4%
FL	3,137	1,801	57%	2,688	1,662	62%	-5%
SD	61	43	70%	65	52	80%	-10%
UT	59	41	69%	228	187	82%	-13%
LA	270	147	54%	503	344	68%	-14%
Total July Results	**40,714**	**28,966**	**71%**	**45,519**	**29,500**	**65%**	**Median +7**

These data were calculated using NCBE data for the Summer 2020 and Summer 2019 exams. In states with multiple tests in 2020, the number of takers and passers are combined in a single score. Because Delaware did not give any Summer 2022 examinations, its data are not included for either year. The five NCBE "off-shore" jurisdictions are not included.[441]

441. Data from *Persons Taking and Passing the 2019 Bar Examination*, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/5BTU-MUEH] (last visited Oct. 9, 2022) and *Persons Taking and Passing the 2020 Bar Examination*, BAR EXAM'R, Spring 2021, at 24, 24-25.

CRYING WOLVES, PAPER TIGERS, AND BUSY BEAVERS—OH MY!: A NEW APPROACH TO PRO SE PRISONER LITIGATION

Justin C. Van Orsdol*

INTRODUCTION

> *Curious, how often you humans manage to obtain that which you do not want*.[1]—Leonard Nimoy as Mr. Spock

To say that the United States is infatuated with incarceration would be a gross understatement.[2] As a result of "tough-on-crime" laws,[3] the United States has "the largest prison population in the world, with more than 2.3 million persons behind bars on any given day" and it "also has the world's highest per capita rate of incarceration"[4] with a rate that is "five to ten times higher than those of other industrialized democracies like England and Wales . . . , Canada . . . , and Sweden."[5] Due in part to prison population increases, the conditions of U.S. prisons are atrocious. Prisons are often overcrowded, "which in turn leads to an increase in violence, neglect, and gross mistreatment."[6]

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* J.D. 2020, University of Georgia School of Law; M.S.A. 2014, California State University of Bakersfield; B.S. 2009, California State University of Bakersfield; A.S. 2007, Antelope Valley College. I would like to thank Jacobs Gilbert and the editors of the *Arkansas Law Review* for their hard work and communication in the publishing process. I would also like to extend a special thanks to my friend and former co-clerk, Ms. Erin O'Neill, for her edits on a previous draft.

1. *Star Trek: Errand of Mercy* (NBC television broadcast Mar. 23, 1967).

2. *See* Susan N. Herman, *Prison Reform Litigation Acts*, 24 FED. SENT'G REP. 263, 266 (2012) ("The volume of prison litigation is, first and foremost, a symptom of our unhealthy addiction to incarceration.").

3. *See Inhumane Jail and Prison Conditions*, FAIR FIGHT INITIATIVE, [https://perma.cc/L5D5-VHJL] (last visited Dec. 5, 2021) ("In the 1990s, the prison population saw the effects of 'tough-on-crime' laws passed over the previous decade. The numbers of incarcerated people skyrocketed . . . .").

4. DAVID FATHI, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES 6 (Benjamin Ward et al. eds., 2009), [https://perma.cc/ZAM4-BG65].

5. *Id.*

6. FAIR FIGHT INITIATIVE, *supra* note 3.

"Imagine one of those dystopian movies in which some character inhabits a world marked by dehumanization and continual state of fear, neglect, and physical violence—*The Hunger Games*, for instance, or *Mad Max*."[7]

What may sound hyperbolic is anything but. Just last year the Supreme Court overturned the Fifth Circuit's grant of qualified immunity to correctional officers in *Taylor v. Riojas*.[8] Taylor, the petitioner, alleged that he was confined to "a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in '"massive amounts" of feces.'"[9] Taylor feared his food and water would be contaminated and did not eat or drink for nearly four days. He was then moved to a second "frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. . . . Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage."[10] These conditions affect prisoners indiscriminately,[11] and sadly Taylor's story is just one of thousands.

The fall of government oversight, coupled with the rise of a private prison industry "backed by insurance companies with teams of lawyers, [has] made it [all but impossible for prisoners] to seek [any form of] justice and retribution for ill treatment."[12] Thanks to the Prison Litigation Reform Act (PLRA)[13] and the

7. Shon Hopwood, *How Atrocious Prison Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), [https://perma.cc/EY5L-69RX].

8. 141 S. Ct. 52 (2020) (per curiam).

9. *Id.* at 53 (footnote omitted) (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019)).

10. *Id.*

11. *See, e.g.*, Rachel Scully, *Proud Boys Leader Alleges Inhumane Conditions at DC Jail in Bid for Release*, THE HILL (Nov. 16, 2021, 11:21 AM), [https://perma.cc/G252-D4JK] (noting allegations that a prisoner's cell was "regularly flooded with dirty toilet water," that meals were cold and inedible, and describing an "incident in which a prisoner had a seizure and was left to lay there for a half-hour before any medical help arrived").

12. FAIR FIGHT INITIATIVE, *supra* note 3. *But see* Andrea Wells, *Behind Bars: The Business of Insuring Correctional Facilities*, INS. J. (June 4, 2012), [https://perma.cc/9Z5R-ELSA] (noting that the vice president of HCC Specialty, Mike Davis, claims that "[f]rom a risk management perspective, [Davis] views privately-run correctional facilities as more cautious than publicly-owned facilities when it comes to policies and procedures").

13. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

Antiterrorism and Effective Death Penalty Act (AEDPA),[14] prisoners face an uphill battle. Often times, prisoners "proceed pro se" and "fare worse than their represented counterparts on average, raising concerns about equality before the law."[15] "[P]ro se litigants lack lawyers' relational capital, substantive legal knowledge, and familiarity with legal procedure" and "are less likely to present effective arguments and evidence and more likely to make procedural errors."[16]

On the other hand, there are numerous stories of pro se prisoner litigants who abuse the judicial system by filing frivolous pleadings. Take for example, "America's favorite serial litigant,"[17] Jonathan Lee Riches:

> By the time . . . Riches finished serving a ten-year prison sentence . . . he had gained a reputation as the most prolific jailhouse lawyer of all time. He'd contested his own case, naturally. But he'd also sued the president, sought to intervene in the bankruptcy proceedings against Bernard L. Madoff and filed civil complaints against public figures ranging from Allen Iverson to Timothy McVeigh.[18]

Although Riches may be the most infamous pro se prisoner litigant, he is not alone. Federal district and appellate court dockets are filled with cases of false claims with inaccurate information[19] and pro se prisoner litigants that have led a "paper

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14. Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214. Even when habeas petitioners are successful, they still face uphill battles. *See, e.g.*, Petition for Writ of Certiorari at 3, Shinn v. Ramirez, 142 S. Ct. 1718 (2022) (No. 20-1009) (requesting cert to determine whether a prisoner, who won his habeas petition, was able to do so by presenting new facts related to his trial and appellate counsel who failed to present exculpatory evidence).

15. Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 L. & SOC. INQUIRY 567, 567 (2020).

16. *Id.* at 570 (citation omitted).

17. Michael Brick, *America's Most Prolific Jailhouse Lawyer and His Many Fans*, NEW REPUBLIC (July 11, 2013), [https://perma.cc/WT2T-AWGG].

18. *Id.* Riches later capitalized on his newfound fame, selling books and merchandise. *See, e.g.*, JONATHAN LEE RICHES ET AL., NOTHING IS WRITTEN IN STONE: A JONATHAN LEE RICHES COMPANION (2018); JONATHAN LEE RICHES, COMES NOW THE PLAINTIFF: SELECTED LAWSUITS (AND POEMS) BY JONATHAN LEE RICHES (Michael Sajdak ed. 2016). Both of these are still selling on Amazon.

19. *See, e.g.*, Daker v. Owens, No. 5:20-CV-354-TES-CHW, 2021 WL 1321335, at *4 (M.D. Ga. Jan. 5, 2021) ("In this case, Plaintiff has an undeniable and significant history of 'abus[ing] the judicial process by filing IFP affidavits that conceal and/or misstate his real assets and income.'" (alteration in original)).

assault"[20] on the courts. Unfortunately, Riches—and those like him—have stigmatized pro se prisoner litigants "in ways that influence assessments of pro se litigants and their claims."[21]

In response to Riches-like pro se prisoner litigants, Congress unsurprisingly made matters worse by enacting the PLRA and AEDPA and failed to attack the underlying issues regarding pro se prisoners. Facing a deluge of litigation, courts have been left to craft various gatekeeping techniques to weed out litigants who cry wolf, over-zealously roar in pleadings, and otherwise dam up the dockets. Whether the PLRA or AEDPA actually save judicial resources is questionable, but what is certain is that they do not combat the underlying problems with today's prison conditions. A new approach to pro se prisoner litigation is needed. That is, rather than treating the symptoms of pro se prisoner litigation, we should instead treat some of the causes.[22]

This Article argues for four possible reforms: (1) increasing the number of magistrate judges, (2) establishing a new specialty court, (3) increasing the number of law school clinics, and (4) adopting an agency approach similar to how the Equal Employment Opportunity Commission (EEOC) interacts with employment discrimination claims. Part I explores the historical data on pro se prison litigation and legislative approaches such as the PLRA and AEDPA. Part II turns to some of the major roadblocks prisoners face, such as pleading standards, exhaustion, prison mailbox rules, and sanctions. The Article concludes in Part III with a discussion of the possible reforms noted above and how these might better address the strain on the judicial system while also improving the conditions in America's prisons.

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20. *See, e.g.*, In re Henderson, No. MC 3:12-402, 2014 WL 198996, at *1-2 (S.D. Ga. Jan. 17, 2014) ("Nearly nine months following this Order, Henderson began a new *paper assault* on the federal court . . . ." (emphasis added)).

21. Gough & Poppe, *supra* note 15, at 570 (citation omitted).

22. Although beyond the scope of this Article, deficiencies in the criminal justice system at large and improving prison conditions would also go a long way towards preventing pro se prisoner litigation. *See* Herman, *supra* note 2, at 263 ("The number of nonfrivolous complaints could be reduced if the states were to ensure that prison conditions were minimally humane instead of waiting to be sued.").

I. HISTORICAL DATA ON PRO SE PRISONER LITIGATION

As Shakespeare once wrote, "[w]hereof what's past is prologue, what to come in yours and my discharge."[23] Thus, before discussing how to fix pro se prisoner litigation it is imperative to understand how we arrived here and the status of the current landscape resulting from the PLRA and AEDPA.

A. The Prison Litigation Reform Act

Nearly twenty-five years ago, "President Bill Clinton signed the Prison Litigation Reform Act."[24] The PLRA was enacted "in the wake of a sharp rise in prisoner litigation in the federal courts" and "contains a variety of provisions designed to bring this litigation under control."[25] Or, as the late Senator Bob Dole once stated: "This amendment will help put an end to the inmate litigation fun-and-games."[26] Some have even suggested that the PLRA's "limited legislative history has itself been treated as evidence of animus" against pro se prisoner litigants.[27] Not convinced? Consider the PLRA's legislative history for yourself.

The PLRA was first introduced on September 27, 1995, by a quartet of senators, including Bob Dole, Orin Hatch, Spencer Abraham, and Jon Kyl.[28] Under the guise of misleading statistics and one-sided stories, these senators collectively wove a narrative that liberal federal judges were "willing to grant any inmate any frivolous request."[29] Senator Dole asserted that "prisons should be just that—prisons, not law firms" and he promised that the

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23. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1, ll. 289-90.

24. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), [https://perma.cc/Z7KB-QS69]; *see also* 42 U.S.C. § 1997e.

25. Woodford v. Ngo, 548 U.S. 81, 84 (2006) (citations omitted).

26. FATHI, *supra* note 4, at 1 (quoting Sen. Dole's comments during a Senate debate on an early version of the PLRA).

27. Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1213 (2020).

28. Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 546 n.56 (2002); *see also* Prison Litigation Reform Act of 1995, S. 866, 104th Cong. (1995).

29. Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC 47, 48 (2018). For those interested in a deep dive of the legislative history, LeClercq's article provides an excellent in-depth review of the hearing on the PLRA.

PLRA would reduce frivolous prison litigation.[30] Making sweeping allegations, Senator Dole asserted that "tough new guidelines" in the PLRA would "work to restrain liberal Federal judges who see violations on constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems."[31] Senator Dole further contorted statistics, noting the sharp increase in prisoner litigation but failed to "report the underlying statistics—the astronomical growth of the prison population."[32]

Senator Hatch, who retired in 2019, added that the PLRA was needed to "stop this ridiculous waste of the taxpayers' money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens."[33] He also "emphasiz[ed] fear" and stated that "citizens should fear inmates who might win court cases and be released to commit 'vicious crimes.'"[34] Additionally, Senator Hatch claimed that only 3.1% of inmate cases were valid,[35] but this claim "ignored any statistical context to exaggerate a 'vast majority' [of prisoner lawsuits] as having 'validity.'"[36] And this statistic failed to "distinguish between cases, for instance[,] those disposed of in other forums, disposed of when inmates dropped suits[,] or [cases in which inmates] had their cases mediated."[37]

Senator Kyl criticized prisoner litigants for treating litigation as a "recreational activity" and explained that prisoners victimize society twice, "first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar."[38] He argued that this "recreational activity" clogged

30. 141 CONG. REC. 26,548 (1995).

31. *Id.* at 26,549.

32. LeClercq, *supra* note 29, at 59.

33. 141 CONG. REC. 26,553 (1995).

34. LeClercq, *supra* note 29, at 53 (quoting 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995)).

35. *See* 141 CONG. REC. 26,553 (1995) ("[O]nly a scant 3.1 percent have enough validity to reach trial.").

36. LeClercq, *supra* note 29, at 65.

37. *Id.*

38. 141 CONG. REC. 26,553 (1995).

the courts and drained precious judicial resources.[39] Lastly, Kyl attacked the use of special masters, claiming that they were "improperly used" and cited choice examples to "tar the whole system."[40]

Finally, Senator Abraham attacked the federal judiciary directly. He claimed that "judicial orders entered under Federal law . . . effectively turned control of the prison system away from elected officials . . . over to the courts."[41] To Senator Abraham, this "control" undermined the legitimacy, deterrent effect, and punitive functions of prison sentences.[42] He also proclaimed that prisoners were being rewarded by being permitted to file lawsuits and that they "would receive an unearned profit" if allowed to continue.[43]

The 1995 version of the PLRA failed to "yield enough votes" to pass.[44] The PLRA was not subject to any serious debate; in fact, it received only a single hour-long hearing filled with the hostile rhetoric described above.[45] Undeterred, it was included in an appropriations bill, which President Clinton vetoed in December of 1995.[46] Senator Hatch, however, was able to get the PLRA passed in 1996 "as a rider to an omnibus appropriations bill that President Clinton signed into law on April 26, 1996."[47] The question of why President Clinton would sign such a law has been debated. Some scholars have suggested that President Clinton ultimately endorsed the tough-on-crime policies embedded into the PLRA and saw the appropriations bill that contained the PLRA as a victory over a Republican Congress that

39. *Id.*

40. LeClercq, *supra* note 29, at 55

41. 141 CONG. REC. 26,554 (1995).

42. *See id.*

43. LeClercq, *supra* note 29, at 58.

44. Mathews, *supra* note 28, at 546 n.56.

45. Anh Nguyen, Comment, *The Fight for Creamy Peanut Better: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 150 (2007) ("Both the proposal and objections to the PLRA were made in less than one hour during the Senate Hearing on September 29, 1995.").

46. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 557 n.19 (2006).

47. Mathews, *supra* note 28, at 546 n.56.

"he effectively charged, had closed down the government in its prior budget efforts."[48]

As it stands, the PLRA contains six main filing provisions. First, under the *in forma pauperis* (IFP) provision, indigent prisoners—unlike other indigent plaintiffs—must pay filing fees in civil actions and appeals according to the formula set forth under 28 U.S.C. § 1915(b).[49] Second, the PLRA requires courts to conduct a frivolity screening of both a prisoner's IFP application and their complaint—if the allegations of poverty are found to be untrue or if the complaint is deemed frivolous, malicious, fails to state a claim, or seeks monetary relief from a defendant(s) immune from suit, the court may dismiss the action sua sponte.[50] Third, prisoners who abuse the judicial process and have three or more claims dismissed based on these issues become subject to the three-strikes provision and become barred from filing any complaints IFP without some allegation of imminent danger of serious physical injury.[51] Fourth, prisoners must exhaust all administrative remedies before bringing any action "with respect to prison conditions."[52] Fifth, the PLRA generally prohibits mental or emotional injuries, unless the prisoner can also show a physical injury.[53] Lastly, the PLRA caps attorney fees at "150[%] of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel."[54]

48. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 21-22 (1997).

49. "[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner *shall be required* to pay the full amount of a filing fee. The court *shall* asses and, when funds exist, collect, as a partial payment of any court fees required by law, an initial filing fee of 20 percent . . . . After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent . . . ." 28 U.S.C. § 1915(b)(1)-(2) (emphasis added).

50. 28 U.S.C. § 1915(e)(2); 42 U.S.C. § 1997e(c)(1) (noting sua sponte dismissal).

51. 28 U.S.C. § 1915(g); 42 U.S.C. § 1997e(e).

52. 42 U.S.C. § 1997e(a).

53. 42 U.S.C. § 1997e(e).

54. 42 U.S.C. § 1997e(d)(3).

B. The Antiterrorism and Effective Death Penalty Act

Much like how the PLRA was the congressional answer to pro se prisoner § 1983 claims, the AEDPA was Congress' response to habeas petitions.[55] From 1948 to 1996, habeas petitions under 28 U.S.C. § 2255 were not subject to statutes of limitations and could essentially be filed at any time.[56] All that changed when Timothy McVeigh "blew up the Alfred P. Murrah [F]ederal [B]uilding in Oklahoma City on April 19, 1995."[57] A result of "the '[Newt] Gingrich Congress,'"[58] AEDPA was first introduced to Congress in January 1995 as a part of House Speaker Gingrich's "*Contract with America platform*."[59] The review and passage of AEDPA, however, was accelerated after the Oklahoma City bombing—and, like the PLRA, it was signed into law by President Clinton.[60]

Although "[t]he [stated] purpose of AEDPA is '[t]o deter terrorism, provide justice for victims, [and] provide for an effective death penalty,'"[61] its relation to the death penalty is tenuous at best.[62] AEDPA is the functional equivalent of the PLRA, in terms of adding roadblocks, for habeas petitions—namely by "restrict[ing] federal review of habeas corpus

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55. *See The History of Habeas Corpus in America*, 2255 MOTION, [https://perma.cc/4DNG-8LZC] (last visited Sept. 17, 2022) (noting that AEDPA "greatly complicated section 2255 proceedings"); *see also* NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 8 (2007), [https://perma.cc/7LVG-NB8K] (noting that in "93% of non-capital cases, the petitioner had no counsel").

56. Benjamin R. Orye III, Note, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 441 (2002).

57. Andrew Cohen, *Two of the Oklahoma City Bombing's Lasting Legacies*, BRENNAN CTR. FOR JUST. (Apr. 21, 2015), [https://perma.cc/Y8SB-ACP6].

58. James S. Liebman, *An "Effective Death Penalty?" AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001).

59. *Id.*

60. *See* Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT, Winter 2018, at 3, [https://perma.cc/77QL-VV8H] ("[O]ver the objections of habeas scholars, civil libertarians, and his own counsel . . . President Clinton signed the bill in April 1996.").

61. Orye, *supra* note 56, at 441 (second and third alterations in original).

62. Certainly, AEDPA does keep people on death row, but the point here is that it affects many more people outside of death row.

appeals."[63] AEDPA proponents "sought to streamline the federal appellate process for claims arising out of state criminal cases"[64] because "[t]here were too many appeals taking too long . . . to the point where delays were eroding confidence in our justice system."[65] Another more likely reason behind AEDPA, however, was to further habeas petitions "as a vehicle for the racialization and subordination of disadvantaged groups and for normalizing excesses of government power."[66]

AEDPA "made sundry changes to habeas corpus practice"[67] both under § 2255 and § 2254, including the "impos[ition of] a gantlet of deadlines and procedural barriers."[68] Aside from all but effectively nullifying federal review of state court decisions, AEDPA "made it even harder for . . . prisoner[s] to present facts in federal court that his or her lawyer had (even incompetently) failed to present in state court"[69] and imposed a one-year statute of limitations.[70] The one-year statute of limitation period comes with a thicket of Catch-22s, all designed to complicate and stall the process.[71] AEDPA also limits successive habeas petitions except under two limited exceptions: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[,]"[72] and (2) when "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."[73] The exceptions are so rare that Justice Souter and Justice Stevens

63. *Judges, Commentators Critical of Habeas Law That 'Keeps People on Death Row Despite Flawed Trials*,*'* DEATH PENALTY INFO. CTR. (July 28, 2015), [https://perma.cc/B8GW-RQGT]; *see also* Radley Balko, *Opinion: It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021, 4:09 PM), [https://perma.cc/KL3S-Y5E9] ("The AEDPA's most destructive provision is arguably its deference to state courts.").

64. Cohen, *supra* note 57.

65. *Id.*

66. Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219, 222 (2021).

67. *The History of Habeas Corpus in America*, *supra* note 55.

68. Balko, *supra* note 63.

69. Liebman, *supra* note 58, at 416.

70. *See* 28 U.S.C. § 2255(f) (2008) ("A 1-year period of limitation shall apply to a motion under this section.").

71. *See* Liebman, *supra* note 58, at 416-17 (explaining the catch-22s regarding tolling and review by state courts).

72. 28 U.S.C. § 2244(b)(2)(A).

73. 28 U.S.C. § 2244(b)(2)(B)(i).

explained that, effectively, "federal habeas limits a prisoner to only one petition challenging his conviction or sentence."[74]

C. Current State of Affairs

The most recent data from the Judiciary Data and Analysis Office reports that "from 2000 to 2019, in 91[%] of prisoner petition filings, the plaintiffs were self-represented."[75] So what impact did the PLRA and AEDPA have on curbing filings? It turns out, not as much as what the tough-on-crime quartet promised.

In 1996, when the PLRA was enacted, the total incarcerated population of the U.S. was 1,654,574.[76] During 1996, these prisoners filed 38,262 filings, or 23.1 filings per 1,000 prisoners.[77] In 2020, the total incarcerated population was estimated at 1.8 million.[78] That year, prisoners filed 26,217 filings, or about 14.7 filings per 1,000 prisoners.[79] At first glance this seems like a substantial decline, but from 1997 to 2020 the number of filings per 1,000 prisoners stayed between 9.6 and fifteen.[80] Moreover, the total number of filings has generally remained constant at about 25,000.[81] Of these, roughly 12.8% of pro se prisoner civil rights cases resolve in favor of the prisoner, which is a surprising upward trend when compared to win rates of 9.5% in the early 2000s.[82]

AEDPA had similar results, with 14,591 habeas petitions filed in 1996 and an average of 19,662 petitions filed between 2003 and 2021.[83] Petitions have trended downward, but over the

74. Mayle v. Felix, 545 U.S. 644, 673 (2005) (Souter, J., dissenting).

75. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), [https://perma.cc/ZCM4-JNHN].

76. Margo Schlanger et al., *Data Update*, INCARCERATION & THE L. (Apr. 2022), [https://perma.cc/A5UH-G3YK].

77. *See id.* at tbl. A.

78. JACOB KANG-BROWN ET AL., PEOPLE IN JAIL AND PRISON IN 2020 1, 3 (2021), [https://perma.cc/4U3D-3JZ4].

79. *See* Schlanger et al., *supra* note 76, at tbl. A.

80. *See id.*

81. *See id.* (noting that the total number of prisoner filings in 1997 was 26,095 and in 2020 it was 26,217).

82. *See id.* at tbl. C.

83. *See infra* note 85.

2003-21 period, petition filings have remained more or less constant.[84]

Figure 1

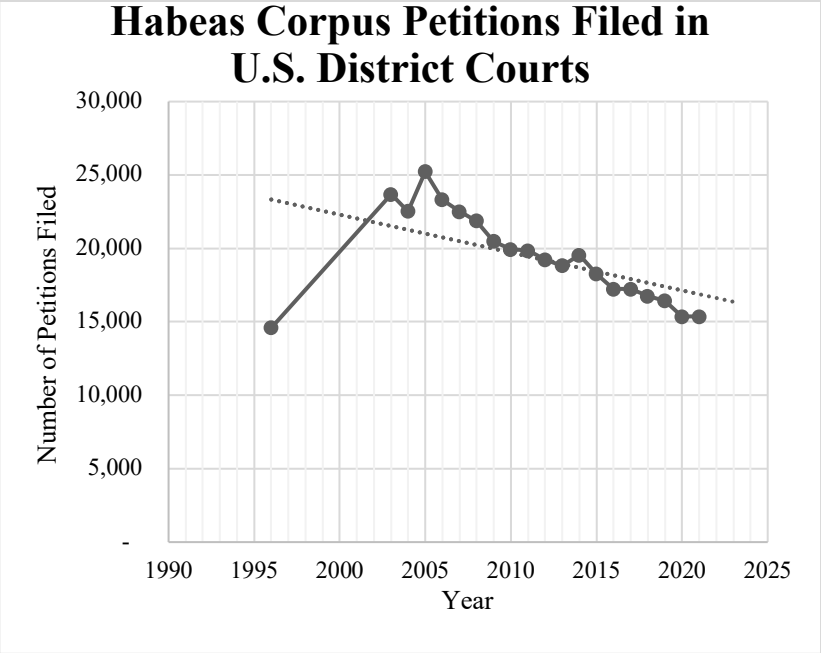

Figure 1: Habeas corpus petitions filed in U.S. district courts.[85]

Thus, although the PLRA and AEDPA had a sharp initial impact on pro se prisoner filings, both failed to address the root causes of prison-related lawsuits, namely questionable state court proceedings,[86] prison conditions, and civil rights violations.[87]

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84. *See infra* note 85 and fig. 1.

85. *Federal Judicial Caseload Statistics*, U.S. CTS., [https://perma.cc/6HK5-9UYR] (last visited Jan. 17, 2022) (filter by "U.S. District Courts" and then select each year and navigate to table C-2, titled "U.S. District Courts-Civil Cases Filed, by Jurisdiction and Nature of Suit"); *see also* Fred Cheesman et al., *Prisoner Litigation in Relation to Prisoner Population*, 4 NAT'L CTR. FOR STATE CTS. 1, 2 (1998), [https://perma.cc/F77U-FRBP].

86. *See* EVE BRENSIKE PRIMUS, LITIGATING FEDERAL HABEAS CORPUS CASES 1-2 (2018), [https://perma.cc/GWF5-RF6Y] (noting that evidence demonstrates that "states systemically violate criminal defendants' constitutional rights" and that there is "data documenting large numbers of wrongful state convictions").

87. *See* Schlanger et al., *supra* note 76, at tbl. B (noting that between 83.3% to 96.9% of all pro se cases filed in district courts are prison conditions or civil rights complaints).

Just as the PLRA and AEDPA did little to curb the total number of filings, they likewise did little to speed up the case disposition time. Like the number of filings, the PLRA and AEDPA initially had a sharp impact on the time it took for district courts to reach a disposition in pro se prisoner civil rights cases. In 1997, the average number of days to disposition in pro se prisoner civil rights cases was 125 days.[88] As of 2019, that number had increased to 161 days—which is puzzling considering all the technical and procedural tools district judges have in their toolboxes to resolve these cases quickly.[89]

Figure 2

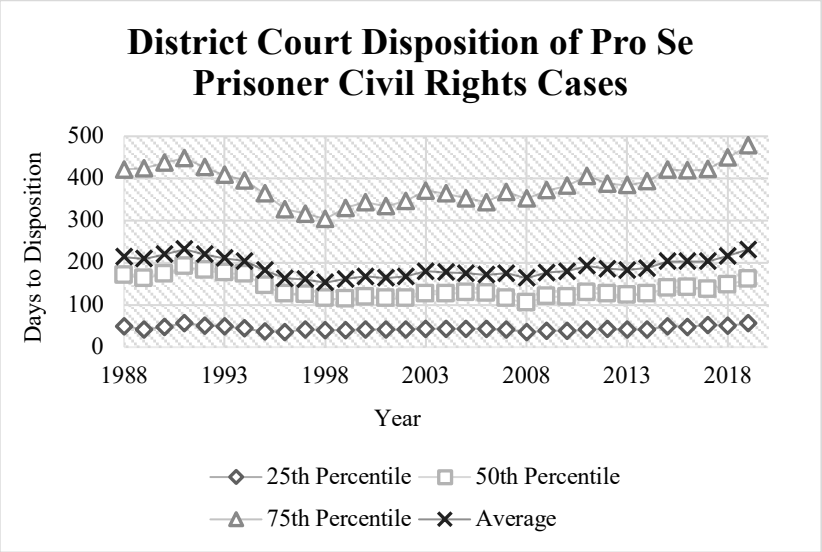

Figure 2: District court disposition of pro se prisoner civil rights cases.[90]

88. *See* Schlanger et al., *supra* note 76, at tbl. H.

89. *See* ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 26 (1995), [https://perma.cc/X8N3-NARY] (noting that for cases disposed of within six months, "the most common reason being court dismissal for failure to meet the legal requirements of Section 1983 or to satisfy procedural requirements such as time deadlines. For these cases, there are clear and conspicuous deficiencies to the issues that permit quick dispositions").

90. *See* Schlanger et al., *supra* note 76, at tbl. H.

As to why the disposition timetable is trending upward is unsettled. One cause might be an increase in the number of complex cases as compared to routine cases. A 1994 Department of Justice (DOJ) study compared the disposition timelines for various types of § 1983 prisoner cases and discovered that challenges to physical conditions took an average of 490 days, whereas excessive force challenges took upwards of 721 days.[91] The report further suggests that courts appear to be more "sensitive to issues concerning the use of force. . . . For this reason, the courts are likely to take considerable time to review issues that concern the alleged used of excessive force with very close scrutiny."[92] Another possible reason is an increase in evidentiary hearings. For example, with physical security issues, the DOJ report calculates an 893-day processing time for cases with evidentiary hearings.[93] The number of judicial vacancies could also be a contributing factor. In 2021, for example, Judge Dale A. Drozd of the U.S. District Court for the Eastern District of California instituted a judicial emergency.[94] "The district, which serves 8 million Californians is supposed to have six full-time judges," but as of February 2020 was down to a single active judge.[95] Or it could be a shortage in U.S. Marshals, who are largely responsible for executing service of process for pro se prisoner claims that proceed past the frivolity review stage.[96] It could also be a function of delayed mail,[97] which pro se prisoners

91. HANSON & DALEY, *supra* note 89, at 31.

92. *Id.* at 31-32.

93. *Id.*

94. Steven Mayer, *Federal Judge Shortage 'Will Seriously Hinder the Administration of Justice' in Kern*, BAKERSFIELD (Feb. 20, 2020), [https://perma.cc/CF78-ZZK8]. As of August 19, 2022, there are sixty-six district court vacancies nationally. *See Judicial Vacancies*, AM. BAR INST. (Aug. 19, 2022), [https://perma.cc/79SY-XZK7].

95. Mayer, *supra* note 94.

96. *See* Whitney Wild, *US Marshals Service Has Manpower Shortage as it Faces Rising Threats Against Judges, Report Says*, CNN (June 16, 2021, 4:12 PM), [https://perma.cc/KA64-35GP] (reporting that the U.S. Marshals Service "is facing major staffing and operational challenges" due to increased threats and budget limitations); U.S. DIST. CT. FOR THE DIST. OF COLUMBIA, PRO SE PRISONER HANDBOOK 9 (2014), [https://perma.cc/B55L-77G6] ("If your request to proceed *in forma pauperis* is granted, the summons will be served by the U.S. Marshal when the judge so directs.").

97. Ellen Ioanes, *Mail Delays and Price Hikes are Coming to USPS. Here's Why.*, VOX (Oct. 3, 2021, 5:10 PM), [https://perma.cc/E3GR-WVEQ] ("The United States Postal service started slowing its mail delivery on Friday, part of an effort by Postmaster General Louis DeJoy to cut costs over the next 10 years.").

rely on to file and receive filings.[98] The likely cause is a combination of all these factors.

Like the PLRA, "even as the [AEDPA] has 'streamlined' appeals in some cases[,] it has bewildered lawyers, frustrated judges, and generated *countless* new procedural and substantive questions that the United States Supreme Court has been forced (with varying degrees of success) to address term after term after term."[99] Similarly, the AEDPA also "has neither sped up . . . nor prevented"[100] what it sought to and instead has resulted in additional litigation. Prior to the passage of AEDPA, the average disposition time for a non-capital habeas petition was six months.[101] As of 2006, the "average overall processing time for all terminated, non-transferred"[102] habeas cases "was 9.5 months, with a median of 7.1 months."[103] What is more striking is that "capital habeas cases that terminated in federal district court lasted an average 29 months, almost twice the 15 months they took before AEDPA."[104] Some potential reasons for the increase in disposition time include: (1) increased habeas caseloads, (2) an increase in stays in "capital habeas cases . . . under *Rhines v. Weber* (2005) to permit petitioners to return to state court to litigate their unexhausted claims," and (3) geographic effects, such as changing circuit precedent.[105]

98. Wayne T. Westling & Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. L.J. 273, 289 (1985) ("[T]he state must provide indigent inmates paper and pens to draft legal documents, notarial services to authenticate them, and stamps to mail them." (citing Bounds v. Smith, 430 U.S. 817, 824-25 (1977)).

99. Cohen, *supra* note 57 (emphasis added).

100. Dale Chappell, *25 Years of the AEDPA: Where do We Stand?*, PRISON LEGAL NEWS (June 1, 2021), [https://perma.cc/6YXF-KWLQ].

101. KING ET AL., *supra* note 55, at 56.

102. *Id.* at 41.

103. *Id.*

104. Jon B. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 JUST. SYS. J. 273, 278 (2008); *see also* Chappell, *supra* note 100 ("But the AEDPA did not speed up the death penalty. Since the AEDPA was enacted in 1996, the wait time on death row has literally *doubled*.").

105. Gould, *supra* note 104, at 279-81.

II. PRO SE PRISONER LITIGATION ISSUES

As a result of the PLRA and AEDPA, pro se prisoner litigants face several roadblocks that stymie any efforts to right constitutional violations or improve prison conditions and do little to curb wasted judicial resources. Among the most powerful of these roadblocks are: (1) pleading issues, (2) dismissals for lack of exhaustion and violations of the prison mailbox rule, and (3) sanctions.

A. Howling at the Moon: Pleading Issues

It is no secret the vast majority of the U.S. prison population has lower-than-average literacy and writing skills compared to the general population. "Almost half of the imprisoned individuals in the United States do not have a high school diploma or its equivalent."[106] Even those with some level of high school education often "function[] at two or three grades below the level actually completed in school."[107] Additionally, "the rate of mental illness and developmental disability is three to ten times higher in prison"[108] and "more than half of prison and jail inmates suffer[] from some form of mental illness."[109] If that was not enough, prisoners also must contend with "limited resources available within prisons themselves [which] are often inadequate to allow prisoners to represent themselves effectively."[110] These factors may explain why it is common for district courts to

106. Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 372 (2006).

107. *Id.*

108. Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 902 n.9 (2017) (citing Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 442-43 (1993)).

109. *Id.* (citing DORIS J. JAMES & LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), [https://perma.cc/DZW3-HCGK]).

110. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 279 (2010).

dismiss pro se prisoner complaints for failing to meet Rule 8 pleading standards[111] or for simply being illegible.[112]

To combat these factors, federal courts have relied on requiring pro se prisoners to recast complaints via form complaints.[113] Prisoners often turn to jailhouse lawyers[114] and prisoner representatives[115] to assist with writing these complaints and motions. Although these solutions are well-intentioned, neither do much to mitigate wasted judicial resources or advance potentially meritorious § 1983 complaints or habeas petitions.[116]

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111. *See, e.g.*, Hammond v. Crum, No. 16-CV-00069-GPG, 2016 WL 687464, at *1 (D. Colo. Feb. 19, 2016) (dismissing a pro se prisoner complaint because he "failed to file an amended Prisoner Complaint that complie[d] with the pleading requirements of Rule 8"); Crownhart v. Major, No. 07CV-00854-BNB, 2007 WL 1686915, at *2 (D. Colo. June 7, 2007) (ordering a pro se prisoner to amend his habeas petition when he "failed to comply with Rule 8").

112. *See, e.g.*, Taylor v. Solano Cnty. Pub. Def.'s Off., No. 2:20-CV-02114-JDP (PC), 2020 WL 7695607, at *1 (E.D. Cal. Dec. 28, 2020) (dismissing a pro se prisoner's complaint "because it [was] mostly illegible"); Cotner v. Campbell, 618 F. Supp. 1091, 1096 (E.D. Okla. 1985) ("The judges, magistrates and law clerks of the federal branch, more accustomed to the style, grace, and thoroughness of pleadings filed by professional attorneys, must grapple with the sometimes illegible and almost always incomprehensible pleadings of the prisoners."), *aff'd in part, vacated in part sub nom.* Cotner v. Hopkins, 795 F.2d 900 (10th Cir. 1986).

113. *See, e.g.*, Jones v. Unknown Defendant, No. 1:18-CV-00017-WLS-TQL, 2018 WL 10799177, at *1 (M.D. Ga. Mar. 5, 2018) (ordering a pro se prisoner to "recast his complaint using the Court's standard complaint form for use by pro se prisoners" and providing additional instructions to complete the form).

114. *See* Johnson v. Avery, 393 U.S. 483, 500 (1969) (White, J., dissenting) (explaining how jailhouse lawyers "solicit[] business as vigorously as [they] can").

115. Some institutions require prisoners to first file complaints with a prisoner's representative as part of the grievance process. *See, e.g.*, Roberts v. Croft, No. 1:12 CV 0936, 2012 WL 3061384, at *9 (N.D. Ohio July 26, 2012) (noting that the "plaintiff was the designated prisoners' representative . . . and prisoners were required to lodge complaints with him as a prerequisite to accessing the courts").

116. *See* Evan R. Seamone, Fahrenheit 451 *on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-*Lewis *Blaze Consuming Their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 98 (2006) (explaining that "the term 'jailhouse lawyer' also extends to incompetent, predatory inmates who possess no more than a 'gift of gab' because there exists no common standard"); *see also Johnson*, 393 U.S. at 499 (White, J., dissenting) ("'[I]t is indisputable' that jailhouse lawyers . . . 'are sometimes a menace to prison discipline and . . . their petitions are often so unskillful as to be a burden on the courts which receive them.'").

1. The Wolf in Sheep's Clothing: Recast Complaints and Form Pleadings

In the early 1980s, "a committee of federal judges took on the task of making recommendations for 'the more effective handling' of pro se prisoner litigation."[117] One response from this committee was the creation of a "model form complaint to be used by prisoners filing civil rights cases."[118] Form complaints for § 1983 actions have become quite popular with district courts and many pro se prisoner litigants are required to use them under the district court local rules.[119] Form complaints have proven useful, as "[t]hey tend to provide clear, straightforward instructions" and "often apprise prisoners of the risks of filing a nonmeritorious lawsuit."[120]

Form complaints, however, have not reduced the sheer number of illegible, unintelligible, or deficient pleadings filed in district courts. This failure is likely due to the inherent flaws in the form complaint itself. A 2017 study conducted by Professor Richard H. Frankel and former professor and now Magistrate Judge Alistair E. Newbern explains several issues with standardized complaint forms.[121] Of note, the study discovered that form complaints vary considerably in their requirements and instructions among districts, and often "hinder prisoners from pleading sufficient facts about the nature of their claim[s]" and "require prisoners to understand legal language or to draw legal conclusions based on terminology that they may not understand."[122]

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117. Frankel & Newbern, *supra* note 108, at 903 (quoting FED. JUD. CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS, at viii (1980)).

118. *Id.* Additionally, "[a]ppended to the Habeas Corpus Rules is a model form for habeas applications." Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 238 (1978); *see also* U.S. CTS., PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS BY A PERSON IN STATE CUSTODY 1 (2017), [https://perma.cc/WUK5-YK53].

119. Tracey I. Levy, Comment, *Mandatory Disclosure: A Methodology for Reducing the Burden of Pro Se Prisoner Litigation*, 57 ALB. L. REV. 487, 513 n.162, app. at 517 n.1 (1993).

120. Frankel & Newbern, *supra* note 108, at 913 (footnote omitted).

121. Judge Newbern and Professor Frankel provide a more in-depth analysis of other problems associated with form complaints not addressed in this Article. *See generally id.* at 918-946.

122. *Id.* at 914.

Although some reforms have been proposed to rectify these flaws, they do not fully solve the issues stemming from form complaints. First, form complaints do not solve illegibility issues. To be sure, most federal prisons generally provide inmates with access to electronic typewriters, but prisons are not constitutionally required to do so.[123] Pro se litigants in some state prisons have had typewriters revoked altogether.[124] Even the prisons that do provide typewriters generally require prisoners to pay an initial cost of $25 to $30 for print wheels and ribbons,[125] which may prove to be cost inhibitive. Whether due to costs, prohibitions, or for other factors, the vast majority of pro se prisoners file hand-written complaints.[126] Given the average educational limitations and limited access to typewriters, many pro se prisoner complaints are illegible.[127] Second, form complaints do not prevent the filing of unintelligible complaints. Prisoners who are fortunate enough to have access to legal resources still may not fully understand which facts are essential for their complaint or what documentation may be required. Last, many prisoners are not aware of the standardized forms and instead initially file complaints and petitions on regular paper. Even those who are aware are generally later directed to recast their complaint on a standardized form within a certain number of

123. Christopher Zoukis, *Prison Law Library: Jailhouse Lawyers*, ZOUKIS CONSULTING GRP. (Mar. 26, 2022, 9:27 PM), [https://perma.cc/QJQ9-LD5D]); *see also* Taylor v. Coughlin, 29 F.3d 39, 40 (2d Cir. 1994) ("[P]rison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts . . . ."); 28 C.F.R. § 543.11(h) (1997) ("Unless clearly impractical, the Warden shall allow an inmate preparing legal documents to use a typewriter, or, if the inmate cannot type, to have another inmate type his documents.").

124. *See, e.g.*, *Ban on Typewriters in Prisons Upheld*, LAS VEGAS REV.-J. (Aug. 29, 2008, 9:00 PM), [https://perma.cc/PWX7-5QLA] (reporting that a "federal judge . . . upheld [a] ban on typewriters . . . [for] Nevada prison inmates . . . after two incidents in which typewriter parts were made into weapons.").

125. *See* Zoukis, *supra* note 123.

126. *See* Rebecca Wise, Note, *Five Proposals to Reduce Taxation of Judicial Resources and Expedite Justice in Pro Se Prisoner Civil Rights Litigation*, 52 U. TOL. L. REV. 671, 685 (2021) ("[A] large percentage of *pro se* prisoner civil rights complaints are handwritten."); Jon O. Newman, *The Supreme Court—Then and Now*, 19 J. APP. PRAC. & PROCESS 1, 3 (2018) (recounting handwritten pro se prisoner petitions at the Supreme Court).

127. *See* Wise, *supra* note 126, at 685 (explaining that "[h]andwritten complaints are often illegible" and lack punctuation, contain spelling errors, and lack a common writing structure).

days.[128] Due to delays in mail or the moving and transferring of inmates, pro se litigants are often late in meeting these deadlines only to have their complaint dismissed and forced to start the process over again.[129]

Because pro se pleadings must be construed liberally, federal courts are often taxed with redundant reviews of the same or similar iterations of a complaint or petition. Each complaint or petition takes time and resources to review adequately.[130] Furthermore, additional time may be expended when and if the prisoner chooses to object to a magistrate judge's order or recommendation, or if the prisoner chooses to file a motion for reconsideration of a district judge's order. By no means should form complaints and petitions be discarded; however, it is imperative to recognize that they are but a tool in a judge's toolbox to both assist pro se prisoner litigants and to reduce somewhat of a strain on judicial resources.

2. Keeping the Wolves at Bay: Lack of Resources and Reliance on Jailhouse Lawyers

Educational and legibility concerns aside, pro se prisoner litigants also face a severe lack of legal resources. The Constitution guarantees prisoners the right to meaningful access

128. *See, e.g.*, Amerson v. Dozier, No. 5:18-CV-00376-TES-CHW, 2019 WL 11908047, at *3 (M.D. Ga. Feb. 15, 2019) ("Plaintiff has filed a § 1983 complaint on the standard complaint form designed for *pro se* litigants and he must now recast his complaint as directed."); Serna v. O'Donnell, 70 F.R.D. 618, 620 (W.D. Mo. 1976) ("Since the adoption of these forms, it has been the practice of this Court, upon receipt of a *pro se* prisoner complaint under 42 U.S.C. § 1983 to immediately send the plaintiff sets of complaint and affidavit forms accompanied by detailed instructions . . . ."); Figures *ex rel* Johnson v. Donahue, No. 8:22CV2, 2022 WL 103312, at *3 (D. Neb. Jan. 11, 2022) (directing the Clerk of the Court to provide a pro se plaintiff with "a copy of the standard form" and "strongly encourag[ing the plaintiff] to use [the] form in drafting an amended complaint").

129. *See* Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L 121, 151 (2015) (noting the "delays inherent in prison mail"). Mail delays have worsened due to COVID-19. *See, e.g.*, Schuh v. Clayton, No. 20-10468, 2021 WL 1823395, at *1 n.1 (E.D. Mich. Mar. 25, 2021) (explaining that "mail processing has been delayed because of the court closure and other issues relating to the public health crisis").

130. *See supra* fig. 2; Schlanger et al., *supra* note 76.

to the courts,[131] which imposes an affirmative duty on prison officials to either establish an adequate law library or provide adequate assistance from persons trained in the law.[132] Notably, in *Bounds v. Smith*, the Supreme Court stated that prison officials can choose between either of these to satisfy the constitutional requirement and need not provide both.[133] Moreover, courts are further permitted to "allow some restrictions on a prisoner's access to legal resources to accommodate legitimate administrative concerns that include (1) maintaining security and internal order; (2) preventing the introduction of contraband . . .; and (3) observing budget constraints."[134] To make matters worse, the Supreme Court further limited prisoner access to legal materials and legal assistance in *Lewis v. Casey*[135]—even after explicitly noting the "largely illiterate prison population."[136] This may explain why prisoners are often forced to litigate without "access to important resources, such as 'libraries, legal materials, computers, the Internet, and even . . . paper, pens, and telephones.'"[137] And with the current COVID-19 pandemic, access has become even more limited in the name of safety.[138]

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131. Arthur v. Dunn, 137 S. Ct. 1521, 1522 (2017) (Sotomayor, J., dissenting) ("Prisoners possess a 'constitutional right of access to the courts.'" (quoting Bounds v. Smith, 430 U.S. 817, 821 (1977)).

132. *See* Gomez v. Vernon, 962 F. Supp. 1296, 1298 (D. Idaho 1997) ("Prison officials have an affirmative duty to ensure that such access is 'adequate, effective and meaningful.'" (quoting *Bounds*, 430 U.S. at 822)).

133. *See Bounds*, 430 U.S. at 828 ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." (emphasis added)).

134. *Substantive Rights Retained by Prisoners*, 48 GEO. L.J. ANN. REV. CRIM. PROC. 1157, 1157-59 (2019) (footnotes omitted).

135. 518 U.S. 343, 354 (1996).

136. *Id.*

137. Hannah Belitz, Note, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R-C.L. L. REV. 291, 326 (2018) (quoting Robbins, *supra* note 110, at 273).

138. *See, e.g.*, Swiderksi v. Harman, 336 F.R.D. 98, 103 (E.D. Pa. 2020) (explaining that a pro se prisoner "stated [that] he did not have access to the law library and [had] limited access to his mail because of [a] COVID-19-related prison lockdown"); Corporal v. Weber, No. DKC-20-2681, 2021 WL 2949784, at *12 (D. Md. July 14, 2021) ("[D]elays in answering requests from inmates seeking copies of cases and addresses by the prison library when the COVID-19 pandemic greatly impacted the ability of prison staff to be on-site to timely respond to inmate requests sent to the library . . . .").

Strangely, even modernization efforts with prison law libraries have impeded prisoners' access to legal materials and assistance. For example, Professor Ira P. Robbins has recounted a prisoner's explanation of when Florida prisons replaced hardbound volumes of federal reporters with digital collections.[139] As the prisoner explained, "[p]risoners in Florida are not allowed to use the computers in the law libraries for research purposes," which means that the prisoner has to "know the name and citation of the case[s] he wants to read" and give those citations to a law clerk to pull.[140] The prisoner then is at the mercy of the schedule of the law clerk and may only take notes from the computer screen.[141]

The Supreme Court's limitation on access to legal materials has created both "a 'Catch-22' situation"[142] and further propounded the strain of judicial resources.[143] Justice Scalia's majority opinion in *Lewis* "made it extremely difficult for prisoners to prove that access to legal materials would be inadequate to fulfill the right of access to the courts."[144] In turn, he created a situation wherein "prisoners, including those with mental illnesses, illiteracy, or a lack of fluency in the English language, must successfully go to court on their own in order to prove that they are unable to successfully go to court without additional assistance."[145] So, what was lauded as a backstop to curb pro se prisoner litigation has effectively spurned a vicious cycle of increased litigation that challenges these limited

139. *See* Robbins, *supra* note 110, at 279.

140. *Id.*

141. *Id.*

142. Christopher E. Smith, Brown v. Plata, *The Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 536 (2013).

143. Additionally, the standards for a "right to access" challenge vary among the circuit courts and are resolved on a case-by-case basis—meaning a pro se prisoner's chance of success is somewhat dependent on where the prison they are housed at is located. *See* Jay W. Spencer, Note, *Habeas Corpus Law in the Ninth Circuit After* Mendoza v. Carey*: A New Era?*, 31 SEATTLE U. L. REV. 1001, 1012-13 (2008) ("As a practical matter, courts differ drastically in their understandings of the standard set forth by the *Bounds* and *Lewis* decisions."); *see also Substantive Rights Retained by Prisoners*, *supra* note 134, at 1158 n.3028 ("Courts have not established definitively what resources a library must maintain to satisfy the right of access.").

144. Smith, *supra* note 142, at 536.

145. *Id.*

resources.[146] And because of limited—or a complete lack of—resources, courts are again tasked with deciphering pro se prisoner claims on these issues.

In the face of limited access to resources, pro se prisoners have increasingly turned to jailhouse lawyers for assistance, who generally do little to help things.[147] "The value of jailhouse legal assistance is subject to debate."[148] Some jailhouse lawyers do provide valuable assistance and have been successful in assisting their clients advocate for themselves.[149] Professor Shon Hopwood, for instance, famously drafted a successful cert petition to the Supreme Court "on behalf of a fellow inmate in 2002 while serving a sentence for bank robbery."[150] Sadly, not every jailhouse lawyer is as talented and good-natured as Professor Hopwood. "While jailhouse lawyers play an essential role in providing legal services to federal inmates, the rule of caveat emptor certainly applies here."[151] In reality, the skill, training, and motive of jailhouse lawyers varies considerably.[152] Put simply, "[t]here are good jailhouse lawyers, and there are snake's oil salespersons."[153] This is why some scholars have reasoned that "[f]ar from assisting fellow prisoners draft pleadings that survive *sua sponte* dismissal, there is a body of

146. A quick search on Westlaw using the search terms: "access /5 law /5 library" returns over 300 results from just the last six months and over 1,800 in the last three years.

147. This is not to say that jailhouse lawyers are not ever useful. Their importance has been noted by the Supreme Court. *See* Johnson v. Avery, 393 U.S. 483, 487 (1969) ("[I]f such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court.").

148. Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1579 (1997).

149. *See, e.g.*, Beth Schwartzapfel, *'For $12 of Commissary, He Got 10 Years Off His Sentence,'* MARSHALL PROJECT (Aug. 13, 2015), [https://perma.cc/9WGG-AJQN] (telling the story of a jailhouse lawyer who helped his cellmate vacate his murder convictions and obtain a new trial).

150. Emma Cueto, *With No Legal Help in Sight, 'Jailhouse Layers' Fill the Void*, LAW360 (Jan. 13, 2019, 8:02 PM), [https://perma.cc/25Y3-XVCT]. Professor Hopwood now teaches at Georgetown University Law Center.

151. Zoukis, *supra* note 123.

152. *See* Kevin D. Sawyer, *Jailhouse Lawyering From the Beginning*, 68 UCLA L. REV. DISCOURSE 98, 105, 122 (2021) (explaining a pro se litigant's path to becoming a jailhouse lawyer and noting that he learned from another cellmate); *see also* Nobel, *supra* note 148, at 1574 ("Jailhouse lawyers learn their legal skills through a variety of means.").

153. Zoukis, *supra* note 123.

research pointing out that some jailhouse lawyers actually encourage their 'clients' to file non-meritorious suits."[154]

The use of jailhouse lawyers also presents another quandary: whether communications between a jailhouse lawyer and his or her client should be protected by privilege. Courts have varied in their approach on this issue,[155] but it is not inconceivable to assume that pro se prisoners seeking the aid of jailhouse lawyers fall victim to saying too much (without a privilege shield) or saying too little out of fear of not having privilege.[156] Although the former issue is problematic in its own right, the latter also further perpetuates complaints which may initially fail under § 1915A's screening stage provision or at the motion-to-dismiss stage—only later to be forced to recast, supplement, or amend the complaint—which uses even more judicial resources.

Ultimately, these fixes and obstructionist measures do little to stem the proliferation of pro se prisoner actions. They may, and likely do, make things more difficult for prisoners and inevitably the courts, which must liberally construe pro se pleadings.

B. Beaver Dams: Exhaustion, Mailbox Rules, and IFP Provisions

Another hurdle of the PLRA and AEDPA is their associated exhaustion rules. Under the PLRA, prisoners must adequately exhaust administrative remedies.[157] Under the AEDPA, a prisoner petitioning under § 2254 must adequately exhaust

154. Howard B. Eisenberg, *Rethinking Prisoner Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 445 (1993); Nobel, *supra* note 148, at 1579 ("The most common concern is that jailhouse lawyers encourage inmates to file frivolous lawsuits which significantly overburden federal courts.").

155. *See* Nobel, *supra* note 148, at 1592-93 (noting different outcomes of this argument among state courts).

156. *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 912-13 (2006) ("The principal rationale for the attorney-client privilege is strongly rooted in the belief that it encourages open and candid communication between attorney and client, and thereby facilitates the rendition of effective legal services.").

157. *See* 42 U.S.C. § 1997e(a); Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (noting that exhaustion requires that prisoners conform to all administrative deadlines and requirements).

appeals in state court.[158] Because prisoners rely on mail to file documents, they also face timing issues under the prison mailbox rule—both at the district and appellate court levels.[159] These timing and procedural rules vary and often cause dismissals on technicalities.

1. The Not-So-Eager Beaver: Exhaustion and Procedural Hurdles

Before filing a § 1983 action in federal court, the PLRA requires prisoners to exhaust administrative remedies.[160] Generally, administrative remedies are in the form of internal prison grievance procedures.[161] Grievance procedures usually force prisoners to limit both their total number of active grievances and the number of issues within each grievance.[162] Normally, prisoners must file their grievance with a prison official who conducts the first review.[163] Assuming the decision is unfavorable, the prisoner must then appeal that decision to a higher authority—sometimes up to four levels of review.[164] Only

158. *See* Kernan v. Hinojosa, 578 U.S. 412, 413 (2016) (per curiam) ("The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner seeking federal habeas relief first to 'exhaus[t] the remedies available in the courts of the State.'" (alteration in original) (quoting 28 U.S.C. § 2254(b)(1)(A)).

159. *See, e.g.*, United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting an issue of whether the mailbox rule applies to a prisoner who had counsel but later filed his appeal pro se); Knickerbocker v. Artuz, 271 F.3d 35, 37 (2d Cir. 2001) (noting that the mailbox rule did not apply to a pro se prisoner who gave his notice of appeal to his sister, who filed the notice late).

160. *See* 42 U.S.C. § 1997e(a).

161. *See* Sharon I. Fiedler, Comment, *Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of "Available" in the Context of the PLRA*, 33 U.C. DAVIS L. REV. 713, 720 (2000) ("Under the PLRA, prisoners can sue in federal court only after exhausting the prison's administrative grievance system.").

162. *See, e.g.*, Rodriguez v. Clupper, No. 5:17-cv-387 (MTT), 2018 WL 3525161, at *3 (M.D. Ga. July 20, 2018) ("We are not persuaded that these aspects of the policy [where an inmate can have no more than two active grievances at any one time and cannot list multiple issues in a single grievance] render the grievance process unavailable for purposes of the PLRA." (alteration in original) (quoting Pearson v. Taylor, 665 F. App'x 858, 867-68 (11th Cir. 2016)); Harvard v. Inch, 411 F. Supp. 3d 1220, 1248 (N.D. Fla. 2019) (noting that the plaintiff "filed a grievance, which was improperly rejected for failing to comply with the one issue rule"); Johnson v. Meier, 842 F. Supp. 2d 1116, 1119 (E.D. Wis. 2012) (finding that defendants wrongly concluded that the plaintiff violated the single-issue rule).

163. *See* Fiedler, *supra* note 161, at 721-22.

164. *See* Allen E. Honick, Comment, *It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency*

after the highest official has denied the grievance may the prisoner file his or her complaint in federal court.[165] The same process also applies to prisoners suing federal officials under *Bivens*.[166]

On the surface, this sounds like a logical process. Giving prison officials, who are closest to the problem, the first opportunity to correct it could—in theory—provide efficient relief to prisoners and avoid involving a court.[167] When scrutinized, however, a problem emerges: effectively, the fox is guarding the hen house.[168] How so? Well, this "proper exhaustion" tactic allows prisons to employ all sorts of hurdles for prisoners. In addition to the limitations mentioned above, there is no longer a set timeline for prison officials to review grievances.[169] Grievance procedures can also be written

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Autonomy, 45 U. BALT. L. REV. 155, 172 n.134 (2015) (explaining that under a California regulation, "a prisoner had to navigate four levels of administrative grievances and appeals before exhausting all administrative remedies").

165. Gray Proctor, Ngo *Excuses: Proving, Rebutting, and Excusing Failure to Exhaust Administrative Remedies in Prisoner Suits After* Woodford v. Ngo *and* Jones v. Bock, 31 HAMLINE L. REV. 471, 473 (2008) ("To properly exhaust all administrative remedies, a prisoner must bring her complaint to every level of the state's prison grievance system and follow all of its procedures.").

166. *See* Jamie Ayers, Comment, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 255 n.38 (2005) ("[A]ctions brought against federal officers as *Bivens* actions must also first exhaust administrative grievance procedures before they can be brought in federal court." (citing Porter v. Nussle, 534 U.S. 516, 524 (2002)).

167. *See* Danielle M. McGill, Note, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 160 (2002-03) ("[A]dministrative adjudication can prove to be extremely valuable to the nation's prisons because such institutions regain the power over day-to-day decisions.").

168. *See* Proctor, *supra* note 165, at 473 ("[T]he fate of the prisoner's suit is in the state's hands . . . .").

169. *See, e.g.*, Webster v. Bosecker, No. 3:20-cv-00632-GCS, 2021 WL 1720278, at *2 (S.D. Ill. Apr. 30, 2021) (finding that a prisoner did not exhaust his remedies despite waiting three months for a decision because "prisoners must afford officials the time and opportunity to fully investigate their claims prior to filing suit"). *But see, e.g.*, Pirl v. Ringling, No. 19-208J, 2021 WL 1964461, at *8 (Mar. 29, 2021) (finding that administrative remedies were unavailable when prison officials did not "provide an initial review response . . . more than 17 months after [the p]lainitff submitted his original grievance"). This tactic can be extremely useful for two reasons. First, for pretrial detainees, it may prevent a lawsuit from being filed altogether if the review process is lengthy enough that the prisoner moves or is released before fully exhausting the grievance process. Second, the length of the process could dissuade prisoners from filing grievances if they know they are set to be released before the process would be completed.

unclearly,[170] making them difficult to follow,[171] such that prison officials can deny nearly any grievance filed.[172]

These problems are not bugs; rather, they are features designed to nullify relief in federal court. To be sure, courts have found that prisoners have exhausted administrative remedies when those remedies were unavailable. For example, this includes when "prison officers are unwilling or unable to redress the inmate's grievance, when the grievance process is incomprehensible, and when the administrative process fails because of 'machination, misrepresentation, or intimidation.'"[173] But a finding that administrative remedies were "unavailable" is rare, as circuit courts have added additional hurdles to show that administrative processes were unavailable. Under the intimidation exception, for instance, some circuits have employed a two-part test that requires prisoners to show that (1) the prisoner subjectively "believed prison officials would retaliate against him if he filed a grievance,"[174] and (2) the prisoner's "belief was objectively reasonable."[175] Although prisoners can *usually* meet the first prong,[176] the second prong is often insurmountable—

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170. *Cf.* Robin L. Dull, Note, *Understanding Proper Exhaustion: Using the Special-Circumstances Test to Fill the Gaps Under* Woodford v. Ngo *and Provide Incentives for Effective Prison Grievance Procedures*, 92 IOWA L. REV. 1929, 1964 (2007) (noting that the Illinois Department of Corrections previously had a grievance procedure that "lacked the necessary level of specificity" and only revised it after the Seventh Circuit found that its procedure was improper).

171. Unclear grievance policies may result in procedural dismissals for technical errors, such as "filing a grievance on the incorrect form, failing to correctly label a grievance, and sending the right form to the wrong official." Honick, *supra* note 164, at 182 (footnotes omitted).

172. *See* Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 159-60 (2021) ("[C]orrections staff have an interest in making it hard for prisoners to successfully exhaust administrative remedies, as the ability to properly exhaust directly impacts the viability of a future lawsuit that could hold those same individuals liable.").

173. Jacqueline Hayley Summs, Comment, *Grappling with Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement in* Ross v. Blake, 69 ADMIN. L. REV. 467, 488 (2017) (quoting Ross v. Blake, 578 U.S. 362, 344 (2016)).

174. McBride v. Lopez, 807 F.3d 982, 987-88 (9th Cir. 2015) (adopting the Eleventh Circuit's test).

175. *Id.* at 987.

176. Prisoners have been unsuccessful on the first prong when they file multiple grievances after an incident underlying their case. *See, e.g.*, Millare v. Murphy, No. 2:20-cv-00451-WBS-JDP (PC), 2021 WL 4355455, at *3 (E.D. Cal. Sept. 24, 2021)

even when there is evidence of preexisting hostility[177]—so long as prison officials do not "explicitly reference the grievance system"[178] when making threatening comments. In short, this means that prison officials can make the grievance process cumbersome and confusing without much fear of recourse.[179]

Prisoners filing habeas petitions under § 2254 face their own procedural roadblocks.[180] First, similar to the PLRA administrative-exhaustion requirement, habeas petitioners challenging their state convictions must exhaust all state remedies.[181] This often means first directly appealing their conviction before seeking collateral review under state habeas review procedures.[182] The state review process can last well over

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(noting that the prisoner filed ten grievances between the date of an alleged incident and the date of his complaint).

177. *See, e.g.*, Thomas v. Reyna, No. 1:19-cv-01217-GSA-PC, 2019 WL 5079546, at *2 (E.D. Cal. Oct. 10, 2019) ("Hostile interaction between a prisoner and prison guards, even when it includes a threat of violence, does not necessarily render the grievance system unavailable . . . .").

178. *See McBride*, 807 F.3d at 988. Note, the Ninth Circuit continues to say that explicit references need not be made to meet the objective prong, but it is hard to imagine many circumstances where a prisoner would be successful without an explicit threat. *See, e.g.*, Gilmore v. Ormond, No. 19-5237, 2019 WL 8222518, at *2 (6th Cir. Oct. 4, 2019) (holding that there was a triable issue of fact "as to whether prison officials impeded [the plaintiff's] ability to exhaust his claims" when prison officials "threatened to show other inmates documents reflecting that he cooperated with law enforcement if he filed a grievance").

179. *See* Derek Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 472 (2012) ("Thus, if prison officials dismiss a grievance due to procedural defect, the dismissal not only forecloses a remedy within the prison, but also forecloses a remedy in federal courts.").

180. Jennifer F. McLaughlin, Comment, *Just DNA: Expansion of Federal § 1983 Jurisdiction Under* Skinner v. Switzer *Should Be Limited to Actions Seeking DNA Evidence*, 23 GEO. MASON U. C.R.L.J. 201, 204 (2013) (stating that "[h]abeas petitioners must navigate numerous procedural hurdles to secure release," including "exhaust[ion of] all state remedies as a prerequisite to bringing a habeas challenge."); 28 U.S.C. § 2254(b)(1)(A).

181. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State . . . ."); Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977) (noting the four procedural hurdles habeas petitioners must face before review of the substantive merits of their petition).

182. *See* Carey v. Saffold, 536 U.S. 214, 219 (2002) ("In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within, say, 30 or 45 days after the entry of the trial court's judgment. Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time . . . ." (citations omitted)).

a year,[183] and given that states also "began implementing comprehensive reforms of state postconviction procedures contemporaneous to the AEDPA's enactment, which has led to unsettled state law,"[184] it is easy to see how pro se prisoners can become confused[185] or frustrated[186] and file their habeas petitions prematurely.[187]

Habeas petitioners also face a strict one-year statute of limitations.[188] And although the statute is tolled during the pendency of state court proceedings, this assumes the petitioner complied with the procedural timelines of the state, which, as discussed above, are often confusing.[189] To be sure, pro se petitioners can attempt to make an equitable tolling argument, but

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183. ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUST. STATS., FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 12 n.9 (1995), [https://perma.cc/RND9-X6BD] (noting a 1979 study that found the average time between conviction in state court to filing a federal habeas petition was 1.5 years); *see also* Weaver v. Amsberry, 535 F. Supp. 3d 1016, 1025 n.2 (D. Or. 2021) ("For instance, a 2007 empirical study found the average time elapsed between state court judgment and federal habeas filing was 6.3 years for non-capital cases and 7.4 years for capital cases."). Almost all states have collectively proposed model time standards of 180 days to complete habeas and other postconviction proceedings, but only two states have adopted the standards. *See* MODEL TIME STANDARDS FOR STATE TRIAL COURTS 3, 13 (NAT'L CTR. FOR STATE CTS. 2011), [https://perma.cc/FV8W-W5UT].

184. Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 378 (2005).

185. *See, e.g.*, Collier v. State, 834 S.E.2d 769, 784 (Ga. 2019) (Peterson, J., concurring) ("By allowing the out-of-time remedy to be applied on direct appeal, our post-conviction jurisprudence has, as Justice Fletcher observed 27 years ago, created a 'tangle of procedural rules' that is both 'confusing' and 'incredible.'"); McKay v. State, 520 S.W.3d 782, 787 (Mo. 2017) ("The confusing inconsistency in treatment of post-conviction motions filed under Rule 29.15 . . . will be abated in future cases . . . ."); *Ex parte* Ingram, 675 So. 2d 863, 866 (Ala. 1996) ("Because Ingram's newly appointed counsel was understandably confused as how to proceed with Ingram's ineffective-assistance-of-counsel claim . . . .").

186. *See, e.g.*, Griffin v. Wingard, No. 3:13-CV-00131, 2013 WL 4543441, at *5 (M.D. Pa. Aug. 26, 2013) (noting that the petitioner was "frustrated by a delay" and that he argued "that this six-month delay in obtaining transcripts from state court proceedings . . . excus[ed] him from compliance with th[e] legally mandated exhaustion requirement"); Matthews v. Cockrell, No. Civ.A. 3:02-CV-0913, 2002 WL 31452412, at *8 (N.D. Tex. Oct. 16, 2002) ("Frustrated by the delay in state court, petitioner sought habeas relief in federal court . . . .").

187. 28 U.S.C. § 2254(b)(1)(A).

188. 28 U.S.C. § 2244(d)(1).

189. *See, e.g.*, Johnson v. Simms, No. CV 18-00825 MV/SCY, 2022 WL 43500, at *3 (D. N.M. Jan. 5, 2022) ("Petitioner did not file his state post-conviction habeas corpus petition until . . . more than one year after his conviction and sentence became final. As a result, the state habeas proceedings did not toll the running of the limitations period.").

"[i]n recent years, the Supreme Court has struggled to define what circumstances warrant equitable tolling in the context of habeas petitions and AEDPA."[190] Some circuits, like the Eleventh Circuit, have even gone so far as to note that the equitable tolling doctrine "in the habeas context is a 'work in progress' and will require more judicial guidance to clarify the doctrine."[191] Moreover, for petitioners asserting a colorable claim of actual innocence, finding evidence to support this claim "takes years and is often a result of blind luck."[192] So, even if a pro se petitioner makes it past the procedural hurdles, the clock is still against them to gather evidence that might support relief on the merits.

2. Muddy Mailbox Rules

Another unique and shifting procedural issue involves the application of the prison mailbox rule. The prison mailbox rule, as first announced in *Houston v. Lack*,[193] provides that a pro se petitioner's "notice of appeal [is] filed at the time [a] petitioner deliver[s] it to the prison authorities for forwarding to the court clerk."[194] The same principle has also been applied to filings in district courts.[195] Like most pro se litigation rules, the prison mailbox rule is deceivingly simple on its face, but its application and protection has been eroded by district and circuit courts alike.

The mailbox rule has provided ample ammunition for courts to dismiss pro se prisoner complaints and habeas petitions. For example, some courts have held that if a prisoner uses a regular mailbox instead of the prison mail log system, the prisoner does

190. Mandi Rene Moroz, Note, *Protecting Access to the Great Writ: Equitable Tolling, Attorney Negligence, and AEDPA*, 51 GA. L. REV. 647, 649 (2017).

191. *Id.* (quoting Cadet v. Fla. Dep't of Corr., 742 F.3d 473, 475 (11th Cir. 2014), *vacated sub nom.*, Cadet v. Fla. Dep't of Educ., 853 F.3d 1216, 1218 (11th Cir. 2017)).

192. Tiffany R. Murphy, *"But I Still Haven't Found What I'm Looking For": The Supreme Court's Struggle Understanding Factual Investigations in Federal Habeas Corpus*, 18 U. PA. J. CONST. L. 1129, 1144 (2016).

193. 487 U.S. 266 (1988).

194. *Id.* at 276.

195. *See, e.g.*, Sulik v. Taney Cnty., 316 F.3d 813, 814 (8th Cir. 2003) (holding that the prison mailbox rule applies to district court filings in § 1983 cases), *overruled on other grounds*, 393 F.3d 765, 766 (8th Cir. 2005); Taylor v. Brown, 787 F.3d 851, 858-59 (7th Cir. 2015) ("Although the prison mailbox rule was first applied to notices of appeal, the rule applies to all district-court filings save for 'exceptional situation[s].'" (alteration in original) (citations omitted)).

not enjoy the benefit of the prison mailbox rule.[196] Even where district courts have given pro se prisoners the benefit of the doubt and considered evidence, such as declarations from the prisoner and fellow prisoners,[197] some circuit courts have been reluctant to stray from this bright-line rule. These courts reason that prison mail logs reduce "disputes and uncertainty over when a filing occurred and . . . [prevent] put[ting] all the evidence about the date of filing in the hands of one party."[198] Recently, due to COVID-19, prison legal mail procedures have been delayed or disrupted. Pro se prisoner litigants who have argued "discrepancies in the prison's mail logs" have generally been unsuccessful when they opt not to use the prison mail system, however.[199] Suffice it to say, pro se prisoners who place their mail in the wrong mailbox are placing a losing bet against the clock.

Pro se prisoners have also had actions dismissed as untimely when administrative rules or the Federal Rules of Appellate Procedure further defined when something was filed. In *Nigro v. Sullivan*,[200] for instance, a pro se prisoner filed a habeas petition, challenging a Bureau of Prisons officer's "determination that [he] had used narcotics."[201] The district court dismissed his petition due to procedural default, finding his appeal to the General Counsel's Office was untimely under agency regulations, and the

196. *See* Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990) ("We disagree that evidence of mailing by deposit in a regular mailbox, instead of through the prison mail log system, suffices, and dismiss the appeal."); Murphy v. Hylton, No. 07-3074-SAC, 2007 WL 3146389, at *2 (D. Kan. Oct. 25, 2007) ("The prison mailbox rule does not apply to the regular prison mail system." (citing United States v. Leonard, 937 F.2d 494, 495 (10th Cir. 1991))). *But see* United States v. Gray, 182 F.3d 762, 765-66 (10th Cir. 1999) (noting that normally "where a prison maintains a legal mail system separate from its regular mail system, a prisoner must use the legal mail system to be entitled to the benefit of the mailbox rule" but concluding that the prisoner was entitled to the prison mailbox rule because the prison's "legal mail system [did] not provide a log or other record" and thus there was no difference between the regular and legal mail drop boxes).

197. *Miller*, 921 F.2d at 203 (noting that "[t]he district court found that [the prisoner] had [timely mailed his notice], based on declarations by [the prisoner] and another prisoner indicating that the notice had been timeously put in a mailbox at the prison facility").

198. *Gray*, 182 F.3d at 765 (quoting Houston v. Lack, 487 U.S. 266, 275 (1988)).

199. *See* Burton v. Martin, 849 F. App'x 759, 760-61 (10th Cir. 2021) (affirming the district court's finding that the prison mail system was adequate despite evidence of discrepancies in the prison mail log system).

200. 40 F.3d 990 (9th Cir. 1994).

201. *Id.* at 993.

prisoner appealed to the Ninth Circuit.[202] When the prisoner argued that his appeal to the General Counsel's Office was timely under the mailbox rule, the Ninth Circuit disagreed.[203] In affirming the district court, the Ninth Circuit noted that the Supreme Court's mailbox rule "addressed an undefined term, 'file' or 'serve.'"[204] Unlike *Houston*, under 28 C.F.R. § 542.14, the term "file" *was* defined and was "simply not open to the interpretation given it in *Houston*."[205] Unpersuaded by policy arguments, the Ninth Circuit found that they were in no position to rewrite procedural legislative rules.[206]

Given 28 C.F.R. § 542.14's plain meaning, the Ninth Circuit found that the Bureau of Prison's interpretation of "filed" was "neither plain error nor inconsistent with the regulation" and thus the prisoner failed to timely appeal to the General Counsel's Office.[207]

Likewise, the Fifth Circuit applied similar logic in *Guirguis v. INS*.[208] In *Guirguis*, the pro se petitioner filed a petition for review of the Bureau of Immigration Appeals' (BIA) dismissal of his appeal from a deportation ruling—"thirty-one days after the BIA entered its order of dismissal."[209] The Fifth Circuit and the INS noted that under "8 U.S.C. § 1105a(a)(1), a petition for review in the case of an alien convicted of an aggravated felony must be filed 'not later than 30 days after issuance' of the final deportation order."[210] The prisoner argued that his appeal was timely under the prison mailbox rule, similar to the prisoner in *Houston*, but the Fifth Circuit distinguished *Houston* by explaining that here, the prisoner was "seeking review not from a district court but from an administrative agency."[211] Unlike *Houston*, which dealt with Rules 3(a) and 4(a) of the Federal Rules of Appellate Procedure, the prisoner's review of an

202. *Id.*
203. *Id.*
204. *Id.* at 994.
205. *Nigro*, 40 F.3d at 994.
206. *Id.* at 996.
207. *Id.*
208. 993 F.2d 508 (5th Cir. 1993).
209. *Id.* at 509.
210. *Id.*
211. *Id.* at 510.

administrative decision fell under Rule 15(a).[212] This meant that the prisoner was required to file his petition with the clerk of a court of appeals within thirty days and the prison mailbox rule did not apply.[213]

To add to the difficulties, pro se prisoners and courts have recently been grappling with another prison mailbox rule twist. What happens when a prisoner who is originally represented by counsel suddenly becomes pro se? Does she or he get to enjoy the benefits of the prison mailbox rule? As it turns out, courts have arrived at different conclusions.[214]

In *Cretacci v. Call*,[215] the Sixth Circuit answered this question in the negative. There, a plaintiff—a former pretrial detainee at a county jail—hired an attorney to represent him in a § 1983 suit against county jail officials.[216] The attorney, however, later realized that he was not admitted to practice in the district and likely would not be admitted pro hac vice in time to file the complaint.[217] The attorney gave a copy of the complaint to the plaintiff and told him that, as an inmate, he could take advantage of the prison mailbox rule since by the time the district court ultimately received it, the statute of limitations had run four days prior.[218] The Sixth Circuit held that the prisoner was not entitled to the prison mailbox rule because he "was not proceeding without assistance of counsel"[219] and further determined that, unlike notices of appeal, the prison mailbox rule did not apply to the filing of complaints.[220]

The Seventh Circuit reached a somewhat different conclusion in *United States v. Craig*.[221] In *Craig*, a pro se prisoner initially informed his trial lawyer that he would not

212. *Id.*

213. *Guirguis*, 993 F.2d at 510.

214. *See* Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773, 779-80 (2009) (noting that the Fourth and Seventh Circuits have extended the prison mailbox rule to passively represented pro se prisoners but the Fifth, Eighth, and Ninth Circuits have not).

215. 988 F.3d 860 (6th Cir. 2021).

216. *Id.* at 864.

217. *Id.* at 864-65.

218. *Id.* at 865.

219. *Id.* at 866.

220. Cretacci, 988 F.3d at 867.

221. 368 F.3d 738 (7th Cir. 2004).

appeal his sentence but later changed his mind and "prepared and mailed a notice on his own because he thought that his lawyer would no longer represent him."[222] The prisoner alleged that he deposited his notice of appeal six days before the time to appeal had expired and that he was entitled to the benefits of the prison mailbox rule.[223] Judge Easterbrook found that the prisoner met the definition under Rule 4(c) as "an inmate confined in an institution" and was "unrepresented" though he was technically represented by counsel.[224] Judge Easterbrook, however, determined that the prisoner could not benefit from the prison mailbox rule because he did not meet the procedural requirements of Rule 4(c)(1), namely that the prisoner failed to submit an affidavit affirming he "prepaid first-class postage."[225]

3. "Chomp" Change: IFP Issues

One additional hurdle pro se prisoners face is a lack of money. Generally, both § 1983 litigations and habeas petitioners can proceed *in forma pauperis* (IFP) without prepayment of fees.[226] But unlike non-prisoner pro se plaintiffs, the PLRA still requires the eventual collection of the entire filing fee[227]—which as of now is $350 (exclusive of fees) to initiate a suit in district court[228] and $505 (inclusive of fees) to file an appeal.[229] Given that prisoners often have little or no money and usually share common complaints about prison conditions, many attempt to file class actions or multi-plaintiff actions IFP or intervene IFP to

222. *Id.* at 739.

223. *Id.* at 739-40.

224. *Id.* at 740.

225. *Id.*

226. *See* 28 U.S.C. § 1915(a)(1); Wright v. Benson, No. C18-4098-LTS, 2021 WL 2827295 at *1 (N.D. Iowa July 7, 2021) ("The doctrine of in forma pauperis allows a plaintiff to proceed without incurring filing fees or other court costs.").

227. *See* 28 U.S.C. § 1915(b)(1) ("[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee.").

228. *See* 28 U.S.C. § 1914(a) (stating, however, that "on application for a writ of habeas corpus the filing fee shall be $5").

229. *See Court of Appeals Miscellaneous Fee Schedule*, U.S. CTS., [https://perma.cc/PF5T-LA8W] (last visited Sept. 19, 2022) ("For docketing a case on appeal or review, or docketing any other proceeding, $500. . . . This fee is collected in addition to the statutory fee of $5 that is collected under 28 U.S.C. § 1917.").

share and minimize the filing fee cost among themselves.[230] But under the PLRA, appellate courts, like the Eleventh Circuit, have determined that this is impermissible.[231] The Eleventh Circuit reasons that "the Congressional purpose in promulgating the PLRA enforces an interpretation that each prisoner pay the full filing fee."[232]

Enforcing the "full filling fee" rule has led district courts within the Eleventh Circuit to foreclose Rule 24 motions to intervene because the PLRA prohibits collecting a filing fee that "exceed[s] the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment."[233] As the Eleventh Circuit district courts have explained, "[b]y allowing each plaintiff to pay his own fee in a single action, the 'filing fee collected' would exceed the amount normally permitted in a civil action."[234]

Ironically, by prohibiting class actions, multi-plaintiff actions, or interventions under the IFP statute, these courts have negated a chief component of the PLRA—limiting the total number of pro se prisoner lawsuits. As noted above, the PLRA has done little to curb § 1983 prisoner litigation.[235] So, instead of joining pro se prisoner plaintiffs with similar or related claims into single actions, these courts have either directed the clerks of courts to open new and separate actions for pro se prisoners who

230. Hubbard v. Haley, 262 F.3d 1194, 1195, 1197 (11th Cir. 2001).

231. *Id.* at 1198. Other courts have precluded pro prisoner class actions altogether. *See, e.g.*, Monge-Piedra v. Dep't of Homeland Sec., No. C14-0457-TSZ-MAT, 2014 WL 2931861, at *2 (W.D. Wash. Apr. 22, 2014) ("The Ninth Circuit has made clear that a *pro se* litigant has no authority to appear as an attorney for others.").

232. *Hubbard*, 262 F.3d at 1197-98 (noting Sen. Kyl's statement that the PLRA "will require prisoners to pay a very small share of the large burden they place on the federal judicial system. . . . The modest monetary outlay will force prisoners to think twice about the case and not just file reflexively" (quoting 141 CONG. REC. S7,526 (daily ed. May 25, 1995)); *see also* Gandy v. Bryson, 799 F. App'x 790, 792 (11th Cir. 2020) (per curiam) (holding the same in the context of Rule 24 motions to intervene).

233. 28 U.S.C. § 1915(b)(3).

234. Daker v. Wetherington, 469 F. Supp. 2d 1231, 1235-36 (N.D. Ga. 2007); *see also* Smith v. Fla. Dep't of Corr., No. 2:06-CV-14201, 2015 WL 500166, at *2-3 (S.D. Fla. Feb. 4, 2015) (denying a motion to intervene based on *Hubbard*).

235. *See* discussion *supra* Section II.A.2.

attempt to intervene or file class actions,[236] or the prisoners file a separate action on their own.[237] So much for judicial economy.

C. Paper Tiger Papercuts: Sanctions

Faced with overwhelming numbers of pro se prisoner cases, and despite the promised protections from the PLRA and AEDPA, courts have had to take matters into their own hands. The PLRA does offer courts some cover, like the three-strikes provision, but even then, some pro se prisoners consistently attempt to file frivolous actions or simply have fellow prisoners file actions on their behalf.[238] Thus, courts have turned to various forms of sanctions to curb abusive litigation further, like full prepayment and prohibition of filing certain actions for a set amount of time.

1. Curiosity Killed the Cat, But Satisfaction Brought It Back: The Three-Strikes Rule

A major tool for district courts dealing with abusive pro se prisoner litigants under the PLRA is the three-strikes provision. The three-strikes provision prohibits pro se plaintiffs from proceeding IFP "if [a] prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court . . . that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless [a] prisoner is under imminent danger of serious physical injury."[239] Recently, the Supreme Court

236. *Daker*, 469 F. Supp. 2d at 1236 (directing the clerk of court to open a new civil rights action on behalf of a pro se plaintiff who attempted to intervene).

237. *See, e.g.*, Chapman v. Rhodes, 434 F. Supp. 1007, 1008 (S.D. Ohio 1977) (noting that after an "action was first filed as a purported class action by . . . two inmates *pro se* and *in forma pauperis*," the court denied class certification and "[t]hereafter, competent counsel entered appearances on behalf of the plaintiffs and thereupon the case was certified as a class action").

238. Although beyond the scope of this Article, some scholars have voiced constitutional concerns with the three-strikes provision itself. *See generally* Kasey Clark, *You're Out!: Three Strikes Against the PLRA's Three Strikes Rule*, 57 GA. L. REV. (forthcoming 2023) (manuscript at 15-27) (on file with author) (arguing that the statutory filing fee violates indigent prisoners' right of access to the courts).

239. 28 U.S.C. § 1915(g).

strengthened the three-strikes provision by clarifying that the "failure to state a claim" language includes both cases dismissed with and without prejudice,[240] and that filing fees must be paid on a "per-case approach" rather than a "per-prisoner approach."[241] Again, although seemingly straightforward, problems and different interpretations of the three-strikes rule have made things more complex. Courts have had to grapple with whether: (1) mixed dismissal counts as a strike, (2) courts are bound by prior court determinations of the three-strikes provision, and (3) when and what actually counts as a strike.

Pro se prisoner complaints typically include multiple claims.[242] Some of those claims might have merit while the rest are frivolous, malicious, or fail to state a claim upon which relief can be granted. The question then, in these mixed cases, is whether courts can assess a strike against the plaintiff or not. Although certain district courts have concluded that a strike can be assessed on a per-claim basis, the circuit courts that have been presented this question have unanimously held that "[w]hen . . . presented with multiple claims within a single action, [courts] assess a PLRA strike only when the 'case as a whole' is dismissed for a qualifying reason."[243] And as the Fifth Circuit reasoned, "[i]mposing a strike only when the action itself is dismissed for one or more of the qualifying reasons is consistent with the [28 U.S.C. § 1915(g)'s] balance between deterring frivolous filings while maintaining access to the courts for facially valid claims."[244]

A trickier issue is determining whether a prisoner is barred under the three-strikes provision. Circuits have vastly different

240. *See* Lomax. v. Ortiz-Marquez, 140 S. Ct. 1721, 1727 (2020).

241. *See* Bruce v. Samuels, 577 U.S. 82, 84-85 (2016).

242. *See, e.g.*, Payton v. Kelly, No. 21-3088, 2021 WL 4543781, at *1 (10th Cir. Oct. 4, 2021) (noting that a pro se prisoner's § 1983 "complaint contained multiple claims"); Ellison v. Minnear, 388 F. App'x 544, 545 (7th Cir. 2010) (noting that the plaintiff, "an inmate in Illinois, filed a pro se suit under 42 U.S.C. § 1983, alleging numerous constitutional and state-law claims"); Branum v. Johnson, 265 F. App'x 349, 350 (5th Cir. 2008) (explaining that a pro se prisoner's § 1983 "complaints were long and rambling, linking numerous claims and defendants").

243. Harris v. Harris, 935 F.3d 670, 674 (9th Cir. 2019) (first alteration in original) (quoting Washington v. L.A. Cnty. Sheriff's Dep't, 833 F.3d 1048, 1057 (9th Cir. 2016)).

244. Brown v. Megg, 857 F.3d 287, 291 (5th Cir. 2017) (noting that the D.C., Fourth, Sixth, Seventh, Eighth, and Tenth Circuits have held the same).

approaches here. For example, the Second, Third, Sixth, and Seventh Circuit have held that "a district court that dismisses a prisoner's action lacks the authority to make a strike call under the statute that binds a later court."[245] Interestingly, how these circuits arrived at this conclusion has differed. The "Second and Third Circuits couch their holdings in constitutional, not statutory, terms."[246] But the Sixth and Seventh rely on the text of the PLRA, rather than the Constitution to reach this result.[247] Meaning, that perhaps if the PLRA was amended, district courts could bind other district courts on strike findings. In any case, most courts rely on other courts' strike findings in applying the three-strikes provision.[248] So while not officially binding, the findings made by prior district courts, and even other circuit courts, are functionally binding.[249]

Courts are split as to what counts as a strike and the requisite language needed to create a strike record.[250] The Third and Fourth Circuits appear to require a certain level of specificity or explicitness for a dismissal to count as a strike.[251] Conversely,

245. Simons v. Washington, 996 F.3d 350, 353-54 (6th Cir. 2021) (collecting cases from the Second, Third, and Seventh Circuits holding the same).

246. *Id.* at 354.

247. *See id.* (citing Hill v. Madison Cnty., 983 F.3d 904, 906 (7th Cir. 2020)).

248. *See, e.g.*, Snipes v. Palmer, 186 F. App'x 674, 675 (7th Cir. 2006) (noting strikes from the Central District of Illinois and applying another for a frivolous appeal); Gabel v. Hudson, No. 2:14-cv-1057, 2014 WL 7183940, at *3 (S.D. Ohio Dec. 16, 2014) (noting prior strikes from other district courts and further explaining that "district courts may apply the three strikes rule *sua sponte*"). *But see, e.g.*, Raleem-x- v. Washington, No. 2:21-CV-12141, 2021 WL 5768609, at *1 (E.D. Mich. Dec. 6, 2021) (dismissing the plaintiff's argument that the district court relied on another district's imposition of strikes and explaining that the court's order "listed seven qualifying cases from [its own] district").

249. *See* Stone v. United States, No. 7:05-CV-016-R, 2005 WL 221407, at *1 (N.D. Tex. Jan. 31, 2005) ("This Court enforces sanctions against inmates imposed by judges in other federal courts in Texas.").

250. *See* Samuel B. Reilly, Comment, *Where is the Strike Zone? Arguing for a Uniformly Narrow Interpretation of the Prison Litigation Reform Act's "Three Strikes" Rule*, 70 EMORY L.J. 755, 771-83 (2021) (explaining various circuit splits as to what counts as a dismissal and therefore a strike, including: (1) immunity, (2) failure to exhaust administrative remedies, and (3) mixed dismissals).

251. *See, e.g.*, Parks v. Samuels, 540 F. App'x 146, 150 (3d Cir. 2014) (holding that a dismissal did not count as a strike when a district court "did not dismiss the action '*explicitly* because it [was] "frivolous," "malicious," or "fail[ed] to state a claim" or . . . pursuant to a statutory provision or rule" (emphasis added) (quoting Byrd v. Shannon, 715 F.3d 117, 126 (3d Cir. 2013)); Everett v. Whaley, 504 F. App'x 245, 246 (4th Cir. 2013) ("[B]ecause the district court's dismissal did not turn on an *explicit* determination that Everett's entire action

the Eleventh Circuit is more lax and has held that "the dismissing court does not need to invoke any magic words or even use the word 'frivolous,' although such language certainly aids our review."[252] All that is required in the Eleventh Circuit is for the district court to "give some signal in its order that the action or appeal was frivolous."[253] In short, district courts that are not crystal clear as to whether a dismissal counts as a strike may be inadvertently leaving the door open for abusive pro se litigants to file further complaints.

Additionally, most courts count dismissals prior to the enactment of the PLRA in determining whether a pro se prisoner is barred under the three strikes-provision.[254] The Third, Sixth, Tenth, and Eleventh Circuits have both determined that such dismissals do count and that the PLRA is retroactive.[255] They reason that "[t]he language of § 1915(g) broadly refers to actions dismissed on 'prior occasions.'"[256] And they explain that Congress' intent "to curb frivolous prisoner litigation would not be furthered by interpreting the statutory command to apply only after a litigious prisoner files what may amount to three *additional* frivolous appeals."[257] The Fourth Circuit, however, noted one caveat—cases filed prior to the enactment of the PLRA are not subject to the three-strikes provision.[258] While the courts seem to be firmly rooted on this issue, scholars have debated the issue and

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failed to state a claim or was otherwise frivolous or malicious, it does not qualify as a strike." (emphasis added)).

252. Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1284 (11th Cir. 2016) (citations omitted).

253. *Id.*

254. *See* Altizer v. Deeds, 191 F.3d 540, 545 (4th Cir. 1999) ("[T]he circuits are split as to whether the 'three strikes' provision applies to a lawsuit filed prior to the effective date of the statute.").

255. *See* cases cited *infra* note 257.

256. Wilson v. Yaklich, 148 F.3d 596, 603 (6th Cir. 1998).

257. *Id.*; *see also* Rivera v. Allin, 144 F.3d 719, 728-29 (11th Cir. 1998) (holding that dismissals prior to the enactment of the PLRA count toward the three-strikes provision); Green v. Nottingham, 90 F.3d 415, 419 (10th Cir. 1996) ("[T]extual analysis . . . suggests that Congress intended § 1915(g) to apply to prisoner actions dismissed prior to its enactment."); Keener v. Pa. Bd. of Prob. & Parole, 128 F.3d 143, 144 (3d Cir. 1997) ("We . . . join those [other] circuits in holding that dismissals for frivolousness prior to the passage of the PLRA are included among the three that establish the threshold for requiring a prisoner to pay the full docket fees . . . .").

258. *See Altizer*, 191 F.3d at 546-47 (holding that the three-strikes provision is not retroactive to suits filed before the PLRA was enacted).

have argued that "[a]lthough . . . *in forma pauperis* status is a privilege, . . . it is a necessary tool for prisoners to exercise the fundamental right of access to the courts to challenge the conditions of his or her confinement."[259] By applying § 1915(g) to actions filed before the PLRA was enacted, these scholars argue that it "attaches new legal consequences to those prior dismissals."[260] Perhaps, given the Fourth Circuit's caveat, there is room for such an argument to win at some point.

Last, there is a split between the D.C., Tenth, and Eleventh Circuits as to whether an appeal dismissed for want of prosecution counts as a strike. The D.C. and Tenth Circuits have held that it does.[261] They "reason that [a] single judge's denial of the petition to proceed *in forma pauperis* on the grounds of frivolousness is the 'but for' cause of the panel's dismissal of the appeal for want of prosecution."[262] The Eleventh Circuit, however, explained that "but-for causation appears nowhere in the text of the [PLRA]," and even if it did, when an appeal is dismissed for want of prosecution, such as failure to pay a filing fee, that says nothing about the frivolity of the appeal itself.[263] Remarkably, the Eleventh Circuit even acknowledged that its "interpretation means that a prisoner can file unlimited frivolous appeals and avoid getting strikes by declining to prosecute the appeals after his petitions to proceed *in forma pauperis* are denied."[264]

Whether the three-strikes provision has mitigated pro se prisoner actions is suspect.[265] In any event, there appears to be a

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259. Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471, 518 (1997).

260. *Id.*

261. Daker v. Comm'r, Ga. Dep't of Corr., 820 F.3d 1278, 1285 (11th Cir. 2016) (first citing Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1179 (10th Cir. 2011); and then citing Thompson v. DEA, 492 F.3d 428, 433 (D.C. Cir. 2007)).

262. *Id.*

263. *Id.*

264. *Id.* at 1286.

265. *See* Reilly, *supra* note 250, at 757 ("While this 'three strikes' rule was passed to reduce the number of cases on the federal docket, it has instead created myriad conflicting interpretations in federal courts . . . ."); *see also* Clark, *supra* note 238 (manuscript at 30) (noting that the imminent danger exception to the three-strikes rules "may not be [an] effective tool to weed out frivolous claims" and explaining that the rule "does not appear to be a wholly satisfactory method of curbing . . . abuse" (quoting *Procup v. Strickland*, 567 F. Supp. 146, 159 (M.D. Fla. 1983))).

permissible way to circumvent the rule altogether: filing in state court. Very recently, the Eleventh Circuit held that § 1915(g) does not apply to actions filed in state court that are removed to federal court.[266] The Eleventh Circuit reasoned that § 1915's "bring" language "has long meant to initiate or commence it, not to prosecute or to continue it."[267] Thus, when a case is removed, it has not been commenced by the plaintiff. The Eleventh Circuit also explained that § 1915's statutory definition does not include state courts, therefore, the statute was inapplicable.[268] Last, it found that the policy implications behind the three-strikes rule were not implicated in removal actions because defendants paid the filing fee.[269]

2. Payment Prowling: Monetary Sanctions

Pro se prisoners, like all litigants, are not immune to sanctions under the Federal Rules of Civil Procedure or a court's inherent authority.[270] Some courts have taken measures a step further by embedding specific sanctions procedures for vexatious pro se litigants. The Eastern District of Texas, for example, permits the court "after an opportunity to be heard [to] . . . order a *pro se* litigant to give security in such amount as the court determines to be appropriate to secure the payment of any costs, sanctions, or other amounts which may be awarded against a vexatious *pro se* litigant."[271] Similarly, the Eleventh Circuit has imposed sanctions in the form of attorney's fees and costs against a pro se litigant, meaning that such a sanction could easily be

266. *See* Maldonado v. Baker Cnty. Sheriff's Off., 23 F.4th 1299, 1306-07 (11th Cir. 2022).

267. *Id.* at 1304.

268. *Id.* at 1305.

269. *Id.* at 1306.

270. *See e.g.*, Kokinda v. Pa. Dep't of Corr., No. 16-1303, 2018 WL 1155999, at *4 (W.D. Pa. Mar. 5, 2018) ("deliberate attempts to mislead this Court exposes prisoner plaintiff to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, which apply to pro se litigants as well as to attorneys" (citing Rivera v. Pa. Dep't of Corr., C.A. No. 09-1604, 2010 WL 4318584 (W.D. Pa. Oct. 26, 2010); Milke v. City of Phoenix, 497 F. Supp. 3d 442, 467-68 (D. Ariz. 2020) (explaining that sanctions may be imposed on pro se prisoner litigants under Rule 37 or the court's inherent authority).

271. Cunningham v. Matrix Fin. Servs., No. 4:19-CV-00896-ALM-CAN, 2021 WL 2796645, at *3 n.3 (E.D. Tex. Feb. 12, 2021) (quoting E.D. Tex. Loc. Ct. Rule CV-65.1(b)).

imposed on a pro se prisoner litigant.[272] For especially abusive pro se prisoner litigants, some district courts have barred prisoners from filing future actions unless the entire filing fee was prepaid and only with permission from a magistrate, district court, or circuit court judge.[273] Not to mention that state statutes also permit monetary sanctions, and pro se prisoners who have attempted to challenge sanctions from state courts under federal habeas actions have often been unsuccessful.[274]

Conversely, other courts have cautioned against imposing high monetary sanctions against pro se prisoner litigants. The Seventh Circuit has stated that "a verbal or written warning, or a modest monetary sanction may have a sufficient effect."[275] And as some district courts have noted, pro se prisoners proceeding IFP would likely "be unable to pay a monetary sanction and the imposition of such a sanction would be futile,"[276] and others have determined monetary sanctions against pro se prisoners to be unjust.[277]

3. Changing Stripes: Pre-screening and Claim Limitations

What happens when the PLRA's three-strikes provision or monetary sanctions are ineffective in stopping an abusive pro se prisoner litigant? In these cases—or in cases of outright threats

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272. Watkins v. Cap. City Bank & Guar., 859 F. App'x 553, 554 (11th Cir. 2021) (per curiam).

273. *See, e.g.*, Stone v. United States, No. 7:05-CV-016-R, 2005 WL 221407, at *1 (N.D. Tex. Jan. 31, 2005).

274. *See, e.g.*, Parker v. Province, 415 F. App'x 19, 20 (10th Cir. 2011) (noting that the state court imposed sanctions under an Oklahoma statute and that the "federal district court denied [the plaintiff's] 28 U.S.C. § 2241 challenge to the imposition of sanctions"); Lawson v. Aleph Inst., Inc., No. 4:04-cv-00105-MP-AK, 2009 WL 4404720, at *1 (N.D. Fla. Dec. 2, 2009) (explaining that a Florida statute "also provide[d] for sanctions when a prisoner is found to have brought a malicious suit involving false information").

275. Ebmeyer v. Brock, 11 F.4th 537, 547 (7th Cir. 2021).

276. Arellano v. Blahnik, No. 16cv2412-CAB (MSB), 2019 WL 2710527, at *11 (S.D. Cal. June 28, 2019).

277. *See* Bradford v. Marchak, No. 1:14-cv-1689-LJO-BAM (PC), 2018 WL 3046974, at *8 (E.D. Cal. June 19, 2018) (noting that because the plaintiff was proceeding IFP, "which makes it unlikely that he would be able to pay any monetary sanction[,] . . . the imposition of such a sanction would be unjust" under Federal Rule of Civil Procedure 37(d)(3)); *see also* Benitez v. King, 298 F. Supp. 3d 530, 542 (W.D.N.Y. 2018) (declining to impose monetary sanctions and explaining that "the Second Circuit has often instructed that *pro se* litigants are deserving of 'special solicitude'").

of violence against judges—some courts have turned to a variety of sanctions outside the confines of the PLRA's three-strikes provision. The most common sanction is dismissal with prejudice,[278] which has been employed when pro se prisoners lie or conceal information in their IFP applications.[279] Even dismissals with prejudice for relatively minor misstatements in IFP applications have been upheld by circuit courts.[280]

Another common sanction that courts have turned to is the addition of pre-screening and claim-limitation requirements for set time periods, usually one to two years.[281] Because nothing in the PLRA prevents vexatious pro se prisoner litigants from physically mailing new complaints, motions, or other filings with the court, some pro se prisoners have taken their litigiousness to the extreme by filing numerous multi-page documents in excess of local rules page limitations.[282] To remedy this problem and cut down on the court's time, district courts have ordered clerks to open miscellaneous case files for these abusive filers and docket

278. *See* Oliver v. Gramley, 200 F.3d 465, 466 (7th Cir. 1999) ("Although dismissal with prejudice is a permissible judicial sanction[,] . . . the general rule is that before dismissing a suit with prejudice as a sanction for misconduct a court should consider the adequacy of a less severe sanction . . . ." (citations omitted)).

279. *See, e.g.*, Daker v. Owens, No. 5:20-CV-354-TES-CHW, 2021 WL 1321335, at *4 (M.D. Ga. Jan. 5, 2021) (finding that the plaintiff had "an undeniable and significant history of 'abus[ing] the judicial process by filing IFP affidavits that conceal and/or misstate[d] his real assets and income'" (first alteration in original) (quoting *In re* Daker, No. 1:11-CV-1711-RWS, 2014 WL 2548135, at *3 (N.D. Ga. June 5, 2014)).

280. *See, e.g.*, Dawson v. Lennon, 797 F.2d 934, 935 (11th Cir. 1986) (noting that the court had "upheld dismissal of a claim under 42 U.S.C. § 1983 of a prisoner who professed to have no money in his prison accounts, which in fact contained thirty cents, and who had a history of manipulating his accounts to support claims of indigency").

281. *See* Smith v. United States, 386 F. App'x 853, 857 (11th Cir. 2010) (per curiam) (noting that the Eleventh Circuit has "upheld an injunction prohibiting a frequent litigant from filing any new actions against his former employer without first obtaining leave of the court; an injunction directing the clerk to mark any papers submitted by a frequent litigant as received but not to file the documents unless a judge approved them for filing; and an injunction ordering a frequent litigant to send all pleadings to a judge for prefiling approval" (citations omitted)).

282. *See, e.g.*, *In re* Henderson, No. MC 3:12-402, 2014 WL 198996, at *1-2 (S.D. Ga. July 17, 2014) (noting that the plaintiff was "an abusive filer" and that he had filed ten separate filings plus an additional "80 pages of material" in the span of three months); Jackson v. Baisden, No. 1:20-CV-174 (LAG) (TQL), 2021 WL 4029268, at *2 (M.D. Ga. Aug. 20, 2021) (noting that the defendant filed a "Motion for Injunction regarding Plaintiff's numerous frivolous and duplicative filings" and listing thirty-six motions filed in the span of a few months).

any filings as notices,[283] which technically gives courts as much time as they want to review the filings, as they will not be subject to the Civil Justice Reform Act requirement to rule on motions within six months.[284] Generally, the district courts will limit the prisoner's future claims only to those that allege imminent danger. Each district has staff attorneys or pro se law clerks who then screen the prisoner complaint and filings to see if a plausible claim exists and make a recommendation to the district court judge as to whether an actual case should be opened or if the complaint should be dismissed.[285] Although this method does not stop abusive filers from continuing to file complaints or motions, it does significantly reduce the number of cases that proceed, and it does minimize the time it takes to review filings. And while necessary for those who cry wolf and might otherwise have a cognizable claim, such a sanction all but forecloses any suits that a prisoner might bring for other constitutional violations that do not put them in imminent danger—for the entire district—not just before a particular judge.[286]

III. REFORMS

Clearly, pro se prisoner litigation is broken. While the PLRA and AEDPA have helped in some respects, they are far from foolproof. Moreover, neither the PLRA nor AEDPA have helped solve some of the root causes of pro se prisoner litigation. Appropriate reforms should strike a balance between protecting judicial resources and the rights of prisoners. To be sure, various reforms have been proposed in the past—varying in degree on which end of the spectrum to lend support. These reforms involve stricter prepayment rules,[287] allowing attorneys to ghostwrite

283. *See In re Henderson*, 2014 WL 198996, at *4.

284. *See* 28 U.S.C. § 476(a) ("The Director of the Administrative Office . . . shall prepare a semiannual report . . . that discloses for each judicial officer—(1) the number of *motions* that have been pending for more than six months . . . ." (emphasis added)).

285. *See In re Henderson*, 2014 WL 198996, at *1 (explaining the miscellaneous case file pre-screening method).

286. *See, e.g.*, *Jackson*, 2021 WL 4029268, at *5 (noting that the sanction applied in the plaintiff's other cases).

287. *See* Levy, *supra* note 119, at 508 (recommending five reforms, including: (1) the imposition of "strict pretrial schedules and discovery requirements," (2) requiring "prepayment of filing fee and partial payments for claims sought to be filed [IFP]," (3)

pleadings for prisoners,[288] and revamping how orders drafted by pro se law clerks (or staff attorneys) are written and drafted to be "more accessible to an uneducated pro se reader."[289]

All of these reforms are great ideas, but there is further room for improvement. That is, we should build upon these ideas to better attack the root causes of pro se prisoner litigation on both ends of the problem by: (1) adding additional magistrate judges, (2) considering a specialty court to deal with pro se prisoner matters, (3) increasing funding and the number of law school clinics to assist in these matters, and/or (4) adopting an EEOC-like agency approach to assist with pro se prisoner claims, similar to workplace discrimination claims.

A. Multiplying Magistrate Judges and Incentivizing Consent

Most district courts use magistrate judges as the first filter for pro se prisoner litigant complaints and habeas petitions. Magistrate judges "exercise the key powers of district court judges: they decide motions, take evidence, instruct juries, and render final decisions."[290] District courts can "refer any nondispositive matter to a magistrate judge without party consent but [they] retain[] jurisdiction to 'reconsider any pretrial matter' for clear error."[291] Given the copious motions that pro se prisoner litigants often file, magistrate judges and staff attorneys provide invaluable support to district court judges in managing these cases and aiding litigants by interpreting and liberally construing their claims to provide an opportunity to amend or recast.[292]

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standardizing complaint forms, (4) the distribution of pro se handbooks, and (5) developing a "mechanism for tracking claims filed district-wide and circuit-wide by each inmate").

288. *See* Robbins, *supra* note 110, at 271 (arguing that "attorneys (and sometimes non-attorneys) should be permitted to ghostwrite pleadings" for pro se prisoner litigants).

289. *See* Katherine A. Macfarlane, *Posner Tackles the Pro Se Prisoner Problem: A Book Review of* Reforming the Federal Judiciary, 83 MO. L. REV. 113, 115 (2018). Interestingly, this was Judge Posner's idea and when the Seventh Circuit declined to implement it, he resigned. *See id.*

290. J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1033 (1985).

291. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 490 (2002) (quoting 28 U.S.C. § 636(b)(1)(A)).

292. *See* Jillian M. Clouse, Comment, *Litigant Consent: The Missing Link for Permissible Jurisdiction for Final Judgment in Non-Article III Courts After* Stern v.

Although magistrate judges have the power to rule on these nondispositive orders, pro se prisoner litigants can, and usually do, object to these orders under Federal Rule of Civil Procedure 72 and 28 U.S.C. § 686.[293] The district court must then provide additional review utilizing the clear error standard.[294] The clear error standard is rarely met,[295] as most pretrial issues involve discretionary decisions. Thus, most magistrate orders on nondispositive matters are accepted and adopted by district court judges. Despite many courts having local rules discouraging the practice,[296] a persistent or abusive litigant, however, can take things a step further and ask the court to reconsider an order that accepts and adopts a magistrate judge's nondispositive order.[297] Motions to reconsider interlocutory orders—like orders adopting a magistrate judge's nondispositive order—are rarely granted because plaintiffs have a heavy burden of demonstrating manifest

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Marshall, 20 AM. U. J. GENDER SOC. POL'Y & L. 899, 920 (2012) (noting that "the motivation behind the grant of jurisdiction to act independently under [28 U.S.C.] § 636(c) is to promote judicial efficiency"); James G. Woodward & Michael E. Penick, *Expanded Utilization of Federal Magistrate Judges: Lessons From the Eastern District of Missouri*, 43 ST. LOUIS U. L.J. 543, 548 (1999) (explaining that one of the purposes behind the Judicial Improvement Act of 1990 was "to aid district courts in taking full advantage of the magistrate judges' capabilities by strengthening the consent provisions for civil trials").

293. *See* FED. R. CIV. P. 72(a) ("A party may serve and file objections to the order within 14 days after being served with a copy. . . . The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.").

294. *Id.*

295. *See In re* Namenda Direct Purchaser Antitrust Litig., No. 15 Civ. 7488 (CM), 2017 WL 3613663, at *3 (S.D.N.Y. Aug. 21, 2017) ("This is the rare case where I conclude that Magistrate Judge Francis committed clear error . . . ."); NAACP v. Fla. Dep't of Corr., 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000) ("The standard for overturning a Magistrate Judge's Order is a very difficult one to meet.").

296. *See, e.g.*, Cont'l Cas. Co. v. Winder Lab'ys, LLC, No. 2:19-CV-00016-RWS, 2020 WL 7496240, at *1 (N.D. Ga. Sept. 1, 2020) ("Because of the interest in finality, courts discourage motions for reconsideration. Under Local Rule 7.2(E), motions for reconsideration 'shall not be filed as a matter of routine practice' . . . and should be brought only when 'absolutely necessary.'"); Covington 18 Partners, LLC v. Attu, LLC, No. 2:19-CV-00253-BJR, 2019 WL 6034867, at *1 (W.D. Wash. Nov. 14, 2019) (noting that motions for reconsideration are disfavored under "Western District of Washington Local Rule 7(h)(1)"); Elder-Keep v. Aksamit, 460 F.3d 979, 985 (8th Cir. 2006) ("Under the local rules for the . . . the District of Nebraska . . . . motions for reconsideration are disfavored and will ordinarily be denied . . . .").

297. Nondispositive orders are generally interlocutory and thus reviewed under Rule 54(b). *See, e.g.*, Patrick v. City of Chi., 103 F. Supp. 3d 907, 911 (N.D. Ill. 2015) ("Motions to reconsider interlocutory orders are governed by Federal Rule of Civil Procedure 54(b).").

errors of law or fact[298] or "newly discovered evidence."[299] Often, pro se prisoner litigants attempt to use motions for reconsideration to present new arguments or simply rehash objections or arguments.[300] These additional reviews, however, consume scarce judicial resources,[301] especially when pro se prisoner plaintiffs also attempt to appeal decisions on interlocutory orders, which the courts of appeal have no jurisdiction over,[302] thereby wasting even more time and resources.

Pro se prisoner litigants can consent to full proceedings before a magistrate judge under 28 U.S.C. § 636,[303] however, they "regularly refuse[] to consent to resolution of matters before [m]agistrate [j]udges" because they "appear to prefer the longer litigation times before [d]istrict [j]udges."[304] Given the benefits and resources that magistrate judges offer to district court

298. Garabrandt v. Lewis, No. 2:18-cv-93, 2018 WL 3370615, at *1 (S.D. Ohio July 10, 2018).

299. *Id.*

300. *See, e.g.*, Haywood v. Bedatsky, No. CV-05-2179PHX-DGC, 2006 WL 1663354, at *1 (D. Ariz. June 7, 2006) ("Plaintiff asserts a number of arguments not contained in his original summary judgment briefing. As noted above, a motion for reconsideration is not the place to assert new arguments."); Amin v. Konteh, No. 3:05-CV-2303, 2008 WL 5111091, at *2 (N.D. Ohio Dec. 1, 2008) (explaining that a pro se habeas petitioner "provide[d] no new evidence or arguments in [his] motion for reconsideration, and merely present[ed] again the arguments from his petition").

301. To be sure, district courts have discretion to reconsider interlocutory orders. *See* Leelanau Wine Cellars, Ltd. v. Black & Red, Inc., 118 F. App'x 942, 945 (6th Cir. 2004) ("The correct starting point in the analysis is the well-recognized principle that district courts posses[] the discretion to reconsider their interlocutory orders at any time.") (alteration in original); *see also* Austin v. Kroger Tex., L.P., 864 F.3d 326, 337 (5th Cir. 2017) ("The Fourth Circuit explained that '[t]he power to reconsider or modify interlocutory rulings "is committed to the discretion of the district court," and that discretion is not cabined by the "heightened standards for reconsideration" governing final orders.'" (quoting Saint Annes Dev. Co. v. Trabich, 443 F. App'x 829, 832 (4th Cir. 2011)).

302. *See* Medrano v. Thomas, 99 F. App'x 521, 522 (5th Cir. 2004) ("We have no jurisdiction to consider an interlocutory appeal from an order denying a request to communicate with another prisoner."); *see also* 28 U.S.C. § 1291 ("The court of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts . . . .") (emphasis added).

303. "Upon consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. § 636(c)(1).

304. Michael J. Bolton, *Choosing to Consent to a Magistrate Judge*, 61 FED. LAW. 90, 92 n.23 (2014).

judges,[305] perhaps there is a way to incentivize pro se prisoner litigants to consent to proceedings before magistrate judges.

One option, which would require a statutory change, would be to require prisoners to opt out of consent instead of opting in. As the Seventh Circuit once stated, "[t]he system of magistrate reference of civil cases is a *flexible* mechanism, which seems well-tailored to helping to absorb the surge of litigation which has caused the crisis with which we are now coping—provided, of course, that the key constitutional values can be maintained and preserved."[306] That said, some have argued whether pro se litigants can actually meaningfully consent.[307] These arguments, however, have commonly been confined to criminal matters or non-prisoner cases where "litigants cannot afford to wait for their cases to be heard by district judges."[308] As explained above, pro se prisoners seem to prefer longer litigation times, so these concerns do not appear especially relevant here.

Another option might be to offer a discounted filing fee for pro se prisoner litigants who opt (or under the idea above chose not to opt-out) to consent to proceedings under a magistrate judge. As explained above, the PLRA and AEDPA still require prisoners to pay the full filing fee under the IFP provisions,[309] albeit under statutorily prescribed increments. Given that most prisoners are not well off financially and earn pennies on the dollar for their labor while in prison,[310] a substantial discount in the total filing

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305. *See* Benjamin H. Barton, *Against Civil* Gideon *(And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1271 (2010) (noting the "creation of a special federal magistrate position in the Eastern District of New York assigned to hear significant categories of pro se matters").

306. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984) (emphasis added).

307. *See* Bloom & Hershkoff, *supra* note 291, at 491 n.81.

308. Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455, 476 (1988).

309. *See supra* notes 226-29 and accompanying text.

310. *See, e.g.*, *Fair Wages for Prison Labor*, REFORM GA., [https://perma.cc/WB3P-ZD3Q] (last visited Sept. 26, 2022) ("In Georgia, incarcerated individuals are not guaranteed any compensation, so the minimum wage for Georgians working behind bars is zero."); Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), [https://perma.cc/C5ZA-3XNT] (listing the average low-end and high-end hourly rates for non-industry at $0.14 and $0.63, respectively, and reporting that the average daily wages paid to incarcerated workers has decreased "from $4.73 in 2001 to $3.45 today").

fee may encourage some pro se prisoners to consent to full proceedings under the magistrate judge. Likewise, prisoners could be further incentivized by permitting class actions and mass actions under the IFP provision if the prisoners consent to full proceedings before a magistrate judge.

Finally, perhaps through local rules, district courts could encourage consent to proceedings before magistrate judges if there was an increased focus on mediation. Magistrate judges are highly utilized for their mediation expertise in other non-prisoner cases,[311] and such expertise could be beneficial to both conserving judicial resources and improving the lives of prisoners. Although prisoner litigants usually include exorbitant demands for relief in their complaints, most are simply seeking to improve the heinous living conditions they face and want to feel heard.[312] In cases where a complaint passes frivolity and where several prisoners have sought to join an action or have attempted to instigate a class action IFP, perhaps the preferred method would be to offer consent in exchange for a mediation session between the prisoners and jail officials with a magistrate judge.[313] If an agreement can be made, this would save on judicial resources and offer an improvement in conditions for the prisoners. If no agreement is made, the case would still proceed under the magistrate judge and Article III review would still be an option if the prisoner loses and appeals to the proper court of appeals.

B. A New Specialty Court and Pro Se Assistance Programs

An alternative approach would be to remove prisoner litigation from federal district courts entirely and to create a

311. Many former magistrate judges have secured positions at JAMS, a well-renowned alternative dispute resolution firm. *See JAMS Federal Judges*, JAMS, [https://perma.cc/BZ8A-WMVE] (last visited Sept. 26, 2022) (listing retired Magistrate Judges Ted. E. Bandstra and Thomas M. Blewitt).

312. Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 70 (2017) ("As before the PLRA, litigation remains one of the few avenues for prisoners to seek redress for adverse conditions or other affronts to their rights."; Benerofe, *supra* note 172, at 148 "[F]ederal litigation has historically improved prison conditions, making the current conditions 'less brutal' and inhumane than in years past.").

313. This idea builds on Judge Bloom and Professor Hershkoff's idea that "the courts could require mediation in categories of cases" and applies it to pro se prisoner litigation. *See* Bloom & Hershkoff, *supra* note 291, at 511.

specialty court to handle prisoner litigations and habeas petitions. A number of specialty courts already exist today to handle discrete matters, including: the Court of Federal Claims, which handles disputes against the government for contract matters and vaccine compensation,[314] bankruptcy courts, tax courts, and the Court of International Claims. Likewise, state courts have already taken specialization to the extreme with "specialty courts that handle child support, child custody, domestic abuse/protective orders, landlord-tenant courts, small claims courts, and divorce courts."[315]

A specialty court for handling pro se prisoner litigation offers unique benefits, particularly with regard to habeas petitions. For example, consider "the collateral review procedure through which § 2255 claims are heard in the same court that oversaw the prisoner's conviction."[316] Although most trial judges do their utmost to maintain impartiality, it is human nature to "carry [some] bias from the original case into the consideration of the post-conviction claim."[317] A specialty court would help eliminate this bias and provide a fresh set of eyes to handle the prisoner's petition and may also provide additional time and resources to conduct evidentiary hearings under § 2255(b).[318]

Moreover, a specialty court would reduce overburdened district courts, which rarely find in favor of pro se prisoner litigants.[319] And for pro se prisoner litigants, a specialty court—

314. *See About the Court*, U.S. CT. OF FED. CLAIMS, [https://perma.cc/Q48A-9456] (last visited Sept. 26, 2022) (explaining that the court's jurisdiction "involves government contracts" and "vaccine compensation").

315. *See* Barton, *supra* note 305, at 1228 n.2

316. Frank Tankard, *Tough Ain't Enough: Why District Courts Ignore Tough-On-Paper Standards for a Federal Prisoner's Right to a Hearing and How Specialty Courts Would Fix the Problem*, 79 UMKC L. REV. 775, 777 (2011).

317. *Id.*

318. *See* 28 U.S.C. § 2255(b) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing . . . .").

319. In fact, some scholars have suggested eliminating § 2254 habeas petitions altogether in noncapital cases due to the rarity in which they are granted. *See* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 820 (2009) (proposing "habeas review of state criminal cases for [only] three categories of claims"). There are, of course, those—like Justice Blackmun, who are "skeptical of the ability of state courts to be as independent as necessary when prisoners take the state to court." HANSON & DALEY, *supra* note 89, at 4-5.

with dedicated resources—may be better suited to move their cases forward and to provide some legal assistance to counteract the educational and resource deficiencies discussed above. A model for such a court has already been implemented in San Antonio, Texas. In 1998, the Bexar County District Court started "the innovative San Antonio Pro Se Assistance Program"[320] that, among other things, provides pro se litigants with an ombudsman who can help answer questions and essentially "hold [the litigants'] hands to make the judicial process easier for them."[321] The Pro Se Assistance Program also connects litigants with a "pro bono coordinator" who can provide a volunteer attorney with "all required forms and information . . . need[ed] . . . to review the file."[322]

At the federal level, similar pro se assistance programs have been instigated.[323] The United States Patent and Trademark Office (USPTO), for instance, began a pilot program that "offers customer service to applicants filing patent applications without legal representation."[324] The USPTO's Pro Se Assistance Program does not provide legal advice but does "help applicants navigate"[325] the USPTO's website and "the Manual of Patent Examining Procedure (MPEP) to locate publicly available educational resources."[326] If we are willing to expend resources to assist people filing patent applications, surely it would be worthwhile to similarly expend resources to assist those attempting to vindicate constitutional violations and pursuing habeas actions. Notably, the Middle District of Alabama Federal Bar Center has started a similar pro se assistance program that provides pro se litigants with "information about federal court procedures; assistance in the preparation of pleadings and other

320. Anita Davis, *A Pro Se Program That is Also "Pro" Judges, Lawyers, and the Public*, 63 TEX. BAR J. 896, 896 (2000).

321. *Id.*

322. *Id.*

323. Some courts, like the Western District of North Carolina, have dedicated pro se settlement assistance programs; however, these programs "do[] not apply to prisoner civil rights cases." Adkins v. FNU Martin, No. 1:17-cv-343-FDW, 2018 WL 1770163, at *4 (W.D.N.C. Apr. 12, 2018).

324. Kristen Matter, *Pro Se Assistance Program*, U.S. PAT. & TRADEMARK OFF. (July 19, 2017 8:58 AM), [https://perma.cc/MA2Q-N9H2].

325. *Id.*

326. *Id.*

court documents; and referrals to other services, in appropriate cases."[327] But generally prisoners must move for the appointment of counsel to secure aid from such organizations—something that is not guaranteed for civil suits.[328]

C. Dedicated Law School Clinics

Another viable option would be to encourage more law schools to develop meaningful pro se prisoner litigation clinics.[329] Many law schools have clinics which provide representation to pro se litigants at the appellate level or for non-prisoner-related litigation; yet surprisingly, few focus on prisoner civil rights and habeas. One example of such a clinic is the Prisoners' Rights Clinic at UCLA Law,[330] which gives students a basic familiarity with the relevant constitutional doctrines and the statutory framework of the PLRA,[331] and introduces students to alternative avenues for advocacy, including through regulatory processes and media exposure.[332] Another example is Harvard Law School's Prison Legal Assistance Project, which "represent[s] people incarcerated in Massachusetts prisons"[333] and "provide[s] inmates with assistance in matters ranging from civil rights violations to confiscated property."[334]

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327. *The Pro Se Assistance Program*, U.S. DIST. CT., MIDDLE DIST. OF ALA., [https://perma.cc/L5BN-MR5E] (last visited Sept. 22, 2022).

328. *See, e.g.*, Mitchell v. Alabama, No. 2:17-cv-768-MHT-WC, 2018 WL 2107218, at *1 & n.1 (M.D. Ala. Apr. 10, 2018) (finding that "Plaintiffs' claims did not meet the Eleventh Circuit's standard to appoint counsel in a civil case because exceptional circumstances did not exist, and the legal issues asserted by Plaintiffs were not so novel or complex as to require the assistance of a trained practitioner" and noting that the court contacted the "District's Pro Se Assistance Program . . . to determine if the program could assist Plaintiffs").

329. Even the Supreme Court has noted the use of law school clinics in pro se prisoner litigation. *See* Johnson v. Avery, 393 U.S. 483, 489 (1969) ("At least one State employs senior law students to interview and advise inmates in state prisons.").

330. Although the UCLA Prisoners' Rights Clinic does not appear to focus on district court litigation, it is still a positive model for success as it also contains policy advocacy—which directly addresses the root causes of prisoner litigation. *Prisoners' Rights Clinic*, UCLA L., [https://perma.cc/3GVR-LL2Z] (last visited Sept. 26, 2022).

331. *Id.*

332. *Id.*

333. *Harvard Prison Legal Assistance Project*, HARV. L. SCH., [https://perma.cc/SRW9-YLPJ] (last visited Sept. 26, 2022).

334. *Id.*

These types of student-based legal assistance clinics provide a triple win: first for the students, second for prisoners, and third for the courts. For students, these clinics provide an opportunity to train in client-based advocacy and develop lawyering skills that cannot be gained in the traditional classroom environment.[335] Prisoners get free representation and access to legal resources,[336] both of which help counteract structural challenges they often face. The courts gain the benefit of legible, well-argued motions that help reduce the strain on judicial resources.[337] Additionally, the clinic provides a buffer to the prisoner to reduce frivolous motions as the clinic can help explain why certain arguments or claims may not be worthwhile to pursue.

Of course, starting and funding new law school clinics requires a cash infusion—either from private donors (like alumni) or from the state (for state law schools). To be sure, "lower enrollment law clinics have higher per academic credit instructional costs than large enrollment classes."[338] Such an investment, however, would be sensible considering the benefits described above.[339] The other positive aspect about this avenue is that it would not require any change in legislation and could be implemented rather quickly, i.e., as fast as it takes a law school to approve a new clinic.

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335. *See* Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 620 n.33 ("Because clinical education is often a space for experimenting with lawyering models and techniques, law students also stand to benefit from developments in lawyering theory."); Richard E. Redding, *The Counterintuitive Costs and Benefits of Clinical Legal Education*, 2016 WIS. L. REV. FORWARD 55, 64-65 (2016) ("Real-world learning experiences and skills are the mechanism by which legal knowledge is applied and understood in context, and skills practice provides students (and their professors!) with critical feedback on the validity and limitations of their legal knowledge.").

336. *Cf.* Paul McLaughlin, Jr., *Leveraging Academic Law Libraries to Expand Access to Justice*, 109 L. LIBR. J. 445, 456 (2017) (explaining how academic law libraries and law school clinics have "helped law schools meet the legal needs of their communities and the educational needs of their students").

337. *See, e.g.*, Johnson v Piatti, No. 5:19-cv-13461, 2021 WL 1923426, at *2 (E.D. Mich. May 13, 2021) (conditionally granting a pro se prisoner plaintiff's motion for the appointment of counsel and contacting the "U of D Mercy Law School Federal *Pro Se* Legal Assistance Clinic . . . to facilitate contact and determine a date for a settlement conference").

338. Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. L. REV. 1, 20 (2014).

339. And "a typical law clinic course is slightly less per credit per student than . . . a seminar with fifteen students." *Id.* at 23.

D. The Agency Approach

Finally, another possible approach would be to borrow the litigation framework for workplace discrimination claims utilizing agency review and litigation or the issuance of right-to-sue letters. This idea stems from Justice White's dissent in *Johnson v. Avery*[340]—a habeas case—in which he explained that it may not be "practical nor necessary to require the help of lawyers"[341] but "[i]deally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination."[342] As foreshadowed, using an agency-like approach modeled after the EEOC in Title VII lawsuits may just be the best remedy of all.

1. The EEOC Analogue

After Congress passed the Civil Rights Act, it created the EEOC through the passage of Title VII.[343] The EEOC's original mission was to "effectuat[e] the purpose of Title VII through conciliation and the issuance of guidelines interpreting the Act."[344] The EEOC later gained enforcement authority through the Equal Employment Opportunity Act of 1972.[345] "Despite the EEOC's rocky transition from a strictly administrative agency to an administrative and enforcement agency, the Commission did enjoy some success."[346] The EEOC is credited with largescale successes like a $45 million settlement agreement with AT&T that ended sex-segregated job categories,[347] and a $125 million jury verdict against Walmart for ADA discrimination.[348] And

340. 393 U.S. 483 (1969).

341. *Id.* at 502 (White, J., dissenting).

342. *Id.*

343. 42 U.S.C. § 2000e.

344. *See* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 676 (2005).

345. *See id.* at 677 (noting the passage of the EEOC Act of 1972, "which amended Title VII" and "imbue[d] the EEOC with enforcement authority").

346. *Id.* at 679.

347. *See id.* at 679.

348. *See, e.g.*, Tom Spiggle, *What the EEOC's $125 Million Verdict Against Walmart Tells Us*, FORBES (Aug. 4, 2021, 12:19 PM), [https://perma.cc/KCN7-MM2E] (reporting the EEOC's victory over Walmart for an ADA discrimination claim).

"[t]he work of the EEOC in enforcing . . . civil rights laws has helped to transform the American workplace and achieve justice for countless individuals."[349]

Today, the EEOC "has the authority to investigate charges of discrimination against employers" and "to fairly and accurately assess the allegations in the charge and then make a finding."[350] When the EEOC finds that discrimination has occurred, it attempts to first settle the charge.[351] If unsuccessful, the EEOC can then "file a lawsuit to protect the rights of individuals and the interests of the public and litigate a small percentage of these cases."[352] The EEOC further "work[s] to prevent discrimination before it occurs through outreach, education, and technical assistance programs."[353] Given the EEOC's success, this framework seems adaptable—with some variations—to improving pro se prisoner litigation and protecting their civil rights while reaping the benefits associated with agency involvement.

2. Adapting the Workplace Discrimination Approach

To file a lawsuit alleging discrimination in the workplace, plaintiffs must first file a charge with the EEOC. As explained above, the EEOC then investigates the matter by appointing an investigator who "may interview witnesses, review employment documents . . . visit the work site[,] or engage in other efforts to find out what happened."[354] Alternatively, the EEOC may attempt mediation to negotiate a solution.[355] When the EEOC determines that discrimination has occurred, it may attempt to settle the charge or file a lawsuit on a plaintiff's behalf.

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349. *EEOC Celebrates Its 45th Anniversary*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 2, 2010), [https://perma.cc/2LCS-2BJ9].

350. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://perma.cc/JR66-4T6N] (last visited Sept.. 26, 2022).

351. *See id.*

352. *Id.*

353. *Id.*

354. Robert Ottinger, *Right to Sue Letters From the EEOC*, OTTINGER L. (Mar. 20, 2020), [https://perma.cc/24SM-9MDT].

355. *Resolving a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, [https://perma.cc/YTB9-TSTH] (last visited Sept. 26, 2022) ("If mediation is unsuccessful, the charge is referred for investigation.").

Conversely, "[a] Dismissal and Notice of Rights is issued when the EEOC is unable to find any solid evidence of discrimination" because the EEOC was "unable to find enough evidence to prove that discrimination occurred."[356] This starts a ninety-day clock for the plaintiff to file their lawsuit.[357]

A similar litigation mechanism could be implemented for pro se prisoner litigants. Instead of the EEOC, agency enforcement and investigations could be carried out by the Special Litigation Section of the DOJ if the Civil Rights of Institutionalized Persons Act[358] was amended and expanded[359] from its current limitation to "review conditions and practices"[360] run by "state or local governments."[361] Much like workplace discrimination claims, prisoners would be required to first file a charge with the DOJ's Special Litigation Section, which would in turn conduct an investigation and proceed to mediate, settle, or issue a right-to-sue letter accordingly. As an adaptation, the DOJ could also include a review of whether the claim is likely frivolous. Alternatively, or conjunctively, the DOJ could also be granted authority to refer matters to specially appointed attorneys or to law school clinics if resources became an issue or for particularized claims with merit that may not warrant DOJ action. The PLRA could be amended to make this process required or optional. For prisoners who opt not to utilize this process, however, the PLRA could further be amended to make prisoners proceed solely before the magistrate judge.

Admittedly, such a system would expend vast resources up front, but again, the investment would likely prove worthwhile for several reasons. First, given the root causes of pro se prisoner litigation (i.e., prison conditions and violence), merely permitting a DOJ investigation might result in both better prison conditions

356. Ottinger, *supra* note 354.

357. *See id.*

358. 42 U.S.C. § 1997a (1996).

359. *See Rights of Persons Confined to Jails and Prisons*, U.S. DEP'T OF JUST., [https://perma.cc/9N7J-AHM3] (June 7, 2022) (explaining that the DOJ "do[es] not assist with individual problems" and "cannot assist in criminal cases, including wrongful convictions" and is "not authorized to address issues with federal facilities or federal officials").

360. *Id.*

361. *Id.*

and a reduction in pro se prisoner civil litigation. The threat of agency action, as opposed to a pro se prisoner lawsuit, undoubtedly ups the pressure on prisons and jails to remedy grievances. Likewise, this threat also evens the scales in habeas actions by potentially providing counsel an opportunity to sift through the criminal proceedings and formulate rationale arguments that a pro se prisoner would likely not develop on their own. Second, the possibility of DOJ involvement during litigation aids the prisoner and reduces the burden on the court, similar to how the pro se law clinics would by submitting well-argued and legible motions compared to the current influx of incomprehensible and illegible ones. Third, such a system is also in line with the spirit of the PLRA but with a gentler touch. This mechanism would stall litigation, and with the pre-screening for frivolous claims, could reduce litigation or signal to courts that potential claims are meritless in a more efficient fashion.[362] And, with the optional approach requiring full proceedings to continue before a magistrate judge, district court judges would be able to escape the time-consuming process of resolving objections and motions for reconsideration. At the same time, this process would provide an opportunity to improve prison conditions and assist pro se prisoners with litigation.

CONCLUSION

Unless or until the United States ends its love affair with the carceral state—or at the very least improves prison conditions and issues with state court convictions—the federal docket will remain inundated with pro se prisoner complaints and petitions. Legislators who were hell-bent on being "tough on crime" and saw themselves as saviors of judicial resources did little, if anything, to help matters. Arguably, these legislators made matters worse. To borrow a phrase from the venerable Mr. Spock: "Curious, how often [we] humans manage to obtain that which [we] do not want."[363]

362. This is not to say that courts would be required to independently assess claims, but a pre-screening filter by the DOJ could send a signal to courts on the likely outcome.

363. *Star Trek: Errand of Mercy* (NBC television broadcast Mar. 23, 1967).

These reforms offer a chance to rethink the way federal courts manage pro se prisoner litigation in a way that benefits all parties: prisoners, the courts, and taxpayers alike. It is not a secret many individuals show a hostility toward prisoners. As an anonymous district court judge once opined: "Nobody pretends to like them, but every once in a while, one of these people is right. And a society is judged by how it treats the least among it, not the best. . . . The job of the Constitution is to make sure that everyone is treated properly."[364] Perhaps, by adding resources through additional magistrate judges, creating a specialty court, encouraging the creation of additional law school clinics, or by adopting similar litigation procedures like with workplace discrimination claims, we can better vindicate constitutional rights while simultaneously and efficiently allocating judicial resources.

364. *See* HANSON & DALEY, *supra* note 89, at 35.

"ALEXA, AM I A MURDERER?": AN ANALYSIS OF WHETHER THE FIRST AMENDMENT PROTECTS SMART SPEAKER COMMUNICATIONS

Josie A. Bates*

I. INTRODUCTION: SYNC OR SWIM

On a Saturday evening in November, James Bates[1] did what many college football fans do in the fall: he hosted a party for his friends to watch his team, the Arkansas Razorbacks.[2] The game was hard fought, but unfortunately for Bates and his fellow fans, the Hogs ended up losing 51-50 in a nail-biter.[3] Bates and his friends were rightfully upset about this outcome, and to mitigate the effects of this loss, they decided to keep drinking beer and taking shots of vodka.[4] After a while, Bates and some of his friends got into his hot tub in the backyard where they continued drinking.[5] As the night wore on, Bates eventually decided to go

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* J.D. Candidate, University of Arkansas School of Law, 2023. Managing Editor of the *Arkansas Law Review*, 2022-2023. The author extends three thank yous to the people that made this comment possible. First, the author thanks her faculty advisor, Professor Mark Killenbeck, University of Arkansas School of Law, her Note and Comment Editor, Elizabeth Esparza, J.D. 2022, her Articles Editor, Natalie Fortner, J.D. Candidate, University of Arkansas School of Law, 2023, and the entire 2022-2023 class of Staff Editors. Without them, this comment would simply not exist. Second, the author thanks McKenna Moore. Her impeccable ability to listen, unwavering patience, and overall brilliant intellect made even the most difficult parts of the writing process feel like magic. Third, the author thanks her parents, Steve and Regina Bates, her brother, Jesse Bates, and his amazing wife and son, Sara and Luca Bates, and her future in-laws, Mike and Susan Moore. They have all played invaluable roles not only in this paper, but in the author's life in general. Thus, this paper is dedicated to them.

1. The author would like to clarify that she is not related to James Bates. Instead, this coincidence serves to highlight the humor in the world.

2. Dillon Thomas, *Bentonville PD Says Man Strangled, Drowned Former Georgia Officer*, 5NEWS (Feb. 23, 2016, 10:43 PM), [https://perma.cc/98QC-S66A].

3. *Late Block Helps Mississippi State Hold off Arkansas 51-50*, ESPN (Nov. 21, 2015), [https://perma.cc/YT74-5HFV].

4. Thomas, *supra* note 2.

5. *Id.*

to bed around one in the morning—leaving his remaining friends behind.[6]

The next morning Bates woke up and started looking around his home for any remnants of the night before—including his friends.[7] However, when he looked outside, it was not bottles and beer cans that caught his eye.[8] Instead, he saw one of his friends, Victor Collins, lying face down in the hot tub.[9] Bates ran back inside to call the police at approximately 9:30 AM.[10] The police arrived shortly thereafter and, upon receiving consent from Bates to search his home, they began their investigation.[11] Following further examination of Collins, they noticed that he had a black eye as well as some swelling, cuts, and bruises.[12] As the investigation went on, the officers also noticed spots of blood near the hot tub that appeared to be watered down.[13] These blood samples were later confirmed as belonging to Collins.[14] Additionally, the officers noticed that the hose in the backyard had been used recently—something they thought was strange given the cold weather.[15]

During the days following this investigation, the police interviewed several people, including Bates.[16] They also looked at his phone records, which revealed several canceled calls from Bates the day of the homicide after one in the morning—the time he originally told police he went to bed.[17] In looking at his water usage, they also determined that 140 gallons of water were used at Bates's residence between the hours of 1:00 AM and 3:00 AM.[18] The only other friend that was supposedly still there later into the evening, Owen McDonald, was confirmed as being home

6. *Id.*
7. *See id.*
8. *See id.*
9. Thomas, *supra* note 2.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Thomas, *supra* note 2.
15. *Id.*
16. *Id.*
17. *See id.*
18. *Id.*

at 12:30 AM by his wife.[19] When interviewed by the police, McDonald told the officers that Collins was still alive when he left.[20]

However, while all of this evidence was interesting to the officers, they found something even more intriguing right next to the hot tub: an Amazon Echo.[21] Following this discovery, the police were adamant about obtaining the Echo's recordings.[22] In focusing on this, the officers hoped that one of the men accidentally said "Alexa" or some other triggering phrase during the evening that caused the device to start recording.[23] Acting on this belief, they issued a search warrant for the device's recordings.[24] However, there was one problem with their plan: Amazon vehemently argued that this information was protected under the First Amendment.[25] Thus, Amazon believed that the officers needed to make "a heightened showing of relevance and need for any recordings."[26] Ultimately, Amazon moved to quash the search warrant.[27]

State v. Bates poses interesting First Amendment questions that go far beyond the case itself, such as whether communications to and from smart speakers are protected under the First Amendment and, if so, whether the government must therefore meet a heightened standard before obtaining information from these devices. But currently, there are no definite answers.[28] Although Amazon argued for First Amendment protection, Bates decided to hand over the device before these issues could be litigated—effectively marking these

19. Thomas, *supra* note 2.

20. *Id.*

21. Eliott C. McLaughlin & Keith Allen, *Alexa, Can You Help with This Murder Case?*, CNN (Dec. 28, 2016, 8:48 PM), [https://perma.cc/DG7T-G3P4].

22. *Id.*

23. *Id.*

24. *Id.*

25. *See* Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant at 1, State v. Bates, No. CR-2016-370-2 (Ark. Cir. Ct. Feb. 17, 2017) [hereinafter Amazon Memorandum], [https://perma.cc/BU6W-URBJ].

26. *Id.* at 2.

27. Sylvia Sui, State v. Bates*: Amazon Argues that the First Amendment Protects Its Alexa Voice Service*, JOLT DIG. (Mar. 25, 2017), [https://perma.cc/X52A-5E7P].

28. *Id.*

questions as moot.[29] Thus, this analysis will attempt to answer these questions as well as offer general guidance for the future of First and Fourth Amendment law in the age of ever-changing technological advancements and never-ending criminal accusations.

II. BACKGROUND: A SIRI-OUS INVASION OF PRIVACY

Before diving into the complexities of First and Fourth Amendment law, it is important to provide background information on these topics as well as smart speakers and search engines in general. Therefore, this section will include the necessary information to inform these topics, including a breakdown of how search engines and smart speakers work, relevant case law regarding the First and Fourth Amendments, and a more in-depth analysis of Amazon's argument in *State v. Bates*.[30]

A. Smart Speakers: From Assistant to Informant

First, it is pivotal to explain not only what a smart speaker is, but also how it operates. Smart speakers are typically capable of a large array of tasks.[31] Due to this, it can be hard to pin down a single definition.[32] Consequently, "[t]here are no official industry standards on what qualifies a product as a smart speaker."[33] However, these products are typically marked by assets such as compact size, internet connection, and speech recognition, among other things.[34] In looking particularly at speech recognition, it is crucial to note that this is not the same concept as voice recognition.[35] Voice recognition "identifies who

29. Alexis Fisher, *First Amendment Issues with the Amazon Alexa*, RISTENPART L., [https://perma.cc/K7FJ-LTEM] (last visited Sept. 27, 2022).

30. Amazon Memorandum, *supra* note 25, at 9.

31. Robert Silva, *What Is a Smart Speaker?*, LIFEWIRE (July 11, 2021), [https://perma.cc/DQ68-WZDR].

32. *See id.*

33. *Id.*

34. *Id.*

35. Max Smolaks & Charly Walther, *How Smart Speakers Work*, AI BUS. (Mar. 16, 2020), [https://perma.cc/LH3V-NLMH].

is speaking."[36] Speech recognition, on the other hand, "analyzes voices to determine what was said."[37] Thus, when it comes to smart speakers, these devices are solely focused on the words spoken, not the person speaking.[38]

However, this process is much more detailed than meets the eye.[39] In trying to determine what the words mean, the device "first filters a person's language by digitizing their voice into a machine-readable format."[40] The device does this to analyze the meaning of the words in a way that its artificial intelligence system can understand.[41] At this point, the device then "uses this data to determine what the user needs."[42] The ability of the device to accomplish this daunting task is due to the large amounts of linguistic data that are used to develop these devices.[43] Due to the continuous improvements to these systems, smart speakers are now able to do a plethora of things, from operating household items like lights, to playing music through the device itself, to booking reservations online.[44] Additionally, due to this dexterity, the demand for smart speakers is continuing to grow across the globe.[45] Therefore, smart speakers are likely not going anywhere any time soon.[46]

Concerning terminology, it is also important to analyze the difference between smart speakers and virtual assistants. A smart speaker is "the physical product[]" itself.[47] However, the virtual assistant is essentially the artificial intelligence system that users talk to when using their speakers.[48] Using Amazon's smart speaker as an example, the smart speaker is called an Echo

36. *Id.*
37. *Id.*
38. *See id.*
39. *See id.*
40. Smolaks & Walther, *supra* note 35.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Mike Paxton, *Alexa, Tell Me About the Smart Speaker Market in 2021*, S&P GLOB.: MKT. INTEL. (Nov. 4, 2021), [https://perma.cc/ZC99-ZA7V].
46. *See id.*
47. Daniel Furn, *What Is the Difference Between Echo and Alexa?*, RADIOTIMES.COM (Aug. 20, 2020, 9:32 AM), [https://perma.cc/RCF2-VUCL].
48. *Id.*

whereas the virtual assistant that operates within the Echo is named Alexa.[49] This differentiation is mirrored across other platforms as well.[50] For Google's smart speaker, it is called a Nest, and its virtual assistant is named Google.[51] Lastly, Apple's smart speaker is called a HomePod, and its virtual assistant is named Siri.[52] Oftentimes, these terms are used interchangeably, but in this analysis, these technical distinctions will make a difference.

B. Search Engines: From Keystrokes to Convictions

Next, another closely related, yet independently informative topic is search engines. A search engine is "a service that allows Internet users to search for content via the World Wide Web."[53] The way that a search engine operates is divided into two categories: queries and SERPs.[54] A query occurs when "[a] user enters keywords or key phrases into a search engine."[55] Using Google as an example, if someone typed something into the search box and pressed "enter," a query has been made.[56] A SERP, on the other hand, stands for a "search engine results page."[57] Thus, a SERP is "[t]he list of content returned via a search engine to a user" after the query is made.[58] This may come in the form of "websites, images, videos or other online data that semantically match[ed] with the search query."[59]

Search engines are capable of this feat because they have programs that "trawl[] the web for content" that is then added to the search engine's index.[60] Without this "constant and recursive

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49. *Id.*

50. *See* Parker Hall & Jeffrey van Camp, *The Best Smart Speakers with Alexa, Google Assistant, and Siri*, WIRED (Apr. 24, 2022, 8:00 AM), [https://perma.cc/93CB-ZLB9].

51. *Id.*

52. *Id.*

53. Justin Stoltzfus, *Search Engine*, TECHOPEDIA (Nov. 26, 2020), [https://perma.cc/4VAG-TTXL].

54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.*

58. Stoltzfus, *supra* note 53.

59. *Id.*

60. *Id.*

process . . . known as indexing," this information would not be available on a SERP.[61] In response to queries, the search engine will then produce "relevant results . . . based on the search engine's algorithm."[62] The algorithm also ranks these results based on their relevance to the user's query.[63] Therefore, the more relevant a result, the higher it is placed on the SERP.[64] This is significant since "most users only browse the top results."[65] Search engines internally operate in a similar manner to smart speakers, but there are also key differences that will be discussed later in this analysis.[66]

C. The Tech-nical History of the Fourth Amendment

In 1967, long before even the idea of smart speakers came into being, there was another popular device that was vulnerable to surveillance: telephone booths.[67] At this time, it was standard practice for individuals to use these booths to make all types of calls—including those containing personal information.[68] Thus, the issue that arose in *Katz v. United States* stemmed from the level of privacy an individual could rely on in making a call on a public phone.[69] In this case, the government listened to and recorded the defendant's conversations while he was using a public telephone booth.[70] This case reached the United States Supreme Court, where Justice Stewart eventually held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth."[71] Therefore, the Court held that the defendant's Fourth Amendment

61. *Id.*
62. *Id.*
63. Stoltzfus, *supra* note 53.
64. *Id.*
65. *Id.*
66. *See* Damian Radcliffe, *From Search to Smart Speakers: Why Voice Is Too Big for Media Companies to Ignore*, WHAT'S NEW IN PUBL'G, [https://perma.cc/F8ND-YXEL] (last visited Sept. 27, 2022).
67. *See* Katz v. United States, 389 U.S. 347, 348 (1967).
68. *See id.*
69. *See id.*
70. *Id.*
71. *Id.* at 348, 353.

protections were violated, and more importantly, that unlimited surveillance of individuals is not supported under the Fourth Amendment.[72] Additionally, Justice Harlan's concurrence in this case introduced the "reasonable expectation of privacy" standard, which is the test still in use today for defining the scope of Fourth Amendment privacy protections.[73]

However, in analyzing whether Fourth Amendment protections have been violated in any given scenario or case, one must first establish whether the act constitutes a "search" under the Fourth Amendment.[74] Due to the ever-changing nature of technology, the Fourth Amendment analysis must also continually change and expand to adjust for these various technological advancements.[75] In other words, scenarios the Framers would have never imagined are now possible, and consequently, the original implications of the Fourth Amendment must constantly be reconsidered.[76]

In *Riley v. California*, the government performed a warrantless search of data stored on the defendant's cell phone.[77] Following this, the Supreme Court granted certiorari and held that "[t]he fact that technology now allows an individual to carry ['the privacies of life'] in [their] hand does not make the information any less worthy of the protection for which the Founders fought."[78] Thus, the Court held that although technology has made information more accessible, this information must still be accessed within the restrictions of the Fourth Amendment.[79]

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72. *See Katz*, 389 U.S. at 353.

73. *Id.* at 361 (Harlan, J., concurring); *see also* Smith v. Maryland, 442 U.S. 735, 735 (1979); United States v. Forrester, 512 F.3d 500, 509 (9th Cir. 2008).

74. *See Katz*, 389 U.S. at 353.

75. Jim Harper, *Administering the Fourth Amendment in the Digital Age*, NAT'L CONST. CTR., [https://perma.cc/RSG5-4QNU] (last visited Sept. 27, 2022).

76. *See id.*

77. Riley v. California, 573 U.S. 373, 373 (2014); *see also* Carpenter v. United States, 138 S. Ct. 2206, 2208 (2018).

78. *Riley*, 573 U.S. at 403 (citing Boyd v. United States, 116 U.S. 616, 625 (1886)).

79. *See id.*; *see also* Kyllo v. United States, 533 U.S. 27, 27 (2001) (stating that "[w]here . . . the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion," that use is a search and is presumptively unreasonable).

D. The First Amendment: Maybe the Bark is Worse than the Byte

The First Amendment guarantees five important freedoms: religion, speech, press, assembly, and petition.[80] While these guarantees are all crucial in protecting the rights of individuals, the one in focus in this analysis is that of speech. In discussing this freedom, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[81] In analyzing the word "Congress," it is important to note that this term encompasses all government entities, including federal and state entities.[82] The meaning of the rest of the words contained in this section of the First Amendment appear seemingly clear—except speech. Defining speech may, at first glance, seem relatively straightforward. But if one looks at the Supreme Court's First Amendment jurisprudence, it quickly becomes apparent that this definition extends past what may first come to mind when one thinks of speech.[83] There are several key points that could be taken from the Supreme Court's First Amendment cases, but the focus here is straightforward: speech takes many forms.[84] Therefore, one person talking to another individual is not the only type of speech that the First Amendment protects.[85] Instead, when referring to speech, it essentially covers any "message . . . [that is] capable of being understood."[86]

Therefore, the First Amendment protects most language[87] except for five categories of speech that the Supreme Court of the United States has deemed unprotected: (1) defamation; (2) true

80. U.S. CONST. amend. I.

81. *Id.*

82. Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT'L CONST. CTR., [https://perma.cc/CTP8-6GKA] (last visited Sept. 28, 2022).

83. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 367 (1968); Texas v. Johnson, 491 U.S. 397, 397 (1989); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969).

84. *See, e.g.*, *O'Brien*, 391 U.S. at 367; *Johnson*, 491 U.S. at 397; *Tinker*, 393 U.S. at 503.

85. *See, e.g.*, *O'Brien*, 391 U.S. at 367; *Johnson*, 491 U.S. at 397; *Tinker*, 393 U.S. at 503.

86. James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 75 (2008).

87. *See* Stone & Volokh, *supra* note 82.

threats; (3) fighting words; (4) obscenity; and (5) child pornography.[88] Each of these categories is unprotected for unique reasons.[89] But the important takeaway here is that if speech does not fall into one of these five categories, it is protected. However, it is crucial to note that even when speech is protected, the government may still regulate it.[90]

Another important concept relevant to the First Amendment is the chilling effect.[91] The chilling effect refers to the discouragement of protected speech at the hands of "government laws or actions that appear to target expression."[92] In other words, the chilling effect occurs when the government puts things into place that hinder people's protected speech.[93] The need to prevent the chilling effect has been seen across topics, and as technology continues to develop, it is increasingly being seen across devices as well.[94] Thus, much like the rest of the law in reference to technology, it is likely that the scope of the chilling effect will continue to grow and change over time as technology does the same.[95]

E. Amazon's Argument: Snitches Get Software Updates

In looking back at the facts of *State v. Bates*, the police issued a search warrant to investigate the recordings on Bates's Amazon Echo.[96] In general, search warrants implicate the Fourth Amendment.[97] But Amazon did not argue that there was simply a Fourth Amendment issue with the search.[98] Instead, it argued that the First Amendment was implicated, and therefore, the

88. *Id.*
89. *Id.*
90. *Id.*
91. Frank Askin, *Chilling Effect*, THE FIRST AMEND. ENCYC., [https://perma.cc/JUU9-5MYN] (last visited Sept. 28, 2022).
92. *Id.*
93. *See id.*
94. *See* Karen Gullo, *Surveillance Chills Speech—As New Studies Show—And Free Association Suffers*, ELEC. FRONTIER FOUND. (May 19, 2016), [https://perma.cc/7D48-XQ4P].
95. *See id.*
96. Amazon Memorandum, *supra* note 25, at 1, 6.
97. *Search Warrant*, CORNELL L. SCH. LEGAL INFO. INST. (May 2022), [https://perma.cc/T6ZY-3SVF].
98. *See* Amazon Memorandum, *supra* note 25, at 9.

government needed to make a heightened showing before it could obtain the recordings.[99] Amazon was not stating that since the information on the Echo was protected, the police could not obtain it.[100] Instead, it was arguing that, given the First Amendment concerns implicated by the device, the State needed to meet a "heightened burden for compelled production of such materials."[101] Amazon relied on two cases from two separate courts where this argument was successful to support the claim that this heightened standard was necessary.[102] Due to this, Amazon argued that, since the First Amendment was implicated, the officers would have to show more than just probable cause—which is ordinarily necessary for a warrant under the Fourth Amendment—in order to obtain the recordings.[103]

According to Amazon, to meet this "heightened burden," the State would need to show: "(1) a compelling need for the information sought, including that it is not available from other sources; and (2) a sufficient nexus between the information and the subject of the criminal investigation."[104] Amazon then went on to argue that "such a heightened standard applies when the requested audio recordings (and transcripts) of speech and sounds in a subscriber's home implicate privacy and First Amendment concerns."[105]

All in all, Amazon argued three very different things.[106] First, Amazon argued that queries to Alexa (in this case, the recordings on Bates's Echo) were protected by the First Amendment.[107] Next, they argued that SERPs created by Alexa (in this case, Amazon's or Alexa's responses to queries from Bates's Echo) were also protected by the First Amendment.[108] Lastly, Amazon argued that due to these protections, the

99. *Id.* at 1.

100. *See id.* at 11.

101. *Id.* at 1.

102. *See In re* Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461 et seq., 706 F. Supp. 2d 11, 11 (D.D.C. 2009); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1044 (Colo. 2002) (en banc).

103. *See* Amazon Memorandum*, supra* note 25, at 10.

104. *Id.* at 2.

105. *Id.* at 3.

106. *See id.* at 10-12.

107. *Id.* at 10.

108. Amazon Memorandum*, supra* note 25, at 11.

government needed to meet a heightened standard and thus, "the State [needed to] [m]ake a [t]hreshold [s]howing of [*c*]*ompelling* [*n*]*eed* for the [r]equested [i]nformation and [*s*]*ufficient* [*n*]*exus* to the [i]nvestigation."[109]

III. ANALYSIS: GOOGLE'S RIGHT TO REMAIN SILENT

Given that the Court did not get to consider the questions raised by *State v. Bates*, one major inquiry remains: what would happen if law enforcement requested the records of a smart speaker, and neither the owner of the smart speaker nor its manufacturer wanted to release them?[110] There are three conclusions that can plausibly be reached in the context of the First Amendment and Amazon's argument: (1) this information *is not* protected under the First Amendment, and therefore no heightened standard should apply for officers obtaining these records; (2) this information *is* protected under the First Amendment, but a heightened standard *should not* apply; or (3) this information *is* protected under the First Amendment, and a heightened standard *should* apply.[111] As previously stated, courts have not yet reached a conclusion on this issue but will inevitably be asked to do so.[112] Consequently, one must focus on past court rulings to determine how current courts will rule when the situation in *Bates* comes up again. In looking for these answers, search engines are a comparable place to start.

In inspecting the similarities and differences between smart speakers and search engines, this analysis will first revisit the concepts of queries and SERPs in reference to search engines, and how courts have handled these topics differently. Courts tend to consider SERPs protected speech under the First Amendment

109. *Id.* at 12.

110. This analysis does not undertake the task of examining what would happen if the owner of a smart speaker did not want to release the information, but the manufacturer did. This situation would invoke the third-party doctrine which is not in question in this analysis. The third-party doctrine states that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44 (1979).

111. Amazon Memorandum, *supra* note 25, at 2-3, 9.

112. *See* Sui, *supra* note 28.

because the Supreme Court has held that "the creation and dissemination of information are speech within the meaning of the First Amendment."[113] However, since queries are seeking information instead of creating or disseminating it, courts are split regarding this second prong.[114] Some courts have held that these communications are protected speech because, in their view, they contain expressive information capable of being understood.[115] Other courts have been more hesitant to adopt this stance—instead focusing on whether a reasonable expectation of privacy exists in the material submitted to a search engine.[116] However, it is essential to note that these issues in reference to search engines have not yet reached the Supreme Court despite these disagreements.[117] Therefore, there is even more uncertainty concerning how this analysis would apply to smart speakers.

Smart speakers are analogous to search engines, although the comparison is not perfect.[118] Regarding search engines, the process is relatively straightforward.[119] A user types what they want to search into a search box, and then the search engine produces various results.[120] Smart speakers on the other hand, while the same at their core, have a few additional layers to this process.[121] Both devices have the same initial goal: producing the response that the user has requested.[122] They both do this by indexing billions of web pages and producing relevant information.[123]

Concerning the differences between these devices, however, smart speakers are engaged verbally.[124] Due to this vocal nature,

113. Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014); Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

114. Fisher, *supra* note 29; *see also* Gonzales v. Google, Inc., 234 F.R.D. 674, 678 (N.D. Cal. 2006).

115. *See, e.g.*, Amazon.com, LLC v. Lay, 758 F. Supp. 2d 1154, 1169 (W.D. Wash. 2010).

116. *See, e.g.*, United States v. Allen, 53 M.J. 402, 409 (C.A.A.F. 2000).

117. *Zhang*, 10 F. Supp. 3d at 436.

118. *See* Radcliffe, *supra* note 66.

119. *See* Sam Marsden, *How Do Search Engines Work?*, DEEPCRAWL, [https://perma.cc/5QWQ-KW6Z] (last visited Sept. 28, 2022).

120. *Id.*

121. *See* Radcliffe, *supra* note 66.

122. *Id.*

123. Marsden, *supra* note 119.

124. Radcliffe, *supra* note 66.

no typing is involved in using a smart speaker—this, in turn, potentially takes away the intentionality typically associated with using a search engine.[125] For example, smart speakers are engaged by using a "wake word."[126] Each device's wake word is unique (Apple uses "Siri," Google uses "Google," and Amazon uses "Alexa").[127] When this word (or a similar sounding word) is uttered, the device begins to listen and record—regardless of whether the person speaking is aware of this recording.[128]

Additionally, the vocal nature of smart speakers has enabled companies to design virtual assistants to engage users with "a natural, conversational voice."[129] When it comes to search engines, keywords are typically used to yield the best results.[130] In contrast, when using a smart speaker, a user is far more likely to phrase their query as though they are "talking to a friend [or] another person."[131] Also, while search engines produce pages of information, smart speakers tend to reply with a singular, overarching response.[132] Thus, the person communicating with the device reveals a lot about themselves in asking a question while simultaneously losing a portion of the choices provided through a run-of-the-mill search engine.[133]

Consequently, one is not simply able to apply the principles of the First Amendment search engine analysis directly to that of smart speakers. This is, of course, not to say that these analyses are not useful in making these determinations. Instead, the analysis of search engines should be used to inform, but not bind, the analysis of smart speakers. First, we must recognize that smart speakers, like search engines, record two distinct components of communication: (1) the verbal communication from the user, and (2) the computer-generated responses. This distinction demands that each component be reviewed separately

125. *See* Allen St. John, *Yes, Your Smart Speaker Is Listening When It Shouldn't*, CONSUMER REPS. (July 9, 2020), [https://perma.cc/KDZ7-VWPY].

126. *Id.*

127. *Id.*

128. *Id.*

129. Radcliffe, *supra* note 66.

130. *See id.*

131. *Id.*

132. *Id.*

133. *See id.*

to determine whether smart speakers may be analyzed under the same framework as search engines.

A. User's Verbal Communication: An Apple a Day Keeps the Subpoenas Away

Prior to analyzing the first prong, verbal communication from the user, it must first be defined. This prong is referring to the information spoken to a smart speaker—regardless of the person speaking.[134] In other words, the speaker could be anyone that triggers the wake word.[135] As previously stated, smart speakers regularly pick up conversations that were not intended for their consumption.[136] Therefore, in making a working definition for this prong of smart speaker analysis, it is critical to highlight that any communication recorded by a smart speaker will fall under this prong—regardless of intentionality.[137]

Concerning verbal communication from users, courts could very likely become split in the way that they have regarding search engine queries.[138] If this were the case, some courts would find that verbal communications are protected under the First Amendment while others would find that they are not.[139] However, given the Supreme Court's prior treatment of the scope of speech, it is likely that if tested, they would hold that both search engine queries and verbal communications from users to smart speakers are speech, and thus should be protected under the First Amendment.[140]

In assuming the courts would conclude that verbal communication from users is protected by the First Amendment, next, the courts would have to decide whether this speech

134. *See* Levi Alston, *The Ultimate Guide to Smart Speakers*, LIVING SPEAKER, [https://perma.cc/M3U9-7MQU] (last visited Sept. 28, 2022); Chip Edwards, *Voice Assistants in Smartphones vs. Smart Speakers*, CREATE MY VOICE (Feb. 1, 2021), [https://perma.cc/D7VU-DNBU].

135. *See* Alston, *supra* note 134.

136. St. John, s*upra* note 125.

137. *Id.*

138. Fisher, *supra* note 29.

139. *Id.*; *see also* Gonzales v. Google, Inc., 234 F.R.D. 674, 674-75 (N.D. Cal. 2006).

140. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 367 (1968); Texas v. Johnson, 491 U.S. 397, 397 (1989); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 503 (1969).

deserved a heightened standard. If a court were to find that these queries deserved a heightened standard, it would likely be in the name of protecting the expression of users.[141] This ties in directly to the chilling effect because users could become fearful of what they say—even within their own homes—if they thought it would be easy for the government to request everything that their smart speakers hear.[142] On the other hand, if a court were to find that these queries did not deserve a heightened standard, its analysis would likely hinge on the words themselves, and whether the content of the verbal communication from a user is categorically protected.[143] Stated otherwise, unless the information in question fell into one of the categories of unprotected speech, a court would likely find that the language involved in a query deserved a heightened standard.[144]

B. Computer-Generated Responses: Head in the iClouds

In defining the second prong of smart speaker communication, it is much more straightforward.[145] Computer generated responses from smart speakers are quite like SERPs.[146] However, as previously mentioned, the difference comes from the limited supply of information provided by smart speakers.[147] For example, if one were to ask Alexa where the nearest restaurant was, the device would likely reply by stating the name of a singular nearby restaurant.[148] When looking at an actual search engine as previously discussed, however, numerous nearby options would likely come up.[149] Due to this, while this prong is like its search engine counterpart, there still lies a difference that lends itself to a separate definition.[150] Thus, in referring to this stage of smart speaker analysis, computer-generated responses

141. *See* Amazon.com, LLC v. Lay, 758 F. Supp. 2d 1154, 1167 (W.D. Wash. 2010).
142. *See id.* at 1168.
143. *See* United States v. Allen, 53 M.J. 402, 408 (C.A.A.F. 2000).
144. *See id.* at 407.
145. *See* Alston, *supra* note 134.
146. *See id.*
147. Radcliffe, *supra* note 66.
148. *See id.*
149. *Id.*
150. *See* Alston, *supra* note 134.

are defined as anything a smart speaker says—regardless of whether this response correctly answered a question posed by a user.[151] This means that any response—even those that are in response to an incorrect interpretation of a wake word—fall under this prong.[152]

Concerning computer-generated responses, it is possible that courts could treat these responses exactly like SERPs, which would likely result in First Amendment protection.[153] However, given the limited responses of smart speakers, courts could find that these two are not closely related enough to be comparable.[154] An argument for First Amendment protection lies in their similarities, as both search engines and smart speakers produce responses based on the user's statement (typically in the form of a question).[155] Thus, since the Court has previously held that the creation and dissemination of information is speech, and computer-generated responses disseminate information, they would likely fall into this category.[156] However, there is also an argument regarding their differences that could potentially suggest a lack of First Amendment protection.[157] As previously mentioned, each search in a search engine produces several results.[158] When one looks at this in comparison to the single result provided by a smart speaker, there may stem a disagreement about whether this can truly be compared to a SERP.[159] However, this leads to a more challenging question of what exactly the courts are looking at in making their determination of whether something is protected by the First Amendment, and therefore, whether it deserves a heightened form of scrutiny. If the courts are looking at brevity, or the lack thereof, there may be a problem here. But if not, perhaps this aspect of

151. *See id.*
152. *See* St. John, *supra* note 125.
153. Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 433 (S.D.N.Y. 2014).
154. *See* Radcliffe, *supra* note 66.
155. *See id.*
156. Fisher, *supra* note 29.
157. *See id.*
158. Radcliffe, *supra* note 66.
159. *See id.*

smart speakers is irrelevant. At this time, the courts have not produced a straightforward answer.[160]

Moreover, the courts are also not in agreement about whether a heightened standard should apply if these communications are found to be protected under the First Amendment. If the heightened standard of strict scrutiny is to be applied, the government must have "a compelling . . . interest . . . and that [interest must be] narrowly tailored."[161] Regarding the *Bates* case, the government has a compelling interest, but whether this interest has been narrowly tailored is another question. However, this analysis is only relevant if the Court chooses to implement strict scrutiny rather than a lower form of scrutiny like intermediate scrutiny or rational basis review.[162] Strict scrutiny is typically applied in cases where the viewpoint of a decision is in question.[163] In other words, these cases typically concern fundamental rights.[164] Intermediate scrutiny and rational basis review are lower tiers of scrutiny, and they require less from the government to be met.[165] It is crucial to note that while the Court has deemed free speech a fundamental right, it typically does not apply strict scrutiny in First Amendment cases.[166]

In analyzing this question, *Comcast of Maine/New Hampshire, Inc. v. Mills* provides insight as to lower courts' opinions surrounding this issue.[167] The subject matter in this case is not quite on point, but the analysis of when heightened scrutiny is appropriate is relevant here.[168] This court stated that "'without a plausible allegation that the offensive conduct interferes with

160. Fisher, *supra* note 29.

161. David L. Hudson, Jr., *Strict Scrutiny*, THE FIRST AMEND. ENCYC. (Aug. 16, 2021), [https://perma.cc/7RVH-8X6G].

162. *Id.*

163. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 53 NAT'L AFFS. 72, 72 (2019); *see also* Kevin Francis O'Neill & David L. Hudson, Jr., *Viewpoint Discrimination*, THE FIRST AMEND. ENCYC. (Sept. 2017), [https://perma.cc/X4GP-G6TC] (defining viewpoint discrimination as that which refers to the singling out of certain opinions or viewpoints. This occurs when laws or decisions of the government are applied to certain groups, but not others.).

164. *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., [https://perma.cc/E3AA-UJUX] (last visited Sept. 28, 2022).

165. Alicea & Ohlendorf, *supra* note 163, at 72-73.

166. *See id.*

167. *See* Comcast of Me./N.H., Inc. v. Mills, 988 F.3d 607, 607 (1st Cir. 2021).

168. *See id.*

First Amendment rights,' a reviewing court 'has neither a reason nor the ability to subject the conduct of the governmental actor to heightened scrutiny.'"[169] However, the court goes on to say that if the actions of the government "pose a particular danger of abuse by the State," then they "are always subject to at least some degree of heightened First Amendment scrutiny."[170] The court concludes by saying that this heightened scrutiny should take shape in the form of intermediate scrutiny.[171] This analysis is in line with other First Amendment cases, and it is instructive for future courts because this form of scrutiny requires that the government act to "further an important government interest" and "must do so by means that are substantially related to that interest."[172]

C. *State v. Bates*: The Reboot

All in all, the answer to the question of what exactly is protected under the First Amendment concerning smart speakers' computer-generated responses has likely already been answered via the courts' analysis of search engines.[173] Thus, courts would likely deem that these responses are protected under the First Amendment. Yet, due to the split regarding courts' opinions of search engine queries, the answer is a bit more complex concerning verbal communications from users to smart speakers.[174] Courts could decide that these communications are protected or not protected under the First Amendment. Therefore, it is relatively up in the air what courts would decide regarding verbal communications from users to smart speakers.

However, while these are likely the solutions that courts will provide, the next question is whether they are the correct answers to these questions. While one may assume this critique stems

169. *Id.* at 613 (quoting Cablevision Sys. Corp. v. FCC, 570 F.3d 83, 96 (2d Cir. 2009)).

170. *Id.* at 614 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 623 (1994)).

171. *Id.* (citing *Turner Broad. Sys., Inc.*, 512 U.S. at 623).

172. *Intermediate Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., [https://perma.cc/W5LM-FKLV] (last visited Sept. 22, 2022).

173. *See* Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 433 (S.D.N.Y. 2014).

174. Fisher, *supra* note 29; *see also* Gonzales v. Google, Inc., 234 F.R.D. 674, 674 (N.D. Cal. 2006).

from the differences between smart speakers and search engines that were previously presented in this analysis, it is not quite that simple. The bigger point of contention is perhaps that the original analysis surrounding search engines provided under these cases was not correct to begin with, and thus this analysis should not be extended to smart speakers but instead cut off.

As previously discussed, courts have formerly reached a decent consensus that SERPs are protected under the First Amendment regarding search engines.[175] If this analysis were extended to smart speakers, all computed-generated responses provided by smart speakers would likely be protected under the First Amendment as well. On the other hand, this would likely mean that any queries verbally submitted by users to smart speakers (much like most courts' opinions concerning search engine queries) could go either way regarding whether they are protected under the First Amendment or not.[176]

While this is the current method of thinking, it is also built on questionable comparisons. In *Zhang v. Baidu.com, Inc.*, the court stated that the Supreme Court has not yet addressed the issue of whether search engine results are protected under the First Amendment.[177] The *Zhang* court argued, however, that given the Supreme Court's past decisions, it is relatively likely that the Supreme Court would find that search engine results are protected under the First Amendment.[178] The major argument here lies in the reasoning that search engine results are akin to search engines' "editorial control and judgment."[179]

The *Zhang* court based this conclusion on a comparison between a newspaper's First Amendment right to decide what it publishes and a search engine's First Amendment right to decide what search results are presented in response to any given query.[180] However, this analysis only works if these two things are comparable. If they are not, then the *Zhang* court's analysis is effectively irrelevant. In looking at this comparison, it may

175. *See, e.g.*, *Zhang*, 10 F. Supp. 3d at 433.
176. Fisher, *supra* note 29; *see also Gonzales*, 234 F.R.D. at 674.
177. *Zhang*, 10 F. Supp. 3d at 436.
178. *Id.*
179. *Id.* at 437 (quoting Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974)).
180. *Id.* at 438.

initially seem like the two are relatively similar given the information that they each provide to users. However, in looking deeper at this analysis, this could not be further from the truth. Instead of likening search engines to the modern-day newspaper, as the court has done in *Zhang*, a much more accurate modern-day comparison to newspapers is that of online news sources.[181]

The purpose of search engines is to "collect[] and organize[] content according to a user's query."[182] The purpose of a newspaper, on the other hand, "is to convey, as efficiently as possible, current information, or 'news', to a particular audience."[183] In other words, while both focus on organizing information, newspapers are far more pointed, and additionally, they do and should have a bigger say over the information presented. Search engines are much more general, and therefore, have a duty to present relevant information, not just the information that they want to produce.

As previously stated, the courts are split concerning queries.[184] Consequently, if this analysis were applied to smart speakers, the outcome would likely be the same. However, this also begs the question as to whether a split is truly necessary. Without the complexities of previous courts' interpretations of how search engine queries should be handled regarding the First Amendment, the answer may be much easier to reach. In looking back at the First Amendment as a whole and what it is meant to protect at its core, it is meant to protect a person's speech.[185] Thus, if the words that a person types are considered speech because they convey a message that is capable of being understood, then the question of whether queries are protected under the First Amendment should have already been answered

181. *Id.*

182. James Kimmons, *What Is a Search Engine?*, THE BALANCE SMALL BUS. (Sept. 29, 2020), [https://perma.cc/2PWZ-GPUH].

183. *What Are Newspapers and Magazines?*, ILL. UNIV. LIBR. (Jan. 26, 2021, 9:33 AM), [https://perma.cc/WKM9-XRJ6].

184. Fisher, *supra* note 29; *see also* Gonzales v. Google, Inc., 234 F.R.D. 674, 674 (N.D. Cal. 2006).

185. *See* U.S. CONST. amend. I.

as a resounding yes from all courts—regardless of whether it involves a search engine or a smart speaker.[186]

In addition to this, there is also the question of whether First Amendment protections should lead to a heightened standard concerning the Fourth Amendment. In *Amazon.com, LLC v. Lay*, the court referenced a separate case involving Monica Lewinsky's book-purchasing records.[187] The court stated that those requesting the records had to show a "compelling interest and sufficient nexus to sustain" their requests because "the First Amendment was implicated."[188] Therefore, if this analysis is adopted by the Supreme Court and the First Amendment is implicated, a heightened standard is likely necessary as has been seen in various First Amendment cases.[189] Regarding search engines, the First Amendment is implicated "where the government seeks the disclosure of reading, listening, and viewing habits."[190] Thus, if this analysis is to be applied from search engines to smart speakers, the actions of users are very likely implicated by the First Amendment, and therefore, the government should have to meet a heightened standard before accessing users' queries.[191] However, regarding SERPs, this information should only implicate the First Amendment if they involve the "creation and dissemination of information."[192] While these pages definitely disseminate information, they do not really create it—instead, they gather it. Thus, while it is unclear if both creation and dissemination of information are required for a SERP to implicate the First Amendment, if they are, this is likely not met.

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186. *See* Ronald Kahn, *Internet*, THE FIRST AMEND. ENCYC. (Mar. 2022), [https://perma.cc/TP98-9GX4].

187. Amazon.com, LLC v. Lay, 758 F. Supp. 2d 1154, 1168 (W.D. Wash. 2010) (citing *In re* Grand Jury Subpoena to Kramerbooks & Afterwords, Inc., 26 Media L. Rep. (BL) 1599, 1600-01 (D.D.C. 1998)).

188. *Id.*

189. *See id.*; *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Media L. Rep. (BL) at 1599-1601; Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1058-59 (Colo. 2002).

190. *Lay*, 758 F. Supp. 2d at 1168.

191. *See id.*

192. Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) (quoting Sorrell v. IMS Health, Inc., 564 U.S. 552, 570 (2011)).

IV. CONCLUSION: THESE ARE NOT THE DROIDS YOU ARE LOOKING FOR

Most people do not take their smart speaker into consideration when they seek to be alone in their home for a discussion. Given their small size and inconspicuous nature (prior to their speech), it can be easy to forget about their existence. Today, it is not the job of this analysis to pass judgment for or against James Bates. However, one thing is certain: if Bates did say things that evening that he did not want the police to hear, he probably was not saying them with his smart speaker in mind. In fact, this analysis cannot help but wonder how many people would feel comfortable talking about everyday things—much less murder—if they believed that the government could demand any accidentally overheard conversations at any time.

Therefore, while courts may conclude that following the ideals stemming from search engine cases should also apply to smart speakers, this Comment suggests that this is not the proper way to go about this new, emerging problem. Technology as it is known today will never be how technology is known tomorrow. Due to this, it is important that the courts of this Nation are not only taking caution in their current holdings, but also taking every opportunity to revisit past cases that may not be appropriate today—or perhaps never were appropriate. Therefore, this Comment suggests that queries spoken to smart speakers or typed into a search engine should be evaluated under a heightened standard. Additionally, SERPs produced by computer-generated devices of any kind should not be analyzed under a heightened standard. With great power comes great responsibility, and if these search engines want to oversee the results presented to practically every person in the world when they ask a question on the internet, they should have to fully bear this burden—regardless of the type of device used.

However, this brings up a separate issue of if this analysis is practical. This inquiry stems from the potential situations that could occur if a heightened standard were applied to one side of these communications, but not the other. For example, if the government cannot meet this heightened standard under this analysis, then the queries in question will not be available to it.

However, the SERPs would still be available if the officers had probable cause. If this is the case, officers may find themselves in the position of assuming (perhaps correctly or incorrectly) what verbal communications were made based on the computer-generated responses they receive that are not protected under the First Amendment. This begs the question of whether protecting queries alone is truly enough. However, the opposite may also be offered that without the queries, the SERPs cannot truly be useful.

Yet, perhaps the solution is simpler than it appears: if the government is unable to meet a heightened standard, but it still requests access to SERPs, those SERPs should not be given as much weight as if they were accompanied by queries. It would be easy to say that both SERPs and queries should either be protected or unprotected, and they should work in tandem. But this argument undermines all the crucial aspects of these communications that separate them. SERPs should not be protected because search engines need to be held accountable for their algorithms. However, queries must be protected, because in the modern era, Google searches contain some of the most personal and invasive types of speech in our world today.[193] All of that to say, this analysis will not be easy. But if courts are to truly uphold the First Amendment, then perhaps it is time that they consider more than just one definition of a "speaker."

193. *See* Fisher, *supra* note 29.

MENTAL HEALTH, LAW SCHOOL, AND BAR ADMISSIONS: ELIMINATING STIGMA AND FOSTERING A HEALTHIER PROFESSION

Natalie C. Fortner*

I. INTRODUCTION

In October 2018, Gabe MacConaill, a junior partner at Sidley Austin, died by suicide in the firm's parking garage.[1] Gabe and his wife, Joanna, had been planning a ten-year anniversary trip for over a year, which was to take place just one month from that October day.[2] Colleagues described Gabe as a "natural born leader" who had the ability to "make you feel like you were the smartest person on earth," which is why he was "the obvious choice" to take over the firm's bankruptcy team when two senior partners, Gabe's mentors, left Sidley Austin in early 2018.[3]

However, this meant Gabe had very little guidance when he took on the massive Mattress Firm bankruptcy case in summer 2018.[4] The firm told him "in no uncertain terms" that they would not hire any lateral support, even when he had other significant responsibilities, including chairing the firm's summer associate

* J.D. Candidate, 2023, University of Arkansas School of Law. Articles Editor, *Arkansas Law Review*, 2022-23. First and foremost, the author thanks Amanda Hurst, Assistant Professor of Law, for her constant encouragement and guidance throughout the writing process. The author also extends gratitude to the entire *Arkansas Law Review* editorial board and staff editors, especially her Executive Editor, Bennett Waddell, J.D. Candidate, 2023, and her Articles Editor, JP Boyter, J.D. Candidate, 2023, for their diligent editing and commitment to excellence. Finally, the author thanks her support system: her mom, Pam, and sister, Katherine, for their patience and enthusiasm for all her endeavors; and her therapist, Kathryn, whose compassion and understanding has steadied her throughout her law school career.

1. Lilah Raptopoulos & James Fontanella-Khan, *The Trillion-dollar Taboo: Why It's Time to Stop Ignoring Mental Health at Work*, FIN. TIMES (July 10, 2019), [https://perma.cc/Z9UN-YA5G].

2. Joanna Litt, *'Big Law Killed My Husband': An Open Letter from a Sidley Partner's Widow*, AM. LAW. (Nov. 12, 2018, 09:00 AM), [https://perma.cc/VH6M-PE4R].

3. Raptopoulos & Fontanella-Khan, *supra* note 1.

4. *Id.*

program.[5] Gabe worried he would be sued for malpractice for lack of sufficient debtor experience but was afraid to show his bosses any weakness.[6] He proceeded to work himself to exhaustion: he no longer laughed, went to the gym, or slept regularly.[7] Joanna asked him to see a therapist, but Gabe could not even find enough time to finish his work.[8] When Gabe began showing cardiac symptoms, Joanna decided to take him to the emergency room, but Gabe responded, "if we go, this is the end of my career."[9] He took his own life a week later.[10]

Kyrie Cameron, wife of Ryan Keith Wallace, another big law attorney who died by suicide, and a lawyer herself, maintains that her husband's perfectionism and fear of failure led to a belief that he had no way out: "We think being a lawyer defines us. That success means being the highest-billing, highest-earning, most productive person there at the expense of taking care of ourselves."[11] Gabe's story is strikingly similar—his wife believed "he would rather die than live with the consequences of people thinking he was a failure."[12]

Though it is easy to blame big law and other high-pressure legal jobs, mental health issues often begin in law school—an environment that often fosters low self-esteem, distrust of peers, and disillusionment about the law.[13] Though students begin their legal education with psychological profiles similar to peers who are not in law school, by graduation, one in ten law students self-harms, one in six has clinical depression, one in three has clinical anxiety, and one in four has developed alcohol dependence.[14] Part II of this Comment explores the current state of mental health in the legal profession and the shortcomings of state bar associations, lawyer assistance programs ("LAPs"), and courts

5. Litt, *supra* note 2.
6. Raptopoulos & Fontanella-Khan, *supra* note 1.
7. *Id.*
8. *Id.*
9. Litt, *supra* note 2.
10. Raptopoulos & Fontanella-Khan, *supra* note 1.
11. *Id.*
12. Litt, *supra* note 2.
13. Kathryne M. Young, *Understanding the Social and Cognitive Processes of Law School That Create Unhealthy Lawyers*, 89 FORDHAM L. REV. 2575, 2582, 2587 (2021).
14. *Id.* at 2575-76.

applying the Americans with Disabilities Act ("ADA") in combating the profession's mental health problem. Part III then examines practical steps the profession can take at the law school level that will aid in eliminating the stigma associated with seeking mental health treatment in the legal profession, thus addressing the problem at its source.

II. THE CURRENT STATE OF MENTAL HEALTH IN THE LEGAL PROFESSION

A. Numbers Don't Lie (But Are Often Misconstrued)

Mental illnesses are health conditions that alter a person's thoughts, feelings, or behavior in a way that causes the individual distress and difficulty functioning.[15] Like any disease, mental illness can be mild or severe.[16] While many people still believe mental illness is rare, in fact, approximately 32.4% of the U.S. population meets criteria for a mental health diagnosis in a given year.[17] Further, "[f]our of the [ten] leading causes of disability—major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder—are mental illnesses."[18] There is no single cause of mental illness; environmental factors such as a head injury or poor nutrition, social factors such as economic hardship or abuse, and genetic factors all combine to influence whether someone develops a mental illness.[19]

As for the legal profession, a wave of research in the late 1980s and early 1990s confirmed the problem that so many already knew existed: lawyers suffer from mental health and substance abuse issues at significantly higher rates than the general population.[20] However, even over thirty years ago, those in the legal profession knew that these issues were "a symptom,

15. Nat'l Inst. of Health, *Information About Mental Illness and the Brain*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (2007), [https://perma.cc/G52Q-M9JB].

16. *Id.*

17. BLAVATNIK INST. OF HEALTH CARE POL'Y, HARVARD MED. SCH., 12-MONTH PREVALENCE OF DSM-IV/WMH-CIDI DISORDERS BY SEX AND COHORT (2007), [https://perma.cc/Y7GM-5FFX].

18. Nat'l Inst. of Health, *supra* note 15.

19. *Id.*

20. Ann D. Foster, *TLAP: Past, Present, and Future*, 67 TEX. BAR J. 522, 522-23 (2004).

and not a principal cause, of the problems."[21] More recently, a 2016 study revealed that 28% of lawyers suffer from depression, 19% suffer from severe anxiety, and 11.4% experienced suicidal thoughts in the previous year.[22] Perhaps surprisingly, "[t]he younger the lawyer, the greater the rate of impairment."[23] The study recommended the profession try to change its "culture of secrecy," which has led to law students who are "terrified of somebody finding out that they have a problem, which will result in their not being admitted to the bar or not being able to get a job. It's really about the stigma that attaches to this issue."[24]

The study proposed five solutions to change the culture of the legal profession and generate discussion surrounding lawyer well-being:

> (1) Identify stakeholders and the role each of them can play in reducing the level of toxicity in the legal profession;
> (2) Eliminate the stigma associated with help-seeking behaviors;
> (3) Emphasize that well-being is an indispensable part of a lawyer's duty of competence;
> (4) Educate lawyers, judges and law students on lawyer well-being issues;
> (5) Take small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.[25]

While at first glance these seem like ideal goals, two of them conflict: how can the profession eliminate mental health stigma while at the same time send the message that lawyers who suffer from mental illness are incompetent? To define competence this way "focuses appraisals of lawyers' abilities not on their performance, but on their health."[26] This definition also conflicts with the legislative history of the ADA, which states that an

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21. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1409 (1988).

22. *New Study on Lawyer Well-Being Reveals Serious Concerns for Legal Profession*, AM. BAR ASS'N (Dec. 2017), [https://perma.cc/JB2V-QN9V].

23. *Id.*

24. *Id.*

25. *Id.*

26. Nicholas D. Lawson, *"To Be a Good Lawyer, One Has to Be a Healthy Lawyer": Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 93 (2021).

employee's "actual performance on the job is, of course, the best measure of ability to do the job."[27] The legal profession would certainly not consider it acceptable to evaluate attorney competency on the basis of a physical disability, even though, admittedly, like mental disabilities, "[m]any . . . physical conditions could render an attorney unfit to practice."[28] Yet, leaders in the legal profession impart the message that mental illness threatens the competency of law students from the day they first set foot on campus for orientation.[29]

Further, does mental illness actually affect a lawyer's competency? With so many law students and lawyers suffering from mental illness,[30] it seems unreasonable to claim that even a significant percentage of them are incompetent, and in fact, research from the mid-1990s resulted in "simply no empirical evidence that [bar] applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney."[31]

While the American Bar Association's Commission on Lawyer Assistance Programs ("CoLAP") and state LAP representatives have "repeatedly suggested that mental health disorders cause a substantial proportion of professional misconduct cases,"[32] information concerning the methodology or scope of the surveys CoLAP has conducted of attorney discipline cases has never been published.[33] Additionally, these surveys often employ ambiguous language, such as "[a]pproximately 40% to 70% of attorney disciplinary proceedings and malpractice actions are *linked to* alcohol abuse or a mental illness."[34] Statements like this confuse correlation with causation; the fact

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27. S. REP. NO. 101-116, at 39 (1989). For further discussion of the ADA, see *infra* Section II.C.

28. Alyssa Dragnich, *Have You Ever…? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 687 (2015).

29. *See* Madeline Holcombe, *Law Students Say They Don't Get Mental Health Treatment for Fear It Will Keep Them from Becoming Lawyers. Some States Are Trying to Change That*, CNN: HEALTH (Feb. 29, 2020, 11:18 PM), [https://perma.cc/FPZ7-G39Y].

30. *See supra* text accompanying notes 22-24.

31. Lawson, *supra* note 26, at 81.

32. *Id.* at 82. For further discussion of LAPs, see *infra* Section II.B.1.

33. Lawson, *supra* note 26, at 82.

34. *Id.*

that an attorney has a mental health diagnosis at the time of a disciplinary proceeding or malpractice action does not imply that mental illness *caused* the misconduct at issue.

To evaluate the effectiveness of the message that mental health and attorney competency are inextricably linked, look no further than the life and career of Gabe MacConaill. He graduated third in his law school class, made partner at a massive, global firm, and won honors for his work as an attorney.[35] Yet, he worried he would be sued for malpractice or fired.[36] Throughout his career, Gabe had surely received the message that mental health issues threaten a lawyer's competency.[37] Judging by his life's tragic ending, this message did nothing to encourage him to seek help, and likely actually contributed to his decision to forgo mental health treatment.[38]

B. The Profession's Response at the Law School Level

This Section explores the legal profession's response to these issues since learning of their existence and evaluates their effectiveness. At the law school level, the profession has primarily employed two methods of intervention for students with mental health issues: (1) lawyer assistance programs ("LAPs")[39] and (2) regulation of admission to practice law through mental health-related questions on state bar character-and-fitness applications and conditional-admission programs.[40]

1. Lawyer Assistance Programs ("LAPs")

LAPs are specialized programs that exist to provide lawyers, judges, and in most states, law students, with mental health and substance abuse treatment.[41] Some even provide services to

35. Litt, *supra* note 2.
36. *Id.*
37. *See id.*
38. *See id.*
39. *Commission on Lawyer Assistance Programs*, AM. BAR ASS'N, [https://perma.cc/8WX6-M4GL] (last visited Oct. 16, 2022).
40. *Mental Health Character & Fitness Questions for Bar Admission*, AM. BAR ASS'N (Aug. 11, 2022), [https://perma.cc/CSM8-8THE].
41. *Commission on Lawyer Assistance Programs*, *supra* note 39.

family members of affected lawyers.[42] Though LAPs across the country differ from one another in size and variety of services provided, LAPs generally offer consultations, assessments, confidential phone lines, mental health education, individual and group therapy, and referrals to treatment centers.[43]

Employee Assistance Programs ("EAPs"), the predecessor of LAPs, have existed since the 1940s, though these programs were directed strictly toward alcoholism.[44] EAPs identified employees whose job performance had deteriorated and referred them to a professional with the experience required to diagnose and treat alcoholism.[45] The companies that sponsored EAPs had written policies "outlining the company's attitude towards alcoholism as a recognizable and treatable disease."[46] These programs proved to be highly successful.[47] Modern EAPs, including LAPs, are much broader in scope but remain effective.[48] This success is partially due to "polic[ies] of strict confidentiality between the employee and the EAP" which are "considered essential . . . if the employees' trust is to be gained and maintained."[49]

The state of Washington developed one of the first LAPs in 1975.[50] It achieved immediate success and soon became a national model, with more than seventy lawyers participating in its first six months of existence.[51] From the program's beginning, the Supreme Court of Washington promulgated strict confidentiality rules, the importance of which "cannot be over-emphasized," as "[i]t is virtually assured that no referrals will occur if there is any possibility that information will be used

42. *See* ARK. JUDGES & LAWS. ASSISTANCE PROGRAM FOUND., 2020 REPORT 5 (2021), [https://perma.cc/MW92-YV8S].

43. *See* IDAHO LAW. ASSISTANCE PROGRAM, REFERENCE MANUAL 5 (2022), [https://perma.cc/Q794-MV58]; ILL. LAWS. ASSISTANCE PROGRAM, REACHING OUT TO ILLINOIS LAW STUDENTS ON THEIR PATH TO WELLNESS 2 (n.d.), [https://perma.cc/2WT5-XPLV].

44. Bloom & Wallinger, *supra* note 21, at 1423.

45. *Id.* at 1424.

46. *Id.*

47. *Id.*

48. *Id.*

49. Bloom & Wallinger, *supra* note 21, at 1424.

50. *Id.*

51. *Id.*

against the referred or referring lawyer at a later date."[52] Notably, unlike some LAPs today, Washington's program has been "completely unconnected to the disciplinary system" since its inception.[53]

Today, all fifty states, as well as Great Britain and Canada, have LAPs.[54] The American Bar Association promotes and collaborates with state LAPs through CoLAP.[55] As LAPs developed and began experiencing the same success as Washington's program, they began extending their services to law students.[56] Though a few programs still have not taken this step, law students now make up 12% of LAP clients nationally,[57] while in Arkansas, law students comprise a whopping 40% of JLAP's client load.[58] With so many law students receiving treatment from LAPs, confidentiality is a primary concern,[59] as many state bar admissions committees ask about mental health and substance abuse treatment on the character-and-fitness questionnaire, which must be submitted before a law school graduate can sit for the bar examination.[60]

LAPs tend to differ in their messaging. While some are lawyer-centered, stating that their foremost mission is "[t]o help

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52. *Id.* at 1425.

53. *Id.* While Washington's program does not accept mandatory referrals from the state disciplinary board, many other state LAPs do. *See, e.g.*, ARK. CODE ANN. RULES OF THE ARKANSAS JUDGES AND LAWYERS ASSISTANCE PROGRAM, R. 7 (2001) ("JLAP may accept referral of lawyers or judges under investigational, provisional, or probational status with the Arkansas Professional Conduct Committee, Arkansas Judicial Discipline and Disability Commission, or any disciplinary agency with disciplinary authority."). When Arkansas JLAP accepts a referral from the professional conduct committee, "reports of non-compliance" may be used against the lawyer in any subsequent proceeding relating to the referral. ARK. CODE ANN. RULES OF THE ARKANSAS JUDGES AND LAWYERS ASSISTANCE PROGRAM, R. 7 (2001).

54. Foster, *supra* note 20, at 523.

55. *Id.*

56. *See* Linda Albert, *Lawyer Assistance Programs: Advocating for a Systems Approach to Health and Wellness for Law Students and Legal Professionals*, BAR EXAM'R, Dec. 2015, at 31, 32.

57. Samantha Wilson, *The Rise of the Lawyer Counseling Movement; Confidentiality and Other Concerns Regarding State Lawyer Assistance Programs*, 27 GEO. J. LEGAL ETHICS 951, 955 (2014).

58. Sarah Cearley, *Lawyer Assistance Programs: Bridging the Gap*, 36 U. ARK. LITTLE ROCK L. REV. 453, 455 (2014).

59. *See infra* note 131 and accompanying text.

60. Holcombe, *supra* note 29.

lawyers, judges, and law students get assistance,"[61] others advertise their primary purpose as "[p]rotect[ing] the interests of clients from harm caused by impaired lawyers," with "assist[ing] lawyers and judges in securing treatment for addictive diseases and mental health issues" coming secondary.[62] North Dakota Supreme Court Rule 49, which established the state's LAP, does not even mention providing lawyers with mental health assistance in its purposes.[63] This difference likely reflects the legal profession's conflicting views on mental health: on the one hand, it is necessary to eliminate the stigma associated with mental health issues in the legal profession in order to encourage those affected to seek support; on the other hand, many in the profession, despite evidence to the contrary, still view lawyers suffering from mental illness as a liability.[64] In order for LAPs to effectively persuade affected lawyers, judges, and law students to seek treatment, it is probably best not to open with the allegation that mentally ill lawyers are actively harming their clients, when in reality, many likely just want help with mild to moderate anxiety and depression.[65] Instead, LAPs should simply aim to create a healthier legal profession by providing low-cost mental health treatment to judges, lawyers, and law students, which will in turn benefit clients and improve the public's overall perception of the legal profession.

2. Regulation of Bar Admissions

State bar associations have required bar applicants to submit character-and-fitness applications since the 1920s and 1930s.[66]

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61. *See* ILL. LAWS. ASSISTANCE PROGRAM, *supra* note 43.

62. *See* IDAHO LAW. ASSISTANCE PROGRAM, *supra* note 43.

63. N.D. CENT. CODE SUP. CT. ADMIN. R. 49 (2014) ("[T]his rule provides for the establishment of a mechanism to protect the public, assist lawyers in the performance of their duties and responsibilities in the representation of clients, and to maintain and improve the integrity of the legal profession.").

64. *See supra* text accompanying notes 27-28.

65. For example, in Arkansas, mental health concerns constitute 84% of JLAP client issues, while substance abuse is the initial concern for only 16% of clients. ARK. JUDGES & LAWS. ASSISTANCE PROGRAM FOUND., *supra* note 42.

66. Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 103 (2001).

The purpose of these questionnaires is to assess if a bar applicant "is capable of performing the duties of a lawyer."[67] In many states, in order to qualify for admission to the practice of law, applicants must demonstrate "mental and emotional stability."[68] Though many jurisdictions do not define "mental and emotional stability" on character-and-fitness applications, it is typically "evaluated through an assessment of mental and emotional health as it affects the competence of a prospective lawyer."[69] This requirement is explicitly "intended to exclude from the practice of law persons having mental or emotional illnesses or conditions that likely would prevent them from carrying out their duties to clients, courts, or the profession."[70] This inquiry is logically different from whether an applicant possesses "good moral character," another requirement of character-and-fitness applications, because "[a]pplicants may be of good moral character, but may be unfit to properly discharge their duties as lawyers by reason of . . . [mental] illness or [emotional] condition."[71] However, some states, including Arkansas, disappointingly still conflate the two.[72]

Currently, forty-five states, as well as Washington, D.C., include at least one question referencing the applicant's mental health status in the character-and-fitness questionnaire.[73] These questions typically fall into one of four categories: (1) diagnosis or existence of a particular mental health condition; (2) treatment, inpatient or outpatient, of the aforementioned condition; (3) use

67. COMM'N ON DISABILITY RIGHTS, AM. BAR ASS'N, MENTAL HEALTH PROVISIONS IN STATE BAR EXAMS 3 (2022), [https://perma.cc/5NLM-ELU2].

68. *See, e.g.*, ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, R. 13 (2004); N.M. STAT. ANN. RULES GOVERNING ADMISSION TO THE BAR, R. 15-103 (2022).

69. TEX. BD. OF L. EXAM'RS, BOARD OF LAW EXAMINERS GUIDELINES FOR DETERMINING CHARACTER AND FITNESS AND OVERSEEING PROBATIONARY LICENSE HOLDERS 1 (n.d.).

70. *Id.* at 1-2.

71. *Id.* at 2.

72. *See, e.g.*, ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010) (listing factors that the Board considers in ascertaining "whether the applicant possesses good moral character and mental and emotional stability," which include "[u]nlawful conduct," "[a]cademic misconduct," "[a]cts involving dishonesty, fraud, deceit or misrepresentation," and "[n]eglect of financial responsibilities"); S.D. CODIFIED LAWS § 16-16-2.3 (1990) (stating that "[e]vidence of mental or emotional instability" is relevant to the determination of whether an applicant possesses good moral character).

73. COMM'N ON DISABILITY RIGHTS, AM. BAR ASS'N, *supra* note 67, at 3.

of the condition as an explanation or defense in legal or administrative proceedings; and (4) whether the applicant has ever been a party to a conservatorship or court-appointed guardianship.[74] Forty states ask about category one, thirty-two states ask about category two, thirty-two states ask about category three, and eighteen states ask about category four.[75]

Practically, these questions exist to elicit "facts and circumstances [that] may be considered as an indication of lack of present fitness."[76] Many jurisdictions contend that diagnosis or treatment alone "does not ordinarily constitute evidence of a lack of present fitness,"[77] and some even go so far as to state that "successful[] complet[ion] [of a LAP] program by the time of graduation . . . shall be considered favorably by the Board when evaluating the applicant's character and fitness."[78] However, these words are meaningless to a law student contemplating entering treatment when "[e]vidence of treatment, advice to seek treatment or any order directing the Applicant to seek mental health treatment" are still "circumstances [that] may be considered as an indication of lack of present fitness,"[79] and an "applicant's failure to complete a treatment program may be considered adversely by the Board."[80] As previously discussed, mental illnesses are complex and often result from multiple environmental and social factors which in many cases have been present in a person's life since childhood.[81] Additionally, most mental illnesses are not curable in the way many bodily diseases are.[82] It seems unreasonable to expect that an applicant be "cured" in the short amount of time from entering treatment during law school to submitting a bar application and to penalize him or her for unexpected life events that may interfere with treatment or for simply wanting to see a different therapist or try a different treatment modality.

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74. *Id.*
75. *Id.*
76. TEX. BD. OF L. EXAM'RS, *supra* note 69, at 2.
77. *Id.*
78. ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010).
79. TEX. BD. OF L. EXAM'RS, *supra* note 69, at 2.
80. ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010).
81. *See supra* text accompanying note 19.
82. Nat'l Inst. of Health, *supra* note 15.

If an applicant is deemed unfit to practice due to mental or emotional instability, what happens next varies by state. In some states, it is simply an outright denial of admission to the practice of law.[83] Other states employ conditional or deferred admission programs.[84] Though these programs appear to be a good compromise for applicants who are determined borderline unfit to practice law due to mental health issues, in reality, these applicants are put into the same category as applicants who were denied admission due to lack of candor in the admissions process, academic dishonesty, financial irresponsibility, or criminal history.[85]

It is worth noting that character-and-fitness questionnaires' inquiries into applicants' mental health are a relatively recent development, as these questions first emerged during the 1980s and 1990s.[86] These questions were originally extremely broad, requiring applicants to reveal if they had *ever* been treated for *any* "mental, emotional or nervous disorder or condition," as well as if they had ever been voluntarily or involuntarily admitted to an institution for treatment of such a condition.[87] Following the enactment of the ADA, bar applicants began challenging these questions in court, to varying levels of success.[88]

C. The ADA and Its Limits

Title II of the ADA applies to "public entities," which include "any department, agency . . . or other instrumentality of a State";[89] thus, state bar associations, as state licensing entities, are covered by Title II.[90] This provision outlaws discrimination against "qualified individual[s] with a disability" by "exclud[ing]

83. *Comprehensive Guide to Bar Admission Requirements Chart 2: Character and Fitness Determinations*, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/HGT4-LLT3] (last visited Oct. 2, 2022).

84. *Id.*

85. *Id.*

86. Nancy Paine Sabol, *Stigmatized by the Bar: An Analysis of Recent Changes to the Mental Health Questions on the Character and Fitness Questionnaire*, 4 MENTAL HEALTH L. & POL'Y J. 1, 7 (2015).

87. *Id.*

88. *Id.* at 8; *see also infra* Section II.C.

89. 42 U.S.C. § 12131(1)(B).

90. Sabol, *supra* note 86, at 9.

from participation in" or "den[ying] the benefits" of a state entity's "services, programs, or activities."[91] Discrimination under the ADA may take the form of (1) "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of . . . disability"; (2) "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability"; or (3) "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability."[92] Put more simply, the ADA prohibits state bar associations from imposing unequal burdens on individuals with disabilities compared to those without them.[93]

A "qualified individual with a disability" falls into one of three categories: (1) those who have a physical or mental impairment that substantially limits one or more major life activities, (2) those who have a record of having such a disability, or (3) those who are regarded as having such a disability.[94] Major life activities include physical activities such as sitting, walking, eating, and caring for oneself, and mental activities such as sleeping, concentrating, thinking, and communicating.[95] Thus, the ADA covers individuals with an extremely broad range of impairments, including those mental health conditions typically considered "minor" that might not ordinarily be regarded as disabilities, such as generalized anxiety and clinical depression.[96] Because the primary purpose of mental health questions on character-and-fitness questionnaires is to "screen out or tend to screen out" applicants with certain mental health conditions, mental health questions conflict with ADA requirements unless state bar associations can prove they are "necessary for the provision of the service, program, or activity being offered."[97]

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91. 42 U.S.C. § 12132.

92. 42 U.S.C. § 12112(b)(1), (3), (6).

93. Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994).

94. 42 U.S.C. § 12102(1)(A)-(C).

95. *See* 42 U.S.C. § 12102(2)(A).

96. Williams v. AT&T Mobility Servs., 186 F. Supp. 3d 816, 825-26 (W.D. Tenn. 2016).

97. *See* 28 C.F.R. § 35.130(b)(8) (2016); Sabol, *supra* note 86, at 11.

Predictably, after Congress enacted the ADA in 1990, a wave of lawsuits from bar applicants who had been subjected to mental health inquiries on character-and-fitness applications ensued.[98] In *Clark v. Virginia. Board of Bar Examiners*, the United States District Court for the Eastern District of Virginia struck down a question that required applicants to reveal whether they had "been treated or counseled for any mental, emotional or nervous disorder" within the past five years,[99] while in *In re Rhode Island Bar*, the Rhode Island Supreme Court concluded that a question that asked whether applicants had ever been diagnosed with, treated, or hospitalized for any "emotional disturbance, nervous or mental disorder" likewise violated the ADA.[100] The Supreme Judicial Court of Maine struck down two similar questions, even when accompanied by the disclaimer: "(THIS QUESTION DOES NOT INTEND TO APPLY TO OCCASIONAL CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS OR DEPRESSION, AND SUCH CONSULTATION SHOULD NOT BE REPORTED)."[101]

In contrast, courts have upheld questions that asked whether the applicant had been diagnosed, treated, or hospitalized for disorders such as schizophrenia or other psychotic disorders, bipolar disorder, antisocial personality disorder, and major depression in the past five to ten years as sufficiently narrow, because in those courts' opinions, these conditions, unlike less severe mental health issues, could potentially affect an applicant's fitness to practice law.[102] Thus, overly broad questions that ask the applicant to reveal a wide range of mental health diagnoses violate the ADA, while courts will generally uphold questions that limit the inquiry to specific diagnoses that admissions committees consider to be higher-risk.

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98. Sabol, *supra* note 86, at 8.

99. 880 F. Supp. 430, 431, 442-43 (E.D. Va. 1995).

100. *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1334, 1337 (R.I. 1996).

101. *In re* Underwood, 1993 WL 649283, at *1 n.1 (Me. Dec. 7, 1993).

102. *See, e.g.*, ACLU of Ind. v. Individual Members of the Ind. State Bd. of L. Exam'rs, No. 1:09-cv-842, 2011 WL 4387470, at *8-9, *13 (S.D. Ind. Sept. 20, 2011); O'Brien v. Va. Bd. of Bar Exam'rs, No. 98-0009, 1998 WL 391019, at *4 (E.D. Va. Jan. 23, 1998); Applicants v. Tex. State Bd. of L. Exam'rs, No. A-93-CA-740, 1994 WL 923404, at *3, *10 (W.D. Tex. Oct. 11, 1994).

While these decisions are undoubtedly progress from the extremely broad mental health inquiries of the 1980s and 1990s, they still sanction admissions policies that violate the ADA, as "limiting, segregating, or classifying" applicants on the basis of a diagnosis alone is textbook ADA discrimination.[103] Additionally, while some initial concern about the symptoms of schizophrenia, which include delusions and hallucinations, and those of bipolar disorder, which include manic or hypomanic episodes, is reasonable, "major depressive disorder" is simply "the clinical term for certain depressive episodes," and "nearly three out of every ten lawyers suffer with depression."[104] It seems that both courts and bar admissions committees need to conduct more research on the symptoms of certain mental illnesses and their prevalence before requiring applicants to reveal sensitive health information just because the name of a particular disorder sounds serious or scary.

While states like Virginia, Rhode Island, and Maine amended their mental health questions in response to these decisions, some states' discriminatory questions and policies required federal intervention even over twenty years after the ADA's enactment.[105] For example, in 2014, Louisiana's deferred-admissions program had such discriminatory effects on mentally ill applicants that the United States Department of Justice ("DOJ"), pursuant to the ADA, stepped in.[106] The DOJ's three-year investigation found that Louisiana's program "subject[ed] bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment" and "implement[ed] burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals'

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103. 42 U.S.C. § 12112(b)(1).

104. Ana P. V. Paladino, Comment, *Mental Health and the Legal Profession: The Florida Board of Bar Examiners Continues to Violate the Americans with Disabilities Act*, 50 STETSON L. REV. 295, 323-24 (2021).

105. *See infra* text accompanying notes 106-14; *see also* Paladino, *supra* note 104, at 310 ("Well after Congress enacted the ADA and ADAAA, the Florida Bar Application mental health questions remained broad.").

106. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Just., to Bernette J. Johnson, C.J., Louisiana Sup. Ct. (Feb. 5, 2014) [hereinafter DOJ Letter], [https://perma.cc/Z8HN-6MXW].

mental health diagnoses or treatment."[107] Specifically, after reporting a mental health diagnosis on the character-and-fitness questionnaire, Louisiana required these applicants to "provide detailed medical information related to their condition, to submit to an Independent Medical Examination . . . or to do both."[108] For one applicant, the admissions committee reviewed her psychiatrist's treatment notes, which "describe[d] each therapy session since she began treatment" and "include[d] details of intimate information . . . such as her upbringing, relationships with members of her family, sexual history, body image, and romantic relationships."[109]

The admissions committee often recommended conditional admission even where applicants' records revealed compliance with treatment and well-controlled symptoms.[110] Louisiana required applicants who were conditionally admitted due to mental health issues to, among other things, "[e]nter into, and comply with, probation agreements with the Office of Disciplinary Counsel ('ODC')," "[a]uthorize their treating health care providers to submit substantive reports to the ODC every three months," and "[g]rant ODC 'full and unfettered access to any and all information contained in files kept by any health care professional regarding [their] diagnosis, treatment, and recovery.'"[111] Applicants were also often assigned a probation monitor who had the ability to contact the applicant's employer and review the applicant's files and accounts.[112] Notably, the ODC did not have any mental health professionals on staff.[113] All in all, Louisiana treated and monitored these applicants as criminals instead of as capable individuals with an immutable condition that *might* at times, if unmanaged, affect their ability to perform their jobs. Though Louisiana changed many aspects of this program to comply with the DOJ's order, conditional-

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. DOJ Letter, *supra* note 106.
112. *Id.*
113. *Id.*

admission programs for mentally ill applicants still exist in many states.[114]

D. Recent Progress

There is currently a national movement spearheaded by law students to remove mental health-related questions from the character-and-fitness questionnaire.[115] In March 2020, the Michigan Supreme Court directed the Board of Law Examiners to (1) remove diagnosis- and treatment-based questions from the character-and-fitness questionnaire and (2) replace them with a conduct-based question: "Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"[116] One of the reasons cited for this change was that "the focus on counseling deterred law students from seeking mental health treatment."[117]

In March 2021, the Kentucky Supreme Court directed the Kentucky Office of Bar Admissions to review the state's bar application after the Kentucky Student Bar Association circulated a petition to remove a treatment-based mental health question from the character-and-fitness questionnaire.[118] Though the Office of Bar Admissions released a statement claiming "treatment, is not in itself a basis on which admission is denied,"[119] it is difficult to ascertain the purpose of the question other than to assess an applicant's mental and emotional stability based on the length and type of treatment received. Additionally, many of these questions require applicants to supply their providers' contact information, leading applicants to reasonably

114. *Comprehensive Guide to Bar Admission Requirements Chart 2: Character and Fitness Determinations*, *supra* note 83.

115. *See* Holcombe, *supra* note 29.

116. *Changes Coming to Mental Health Questions on Bar Exam Application*, STATE BAR OF MICH. (Mar. 18, 2020), [https://perma.cc/2T62-WFKR].

117. *Id.*

118. Monica Harkins, *UPDATE: Supreme Court Says It Will Evaluate Law Students' Exam Concerns*, WTVQ (Mar. 21, 2021), [https://perma.cc/JC4B-67NV].

119. *Id.*

believe their doctor or therapist will be contacted by the bar admissions committee.[120]

III. PRACTICAL STEPS THE PROFESSION CAN TAKE TO ELIMINATE STIGMA AND ENCOURAGE EARLY INTERVENTION

A. Bar Admissions Reform

1. Complete Removal of Mental Health Questions

One possible solution to the problem of mental health stigma in the legal profession is the removal of mental health questions from character-and-fitness applications altogether. It is notable that for most professions, there are no mental health qualifications or inquiries;[121] in fact, as previously discussed, pre-employment mental health-related questionnaires typically violate the ADA because these inquiries are "selection criteria that screen out or tend to screen out . . . individuals with disabilities."[122] Additionally, there is a genuine question of whether these inquiries even work—that is, whether applicants are honestly answering them. If an applicant simply answers "no" to mental health questions, there is typically no way of discerning whether he or she is lying, as "mental health providers are bound by professional ethical rules that require doctor-patient confidentiality."[123] The low rate of affirmative answers to mental health questions compared to the rate of mental illness among law students clearly illustrates that these inquiries incentivize dishonesty.[124] In light of the fact that there is no empirical evidence that law students' mental health histories predict future

120. *Id.*; Holcombe, *supra* note 29; Samantha Braver, *Mental Health Questions on the Bar Application Prevent People From Seeking Help*, TEEN VOGUE (Jan. 5, 2022), [https://perma.cc/8ELL-JNDB].

121. Allison Wielobob et al., *Bar Application Mental Health Inquiries: Unwise and Unlawful*, HUM. RTS., Winter 1997, at 12, 12.

122. 42 U.S.C. § 12112(b)(6).

123. Dragnich, *supra* note 28, at 686.

124. *Id.* at 685.

professional misconduct,[125] this "calls the utility—and fairness—of the whole enterprise into question."[126]

Still, admission to the practice of law is a privilege, not a right, as lawyers have a special fiduciary duty to their clients that often includes handling client funds and submitting crucial court documents on time.[127] Thus, some level of inquiry into applicants' emotional stability is necessary to the extent of identifying applicants who have a record of misconduct related to a mental health condition; however, it should not take the form of questions that require applicants to reveal sensitive health information, especially when the condition at issue is well-managed and has never contributed to wrongful conduct.

2. Conduct-Based Questions

Conduct-based questions present a good compromise between complete removal of mental health questions from character-and-fitness applications and intrusive diagnosis- and treatment-based questions. Specifically, questions from category three[128] that ask whether an applicant has used a mental health condition as an explanation or defense in legal or administrative proceedings eliminate the possibility that an applicant whose mental health condition has never contributed to wrongful conduct will be singled out for a supplemental investigation or conditional admission, but they still elicit responses from high-risk applicants who have a history of questionable behavior related to a mental illness. This approach also eliminates the problem of singling out applicants with diagnoses, such as bipolar disorder, that are more heavily stigmatized for more intrusive inquiries.

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125. *See supra* text accompanying note 31.

126. Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 674 (1997).

127. *See* ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, RR. 12-13 (2022).

128. *See supra* text accompanying note 74.

3. Specialized Conditional Admission for Mental Health Issues

Even if all jurisdictions switch to a conduct-based approach to applicants' mental health issues, some applicants undoubtedly do have severe mental health issues related to past misconduct that may threaten their competency as attorneys. Conditional-admission programs are a good alternative to outright denial of admission for these applicants, but these programs should be better tailored to fulfill the needs of applicants with mental health issues. These programs should be focused on monitoring symptoms and treatment progress, not on discipline. To accomplish this, conditional-admission programs for mentally ill applicants should be separate from conditional-admission programs for applicants with character issues such as unlawful conduct or academic dishonesty and should be overseen by a mental health professional. Instead of being assigned a probation officer, applicants should attend progress monitoring sessions every month or so with a counselor or social worker. Admissions committees should not have unfettered access to records from these meetings or records from any of the applicant's treatment providers, but instead, these professionals should be required to report to the committee only pre-determined conduct of the applicant that would negatively affect the applicant's clients or ability to practice law.

B. LAP Confidentiality Policies

For many of the roughly one-quarter to one-third of law students who suffer from mental health or substance abuse issues,[129] the logical solution to the problem of invasive diagnosis- and treatment-based questions on the character-and-fitness application is to delay mental health treatment until after bar admission.[130] For example, a stressed and isolated law student

129. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 116 (2016).

130. *See id.* at 142; Holcombe, *supra* note 29; Bauer, *supra* note 66, at 151 ("Many law school faculty members, administrators, and counselors have described encounters with law students who decided not to seek help for mental health or substance abuse problems out of fear of what would need to be reported to the bar examiners."). Courts have also

at the University of Kentucky decided, after hearing a judge tell his class the bar admissions committee would inquire about applicants' mental health diagnoses "to determine if they were qualified to become lawyers," that seeking mental health treatment "wasn't worth the risk to his dream."[131] While stress and loneliness are often temporary issues, the implications of deciding to delay treatment for those with conditions that tend to worsen with time, such as alcoholism, are much greater.[132]

According to a 2016 law student survey, 45% of respondents indicated that the potential threat to bar admission would discourage them from seeking mental health treatment, and 63% indicated that the potential threat to bar admission would discourage them from seeking substance abuse treatment.[133] Clearly, those most in need of help are also the most reluctant to seek it.[134] The stigma associated with moderate stress or anxiety, and thus the likelihood that the bar admissions committee would view it negatively, is much less than that associated with severe mental health issues and substance abuse disorders. While mental illnesses vary in severity, most are highly treatable;[135] however, if left untreated, these issues can and often do contribute to problems with clients and colleagues, malpractice suits, disciplinary sanctions, and disbarment.

Thus, by discouraging law students from seeking mental health treatment before entering practice, diagnosis- and treatment-based questions achieve the opposite of their intended purpose—instead of identifying applicants whose ability to practice law might be impaired, these questions cause many of these students, as well as others who are perfectly capable of entering practice, to simply avoid seeking treatment while their

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recognized this obvious consequence of invasive mental health questions. *See In re* Frickey, 515 N.W.2d 741, 741 (Minn. 1994) ("[T]he prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling . . . .").

131. Holcombe, *supra* note 29.

132. Catherine G. McLaughlin, *Delays in Treatment for Mental Disorders and Health Insurance Coverage*, 39 HEALTH SERVS. RSCH. 221, 221 (2004); Brian Cuban, *When Bar Examiners Become Mental Health Experts*, ABOVE THE L. (Jan. 10, 2018, 10:03 AM), [https://perma.cc/W8P6-4U2B].

133. Organ et al., *supra* note 129, at 141.

134. *Id.* at 142.

135. Nat'l Inst. of Health, *supra* note 15.

symptoms worsen.[136] While the obvious solution to this problem is to eliminate these questions from the character-and-fitness questionnaire, LAPs can also play an integral role in encouraging law students to seek treatment by discounting the practices of (1) reporting law student treatment to state bar admissions committees and (2) accepting referrals from state disciplinary boards.

IV. CONCLUSION

While, as discussed, LAPs have their shortcomings, when students and attorneys take the admirable step of entering mental health treatment, these programs really do work. For example, an Arkansas attorney with a bipolar disorder diagnosis and a history of "psychotic breaks, commitment to psychiatric hospitals, deep depression, [and] panic attacks" has found success in the legal profession as a Social Security disability attorney.[137] She is now a mental health advocate and Arkansas JLAP volunteer.[138] She attributes her success to medication, therapy, and accommodation from her employer, who allows her to practice part-time.[139] Perhaps if Gabe MacConaill's employer had been so accommodating, he would still be here today. This is what it takes to create a healthier profession: (1) attorneys who are educated about mental illness and its signs and willing to work with colleagues who are suffering; (2) state bar admissions policies that encourage students to seek treatment early rather than penalize them for it; and (3) for those with severe mental health issues that could truly affect their fitness to practice, specialized conditional-admission programs that provide support and monitoring with the goal of granting full admission after ensuring

136. *See* Bauer, *supra* note 66, at 152 ("An approach that rests on the overriding importance of protecting the public from unfit lawyers must seriously grapple with the question of whether the gains in public protection achieved by identifying some potentially unfit applicants are offset by the costs to lawyer fitness of discouraging preadmission treatment.").

137. Hilary Martin Chaney, *ARJLAP—Through the Open Door: A Bipolar Attorney Talks Mania, Recovery and Heaven on Earth*, ARK. LAW., Winter 2014, at 42, 42.

138. *Id.* at 42, 44.

139. *Id.* at 44.

these applicants are making progress within a treatment regimen that works for them.

IS "TOUCH AND CONCERN" DEAD IN ARKANSAS?: A RECENT CASE AND ITS IMPLICATIONS FOR REAL COVENANTS

Bennett J. Waddell*

INTRODUCTION

[I]t is easy to become concerned about touch and concern, but it is impossible to touch it.[1]

Real covenants occupy a doctrinal abyss within property law.[2] The subject perpetually frustrates first-year law students and legal scholars alike, as they confront concepts that appear esoteric and even anachronistic.[3] Naturally, the criticism has been sharp, with commentators quipping that the field "is an unspeakable quagmire," a "formidable wilderness," and plainly "ridiculous."[4]

Even critics, however, acknowledge the profound significance of this area of the law.[5] Indeed, the central role that real covenants have played in facilitating modern land development cannot be overstated.[6] Covenants provided a legal

* J.D. Candidate, 2023; Executive Editor, *Arkansas Law Review*. The author thanks Professor Stephen J. Clowney for his expertise and invaluable guidance during the writing process. The author also thanks his brother, Samuel T. Waddell, J.D. 2014, for his suggestion of this topic.

1. Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 928 n.23.

2. *See* William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 863 (1977).

3. *See* CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 2 (2d ed. 1947).

4. EDWARD H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 489 (1974); Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEB. L. REV. 653, 658 (1998) [hereinafter *Tribute*].

5. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261-63 (1982) [hereinafter *Ancient Strands*].

6. Ronald H. Rosenberg, *Fixing a Broken Common Law—Has the Property Law of Easements and Covenants Been Reformed by a Restatement?*, 44 FLA. ST. U. L. REV. 143,

device through which nineteenth-century landowners could protect their properties against encroaching industrialization when public regulations failed to do so.[7] Yet, the device also enabled commercial development to flourish.[8] Today, over 74 million Americans live in communities governed by homeowner associations, which impose extensive use and design controls to provide uniformity and protect property values.[9] These, too, are made possible through the use of covenants.[10]

Private land use restrictions form the legal framework of virtually every planned development in existence today, from shopping centers to condominiums, and their vitality will only increase as living arrangements become denser and more complex.[11] Real covenants are an attractive planning tool because they provide landowners with a sense of permanence, which protects expectations and encourages capital investments in property.[12] But these restrictions can impose onerous burdens that ultimately depress land values.[13] In light of this paradigm, courts have traditionally imposed several requirements on the creation of covenants "which are now accepted as almost sacrosanct."[14] Chief among these requirements is the touch-and-concern doctrine, which protects unsuspecting

144 (2016); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 139 (1978) [hereinafter *Judicial Supervision*].

7. *Ancient Strands*, *supra* note 5, at 1262-63; Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1214 (1988) [hereinafter *Design Proposal*].

8. *Design Proposal*, *supra* note 7, at 1214.

9. FOUND. FOR CMTY. ASS'N RSCH., 2020-2021 U.S. NATIONAL AND STATE STATISTICAL REVIEW: U.S. COMMUNITY ASSOCIATIONS, HOUSING UNITS, AND RESIDENTS 1 (2020), [https://perma.cc/V62N-M2LW]; A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 806-08 (1998); Rosenberg, *supra* note 6, at 148-49; *see also Judicial Supervision*, *supra* note 6, at 139.

10. *See* Tarlock, *supra* note 9, at 806-07, 812.

11. RABIN, *supra* note 4, at 490; CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 703 (1977).

12. *Ancient Strands*, *supra* note 5, at 1264; Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1184 (1982) [hereinafter *Unified Concept*]; CHRISTOPHER SERKIN, THE LAW OF PROPERTY 181 (2d ed. 2016).

13. *Ancient Strands*, *supra* note 5, at 1265.

14. Olin L. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 13 (1978).

possessors against incurring the personal promises of generations past by virtue of taking title to land.[15]

However, in *Bernard Court, LLC v. Walmart, Inc.*, a recent case concerning the enforcement of a commercial anticompetition covenant, the Arkansas Court of Appeals proclaimed that the touch-and-concern requirement does not exist under Arkansas law.[16] In *Bernard Court*, Walmart conveyed a parcel of land adjoining one of its supercenters[17] to a commercial developer but imposed a restrictive covenant in the deed prohibiting the property from being "used as a grocery store/supermarket or discount department store or wholesale club, such as or similar to Target, Price Club or K-Mart."[18] Bernard Court later took title to the parcel and, despite repeated attempts for nearly a year, was unable to lease the property to chain retailer Dirt Cheap due to the restriction.[19] Bernard Court subsequently filed a complaint for declaratory judgment seeking to avoid enforcement of the covenant, arguing in part that it was not binding because covenants intended to restrict competition do not touch and concern the land in Arkansas at law or in equity.[20] The circuit court agreed that the covenant did not touch and concern but enforced the restriction as an equitable servitude.[21]

The court of appeals reversed, finding that courts in Arkansas have never required that covenants satisfy this traditional rule to run with the land, as evidenced in caselaw by the absence of the words "touch and concern."[22] "Rather," the court noted, "our supreme court has held that a covenant is

15. *See id.*; *see also* discussion *infra* Part III.

16. 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *6. Although the case is unreported, it is nonetheless precedential. ARK. SUP. CT. R. 5-2(c) ("Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding.").

17. *See* Appeal Record at 127, Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, 2020 WL 7251256 (No. CV-19-536).

18. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 2, 2020 WL 7251256, at *1.

19. *Id.* at 2, 2020 WL 7251256, at *1; Appeal Record, *supra* note 17, at 192.

20. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 2, 12, 2020 WL 7251256, at *1, *6.

21. *Id.* at 12-13, 2020 WL 7251256, at *6-7.

22. *Id.* at 12-13, 2020 WL 7251256, at *6-7.

enforceable in law when the covenant is beneficial or essential to the use of the land conveyed . . . ."[23]

In a robust dissent, Chief Judge Harrison opined that contrary to the majority's conclusion, "Arkansas is currently a touch-and-concern state, though the underdeveloped caselaw admittedly expresses this old common-law concept in a different way."[24] Specifically, the phrase "beneficial or essential to the use of the land" is synonymous with the touch-and-concern requirement and reflects the same legal principle.[25] In this vein, the supreme court requires that a covenant touch and concern the land to be enforced at law or in equity, and accordingly, an anticompetition covenant fails to satisfy this requirement because it confers only a financial benefit to the covenantee.[26]

Which opinion more accurately distills the law in Arkansas? This Comment endeavors to answer that question. The court, unlike other jurisdictions, articulated no alternative doctrine to replace touch and concern's protective function, meaning that the majority's holding has troubling implications for property owners in the state.[27] Indeed, the potential ramifications and uncertainties that *Bernard Court* presents are all the more significant given the Arkansas Supreme Court's denial of certiorari in the case.[28]

Part I of this Comment explores the development of the modern real covenant, tracing its lineage from England to American courtrooms today. Expanding on this history, Part I then discusses the traditional requirements needed to create a covenant, with the touch-and-concern doctrine receiving the most attention. Further, Part I explores both the various sub-doctrines that have developed out of the touch-and-concern rule, including at law and in equity, and their application to the context of

23. *Id.* at 12, 2020 WL 7251256, at *6. The court also stated that the covenant must be "expressly made binding upon the heirs, assigns, or successors of the grantor." *Id*. at 12, 2020 WL 7251256, at *6. This language draws from the intent requirement, which is discussed in Section I.B.2.

24. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 16, 2020 WL 7251256, at *8 (Harrison, C.J., dissenting).

25. *Id.* at 16-17, 2020 WL 7251256, at *8.

26. *Id.* at 17-19, 2020 WL 7251256, at *9.

27. *See infra* notes 291-97 and accompanying text.

28. Denial of Petition for Review, Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, 2020 WL 7251256 (No. CV-19-536).

commercial anticompetition covenants. Part II then applies these principles to an explication of Arkansas caselaw in an effort to resolve the ambiguities created by the decision in *Bernard Court*. Finally, Part III expounds the theoretical underpinnings of the touch-and-concern doctrine, its relevance in modern property law, and the implications of the *Bernard Court* holding.

I. ORIGINS OF THE REAL COVENANT: A BRIEF PRIMER

A. The Covenant Defined

At its core, a real covenant is a contract respecting the use of land.[29] Between the original parties, the promise departs from traditional contract law in no considerable respect.[30] Rather, the novelty of the real covenant lies in its ability to bind successors to the original promise in the absence of contractual privity.[31] That is, the common law has created a mechanism through which the covenantor and covenantee's successors in interest assume the rights and duties of the contract by virtue of assuming title to their predecessors' respective estates in land.[32] As such, real covenants provide a "unique example of the possibility of one being sued as a promisor upon a promise he has not made."[33] This is possible because real covenants create nonpossessory interests that allow the benefit and the burden of the covenant to "run with the land," thus obviating the need for express assignment or delegation since these rights and duties pass by operation of law when successors assume ownership or occupancy of the property affected by the

29. CLARK, *supra* note 3, at 4; SERKIN, *supra* note 12, at 182.

30. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 60.01 (Michael Allan Wolf ed., 2022).

31. *See* RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); SHELDON KURTZ ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 356 (7th ed. 2018).

32. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); KURTZ ET AL., *supra* note 31, at 356.

33. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944); *see also* Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 170 (1970) [hereinafter *Policy Analysis*] ("[A successor covenantor] would be liable for all obligations under the covenant arising during his period of ownership just as if he had entered into them himself.").

original promise.[34] Essentially, as a contract, the promise personally binds the original parties; as a covenant, it binds both the original parties and their successors.[35]

Although this form of private land use planning can be found in early Year Book cases,[36] the Industrial Revolution precipitated the concept of the running covenant as it exists today.[37] Historically, English courts were hostile to encumbrances on the use of land and recognized only profits and easements as valid servitudes.[38] The law specifically viewed negative easements narrowly and enforced only those restrictions that prohibited landowners from blocking their neighbors' access to light, air, water, or structural support.[39] Such limited forms provided woefully inadequate protections to owners against incompatible land uses in a rapidly modernizing world;[40] accordingly, courts were pressured to innovate.[41] The result was a reimagined legal device that could, in theory, offer "nearly unlimited flexibility" in imposing obligations on another's property.[42] For example, one could convey a parcel of land with a deed specifying that the property be used only for residential purposes, thereby preserving the character of a neighborhood.[43]

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34. *Design Proposal*, *supra* note 7, at 1214-15; Stoebuck, *supra* note 2, at 864.

35. Stoebuck, *supra* note 2, at 887.

36. *See, e.g.*, The Prior's Case, YB 42 Edw. 3, fol. 3a-4a, Hil. 14 (1368) (Eng.).

37. *Ancient Strands*, *supra* note 5, at 1262; *Design Proposal*, *supra* note 7, at 1214.

38. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 574 (4th ed. 2017); *Unified Concept*, *supra* note 12, at 1187-88; Keppell v. Bailey (1834) 39 Eng. Rep. 1042, 1049; 2 My. & K. 517, 535 ("But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner.").

39. *Unified Concept*, *supra* note 12, at 1187 n.42; Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 959 (1942) [hereinafter *Equitable Servitudes: Part I*]; SPRANKLING, *supra* note 38, at 570. That negative easements could bind landowners without notice, including through prescription, contributed to courts' ambivalent application of the doctrine. SPRANKLING, *supra* note 38, at 570.

40. *See Ancient Strands*, *supra* note 5, at 1262; *see also Design Proposal*, *supra* note 7, at 1214. Indeed, courts were faced with unprecedented conflicts during this period, including "elaborate arrangements between riparian owners concerning power generated by streams, servitudes subjecting residents to industrial nuisances, and modern 'industrial parks.'" *Unified Concept*, *supra* note 12, at 1183.

41. SERKIN, *supra* note 12, at 181.

42. *Id.*

43. SPRANKLING, *supra* note 38, at 574-75; *Ancient Strands*, *supra* note 5, at 1263-64; SERKIN, *supra* note 12, at 181.

English courts, however, did not eschew their suspicions of land-related restrictions, nor did the device shed its doctrinal roots.[44] In effect, courts repackaged the application of an ancient legal doctrine governed by a number of historic requirements, the effect of which was to produce a body of law "encrusted with the debris of ages."[45] Namely, the requirements of writing, intent, notice, privity, and touch and concern developed through centuries of common law and have instigated much of the confusion surrounding the subject today.[46]

B. The Covenant Arrives in America

The modern concept of the real covenant quickly found itself across the Atlantic as landowners in the United States, beset with similar issues surrounding rapid industrialization, turned to the doctrine in earnest.[47] However, courts were perplexed as to what English law required and thus haphazardly applied the traditional rules that govern the device: the confusion was so great that courts have at times ruled inconsistently even in the same jurisdiction.[48] In fact, the unpredictability persists to such an extent today that one will search in vain to find a property treatise providing a definitive encapsulation of the law of covenants.[49]

Nonetheless, American courts' adoption of the English covenant rules advanced what many deemed to be a public policy preference for the unfettered use of land, as these safeguards were intended to assuage concerns that covenants could be used to impose restrictions so exacting that the effect would be to distort

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44. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

45. RABIN, *supra* note 4, at 489.

46. POWELL, *supra* note 30, § 60.04.

47. *See* RABIN, *supra* note 4, at 490; *Unified Concept*, *supra* note 12, at 1189.

48. Browder, *supra* note 14, at 44-45; POWELL, *supra* note 30, § 60.04; SPRANKLING, *supra* note 38, at 577.

49. *See* CLARK, *supra* note 3, at 2; *Unified Concept*, *supra* note 12, at 1180. As one court lamented: "Probably in no single subject of the law is there found a greater divergence of opinion among the courts of the several States than on the nature, extent, and construction of covenants restricting . . . the use of land." McFarland v. Hanley, 258 S.W.2d 3, 4 (Ky. 1953).

desirable land development and ultimately impair alienability.[50] This Section briefly explores the rules that courts generally—albeit sporadically—require to enforce either the burden or the benefit of a covenant; these elements provide a contextual basis for a discussion of the touch-and-concern doctrine, which is regarded as the most contested rule that courts impose.[51]

1. Writing

At early common law, a promise respecting the use of land created an enforceable covenant only if the parties reduced the promise to writing and the promisor signed under seal.[52] More recently, as states have abolished the seal requirement, a writing that comports with the statute of frauds suffices in jurisdictions that consider a covenant an interest in land.[53] Notably, a few states view covenants solely as a contract right and thus do not require parties to memorialize their agreement.[54] Regardless, the writing requirement rarely poses enforcement issues, as covenants are typically created by deed.[55]

2. Intent

Courts are in near unanimity that a covenant will bind successors in interest only if the original parties intend that the covenant run with the land; otherwise, the promise is of a personal nature and will be treated as a traditional contract.[56] Furthermore, the benefit and burden must be analyzed separately, as the parties

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50. Paula A. Franzese, *"Out of Touch:" The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes*, 21 SETON HALL L. REV. 235, 237 (1991); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

51. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 884 (1988); *see also* Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1409 (1982).

52. *See* CLARK, *supra* note 3, at 94; RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

53. KURTZ ET AL., *supra* note 31, at 357.

54. POWELL, *supra* note 30, § 60.02; *see also* 3 HERBERT THORNDIKE TIFFANY, TIFFANY REAL PROPERTY § 848 (3d ed. 2021).

55. POWELL, *supra* note 30, § 60.02.

56. *Policy Analysis*, *supra* note 33, at 173; Browder, *supra* note 14, at 13; POWELL, *supra* note 30, § 60.01.

may intend for the benefit to run to the covenantee's successors while the burden remains personal to the covenantor, and vice-versa.[57]

While most courts do not require that the parties use specific language, various approaches are used to ascertain intent.[58] Most states will consider extrinsic evidence, including the facts and circumstances surrounding the conveyance.[59] Other states require that evidence of intent be determined from the language of the document itself, which can create obvious enforcement issues where the intent to create a running covenant is implicit.[60]

3. Privity of Estate

Lord Kenyon declared in the English decision of *Webb v. Russell* that, "in order to make [a real covenant] run with the land, there must be a privity of estate between the covenanting parties."[61] Debates as to the meaning and application of this rule have led to divergent privity doctrines among jurisdictions which have produced significant differences in legal outcomes.[62] Generally, courts require horizontal privity between the covenantor and covenantee for the burden to run and vertical privity between successors in interest and the original parties for both the benefit and burden to bind successors.[63] While English law requires the covenanting parties to share a simultaneous legal interest in the same parcel, which is typically satisfied only through a landlord-tenant relationship,[64] most American courts have expanded the rule by recognizing horizontal privity in

57. POWELL, *supra* note 30, § 60.04.

58. *See* Stoebuck, *supra* note 2, at 866; *Unified Concept*, *supra* note 12, at 1230; CLARK, *supra* note 3, at 95.

59. Kirtland L. Mablum, Comment, *Covenants Not to Compete—Do they Pass?*, 4 CAL. W. L. REV. 131, 134 (1968).

60. *Id.* at 134-35; Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 359 (1986) [hereinafter *Integration of Servitudes*].

61. (1789) 100 Eng. Rep. 639, 644; 3 T.R. 393, 402.

62. *Policy Analysis*, *supra* note 33, at 179.

63. POWELL, *supra* note 30, § 60.04; *see also* HERBERT HOVENKAMP ET AL., PRINCIPLES OF PROPERTY LAW 408-09 (7th ed. 2016).

64. TIFFANY, *supra* note 54, § 850. This requirement is also known as mutual, or tenurial, privity. POWELL, *supra* note 30, § 60.04.

grantor-grantee relationships, where the parties form a covenant that becomes effective with the conveyance of the estate from one party to the other.[65]

Vertical privity, on the other hand, requires that a "sufficient nexus" exist between successive owners, which is satisfied when the covenanting parties' successors assume ownership or possession of the same quantum of estate as their predecessors.[66] Notably, however, many courts relax this requirement when a covenantee's successor wishes to enforce the promise against the original covenantor provided that the successor assumes at least part of the covenantee's estate.[67]

4. Touch and Concern

The intangibility of the touch-and-concern doctrine has confounded legal scholars since its inception in *Spencer's Case* over 400 years ago, when an English court pronounced that no real covenant will run if it is "merely collateral to the land, and doth not touch or concern the thing demised in any sort."[68] Although nothing more was offered, courts in the United States later adopted the cryptic requirement, such that it is now an axiom of American common law that a covenant will bind successors only if its performance relates to the land to such a degree that it metaphorically touches and concerns the land.[69] Indeed, courts, at least traditionally, have almost ubiquitously recited the requirement despite enforcing other covenant rules more sparingly, as touch and concern is the only rule that functions as an independent constraint on the substance of the covenant rather than merely the form.[70]

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65. SPRANKLING, *supra* note 38, at 583-84. In practice, this requires that the covenant usually be contained in a deed. KURTZ ET AL., *supra* note 31, at 358.

66. SERKIN, *supra* note 12, at 183.

67. POWELL, *supra* note 30, § 60.04. Professor Powell notes that this position is one of practicality, as the original covenantor was obviously a party to the transaction. *Id.*

68. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b. This doctrine was first applied in the leasehold context but has since expanded to fee estates. CLARK, *supra* note 3, at 96.

69. *Integration of Servitudes*, *supra* note 60, at 361.

70. *See* Stoebuck, *supra* note 2, at 866 ("[O]f all the elements of real covenants [touch and concern] continues to occupy center stage."); SPRANKLING, *supra* note 38, at 579-80.

However, the doctrine has been interpreted so varyingly among the several states that it is impossible to frame an authoritative test to guide courts in determining when a promise actually touches and concerns.[71] This jurisdictional incoherence—a common theme in the law of covenants—is the product of a doctrinal "metamorphosis" resulting from centuries of judicial discretion in applying the rule.[72] At its core, though, the purpose of the touch-and-concern requirement is to provide a supervisory tool for courts to distinguish mere personal obligations, i.e., those that dictate individual behavior, from those that run with the land.[73]

Courts and scholars alike have made several attempts to articulate an operational definition for the doctrine, some of which have gained more traction than others.[74] Centuries after *Spencer's Case*, the King's Bench clarified in *Congleton v. Pattison* that a covenant, in order to touch and concern the land, must "directly affect[] the nature, quality, or value of the thing demised, [or] the mode of occupying it."[75] Rejecting this test as "vague" and "question-begging,"[76] American Professor Harry Bigelow endeavored to provide a "scientific method of approach" by measuring the "legal relations of the parties" as landowners.[77] According to Bigelow's articulation, the burden sufficiently touches and concerns if the covenant's performance renders the covenantor's legal interest in the land *less* valuable.[78] Conversely, the benefit sufficiently touches and concerns if the covenant's performance renders the covenantee's legal interest in the land *more* valuable.[79]

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71. *See* Ralph A. Newman & Frank R. Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1332 (1970).

72. Stoebuck, *supra* note 2, at 866.

73. SERKIN, *supra* note 12, at 185; Tarlock, *supra* note 9, at 818.

74. *See* Stoebuck, *supra* note 2, at 874.

75. (1808) 103 Eng. Rep. 725, 727; 10 East 130, 136.

76. Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 639 (1914); CLARK, *supra* note 3, at 97.

77. CLARK, *supra* note 3, at 97. It is worth noting that Professor Bigelow was the Reporter for the *Restatement (First) of Property*. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 683 (2014).

78. *See* Bigelow, *supra* note 76, at 645; POWELL, *supra* note 30, § 60.04.

79. *See* Bigelow, *supra* note 76, at 645; POWELL, *supra* note 30, § 60.04.

Judge Charles E. Clark voiced approval of the Bigelow test but rephrased it in simpler terms: "Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the [touch-and-concern] requirement should be held fulfilled."[80] While some commentators criticize these definitions as circular,[81] most courts and scholars cite the Clark-Bigelow test as an authoritative guide to a nebulous concept.[82] For example, a covenant requiring a home to be built no closer than twenty feet from the property line clearly affects the use of the land itself.[83] On the other end of the spectrum, a covenant requiring a tenant to paint his landlord's portrait has nothing to do with the land, and thus a future tenant could not be expected to incur that obligation by virtue of entering into the leasehold.[84]

The *Restatement (First) of Property*[85] also echoes the test, requiring that a covenant be a "promise respecting the use of the land," which consists of either "increasing or decreasing the usefulness of the land involved."[86] The *Restatement (First)* contextualizes the former criterion by noting that the usefulness of the property will increase "[i]f the performance of the promise benefits the beneficiary of the promise in the use of his land."[87]

As is made clear by the Clark-Bigelow test, the benefit of a covenant, i.e., the rights of the covenantee, may touch and concern the land while the burden, i.e., the duties imposed on the

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80. CLARK, *supra* note 3, at 99; Stoebuck, *supra* note 2, at 874. Judge Clark sat on the United States Court of Appeals for the Second Circuit and served on the drafter's committee for the *Restatement (First) of Property*. Norman P. Ho, *A Defense of Horizontal Privity in American Property Law*, 91 MISS. L.J. 109, 110 n.2 (2022).

81. Stake, *supra* note 1, at 929; Rose, *supra* note 51, at 1409.

82. Stoebuck, *supra* note 2, at 873; Stake, *supra* note 1, at 929-30; Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 796 (N.Y. 1938).

83. *Cf.* SERKIN, *supra* note 12, at 185 ("A covenant to build only single-family residential housing, or to leave parts of the land undeveloped, undoubtedly touches and concerns the land.").

84. Stoebuck, *supra* note 2, at 869.

85. The *Restatement (Third)*, released in 2000, is the most current source on the subject. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES Foreword (AM. L. INST. 2000). However, as will be detailed in Part II, the application of touch and concern in Arkansas caselaw borrows heavily from the *Restatement (First)*.

86. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

87. *Id.*

covenantor, does not.[88] Alternatively, the burden may do so while the benefit does not.[89] Although it is an infrequent occurrence for only one side to satisfy the requirement,[90] courts test the benefit and burden separately.[91] The benefit typically runs if it alone touches and concerns, meaning that the burden is not evaluated.[92] However, because the burden encumbers the use of land, unlike the benefit, some courts treat their analyses of this side with greater scrutiny than others.[93] These attitudes can be distilled into a dyad of competing views: the English appurtenance requirement and the in-gross approach.[94]

Fundamentally, courts that adhere to the English appurtenance requirement scrutinize both the burden and the benefit in determining whether the burden runs.[95] Accordingly, for the burden of a covenant to bind successors, not only must the burden touch and concern the land, but so too must the benefit.[96] In other words, the appurtenance requirement does not permit the enforcement of a covenant where the benefit is held in gross, in that it is personal to the covenantee and does not affect his land.[97] As the name suggests, this rule stems from English courts' historic aversion to land use restrictions and invalidation of covenants in gross.[98]

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88. POWELL, *supra note* 30, § 60.04.

89. *Id.*

90. *See* KURTZ ET AL., *supra* note 31, at 358.

91. *Id.*; *see also* Stoebuck, *supra* note 2, at 869.

92. *See* Franzese, *supra* note 50, at 239; POWELL, *supra* note 30, § 60.04; RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

93. *See* Margot Rau, Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 143 (1978).

94. *See* POWELL, *supra* note 30, § 60.04.

95. James L. Winokur, *Ancient Strands Rewoven, or Fashioned Out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 142 n.66 (1994) [hereinafter *First Impressions*].

96. *See id.* However, the benefit need not touch and concern the land that is burdened. *See id.* at 145 ("[T]he appurtenance principle of the touch and concern rule would require a showing that some land was benefitted, whether or not technically owned by the servitude enforcer.").

97. Rau, *supra* note 93, at 143; Thomas E. Roberts, *Promises Respecting Land Use—Can Benefits Be Held in Gross?*, 51 MO. L. REV. 933, 934 (1986).

98. Roberts, *supra* note 97, at 934.

The appurtenance requirement has generated controversy,[99] and, according to Judge Clark, is unsupported by caselaw.[100] Others have reached different conclusions, with one scholar claiming that only the state of New York recognizes benefits in gross,[101] another noting that jurisdictions are more divided on the issue,[102] and still another positing that most courts *do* enforce personal benefits.[103] These contrasting views are perhaps a product of references in many opinions to the running of "the covenant" rather than that of a specific side, as in many cases the distinction is unnecessary for adjudication.[104]

Courts adopting the in-gross approach, on the other hand, hold that a burden that touches and concerns the land binds successors even if the benefit is personal to the covenantee.[105] Proponents of this laissez-faire position, including Judge Clark, find the hostility toward benefits in gross to be unwarranted and without policy justification, arguing that the burden side of many covenants promotes social utility and upholds freedom of contract.[106]

C. The Birth of the Equitable Servitude

In practice, horizontal privity proved to be the most difficult rule for English landowners to satisfy.[107] Specifically, the requirement that both parties must possess *simultaneous* legal interests in the same parcel, which typically only exists in landlord-tenant relationships, prevented landowners from creating common-interest communities needed to preserve their

99. *See First Impressions*, *supra* note 95, at 131.

100. CLARK, *supra* note 3, at 141.

101. Newman & Losey, *supra* note 71, at 1337.

102. *See Design Proposal*, *supra* note 7, at 1216 n.11.

103. POWELL, *supra* note 30, § 60.04.

104. Stoebuck, *supra* note 2, at 881.

105. Rau, *supra* note 93, at 143-44.

106. POWELL, *supra* note 30, § 60.04; Roberts, *supra* note 97, at 949.

107. *See* Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067, 1067 (1942) [hereinafter *Equitable Servitudes: Part II*]; Tarlock, *supra* note 9, at 814.

neighborhoods' livability as cities expanded.[108] This, in effect, undercut the primary purpose of the real covenant, which was to protect and encourage investments in property.[109] Fortunately, England's chancery court found occasion to innovate in the landmark decision of *Tulk v. Moxhay*, where it dispensed with the privity requirement and enforced a promise in a deed requiring the purchaser to leave Leicester Square, one of London's last greenspaces, free from any structures.[110] Although no landlord-tenant relationship existed between the buyer and the covenantor, the court opined that it would be inequitable for a purchaser with notice of a restriction to avoid enforcement due to a technicality.[111]

Thus was born the equitable servitude, which quickly replaced the real covenant as the land use device of choice.[112] An equitable servitude differs from a covenant in that it is a land use restriction enforceable in equity, whereas the latter is enforceable only at law.[113] Equitable servitudes dominate modern land use planning in large part because property owners intuitively prefer injunctive relief to monetary damages.[114] After all, damages would do little to quell the obscene stench emanating from a new neighbor's backyard hog farm, for instance. However, *Tulk*, much like *Spencer's Case*, failed to set forth rules governing the enforcement of equitable servitudes, and the requirements have likewise evolved in piecemeal fashion through centuries of English and American common law.[115] To complicate matters, as law and equity have merged, Americans courts have blurred the boundaries between covenants and equitable servitudes, with

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108. *Equitable Servitudes: Part I*, *supra* note 39, at 970; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *see also* TIFFANY, *supra* note 54, § 850; SERKIN, *supra* note 12, at 181.

109. *See supra* note 12 and accompanying text.

110. (1848) 41 Eng. Rep. 1143, 1143-45; 2 Ph. 774, 774-79.

111. *Id.* at 1144, 2. Ph. at 777-78.

112. SPRANKLING, *supra* note 38, at 575; *see also* CLARK, *supra* note 3, at 170 (remarking that the advent of equitable servitudes marks "[o]ne of the best examples of the expansion of modern property law to accommodate the demands of the realty market"); Stoebuck, *supra* note 2, at 889 ("[Equitable servitudes] have nearly replaced real covenants in the courts today.").

113. POWELL, *supra* note 30, § 60.01.

114. *See id.*; SERKIN, *supra* note 12, at 185.

115. POWELL, *supra* note 30, § 60.01.

some choosing to grant either form of relief regardless of the type of promise that is enforced.[116] Even so, despite the efforts of many scholars toward simplification, the two doctrines remain somewhat distinct in modern law and thus warrant separate discussion.[117]

To create an enforceable equitable servitude, nearly all courts require that the parties intend the promise to run with the land and that the successor covenantor have actual or constructive notice of the restriction, which is usually satisfied when the servitude is reduced to writing.[118] While there exists some disagreement as to whether *Tulk* applied the touch-and-concern doctrine,[119] the majority of courts find sufficient support for extending the requirement to equity.[120]

Ultimately, though, how a court rules on the touch-and-concern question boils down to which of the two underlying theories of enforcement the jurisdiction follows.[121] Adherents to the contract theory assert that the *Tulk* court simply mandated specific performance of a contractual obligation, in that equity will enforce an agreement against any covenantor with notice regardless of whether the restriction comports with the traditional requirements governing covenants at law.[122] However, the vast

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116. SPRANKLING, *supra* note 38, at 575; POWELL, *supra* note 30, § 60.07.

117. POWELL, *supra* note 30, § 60.01.

118. SERKIN, *supra* note 12, at 184-85; POWELL, *supra* note 30, § 60.04. These requirements are identical to those discussed in Section I.B. *See* John J. McLoone, Jr., Comment, *Equitable Servitudes—A Recent Case and Its Implications for the Enforcement of Covenants Not to Compete*, 9 ARIZ. L. REV. 441, 445-47 (1968).

119. *Compare* Stoebuck, *supra* note 2, at 892 ("To run, equitable restrictions must touch and concern benefited and burdened land . . . ."), *and* James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 93 n.400 [hereinafter *Mixed Blessings*] ("[P]rivity requirements have been the only traditional real covenant requirements actually eliminated in deciding enforceability of equitable servitudes."), *with* TIFFANY, *supra* note 53, § 858 ("In equity, the question whether such a covenant runs with the land is material on the question of notice only . . . .").

120. POWELL, *supra* note 30, § 60.01; *see also Unified Concept*, *supra* note 12, at 1179 n.5 ("Most courts reject the idea that equitable servitudes can be held 'in gross.'"). However, as an equitable servitude is usually proscriptive, in that the restriction specifies how the land cannot be used, most courts find it unnecessary to apply touch and concern as a separate requirement because the doctrine is readily satisfied. *Integration of Servitudes*, *supra* note 60, at 362.

121. McLoone, *supra* note 118, at 443.

122. Stoebuck, *supra* note 2, at 887-89; *Equitable Servitudes: Part I*, *supra* note 39, at 971.

majority of courts follow the equitable easement theory,[123] which posits that the restriction in *Tulk* created an equitable property interest in the burdened land itself rather than the estate.[124] As a property interest that binds all subsequent possessors,[125] the touch-and-concern doctrine was a necessary criterion.[126] Of course, in jurisdictions that enforce the equitable easement theory, the touch-and-concern requirement is, at least in principle, identical to that of real covenants.[127] As such, the English appurtenance requirement and the in-gross approach also exist in equity.[128]

D. Commercial Anticompetition Covenants

The historical disparate treatment of covenants at law and equity intended to limit business competition, which was the type of restriction at issue in *Bernard Court*,[129] is a direct outgrowth of the more fundamental divide regarding the enforcement of benefits in gross and the touch-and-concern requirement generally.[130] Today, most courts hold that these covenants, in which the covenantor promises not to engage in the same type of business that the covenantee conducts on his own property, adequately touch and concern the land and are enforceable at law.[131] These jurisdictions interpret the touch-and-concern doctrine more liberally and find the rule satisfied even though anticompetition covenants tend only to economically benefit the covenantee's business on the dominant estate.[132]

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123. McLoone, *supra* note 118, at 443 n.4; *see also Unified Concept*, *supra* note 12, at 1226. It must be noted that many courts have historically fluctuated between the two theories through decades (and centuries) of rulings, which likely reflects implicit concerns regarding the social desirability of the outcome that a particular theory would mandate. *Equitable Servitudes: Part I*, *supra* note 39, at 978.

124. Stoebuck, *supra* note 2, at 889.

125. *Id.* at 898.

126. *See id.* at 898; McLoone, *supra* note 118, at 447.

127. Stoebuck, *supra* note 2, at 892.

128. *See* Browder, *supra* note 14, at 42; SPRANKLING, *supra* note 38, at 598.

129. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 2, 2020 WL 7251256, at *1.

130. POWELL, *supra* note 30, § 60.06.

131. Roberts, *supra* note 97, at 955; POWELL, *supra* note 30, § 60.06.

132. Roberts, *supra* note 97, at 955.

Some courts go so far as to ignore the requirement and instead evaluate these restrictions for their effect on competition in an analysis akin to that conducted in the employment context.[133] Those courts will enforce the covenant provided that it is reasonable in scope and constitutes only a partial restraint of trade.[134] In equity, whether a court requires a reasonable covenant to also touch and concern the land depends, again, on the underlying theory of enforcement to which the court adheres.[135] Under the contract theory, reasonableness is sufficient; under the equitable easement theory, the touch-and-concern requirement reigns supreme, and the reasonableness of a restriction will not in itself render an anticompetition covenant enforceable.[136]

Traditionally, courts were troubled by a landowner's ability to prevent a competing business from operating on a neighboring parcel because doing so could stifle development and depress property values.[137] Given the newfound freedom that *Tulk v. Moxhay* afforded in creating servitudes and the concomitant concern that landowners would impose a host of burdensome restrictions, many nineteenth-century courts held that anticompetition covenants did not touch and concern the land and were thus unenforceable.[138]

Justice Oliver Wendell Holmes, then serving on the Massachusetts Supreme Court, echoed this deep suspicion of anticompetition covenants in the famous case of *Norcross v. James*.[139] In *Norcross*, the court confronted the question of whether a covenant not to use the land as a quarry in competition with the covenantee's adjoining operation ran with the land, allowing the successor covenantee to enforce the burden against

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133. 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 32 (2022); Warren E. Banks, Comment, *Covenants Not to Compete*, 7 ARK. L. REV. 35, 40 (1952-53).

134. Robert L. Potts, Commentary, *Real Covenants in Restraint of Trade—When Do They Run with the Land?*, 20 ALA. L. REV. 114, 119 (1967).

135. *Id.*

136. *Id.*

137. Susan F. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with Land? Comparing Results Under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 REAL PROP. PROB. & TR. J. 267, 280 (2003) [hereinafter *Covenants Against Competition*].

138. *Id.* at 280-81.

139. 2 N.E. 946, 949 (Mass. 1885); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.6 cmt. a (AM. L. INST. 2000).

the successor covenantor who had violated the restriction.[140] The court refused to enforce the covenant, finding that the benefit was held in gross.[141] Specifically, Justice Holmes noted that the touch-and-concern requirement is satisfied only when the covenant "extend[s] to the support of the thing" and is "for the benefit of the estate."[142] In this vein, he required that the benefit be tangible rather than one affecting merely the financial enjoyment of the land by enhancing its commercial value, stating:

> In what way does [the covenant] extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products.[143]

Norcross soon became a lodestar for the traditional view that the benefit of an anticompetition covenant is personal to the covenantee because it affords only a financial advantage.[144] This case also espouses support for the equitable easement theory of enforcement, as the court required that the covenant touch and concern both at law and in equity.[145]

Expanding upon its adherence to the English appurtenance requirement, the *Restatement (First)* adopted the *Norcross* view, similarly finding that the burden does not run because the benefit fails to relate to the physical use or enjoyment of the land.[146] In doing so, it opined that "the risk of social harm involved in a possible monopoly" created by the covenantee "is sufficient to

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140. *Norcross*, 2 N.E. at 946.

141. *Id.* at 949. As the question presented pertained to the enforcement of the burden, the court necessarily followed the English appurtenance principle in requiring the benefit to touch and concern. *See supra* text accompanying notes 94-98.

142. *Norcross*, 2 N.E. at 949.

143. *Id.*

144. *See* Roberts, *supra* note 97, at 954.

145. *Norcross*, 2 N.E. at 948; D. Robb Ferguson, Case Comment, *Property Law—Anticompetitive Covenants—Redefinition of "Touch and Concern" in Massachusetts—*Whitinsville Plaza, Inc. v. Kotseas, *79 Mass. Adv. Sh. 1262, 390 N.E.2d 243 (1979)*, 14 SUFFOLK U. L. REV. 117, 127 (1980); *Equitable Servitudes: Part II*, *supra* note 107, at 1069 & n.97.

146. *See* RESTATEMENT (FIRST) OF PROP. § 537 cmt. f (AM. L. INST. 1944); Mablum, *supra* note 59, at 139-40.

induce the refusal to extend the 'running of promises' to such cases."[147]

Today, the traditional view no longer carries the force of law in Massachusetts, as the state supreme court overturned *Norcross* with its decision in *Whitinsville Plaza, Inc. v. Kotseas* by enforcing an anticompetition covenant on the basis of reasonableness.[148] Although most courts today hold that such covenants touch and concern,[149] the *Norcross* doctrine clings to life in some states,[150] and accordingly, this case, along with many of the positions advanced by the *Restatement (First)*, provides a window into the covenants caselaw of Arkansas.

II. THE LAW IN ARKANSAS

The law in Arkansas on real covenants and equitable servitudes is, as Chief Judge Harrison aptly noted, "underdeveloped."[151] Notwithstanding this limitation, courts have applied many of the principles explored above, including writing,[152] privity,[153] intent,[154] and notice.[155] Most notable of all, however, is the touch-and-concern doctrine, which the court in *Bernard Court* concluded has never before been articulated in the state.[156] While the court was correct in stating that the words "touch and concern" have never been used,[157] a survey of the caselaw reveals that the principles underlying the doctrine have been applied time and again.

Perhaps the most explicit application of touch and concern can be found in *Savings, Inc. v. City of Blytheville*, a case in which

147. RESTATEMENT (FIRST) OF PROP. § 537 cmt. f (AM. L. INST. 1944).

148. 390 N.E.2d 243, 249-50 (Mass. 1979).

149. *Id.* at 249.

150. Roberts, *supra* note 97, at 957.

151. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 16, 2020 WL 7251256, at *8 (Harrison, C.J., dissenting).

152. Indeed, a restrictive covenant is required by statute to be in writing. ARK. CODE ANN. § 18-12-103 (2011); *see also* Knowles v. Anderson, 307 Ark. 393, 395, 821 S.W.2d 466, 467 (1991).

153. Ross v. Turner, 7 Ark. 132, 145, 1846 WL 638, at *4.

154. Fort Smith Gas Co. v. Gean, 186 Ark. 573, 577-78, 55 S.W.2d 63, 65-66 (1932).

155. Shelton v. Smith, 243 Ark. 721, 727, 421 S.W.2d 348, 351 (1967).

156. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *6.

157. *Id.* at 13, 2020 WL 7251256, at *6.

the Arkansas Supreme Court expressly incorporated the reasoning of *Norcross* into its own analysis of an anticompetition covenant almost a century later.[158] In *Savings, Inc.*, the owners of two lots which straddled the east and west sides of a highway leased a portion of the east lot to Savings, Inc. In the lease agreement was a covenant specifying in part that, should the owners sell the west lot, they would create an additional covenant prohibiting the property from being used as a competing service station.[159] The owners later sold the west lot but failed to include the restriction in the deed, and consequently, the new owners deeded part of the lot to Curt's Oil Company, which soon erected a gasoline service station.[160]

In more familiar terms, this case presented a scenario in which the original covenantee wished to enforce the restriction against a successor covenantor, arguing that the anticompetition covenant ran with the land.[161] The trial court found the covenant to be unenforceable because it was held in gross by the original lot owners.[162] The supreme court affirmed, dedicating most of its opinion to a discussion of *Norcross*,[163] which differs from *Savings, Inc.* in an important respect: whereas the former case concerned the enforcement of the benefit,[164] the latter case pertained to the enforcement of the burden, as the appellant was the original covenantee.[165]

Nonetheless, in its holding that the burden of the east lot covenant did not run, the court quoted extensively from Justice Holmes's language expressing that the benefit of an anticompetition covenant does not touch and concern the land.[166] Specifically, the court opined that the covenant in no way "affected" the east lot.[167] Recall the touch-and-concern test that the King's Bench applied in *Congleton v. Pattison*: the covenant

158. 240 Ark. 558, 562-63, 401 S.W.2d 26, 29 (1966).
159. *Id.* at 559, 401 S.W.2d at 27.
160. *Id.* at 560, 401 S.W.2d at 27.
161. *See id.* at 560-61, 401 S.W.2d at 28.
162. *Id.* at 561, 401 S.W.2d at 28.
163. *Sav., Inc.*, 240 Ark. at 562, 401 S.W.2d at 29.
164. *See supra* note 141 and accompanying text.
165. *Sav., Inc.*, 240 Ark. at 558-59, 401 S.W.2d at 27.
166. *Id.* at 563, 401 S.W.2d at 29.
167. *Id.* at 563, 401 S.W.2d at 29.

must "directly *affect*[] the nature, quality, or value of the thing demised."[168] Clearly then, the *Savings, Inc.* court invalidated the covenant because it failed to touch and concern. Indeed, it would defy logic to posit that even though the court explicitly applied the reasoning of *Norcross*—which was premised on the touch-and-concern doctrine—to its own decision to invalidate an anticompetition covenant, it did so without applying the requirement.[169]

To be sure, courts and scholars alike universally recognize *Savings, Inc.* as supporting the traditional view that an anticompetition covenant does not touch and concern the land.[170] This case is also noteworthy because it is demonstrative, albeit implicitly, of the court's application of the English appurtenance requirement.[171] That is, the court's adoption of Justice Holmes's proposition that the benefit of an anticompetition covenant is held in gross[172] and quotation of his language that such a covenant "simply tends indirectly to increase" the value of the benefited land[173] would have little application to the burden of the covenant unless the court adhered to the appurtenance principle by testing both sides of the restriction. Moreover, by opining that "*nothing* in this agreement . . . affected [the east lot] whatsoever,"[174] the court necessarily implied that neither the burden nor the benefit touched and concerned, as the analysis centered on a single parcel rather than on a dominant and servient estate in a traditional context.[175]

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168. (1808) 103 Eng. Rep. 725, 727; 10 East 130, 136 (emphasis added).

169. *See supra* notes 141-43 and accompanying text.

170. *See, e.g.*, Barton v. Fred Netterville Lumber Co., 317 F. Supp. 2d 700, 706 (S.D. Miss. 2004); Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 294 (N.J. 1990); *Mixed Blessings*, *supra* note 119, at 85 & n.364; *First Impressions*, *supra* note 95, at 137 & n.42; Ferguson, *supra* note 145, at 126 & n.38; Browder, *supra* note 14, at 42 & n.132; Mablum, *supra* note 59, at 137 & n.54; Stoebuck, *supra* note 2, at 872 & n.35; Franzese, *supra* note 50, at 240 & n.35. It must be noted that anticompetition covenants in this context differ from those imposed ancillary to the sale of a business: courts generally uphold such restrictions to the extent they are reasonably necessary for the buyer's protection. *See, e.g.*, Easley v. Sky, Inc., 15 Ark. App. 64, 66-67, 689 S.W.2d 356, 358 (1985).

171. *See supra* notes 95-98 and accompanying text.

172. *See Sav., Inc.*, 240 Ark. at 563, 401 S.W.2d at 29.

173. *Id.* at 563, 401 S.W.2d at 29.

174. *Id.* at 563, 401 S.W.2d at 29 (emphasis added).

175. *See id.* at 558, 561, 401 S.W.2d at 27, 28 (noting that only the east lot was the subject of litigation).

In other words, it appears that the court tested the covenant holistically by gauging its effect on the east lot as a whole.[176] Finding that it burdened the original owners personally and benefited Savings, Inc. only financially, the court refused to let the covenant run.[177] It is worth noting that the court of appeals cited *Savings, Inc.* as good law over forty years later in *Rooke v. Spickelmier*.[178] However, despite its wide recognition as embodying the traditional view of anticompetition covenants, the court in *Bernard Court* did not address *Savings, Inc.* even though both cases are factually similar. Specifically, the question presented in *Bernard Court*, like in *Savings, Inc.*, involved the running of the burden of the covenant, as Bernard Court was a successor in interest to the original covenantor.[179]

Savings, Inc. is not the only illustrative application of the principles inherent in the touch-and-concern doctrine in Arkansas. In the nineteenth-century decision of *St. Louis, I.M. & S. Railway v. O'Baugh*, the supreme court held that the benefit of a covenant ran because "it related to the particular land and was its benefit. It was not to do a thing collateral."[180] Years later, the court elaborated in *Bank of Hoxie v. Meriwether*, stating, "The distinction between real and personal covenants is that the former relate to the realty, having for their main object some benefit to the realty and inuring to the benefit of and becoming binding upon subsequent grantees, while the latter do not run with the land."[181] Moreover, the court in *Fort Smith Gas Co. v. Gean* noted that running covenants "affect the land itself and confer a benefit on the grantor."[182] However, "where the covenant imposes a burden on real estate for the benefit of the grantor personally[,] it does not follow the land into the possession of an assignee."[183]

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176. *See id.* at 563, 401 S.W.2d at 29; *see also* Ferguson, *supra* note 145, at 121 n.21 (citing *Savings, Inc.* in support of the proposition that both the benefit and burden of a covenant must touch and concern the land).

177. *Sav., Inc.*, 240 Ark. at 563, 401 S.W.2d at 29.

178. 2009 Ark. App. 155, at 6, 314 S.W.3d 718, 721.

179. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 2 n.2, 2020 WL 7251256, at *1 n.2.

180. 49 Ark. 418, 423, 5 S.W. 711, 713 (1887).

181. 166 Ark. 39, 47, 265 S.W. 642, 645 (1924).

182. 186 Ark. 573, 577, 55 S.W.2d 63, 65 (1932).

183. *Id.* at 577, 55 S.W.2d at 65.

The application of the doctrine is further demonstrated in *Lawhon v. American Cyanamid & Chemical Co.*, where the court articulated: "If a covenant is of value to the covenantee by reason of his occupation of the land, ordinarily it is regarded as running with the land."[184] Conspicuously cited as support for this proposition is section 854 of *Tiffany on Real Property*, titled "'Touching and concerning' the land."[185] The court further noted that statements made in previous cases defining a running covenant as "one that benefits the land itself" are "entirely harmonious" with Tiffany's definition, "for a covenant that may be said to benefit the land itself is of value to the covenantee primarily because he is entitled to occupy the land and enjoy the benefit."[186]

In a more tangible illustration of these principles, the court in *Kell v. Bella Vista Village Property Owners Ass'n* imposed the touch-and-concern requirement and found that covenant assessments created for the maintenance of facilities in a planned community satisfied the rule.[187] In support, the court cited to *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*,[188] recognized by many to be a "classic" leading decision adopting the Clark-Bigelow touch-and-concern test.[189] Finally, in *Nordin v. May*, the Eighth Circuit Court of Appeals provided a distillation of state caselaw when it stated in part that:

> The general rule in Arkansas appears to be that a covenant which is beneficial or essential to the use of the land conveyed . . . runs with the land. . . . There is no reason to believe that the applicable law of Arkansas differs from the law which is *generally applied* to covenants such as that in suit.[190]

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184. 216 Ark. 23, 26, 223 S.W.2d 806, 808 (1949).

185. *Id.* at 26, 223 S.W.2d at 808; TIFFANY, *supra* note 54, § 854.

186. *Lawhon*, 216 Ark. at 26, 223 S.W.2d at 808.

187. *See* 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1975); *see also* Rau, *supra* note 93, at 154 n.94 (citing *Kell* for its imposition of the touch and concern doctrine).

188. *Kell*, 258 Ark. at 760, 528 S.W.2d at 653.

189. *See, e.g.*, *Mixed Blessings*, *supra* note 119, at 86 n.373; Potts, *supra* note 134, at 120.

190. 188 F.2d 411, 414-15 (8th Cir. 1951) (emphasis added).

This "general rule" was also articulated by the court in *Bernard Court*.[191]

Quite simply, the language that the supreme court employed in each of these cases could not more closely mirror that used in the various iterations of the touch-and-concern doctrine.[192] Just as *Spencer's Case* declared that no real covenant will run if it is "merely collateral to the land,"[193] the court in *O'Baugh* premised its enforcement of a restriction on the fact that it was not merely "collateral" to the covenantee's property.[194] Statements in subsequent cases that the covenant must inure a benefit to the realty tracks with both Judge Clark's requirement that the covenant be "intimately bound up with the land, aiding the promisee as landowner,"[195] and Justice Holmes's admonition in *Norcross v. James* that the covenant must "extend to the support of the thing" and function "for the benefit of the estate."[196] Furthermore, *Lawhon*'s reasoning that the covenant must be of value to the covenantee as a landowner by benefiting the land is synonymous with the language of the *Restatement (First)* stating that the promise must increase the usefulness of the land by benefiting the covenantee in the use of the property.[197] In other words, that a covenant must be "beneficial or essential to the use of the land" echoes the *Restatement (First)*'s "usefulness" metric.[198] *Gean*, however, is perhaps most telling: Judge Clark, the preeminent authority on real covenants and the namesake of the Clark-Bigelow touch-and-concern test, stated that the Arkansas Supreme Court explicitly applied the doctrine in that case.[199]

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191. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 12, 2020 WL 7251256, at *6.

192. *See* discussion *supra* Section I.B.4.

193. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b.

194. St. Louis, I.M. & S. Ry. v. O'Baugh, 49 Ark. 418, 423, 5 S.W. 711, 713 (1887).

195. Bank of Hoxie v. Meriwether, 166 Ark. 39, 47, 265 S.W. 642, 645 (1924); *supra* note 80 and accompanying text.

196. *See supra* note 142 and accompanying text.

197. Lawhon v. Am. Cyanamid & Chem. Co., 216 Ark. 23, 26, 223 S.W.2d 806, 808 (1949); *supra* note 85-87 and accompanying text.

198. Nordin v. May, 188 F.2d 411, 414-15 (8th Cir. 1951); *supra* note 87 and accompanying text.

199. Charles E. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 724 n.89 (1943).

Kell, like *Savings, Inc.*, also demonstrates an implicit affirmation of the English appurtenance requirement. The *Kell* court found that both the burden and the benefit of a covenant to pay annual property owners association ("POA") assessments touched and concerned the members' properties because the community facilities to be maintained by the assessments increased the value of each lot.[200] In an in-gross jurisdiction that recognized benefits personal to the covenantee, the court's inquiry would not encompass the benefit side of the covenant. [201]

On the other hand, ascribing a general theory of equitable servitude enforcement to the caselaw has proven more challenging.[202] Taking after *Norcross*, [203] the court in *Savings, Inc.* applied the touch-and-concern doctrine in equity,[204] which, of course, is a hallmark of the equitable easement theory.[205] The *Meriwether* court similarly required that the covenant in that case touch and concern after agreeing with the chancery court's characterization of the promise as an "equitable charge, easement, and servitude" upon the land.[206]

These examples, nevertheless, must be reconciled with other cases that appear to support the contract theory of enforcement, under which a restriction may be equitably enforced on the basis of notice alone.[207] In *Arkansas State Highway Commission v. McNeill*, the court found that landowners were not entitled to compensation for the alleged breach of a residential use covenant when the State planned to construct a roadway close to their home.[208] One commentator cites the decision as evidence of the court's holding that a covenant is not a property interest,[209] which

200. Kell v. Bella Vista Vill. Prop. Owners Ass'n, 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1975).

201. *See* discussion *supra* Section I.B.4.

202. *See* discussion *supra* Section I.C.

203. *See supra* note 150 and accompanying text.

204. Indeed, a chancery court heard the case below. *See* Sav., Inc. v. City of Blytheville, 240 Ark. 558, 560-61, 401 S.W.2d 26, 28 (1966). Arkansas did not formally merge law and equity until 2000. ARK. CONST. amend. 80 § 19.

205. *See supra* notes 123-26 and accompanying text.

206. Bank of Hoxie v. Meriwether, 166 Ark. 39, 47, 265 S.W. 642, 645 (1924).

207. *See supra* note 122 and accompanying text.

208. 238 Ark. 244, 244-45, 247, 381 S.W.2d 425, 425-27 (1964).

209. KURTZ ET AL., *supra* note 31, at 357 & n.13.

discords with the equitable easement theory.[210] But this conclusion fails to take into account the court's acknowledgement: "We do not deny the existence of a property right in the appellees."[211] Instead, the construction of the roadway, rather than the breach of the covenant, was the "proximate cause" of the injury.[212]

There also exists a line of decisions involving restricted districts in residential use planning; in many of these cases, courts have stated that "one taking title to land with notice that it is subject to an agreement restricting its use will not, in equity and good conscience, be permitted to violate its terms."[213] In this area of covenant law, courts will allow for the creation of implied reciprocal servitudes on subdivision lots if there exists a general plan of development, which is "based on the contractual relationship between the common grantor and his grantees."[214]

The issue is the apparent dissonance between the language used in these cases and that used in *Savings, Inc.*, as the language employed here seems to implicate the contract theory. Notably, however, scholars recognize the general plan theory as a separate doctrine that is narrow in scope and is intended to serve as a gap filler to protect purchasers who have reasonably relied on the belief that all lots in a subdivision are governed by a like set of restrictions.[215] As such, landowners are entitled to the protection of this equitable remedy only when a developer fails to record a declaration of servitudes applicable to the entire development.[216] If anything, the doctrine serves as a relaxation of the writing requirement.[217]

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210. *See supra* note 125 and accompanying text.

211. *McNeill*, 238 Ark. at 248, 381 S.W.2d at 427.

212. *Id.* at 247, 381 S.W.2d at 427.

213. *E.g.*, Holaday v. Fraker, 323 Ark. 522, 526, 920 S.W.2d 4, 6 (1996); Holmesley v. Walk, 72 Ark. App. 433, 435-36, 39 S.W.3d 463, 465 (2001); *see also* McGuire v. Bell, 297 Ark. 282, 290, 761 S.W.2d 904, 909 (1988) (using nearly identical language).

214. Knowles v. Anderson, 307 Ark. 393, 397, 821 S.W.2d 466, 468 (1991). *See generally* POWELL, *supra* note 30, § 60.03.

215. SERKIN, *supra* note 12, at 191; TIFFANY, *supra* note 54, § 867.50.

216. TIFFANY, *supra* note 54, § 867.50.

217. SERKIN, *supra* note 12, at 190.

The court of appeals recognized the distinction between the general plan theory and garden-variety covenants in *Rooke v. Spickelmier*, in which a landowner argued that a covenant prohibiting the use of a mobile home on the servient parcel was unenforceable because it was not issued as part of a general plan.[218] The court agreed that no subdivision existed but stated that a development was unnecessary for the covenant to run with the land, as the covenantor simply imposed the restriction as part of a conveyance for the benefit of his adjacent property.[219] In doing so, the court opined that the landowner's argument applied in the context of a restricted district setting rather than that of a general covenant.[220]

Accordingly, the court in *Bernard Court* did not cite to the language of these general plan cases. Yet, rather remarkably, in its evaluation of whether the anticompetition covenant at issue was enforceable as an equitable servitude, the court relied on conflicting authorities: to support its statement that covenants that do not run with the land may nonetheless be enforced in equity, the court cited to a case from California that adhered to the contract theory.[221] However, the court then quoted a case from Oregon, stating:

> The general rule is that "even if all technical requirements for a covenant to run with the land are not met, a promise is binding as an equitable servitude if (1) the parties intend the promise to be binding; (2) the promise *'concern[s] the land or its use in a direct and not a collateral way*;' and (3) 'the subsequent grantee [has] notice of the covenant.'"[222]

The second prong that the court quotes very plainly imposes the touch-and-concern requirement in equity, consistent with the equitable easement theory.[223] If the use of the term "concern[s]" is an insufficient basis for this conclusion, recall once more the

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218. 2009 Ark. App. 155, at 1-2, 314 S.W.3d 718, 719-20.

219. *Id.* at 5, 314 S.W.3d at 721.

220. *Id.* at 5, 314 S.W.3d at 721.

221. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *7 (citing Taormina Theosophical Cmty., Inc. v. Silver, 190 Cal. Rptr. 38, 43 (Cal. Ct. App. 1983)).

222. *Id.* at 13-14, 2020 WL 7251256, at *7 (emphasis added) (quoting Nordbye v. BRCP/GM Ellington, 266 P.3d 92, 102 (Or. Ct. App. 2011)).

223. *See supra* notes 123-26 and accompanying text.

language of *Spencer's Case*, stating that a covenant does not touch and concern if it is "merely collateral to the land."[224] Moreover, the Oregon court drew the above quote from a prior decision in which the sole inquiry was whether a covenant to pay a POA initiation fee touched and concerned the land so as to be enforceable as an equitable servitude.[225] That the court in *Bernard Court* cited this case in a decision that expressly rejected the touch-and-concern doctrine is puzzling.

In sum, the caselaw demonstrates that Arkansas is a touch-and-concern state. Courts espouse the English appurtenance requirement in their analyses by requiring both the burden and the benefit of a covenant to touch and concern the land in order for the burden to bind successors;[226] in accord with this principle, a commercial anticompetition covenant does not touch and concern the land because it confers only a personal, financial benefit to the covenantee.[227] As further demonstrated by *Savings, Inc.*'s adoption of the reasoning from *Norcross v. James*, anticompetition covenants are unenforceable even in equity.[228] In this vein, courts adhere to the equitable easement theory of enforcement by extending the touch-and-concern requirement to equitable servitudes.[229]

That courts in Arkansas impose the touch-and-concern doctrine is congruous with the state judiciary's attitude toward restrictions on land in general. The language employed in a myriad of decisions involving the use of covenants evinces a strong inclination toward the unencumbered use of land: "Restrictions upon the use of land are not favored in law.";[230] "Restrictive covenants are to be strictly construed against limitations on the free use of property.";[231] "[A]ll doubts are resolved in favor of the unfettered use of land."[232] These

224. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b.

225. Ebbe v. Senior Ests. Golf & Country Club, 657 P.2d 696, 701-02 (Or. Ct. App. 1983).

226. *See supra* notes 199-201 and accompanying text.

227. *See supra* note 166 and accompanying text.

228. *See supra* notes 203-04 and accompanying text.

229. *See supra* notes 203-06 and accompanying text.

230. White v. McGowen, 364 Ark. 520, 522, 222 S.W.3d 187, 189 (2006).

231. Forrest Constr., Inc. v. Milam, 345 Ark. 1, 9, 43 S.W.3d 140, 145 (2001).

232. Acuna v. Watkins, 2012 Ark. App. 564, at 9, 423 S.W.3d 670, 675-76.

sentiments embody the traditional views of English courts and the *Restatement (First)*, both of which were hostile to land use restrictions.[233] Indeed, one commentator opines that it is "difficult to articulate a policy justifying" the refusal to permit anticompetition covenants to run with the land unless the court relies on the *Restatement (First)*'s reasoning that such restrictions are undesirable.[234]

III. POLICY IMPLICATIONS OF TOUCH AND CONCERN

Now that it has been ascertained that Arkansas is a touch-and-concern state, the question becomes whether the doctrine constitutes sound judicial policy. Is it wise to test covenants using a rule first conceived in the sixteenth century?[235] If the Arkansas Supreme Court were to dispense with the requirement, which doctrine would take its place? To answer these questions, it is worth pondering in greater detail the purpose for which courts have traditionally used the touch-and-concern requirement. As a preliminary matter, it must be noted that this judicially imposed constraint on covenants materializes only when land is transferred; a covenant need not touch and concern the land to bind the original parties to the transaction.[236]

Rather, concerns arise when a successor in interest takes title to a parcel only to be surprised when a covenant that appears to be in gross actually runs with the land to dictate its use.[237] In this regard, some scholars posit that touch and concern is a tool to effectuate the intent of the parties rather than to protect land use, and yet it is distinct from the intent requirement because it is objective in nature.[238] Specifically, it ensures that parties will be bound only to those promises that a reasonable purchaser would expect to assume, which promotes notions of fairness and marketability.[239] If the expressed intent of the parties that a

233. *See supra* notes 38, 146-47 and accompanying text.
234. *Policy Analysis*, *supra* note 33, at 214.
235. *See supra* note 68 and accompanying text.
236. *Judicial Supervision*, *supra* note 6, at 150.
237. *See id.* at 163.
238. *See, e.g.*, *Policy Analysis*, *supra* note 33, at 208-09, 219-20.
239. *Ancient Strands*, *supra* note 5, at 1290.

covenant runs with the land accords with what the court[240] believes the community would expect to run under the circumstances, then the court will give effect to that intent.[241]

Adherents to the traditional approach, which include the authors of leading treatises on the subject, disagree with the intent effectuation assessment and argue that the doctrine evolved from English land protection policies, in which some encumbrances were held unenforceable regardless of the parties' intent.[242] In this sense, touch and concern serves as a "judicial screening" tool that allows courts to invalidate unreasonable covenants, which reflects the common law's historical distrust of land use restrictions and their potential effect on property values.[243] In reality, these contrasting views are merely a product of the evolving use and treatment of an inherently flexible doctrine over time.[244]

On occasion, courts have used touch and concern to ascertain intent, while in other instances, the requirement has been employed to test the substantive effects of a covenant, with courts invalidating those restrictions that have become economically undesirable by unduly restraining alienation, for example.[245] These shifting attitudes are the source of much of the vigorous debate surrounding touch and concern today.[246] Opponents argue that the doctrine is vague and confusing because it allows courts to void covenants without articulating why the arrangement is defective.[247] In turn, this opacity affords courts the discretion to unpredictably strike those restrictions that seem inconvenient or to give effect to the judiciary's beliefs as to which restrictions

240. Whether a covenant touches and concerns is uniformly viewed as a question of law. *Judicial Supervision*, *supra* note 6, at 143. There is a rich irony inherent in the intent effectuation view that a judge must deduce the probable understandings of the community rather than jurors drawn from that very community. *Policy Analysis*, *supra* note 33, at 212.

241. *Integration of Servitudes*, *supra* note 60, at 360.

242. *First Impressions*, *supra* note 95, at 139-40; *see also* TIFFANY, *supra* note 54, § 850; POWELL, *supra* note 30, § 60.04 (positing that the intent of the parties does not control in the analysis).

243. Tarlock, *supra* note 9, at 814, 817.

244. *See supra* note 72 and accompanying text; *Design Proposal*, *supra* note 7, at 1220.

245. *Ancient Strands*, *supra* note 5, at 1289-1291.

246. SPRANKLING, *supra* note 38, at 590.

247. *Id.* at 590; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. b (AM. L. INST. 2000).

should bind successors and which ones should not.[248] These opponents assert that the prevalence of touch and concern has declined in recent years as more courts have chosen to address underlying policy goals directly, rather than tangentially, through the use of protective rules found outside the scope of traditional covenant law.[249]

At its core, the criticism lobbed at the touch-and-concern doctrine stems from the argument that a covenant is indistinguishable from a contract, as prospective purchasers have notice through the land records of the obligations they will incur and thus may refrain from taking title if conditions dictate.[250] Because of the "take it or leave it" principle inherent in the freedom of contract, the choice of whether an encumbrance runs with the land should rest with property owners rather than with the courts.[251] As such, if a covenant proves to be especially onerous, market forces will dictate that the owners work out a termination transaction.[252]

The latest *Restatement (Third) of Property* joins the chorus of criticisms but acknowledges the role that touch and concern has played in land protection, noting that courts, in an effort to "protect the social interest in preventing land from becoming unusable and unmarketable," developed the doctrine "to protect landowners from requirements akin to the feudal incidents of providing labor or other services to an overlord."[253] However, it remarks that despite "appear[ing] to retain more currency than the other traditional doctrines," touch and concern "poorly identif[ies]" those restrictions which create a risk of harm.[254] Thus, the *Restatement (Third)* dispenses with touch and concern in its entirety but ostensibly seeks to retain the spirit of the defunct

248. SPRANKLING, *supra* note 38, at 590-91; KURTZ ET AL., *supra* note 31, at 418.

249. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *see also* Roberts, *supra* note 97, at 958 (noting that modern courts prefer not to "hide behind running covenant and servitude theory" in the context of anticompetition covenants).

250. *Judicial Supervision*, *supra* note 6, at 149.

251. *Id.*

252. *Id.*

253. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e (AM. L. INST. 2000).

254. *Id.* § 3.1 cmts. a-b.

doctrine by adopting the head-on approach of addressing potential harms directly.[255]

It must be noted, however, that the *Restatement (Third)*'s approach is but a piece of a much more significant overhaul of its conception of private land use arrangements.[256] Indeed, in its pursuit of eliminating the "baroque facade" of this area of the law,[257] the *Restatement (Third)* merges the real covenant, equitable servitude, and easement into a single category: the servitude.[258] As part of this reconceptualization, the common law requirements that traditionally served as prerequisites to the running of covenants are "unceremoniously tossed aside."[259] Instead, in an endorsement of the intent-effectuation approach[260] and freedom of contract, any agreement between parties now creates an enforceable obligation that runs with the land so long as it comports with public policy.[261] Accordingly, an anticompetition servitude is evaluated to determine whether it imposes an unreasonable restraint on trade or competition in violation of common or statutory law.[262]

Proponents of touch and concern, however, view the doctrine's vagueness not as a bug but as a feature because it allows "courts to pour new meaning into the old 'touch and concern' bottle as changing conditions warrant."[263] This flexibility, in turn, has allowed courts to protect the expectations of purchasers and finite land resources by limiting the enforcement of covenants to those that serve land planning functions.[264] By premising the inquiry into the validity of a covenant on a rule distinctly rooted in property law rather than employing a wholesale public policy approach that sounds in contract, courts recognize land ownership as an indispensable

255. *Id.* § 3.2 cmts. a-b; Tarlock, *supra* note 9, at 810.
256. SPRANKLING, *supra* note 38, at 610.
257. Tarlock, *supra* note 9, at 810.
258. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (AM. L. INST. 2000).
259. Merrill & Smith, *supra* note 77, at 694.
260. *First Impressions*, *supra* note 95, at 139.
261. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *Covenants Against Competition*, *supra* note 137, at 283; SPRANKLING, *supra* note 38, at 610.
262. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.6 cmt. a (AM. L. INST. 2000).
263. *Ancient Strands*, *supra* note 5, at 1289 n.149.
264. *Tribute*, *supra* note 4, at 659, 661; *First Impressions*, *supra* note 95, at 138.

asset that "uniquely advance[s] the important social values of liberty and personal identity."[265] In other words, the touch-and-concern doctrine recognizes that ownership and possession allow for individual choice and "serve as one of several guardians of the 'troubled boundary between individual man and state.'"[266] Accordingly, these rights deserve protection and recognition as unique benefits offered by property law. [267]

This Comment echoes these sentiments and posits that the touch-and-concern doctrine continues to occupy an invaluable role in the law of covenants. Although opponents are correct in asserting that a covenant is nothing more than a contract as it applies to the original parties to the transaction, this position fails to account for the fact that real covenants are wholly distinct from garden-variety promises.[268] While many contracts are temporally dictated and specify single acts of performance, an encumbrance on land has staying power and may linger in perpetuity.[269] The public policy approach is also problematically ironic: by espousing a belief that judicial supervision of servitudes should retreat so that parties may enjoy contractual freedom restricted only by the bounds of public policy, proponents actually create grounds for more intrusive intervention, as this view imposes an open-ended standard that expands the basis on which a court may invalidate a covenant.[270]

Supporters of the contract approach, including a leading scholar who submits that freedom of contract should not be subordinate to the interests of future third parties,[271] similarly fail to account for the unique role that property law plays in asset allocation. This argument does not acknowledge that the common law has evolved around the reality that land is a scarce

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265. *See First Impressions*, *supra* note 95, at 139.

266. *Judicial Supervision*, *supra* note 6, at 144 (quoting Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964)).

267. *See id.* at 139-40.

268. *See supra* note 31 and accompanying text; Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1528 (2007).

269. *Judicial Supervision*, *supra* note 6, at 149; Korngold, *supra* note 268, at 1528.

270. Tarlock, *supra* note 9, at 810-11.

271. Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1360 (1982).

and non-fungible resource[272] and accordingly frowns upon possessors who create waste or do not efficiently steward their property at the expense of subsequent takers.[273] For instance, the rule against perpetuities, as well as the doctrines of adverse possession and prescription, exemplifies the consideration of "intergenerational fairness" and a concomitant reluctance to allow dead-hand control.[274]

Often is the case that land transfers occur between parties who are relatively inexperienced in real estate transactions.[275] Mistakes are bound to occur, and a covenantor who underestimates the extent to which a burden will reduce the value of his property may accept consideration for the promise that is inadequate.[276] The lack of standardization in land sales leads to difficulties in assessing a covenant's impact on the future market price of a subject parcel, which can make wealth-reducing miscalculations such as these commonplace.[277] The associated costs, however, are not absorbed entirely by the covenantor but are externalized because new generations of owners will assuredly take title to the burdened land.[278] Moreover, market forces may serve as an insufficient catalyst for removing onerous restrictions because the transaction costs of doing so, especially in the case of a parcel that has fallen into multiple ownership, may make the effort futile, as parties naturally seek to maximize their end of the bargain.[279] Courts, on the other hand, need not grapple with this inherent difficulty, as "[t]he stroke of a judicial pen can detach a covenant" from the land if it does not touch and concern.[280]

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272. *See* Korngold, *supra* note 268, at 1529.

273. *See* Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639, 2655 (2021); RESTATEMENT (FIRST) OF PROP. div. IV, pt. I, intro. note (AM. L. INST. 1944).

274. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e (AM. L. INST. 2000); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 615-17, 634 (1985) [hereinafter *Servitude Restrictions*].

275. Stake, *supra* note 1, at 939.

276. *Id.* at 935.

277. *Id.* at 934, 940.

278. *Id.* at 934-35 ("[M]istakes reduce the wealth of those surrounding the mistake-maker.").

279. *Id.* at 937-38; *Servitude Restrictions*, *supra* note 274, at 619.

280. Stake, *supra* note 1, at 941.

The touch-and-concern doctrine is necessary because parties lack the foresight to fully contemplate the implications of their promise on distant successors.[281] Indeed, "the individual who today makes a decision with future impact may differ significantly from the individual who reaps the benefits or suffers the consequences of those decisions in the future."[282] Quite simply, humans are not clairvoyant, and instances of land use planning that adequately anticipate future needs are rare enough that successful attempts are celebrated.[283] Because covenants essentially function as "private legislation" that affects a line of future possessors, touch and concern provides a tool for courts to simply shift the burden of negotiation where a promise serves no land planning function but instead regulates only the behavior of the parties to the transaction.[284] Rather than force a successor to incur high transaction costs in seeking release from the covenant, the burden falls on the other party to renegotiate with subsequent owners.[285] In effect, the doctrine ensures that "[p]ersonal contracts remain the subject of personal bargains."[286]

In Arkansas, the language used almost canonically in covenant cases that the unencumbered use of land is to be championed[287] seems to give effect to the notion that touch and concern, and by extension judicial supervision of land use restrictions, "safeguard[s] individual freedom."[288] To this end, the *Restatement (Third)*'s reconceptualization of the law of servitudes has had little demonstrable effect in caselaw,[289]

281. Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 958 (1988).

282. *Id.*

283. Korngold, *supra* note 268, at 1531; *see, e.g.*, REM KOOLHAAS, DELIRIOUS NEW YORK: A RETROACTIVE MANIFESTO FOR MANHATTAN 18-19 (Monacelli Press 1994) (1978) (remarking that New York City's street grid plan first implemented in 1807 was "the most courageous act of prediction in Western civilization: the land it divides, unoccupied; the population it describes, conjectural; the buildings it locates, phantoms; the activities it frames, nonexistent").

284. *Unified Concept*, *supra* note 12, at 1232-33.

285. *Id.* at 1233.

286. *Id.*

287. *See supra* notes 230-33 and accompanying text.

288. *Unified Concept*, *supra* note 12, at 1233.

289. Rosenberg, *supra* note 6, at 191; Merrill & Smith, *supra* note 77, at 694 ("To date, the courts have largely ignored the reforms urged by the *Restatement (Third) of Servitudes* . . . .").

although the court in *Bernard Court* did take note of the source's departure from the touch-and-concern doctrine.[290]

But it must be emphasized once more that the court in *Bernard Court* articulated no alternative rule through which to test the covenant at issue. Thus, following the court's holding that the touch-and-concern doctrine is not a fixture of Arkansas property law, there appears to be no external constraint to protect successors from incurring burdens of even the most personal nature, or at least those that are highly tailored to the needs of only the original parties, because the court did not adopt the *Restatement Third*'s public policy approach to test the covenant directly. Since parties cannot fully predict the needs of future generations, those unbounded by any real constraints are free to exert dead-hand control and high transaction costs on third parties, which are the very evils that property law seeks to prevent.[291]

As a result, the troubling reality under *Bernard Court*'s interpretation of the law is that one may impose a covenant on a piece of property unbounded by any limits as to the novelty or personalization of the promise.[292] Suppose that *A* sells Blackacre to *B* but creates a deed covenant requiring *B* to pay *A* $2,000 per year in addition to the purchase price. The source of the surcharge is a personal agreement between the two concerning a subject that is completely unrelated to the sale of the parcel. *A* is aware that running covenants have staying power and places language in the deed expressing the parties' intent for the covenant to run with the land. Years later, *C*, an unsophisticated purchaser acting without the assistance of counsel, or perhaps even a real estate agent, takes title to Blackacre and is surprised to learn that the seemingly personal promise between *A* and *B* now requires him to also pay $2,000 per year. Consequently, the covenant creates a cloud on

290. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 13 n.6, 2020 WL 7251526, at *6 n.6.

291. *See* Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 951 (2009); *supra* note 278 and accompanying text.

292. To be sure, the covenantee would continue to be constrained by state and federal constitutional limits, e.g., racially restrictive covenants clearly violate the Equal Protection Clause of the Fourteenth Amendment. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (AM. L. INST. 2000).

title that devalues the property.[293] Such a covenant clearly does not touch and concern the land, but under the *Bernard Court* holding, what is to stop this absurdity from occurring?[294]

Indeed, in the wake of *Bernard Court*, a timeshare owner could be forced to pay amenity fees for recreational facilities that share only a diminutive connection with his property;[295] a commercial landlord could be obligated to uphold a promise made by its distant predecessor to return security deposits to tenants;[296] and a landowner who suffers a condemnation action could be compelled to award the compensation for the taking to the original owner of the parcel.[297] The covenants in all three of these cases were held unenforceable for want of the touch-and-concern requirement. Yet, these promises would likely find safe harbor in the *Bernard Court* holding.

Importantly, "[t]ouch and concern continues to be diligently, if incoherently, applied by courts because it has a function, although courts often have trouble articulating it."[298] Even "progressive" courts that have tested covenants using more modern doctrines have found themselves unable to shake touch and concern's roots.[299] In *Davidson Brothers v. D. Katz & Sons,* a leading case on the issue,[300] the court adopted a reasonableness test to evaluate an anticompetition covenant but chose not to abandon touch and concern, holding that the doctrine is a factor to be considered in determining the reasonableness of a restriction.[301] Likewise, in *Whitinsville Plaza, Inc. v. Kotseas*, the case that overturned *Norcross v. James*, the court validated an anticompetition covenant on the basis of reasonableness but similarly did not dispense with the doctrine, noting that it is a "prerequisite" for the enforcement of both real covenants and

293. *Cf.* SERKIN, *supra* note 12, at 186 (exploring a similar hypothetical).

294. *See id.*

295. *Contra* Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, 652 S.E.2d 378, 389 (N.C. Ct. App. 2007).

296. *Contra* Mullendore Theatres, Inc. v. Growth Realty Invs. Co., 691 P.2d 970, 971 (Wash. Ct. App. 1984).

297. *Contra* Caulk v. Orange Cnty., 661 So. 2d 932, 933-34 (Fla. Dist. Ct. App. 1995).

298. Tarlock, *supra* note 9, at 810.

299. *See id.* at 811.

300. *Id.* at 811-12.

301. 579 A.2d 288, 295 (N.J. 1990).

equitable servitudes.[302] In other words, the court enforced the covenant at issue because it was reasonable in scope *and* it touched and concerned the land.[303] Many states have gone so far as to codify the underlying function served by the doctrine by statutorily prohibiting the running of covenants in gross.[304] In sum, while its application has been messy, touch and concern remains a viable doctrine and one that constitutes sound judicial policy.

CONCLUSION

With its decision in *Bernard Court, LLC v. Walmart, Inc.*, the Arkansas Court of Appeals has imparted additional uncertainty onto an already opaque corner of the law. The touch-and-concern doctrine is not dead, however, as the court's holding failed to accord with relevant precedent from the Arkansas Supreme Court. If presented with another apposite case, the supreme court should resolve this incongruity by reaffirming the existence of touch and concern under Arkansas law and the protections the doctrine provides to landowners in the state. Alternatively, the General Assembly should follow the lead of other states by codifying the function embodied by the rule.

Ultimately, touch and concern recognizes that "[l]and is altogether different."[305] It is a static, finite commodity of which future generations will assume control.[306] As ownership of this permanent resource is a keystone right that is interwoven with the American identity,[307] the law responds by "order[ing] property in response to societal needs."[308] In this vein, the touch-and-concern

302. 390 N.E.2d 243, 246, 250 (Mass. 1979).

303. *Id.* at 250 ("[A]n enforceable covenant will be one which is consistent with a reasonable overall purpose to develop real estate for commercial use. In addition, the ordinary requirements for creation and enforcement of real covenants must be met.").

304. *See, e.g.*, MONT. CODE ANN. § 70-17-203 (2011); N.D. CENT. CODE § 47-04-26 (1943); S.D. CODIFIED LAWS § 43-12-2 (1939); CAL. CIV. CODE § 1462 (West 1872). These statutes all require that a covenant directly benefit property.

305. Korngold, *supra* note 268, at 1528.

306. *Id.* at 1529.

307. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333 (1996); Korngold, *supra* note 268, at 1535-36.

308. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 547 (2005).

doctrine ensures that the personal promises of generations past do not linger to infringe on the individual liberties of subsequent owners and their concomitant ability to meet the demands of an inexorably changing world.[309] To be sure, touch and concern poses no real barrier to the vast majority of covenants that landowners create.[310] It merely serves as a bulwark against the dangers that property law has evolved to guard against.

309. *Mixed Blessings*, *supra* note 119, at 87; Korngold, *supra* note 268, at 1540-41.
310. *Servitude Restrictions*, *supra* note 274, at 649.