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CONTENTS

ENABLING THE PRIVATIZING OF TOLL ROADS: A PUBLIC-PRIVATE PARTNERSHIP MODEL FOR NEW JERSEY.....623
R. David Walker

COMPUTER FRAUD AND ABUSE ACT: ABUSING FEDERAL JURISDICTION? 661
Sarah Boyer

RECENT DEVELOPMENTS IN SCHOOL SPEECH LAW – EXAMINING THE POTENTIAL FATE OF *HARPER V. POWAY UNIFIED SCHOOL DISTRICT*.....703
Matthew Kohut

"WHISTLEBLOWING" AND THE INTENTIONAL DISTORTION OF NEWS.....745
Jessica Bisignano

PRESERVING THE BEST INTERESTS OF THE WORLD'S CHILDREN: IMPLEMENTING THE HAGUE TREATY ON INTERCOUNTRY ADOPTION THROUGH PUBLIC-PRIVATE PARTNERSHIPS..... 780
Lisa Myers

A CALL TO THE COURTS TO NARROW THE SCOPE OF THE DEFINITION OF LEARNING DISABILITY WITHIN THE AMERICANS WITH DISABILITIES IN EDUCATION ACT.....819
Mark F. Kowal

LIMITING CONTINUATIONS: A PHARMACEUTICAL BASED PERSPECTIVE.....856
Hedwig A. Murphy

THE PLAYBOY DEFENSE IN PHILADELPHIA: HOW PENNSYLVANIA CONTINUES TO THWART FAIR AND EFFECTIVE SEXUAL ASSAULT PROSECUTIONS BY REFUSING TO ADMIT EXPERT TESTIMONY ABOUT RAPE TRAUMA SYNDROME 891
Christopher Emrich

ENABLING THE PRIVATIZING OF TOLL ROADS: A PUBLIC-PRIVATE PARTNERSHIP MODEL FOR NEW JERSEY

R. David Walker[1]

I. INTRODUCTION

With the recent tragedy of the I-35W Mississippi River bridge collapse in Minnesota, the state of the nation's transportation infrastructure was thrust into the national spotlight. Thirteen people were killed and over one hundred injured when a steel truss arch bridge collapsed into the Mississippi River outside of Minneapolis in August of 2007.[2] News of the accident and the resulting death and destruction brought great consternation from the American public and pledges from political leaders for increased transportation funding across the country. In response, Congress initially proposed an ambitious funding bill which would have devoted $25 billion to repairing transportation infrastructure across the country.[3] In short order, however, the bill was reduced to a $2 billion proposal in the House and was ultimately never passed

[1] B.A., Political Science, Drew University (2005); J.D., Rutgers University School of Law – Camden (2009).

[2] Jason Hoppin, *Recovery Ends, Rebuilding Begins*, ST. PAUL PIONEER PRESS (St. Paul, Minn.), Aug. 21, 2007, at B6.

[3] Kevin Diaz, *Pared from $25 Billion to $2 Billion: Without a Gas Tax Hike, Oberstar had to Propose a Bare-Bones Bridge Repair Bill*, STAR TRIB. (Minneapolis – St. Paul, Minn.), Oct. 31, 2007, at 1A.

by the Senate.[4] Although the proposal is periodically reintroduced, it appears that at least for the time being, the political impetus for sweeping reinvestment in the nation's transportation infrastructure does not exist at the national level.[5] This is troubling given that every recent assessment of the nation's transportation infrastructure has raised major concerns throughout all regions of the country and across particular types of infrastructure.

A 2007 analysis by the U.S. Department of Transportation put the number of structurally deficient and structurally obsolete bridges across the entire country at twelve percent and thirteen percent respectively.[6] Recent assessments of the country's roadways similarly reveal a number of troubling statistics. According to one national transportation research group, "33 percent of the nation's major roads are in 'poor or mediocre condition…' [and] 36 percent of major urban highways are congested."[7] The major problem is an aging national roadway system, largely completed in 1950's, that has failed to adapt to exponential growth in traffic during the same period. In the space of little more than 50 years, the number of cars and trucks using the national roadway system has increased from roughly 65 million to around 250 million.[8] Compounding the problem is the concurrent crisis in available sources of transportation funding. At the current rate of federal gasoline taxes, the Federal Highway Trust Fund is projected to be depleted by 2009.[9]

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[4] *Id.*; *see also* GovTrack.us., H.R. 3999: National Highway Bridge Reconstruction and Inspection Act of 2008, http://www.govtrack.us/congress/bill.xpd?bill=h110-3999 (last visited Apr 4, 2009).

[5] GovTrack.us., *supra* note 3.

[6] U.S. Department of Transportation, Research and Innovation Technology Administration, Bureau of Transportation Statistics, Condition of U.S. Highway Bridges by State: 2007 (Aug. 13, 2007), http://www.bts.gov/current_topics/2007_08_02_bridge_data/html/bridges_by_state.html (last visited Mar. 10, 2009).

[7] John W. Schoen, *U.S. Highway System Badly in Need of Repair*, MSNBC, Aug. 3. 2007, http://www.msnbc.msn.com/id/20095291/.

[8] *Id.*

[9] *Id.*

The fact that the nation's transportation infrastructure is in an already troubled condition and headed toward crisis is not widely disputed. What is in contention, however, is the form in which much needed reforms will eventually take. Currently, there are two main sources from which funding for transportation infrastructure maintenance and expansion is drawn – government grants and taxes on gasoline.[10] As was demonstrated by the congressional response to the Minnesota bridge collapse, the political will for increasing federal funding for bridges and roadways is extremely limited. The nature of the federal legislative process also tends to emphasize individual legislators obtaining money for limited projects within their own states rather than comprehensive transportation reform for the country as a whole. Thus, the onus of bridging the growing gap in transportation funding largely falls on the states themselves.[11] In the face of this difficult situation, states around the country are increasingly turning towards alternative methods of finance for continuing transportation costs. One of the predominant new initiatives being explored at the moment is the viability of turning significant portions of state-run roadways over to private corporations in what are known generally as public-private partnership (PPP) agreements.

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[10] PETER SAMUEL, REASON FOUNDATION, THE ROLE OF TOLLS IN FINANCING 21ST CENTURY HIGHWAYS (2007), http://www.reason.org/ps359.pdf.

[11] *Id.* at 3. This gap in funding is one that states are unlikely to be able to fund in the future based on gasoline taxes alone. Current rates of transportations expenditures do not meet the cost of maintaining the current roadway system without even taking into account the cost of expansions needed to accommodate future growth:

> In 2002 dollars, the most recent estimate of the annual investment needed to maintain the current level of pavement conditions was $73.8 billion a year, compared with actual capital spending of $68.1 billion – an 8.3 percent shortfall.
>
> The estimated cost to improve (as well as maintain) was put at $118.5 billion a year. Thus, a 74 percent increase in annual spending was judged necessary to improve the system in order to keep pace with the growth in driving and truck usage.

Id.

A. General History of Toll Road Privatization Initiatives

The concept of privately operated toll roads is hardly a new one in the United States. As early as the nineteenth century, examples of privately incorporated turnpikes can be found throughout the United States as rural residents sought to connect themselves to major industrial centers.[12] These initiatives were encouraged by local and state officials and competition for new transportation infrastructure was often fierce. James A. Dunn writes that state governments "scrambled to stay ahead of their neighbors and were willing to offer as many inducements as necessary (direct stock ownership, subsidies, loans, monopoly charters and franchises, land grants, tax incentives, dedicated streams of public revenue, etc.) to make sure that their communities were not bypassed by the new mode."[13] Eventually, however, the state run model of major roadway financing would win out across the country and it was not until recently that the idea of privately held turnpikes again resurfaced in any systematic way around the country.[14]

In New Jersey specifically, the idea of leasing the New Jersey Turnpike and the Garden State Parkway is one that has been floated periodically for years. The proposal, however, did not gain any serious traction until it was first discussed by Governor Corzine as a possible remedy for the state transportation budget crisis.[15] When he first came to Trenton, the Governor made a point of highlighting the current transportation budget problems within the state and offered the potential lease of both

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[12] *See generally* Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845*, 26 Law & Soc'y Rev. 469 (1992). Klein and Majewski present a comprehensive background on the roots of the turnpike movement in New York during the 1800's and the rationales behind use generally as an alternative to state funded roadways. *Id.*

[13] James A. Dunn, *Transportation: Policy-Level Partnerships and Project-Based Partnerships*, *in* Public-Private Policy Partnerships 78-79 (Pauline Vaillancourt Rosenau, ed., 2000).

[14] Samuel, *supra* note 9, at 12-13.

[15] Tom Davis, *N.J. Faces Rocky Ride in Sale of Toll Roads; Does One Shot Windfall Justify Long-Term Risks?*, The Record (Bergen County, N.J.), Jan. 14, 2007, at A1.

highways as the only real hope of lowering the highest in the nation property taxes. State Senator Raymond J. Lesniak (D. Union) then introduced in February of 2007 a bill that would have provided statutory authorization for the Governor to pursue his privatization agenda.[16]

The introduction of the enabling bill in the New Jersey Senate, however, appears to have been the high-water mark of the political impetus for transportation privatization in the state. Despite general agreement that privatizing the state's toll roads would generate a substantial windfall, public sentiment was decidedly against the maneuver.[17] Polls taken during that time period revealed that around 60 percent of voters were opposed to any form of leasing the New Jersey Turnpike and Garden State Parkway.[18] And perhaps most worrisome for proponents of the measure, voters were more inclined to oppose leasing, the more they learned about the proposal.[19] Senator Lesniak's bill has subsequently stalled in committee and Governor Corzine has since backed away from the proposal himself.[20]

---

[16] S. 2539, 212th Leg., Reg. Sess. (N.J. 2007) (permitting the "State Treasurer to enter into public-private partnership providing certain concession rights to private parties or a public-private partnership under same terms and conditions" and directing that "proceeds of this transaction be used for reduction of State debt and refunding of Turnpike Authority Debt").

[17] Paul Nussbaum, *Spinning Toll Roads' Asphalt into Gold: Pennsylvania and New Jersey are Considering Leasing Them to Firms. The States Could Get Billions. But at What Cost?*, PHILA. INQUIRER, Feb. 25, 2007, at B1. Current estimates of the dollar amount that the state could potentially net from a lease of the Turnpike and Parkway are somewhere in the $30 to $40 billion range. Lack of transparency in other deals around the country and idiosyncrasies of any potential New Jersey deal make any exact determination unpredictable. *Id.*

[18] Rutgers-Eagleton Poll, Corzine Faces Uphill Climb to Sell Toll Road Idea (Aug. 14, 2007), http://eagletonpoll.rutgers.edu/polls/release_08-14-07.pdf.

[19] *Id.*

[20] Tom Hester Jr., *New Jersey Weighs New Approach to Transportation Funding*, THE TIMES (Trenton, N.J.), Jan. 27, 2008 at A5. Governor Corzine is currently proposing the creation of a "nonprofit corporation to manage toll roads and issue[] bonds [which will be] paid back by increasing tolls." This would in theory accomplish some of the same goals as the creation of public-private partnership but importantly, all control would be left in the hands of the government. *Id.*

Across the country, critics of toll road privatization strike a number of common themes in their arguments against PPP projects – predominantly focusing on unintended negative consequences that will arise. It is apparent that many of these arguments have struck a chord with New Jersey residents. Of foremost concern to New Jersey motorists and PPP detractors generally is the potential effect that privatization will have on current toll rates.[21] Consequently, the authority with whom ultimate rate-setting authority is vested and the existence of governmental checks on rate-hikes are of foremost concern in any eventual partnership with a private corporation. A second concern heard time and again from PPP critics is the negative effect that privatization will have on current state highway employees.[22] New Jersey currently employs over 2,000 Turnpike and Parkway employees, making this issue a particularly resounding one for New Jersey residents.[23] Other complaints run the gamut from fears of foreign ownership and operation of strategic national infrastructure to concerns over continued customer service and the levels of maintenance provided by privately run firms.[24]

Regardless of their accuracy, these attacks on PPP agreements have had their intended effect and, without significant change in public sentiment, any new legislation in this area is unlikely. Consequently, it would appear that any successful public-private partnership legislation in New Jersey will in some way have to account for these concerns and craft legislatives answers.

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[21] Davis, *supra* note 14.

[22] *Id.* One of the major problems that has emerged with a major PPP project implemented in Indiana has been the initiative's failure to take into account the state employees affected by the transfer to a private company. Eventually, Indiana offered alternative employment to 600 of its employees affected but the issue has remained in contention since the projects inception. *Id.*

[23] *Id.*

[24] *See, e.g.*, *Testimony from Invited Guests Concerning Asset Monetization, Specifically the Possible Sale or Lease of the State's Toll Roads: Hearing Before the Assem. Trans. and Public Works Comm.*, 212th Sess. 56-60 (N.J. 2007) (statement of Len Shiro, International Federation of Professional and Technical Engineers).

B. OBJECTIVES OF THE NOTE

This Note will examine the various forms that PPP enabling legislation has taken in other states and the practical effect that it has had on the several privatization projects now underway throughout the country. It will then recommend various features of existing legislation that have been successful and should be incorporated into any future New Jersey legislation. It will also suggest aspects of typical PPP legislation that should be tailored to the particular needs of New Jersey.

II. THE CURRENT STATE OF PUBLIC-PRIVATE PARTNERSHIPS

Because the traditional state model for transportation infrastructure development was largely premised on "the use of government funds and traditional contracting," almost all states did not initially have the legal framework in place to turn highway construction and maintenance over to the private sector.[25] This landscape has begun to change dramatically in recent years and there are currently twenty-three states, most in the southeastern and western portions of the U.S., that have provided statutory authority for PPP agreements.[26] This authorization is often broad and can refer to a number of different arrangements between state governments and private entities for the operation of state highways.

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[25] Katie Nees & Pamela Bailey-Campbell, *Private on the I's: What to Consider When Turning Interstates into Stockholder Property*, ROADS & BRIDGES, Mar. 2006, at 46.

[26] For a complete survey of existence PPP legislation by state, see Department of Transportation, Federal Highway Administration, State PPP Enabling Statutes, http://www.fhwa.dot.gov/PPP/tools_state_legis_statues.htm (last visited Mar. 10, 2009).

A. STATES WITH PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

1. Heavily Regulated PPP Enactment Model

States with PPP legislation have enacted a myriad of legislative measures allowing them to retain control over substantial portions of eventual partnership agreements with private entities. In many cases, these provisions have a substantial impact on the eventual form that PPP agreements take. In some instances, regulation can be so limiting as to make public-private partnership an unprofitable proposition, effectively stifling private sector interest altogether. Clearly, striking the right balance between effective and overbearing regulation is an essential aspect to the legislative process.

a. Government Tolling Enterprises

Several states have created a subsidiary governmental body specifically for handling regulation of public-private partnership agreements. In Colorado, for example, this legislation has created the Colorado Tolling Enterprise (CTE).[27] The Enterprise in this instance actually operates as a government owned business contracting out with private corporations for substantially limited portions of the overall operation of the Colorado State toll road system.[28] Although the CTE does

[27] COLO. REV. STAT. §§ 43-4-801-812 (2004). The Colorado statute explains that the statewide tolling enterprise "shall operate as a government-owned business within the department [of transportation] and shall be a division of the department." § 43-4-803(1).

[28] The functions over which the Colorado Tolling Enterprise retains authority is instructive. Section 43 of the Colorado Code provides that the CTE has the power:

> (d) To establish and, from time to time, increase or decrease fees, tolls, rates, and charges for the privilege of traveling on or the use of the property of a toll highway . . . .
>
> (e) To establish, charge, and collect fees and charges for the use of other property of the enterprise;
>
> . . . .
>
> (k) To prepare . . . detailed plans, specifications, or estimates for the financing, construction, relocation, repair,

accept bids from private entities, it is only in the limited capacity of "facilitating" the Enterprise in operation and maintenance of toll roads.[29] Where private entities are contracted to operate a particular toll road, the CTE retains a great deal of discretion over the actual toll rates that are established.[30] This model for public-private partnership initiatives clearly subjugates any private entity contracting with the CTE for the operation of toll roads in the state and represents one of the most highly regulated models for this type of agreement.

b. Retention of Rate Setting Authority

Another typical form of control over public-private partnership agreements is in retention by the state of significant authority over the maximum toll rates that can be established on highways within the state. This control can be implemented in a number of different ways. One common form of regulation is to stipulate that the state government has the power to set particular toll rates within each individual PPP agreement. Indiana Code, for example, stipulates that for each PPP agreement, the Department of Transportation may:

> (1) establish maximum amounts for the user fees; and
>
> (2) provide for increases or decreases of the maximum amounts based upon the indices,

---

> maintenance, or operation of a toll highway within the state . . . .
>
> (l) To acquire, construct, relocate, operate, regulate, and maintain a toll highway through and within the state;
>
> (m) To construct, maintain, and operate stations for the collection of tolls along a toll highway . . . .

§ 43-4-806.

[29] COLO. REV. STAT. § 43-4-806(h) (2004).

[30] COLO. REV. STAT. § 43-4-806(h)(I) (2004). Any increase in toll rates or charges is "subject to the *supervision and approval* of the enterprise." *Id.* (emphasis added).

> methodologies, or other factors that the department consider appropriate.[31]

This formulation grants the government a great deal of discretion over the terms of any arrangement with private entities. There is no requirement that the state base toll rates on market conditions or any other particular financial indicator and could in theory be used to effectively block future privatization by making any particular agreement financially untenable.

Another popular form of governmental control is to impose a statutorily mandated rate limit at which toll fees can increase in the future. Although the specific language varies by state, the Virginia formulation is illustrative of the norm. Virginia Code states that a comprehensive agreement with a private entity for the operation of a toll road can provide no more than a "reasonable . . . rate of return" for that entity.[32] This reasonableness requirement provides significant discretion to the state in negotiating PPP agreements but notably less than a formulation such as that in Indiana. A more stringent variation of this concept is the Florida Statute which provides that toll rates be regulated in accordance with legislative standards set for toll rate increases on state owned roadways. Specifically, rates are required to be indexed "to the annual Consumer Price Index or similar inflationary indicators." It goes on to provide that, "[t]oll rate adjustments for inflation under this subsection may be made no more frequently than once a year and must be made no less than once every 5 years as necessary to accommodate cash toll rates schedules."[33] This arrangement

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[31] IND. CODE ANN. § 8-15.7-1-1 (West 2008). An even more drastic version of this arrangement can be found in the North Carolina statutory formulation. Although the state has enabled PPP relationships, it retains absolute authority to "fix, revise, charge, and collect tolls and fees for the use of the Turnpike Projects." N.C. GEN. STAT. § 136-89.183 (1994).

[32] VA CODE ANN. § 56-566(A)(8) (2005). *See also* MINN. STAT. § 160.86(f) (1993) ("The agreement must establish a reasonable rate of return on investment and capital during the term of the agreement.").

[33] FLA. STAT. ANN. § 338.165(3) (West 2007). Interestingly, the proposed PPP legislation now before the New Jersey Legislature contains a similar provision, stating that:

> Increases in tolls, if any, in any calendar year shall not exceed the percentage increase in the Consumer Price Index reported

provides less governmental discretion in negotiations with private entities but at the same time may be the most severely limiting on rate increases of any of the provisions discussed.

2. Limitation or Re-Authorization Requirements

States have also attempted to limit the scope of PPP initiatives by either setting limits on the total number of such projects or by requiring additional legislative approval for each individual project. In some instances, states have created PPP legislation that enables only one project that is expressly named within the statute.[34] Others have specifically authorized a set number of projects as a "pilot projects" in order to assess their effectiveness. This alternative has been widely utilized and provides states with a way of checking expansion of PPP projects and ensuring that their future use can only be authorized after additional assessment by the legislature. Arizona, for example, has passed enabling legislation specifically entitled "Transportation Facility Pilot Projects" which expressly prohibits approval of more than two PPP projects.[35] This approach obviously grants a great deal of control to the government in determining where to proceed after the pilot program has run its course, but at the same time it severely restricts the scope PPP transportation development within the state.

> in the previous calendar year, except that increases in tolls for commercial motor vehicles shall not exceed the percentage increase in the [GDP] . . . and except that with regard to tolls charged on the Garden State Parkway, during ten years from the date of the agreement, tolls shall not exceed $0.50 and may be increased no more than $0.10 during each succeeding ten-year period . . . .

S. 2539, 212th Leg., Reg. Sess. (N.J. 2007).

[34] *See generally* ALASKA STAT. §§ 19.75.111, .113, .211, .221 (2008). Alaska PPP legislation authorizes the Knick Arm Bridge and Toll Authority to "utilize a PPP to finance, design, construct, operate and maintain the Knik Arm Bridge." U.S. Department of Transportation, Federal Highway Administration, State Public Private Partnership Legislation Overview Table (Dec. 2007), http://www.fhwa.dot.gov/ppp/tools_state_legis_table.htm.

[35] ARIZ. REV. STAT. ANN. § 28-7701(D) (1997).

More generally within this same category, an important distinction between state approaches is whether the particular legislation allows unsolicited bids from private corporations. Here, the only difference between the two drafting alternatives is whether a state will accept bids for PPP projects it did not initiate. States with PPP legislation are divided as to how they approach this issue, but states that do not allow unsolicited bids are able to use this provision to substantially control the direction of private transportation initiatives within the state.[36]

a. Less Restrictive PPP Enabling Models

The least restrictive public-private partnership legislation is most easily defined in the negative. States can be viewed as particularly open to toll road privatization by their lack of the control measures above that create a highly regulated atmosphere for potential PPP initiatives. The Louisiana PPP enabling statute is illustrative of this hands-off approach to transportation privatization.[37] It allows for both solicited and unsolicited bids for the development or operation of transportation facilities as public-private partnership projects and places no limits on the number of proposal that will be

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[36] *See* S.C. CODE ANN. §§ 57-3-200; 57-5-1310 (2007) (providing no express provision governing the treatment of unsolicited private bids, effectively denying the Department of Transportation authority to accept them). The proposed New Jersey PPP act also falls decidedly on the side of states favoring government control over the PPP proposal process, stating in part that:

> The Treasurer of the State of New Jersey may enter into an agreement for a public-private partnership with a private firm to operate and maintain transportation projects of the Turnpike Authority and to undertake certain related duties for a period of time not to exceed 50 years. *If the Treasurer determines to seek such an agreement he shall solicit requests for proposal from private firms* for a public-private partnership pursuant to section 6 of this act.

S. 2539, 212th Leg., Reg. Sess. (N.J. 2007) (emphasis added).

[37] LA. REV. STAT. ANN. §§ 48:2072(C)-(D), 48:2084 (2004). The legislative findings of the Louisiana enabling statute declares that "[i]t is the intent of this Chapter to encourage investment in the state of Louisiana by private entities and to facilitate to the greatest extent feasible the financing, development, and operation of transportation facilities." *Id.*

considered or accepted.[38] Upon accepting a PPP project bid, the criteria set forth for determining the acceptability of such a project are more lenient than many other states.[39] Finally, it is the private entity that is granted the initial authority to set user fees for transportation facilities and determine when rates should be raised.[40] Toll rates set by private entities are only reviewed after the fact by the Louisiana Department of Transportation for general reasonableness.[41] This system of regulation grants the state less discretion in denying private entity bids for PPP projects and fosters an atmosphere likely to encourage their increasing use in the state.

B. PUBLIC PRIVATE PARTNERSHIP AUTHORIZATION THROUGH ADMINISTRATIVE AGENCY REGULATION

1. Maryland Case Study

Maryland's path to enabling public-private partnership transportation projects has been a convoluted one but also one that may be instructive in states where PPP legislation appears to be dead in the water, as in New Jersey. Currently, there is no Maryland statute that authorizes the government to contract

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[38] LA. REV. STAT. ANN. § 48:2084(A) (2004).

[39] LA. REV. STAT. ANN. § 48:2084(D)(1) (2004). The authority is directed to approve a PPP proposal upon a finding that "the proposal serves a public purpose." *Id.* In reaching that determination, the authority should decide only whether:

> (a) There is a public need for a transportation facility or facilities of the type the private entity proposes to develop or operate as a transportation facility.
>
> (b) The transportation facility or facilities and the proposed interconnections with existing transportation facilities, and the private entity's plans for operation of the qualifying transportation facility or facilities are reasonable and not incompatible with the state transportation plan and with the local governmental entity's comprehensive plan or plans.

Id.

[40] LA. REV. STAT. ANN. §§ 48:2084.5(D) (2004).

[41] *Id.*

with private entities for the construction of PPP projects. Nevertheless, the Maryland Department of Transportation has created an extensive body of regulations governing the subject and several PPP projects are now on the horizon in the state.[42] These projects include the proposed privatization of portions of the Capital Beltway (I-495) and the Baltimore Beltway (I-695).[43]

Despite the lack of legislative action, the Attorney General of Maryland has subsequently upheld this method of authorizing PPP projects, and under the current formulation, the Department of Transportation Code serves as the governing document for all future projects. In a 1996 decision, the Attorney General found authority for public-private partnership in transportation based on the fact that state law did "not *prohibit* a private entity from owning, constructing, or maintaining a highway."[44] The Attorney General went on to examine the enabling statute pertaining to the already existing Maryland Transportation Authority (MTA). The MTA was expressly charged with powers and duties "relating to the supervision, financing, construction, operation, maintenance, and repair of transportation facilities."[45] The MTA was further authorized to "make any contracts and agreements necessary or incidental to the exercise of its powers and performance of its duties."[46] In conclusion, the Attorney General found that this clause incorporated the ability to contract with private entities for the operation of state owned roadways.

This decision has never been challenged, and it is unclear what the outcome would be in another state that attempted a similar maneuver. Despite similar statutory language in almost every state regarding the grant of power to either a

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[42] *Private Transportation and Competition: Hearing Before Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Gov't Reform*, 108th Cong. (2004) (Statement of Dr. Adrian Moore, Vice President, Reason Foundation), available at http://www.reason.org/commentaries/moore_20040518.shtml.

[43] *Id.*

[44] Private Construction and Operation of a Toll Highway, 81 Op. Att'y Gen. 261 (1996).

[45] *Id.* at 263.

[46] *Id.* at 264.

transportation authority or the department of transportation itself, it is far from certain that another state would make the conclusion that this inherently provided authority for private contraction on transportation projects. In a state such as New Jersey, where the issue is hotly contested in the public at large, it is even more questionable that the political will exists to attempt something of this kind. Regardless, the Maryland model presents an interesting interpretation of PPP authorization worth exploring where the legislature appears deadlocked on the issue.

C. FEDERAL HIGHWAY ADMINISTRATION MODEL LEGISLATION

The final legislative formulation for PPP enabling statutes worth exploring is the model legislation promulgated by the Federal Highway Administration (FHA).[47] The FHA has examined the landscape of state statutes authorizing public-private partnerships for common themes and suggested approaches to particular policy goals. The stated purpose according to the FHA is to "provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services."[48] Although its scope is broad, it is interesting to note that the majority of issues addressed are real concerns that have been raised with regard to proposed PPP legislation in New Jersey. The legislation is obviously biased toward the promotion of PPP projects around the country as a means of financing comprehensive transportation reform and consequently it serves as a useful tool in examining some potential legislative resolutions to the current impasse in New Jersey.[49]

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[47] U.S. Department of Transportation, Federal Highway Administration, PPP Model Legislation Working Draft, http://www.fhwa.dot.gov/PPP/pdf/legis_model.pdf (last visited Mar. 10, 2009).

[48] *Id.* at 1.

[49] *Id.*

The most striking feature of the Federal Highway Administration Model Legislation is the amount of discretion it proposes to leave to state transportation departments in negotiating the terms of eventual PPP agreements. Almost all provisions of the model legislation identify the requisite areas that eventual agreements must cover but ultimately do not set any hard and fast standards that must be met. Clearly, the federal drafters of the model legislation envision a largely individualized process whereby state governments are granted wide discretion in crafting individualized terms to meet the needs of specific projects.

An important example of this approach can be seen in the model legislation provisions covering the necessary elements of any PPP agreement. This section essentially sets forth the minimum aspects of an agreement that must be addressed.[50] As

[50] *Id.* at 8-9. Public Private Agreement.

> (b) The public-private agreement shall provide for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.
>
> (c) The financing mechanism included in a public-private agreement may include the imposition and collection of user fees and the development or use of other revenue sources.
>
> (d) A public-private agreement between the Department and a private entity shall specify at least the following:
>
> (1) which party will assume responsibility for which specific project elements and the timing of the assumption of responsibility;
>
> (2) the type of property interest, if any, the private entity will have in the transportation facility;
>
> (3) if and how the parties will share costs of development of the project;
>
> (4) if and how the parties will allocate financial responsibility for cost overruns;
>
> (5) liability for nonperformance;
>
> (6) any incentives for performance;
>
> (7) any accounting and auditing standards to be used to evaluate progress on the progress on the project; and
>
> (8) other terms and conditions.

opposed to many of the more restrictive versions adopted by the various states mentioned above, the model legislation merely states that "user fees" are allowable on PPP created transportation infrastructure and that the terms of any revenue sharing must be negotiated beforehand. Similarly, the balance of the "Public Private Agreement" section merely puts forth the minimum elements of a PPP agreement that must be covered but puts no limitations on the shape of any eventual agreement. Responsibilities of the private and public parties, the allocation of the property interest in the eventual infrastructure, and cost sharing are all left to be defined in any future agreement between a private party and the state.[51] The Model Legislation also provides for the acceptance of unsolicited proposals from private entities wishing to contract with the state.[52] As explained above, denying the state department of transportation from considering unsolicited proposals is a major limitation on the development of PPP projects with a state.

In this way, the Model Legislation proposed by the Federal Highway Administration is even less restrictive than any of the state legislation considered above as examples of more lenient legislation. It is clear that as PPP legislation has been adopted around the country, it has not taken a form that in most cases even remotely resembles the version championed by the FHA. The reason for this discrepancy likely lies with the competing political concerns that most states have faced in adopting PPP legislation and that this article seeks to address. PPP legislation in the great majority of states reflects a compromise between PPP proponents and those who seek to prohibit the practice altogether. The end result in most cases has apparently been the

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Id.

[51] *Id.*

[52] *Id.* at 5. The only limitation placed on the state's discretion to consider unsolicited proposals is found in Section 1-103(b)(1) which directs the state to consider an unsolicited bid if the proposal: (A) is independently originated and developed by the proposal; (B) benefits the public; (C) is prepared without Department supervision; and (D) includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner. *Id.* Obviously, this lax language is designed to permit consideration of all but the most unserious bid proposals.

adoption of PPP legislation which significant limitations placed on the state government in negotiating with private entities.

D. PPP TRANSPORTATION PROJECTS

After examining the various forms that PPP legislation has taken around the country, the next logical step is to examine how enabling legislation has performed in the few states where actual projects have resulted. The first significant public-private partnership in the nation was formed to construct the Chicago Skyway Project and by far the most extensive and ambitious project has been the "Major Moves" initiative in Indiana. These two projects will be considered in turn. The way in which the legislation in place has shaped the eventual projects and how it has in many ways failed to account for a number of significant problems that have resulted are important considerations for any future legislation to be drafted in other states.

1. Chicago Skyway Project

Originally constructed in 1958, the Chicago Skyway Bridge is a major connector between Chicago and neighboring Indiana, servicing 18.7 million motorists in 2002.[53] "Bridge" is something of a misnomer as it actually includes almost eight miles of roadway on either side of the actual bridge that spans the Calumet River.[54] In 2003, the Skyway was turned over to a private operating company in return for $1.83 billion in concessions making it the first existing toll road to be privatized in the United States.[55]

The impetus behind privatizing the Chicago Skyway was much the same as for those states now considering similar initiatives such as New Jersey. In 2002, when the proposal was first floated, Chicago was suffering from a slowing national economy and increasingly inadequate federal and state funding for critical programs.[56] The fiscal situation facing the City of

[53] Chicago Skyway, www.chicagoskyway.org (last visited Mar. 10, 2009).

[54] *Id.*

[55] *Id.*

[56] *City Closes Skyway Concession Sale Transaction*, US STATES NEWS, Jan. 26, 2005.

Chicago at the time the lease was first proposed has been described as an unqualified "budget crisis."[57] Leasing the Chicago Skyway presented an opportunity to infuse the city with immediate and much needed funding. The eventual deal, signed in 2003 with Cintra-Macquarie Consortium, brought in a reported $1.83 billion in revenue.[58] This sum was earmarked for city spending programs across the board including everything from education, welfare programs, and debt retirement.[59] Interestingly, none of the $1.83 billion went toward transportation infrastructure or improvement. This aspect of the deal was somewhat controversial and will be discussed in depth at a later point.[60]

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[57] *Public-Private Highways Deals: The Future of Infrastructure Finance?: Hearing Before Highways, Transit and Pipelines Subcomm. of H. Trans. and Infrastructure Comm.,* 109th Cong. (2006) (statement of John H. Foote, Senior Fellow, Harvard University).

[58] *Skyway Concession Sale*, *supra* note 55.

[59] US States News broke down the proposed allocation of the revenue received from the Skyway lease as follows:

> In December 2004, Chicago City Council approved the Mayor's proposed allocation of the $183 billion Skyway proceeds. $875 million will be set aside in to establish a $500 long-term reserve fund, and a $375 million mid-term annuity the city can use to smooth the effects of economic cycles and stabilize the need for additional revenues.
>
> $100 million will be invested over the next five years to help improve quality of life in the city's neighborhoods for people and businesses. The largest portion of that $100 million… will fund safety net programs that will bridge the gap for Chicago's residents most in need . . . .
>
> Some of the initiatives to receive new or additional funding include Phase III of Chicago's Plan to End Homelessness, home heating assistance programs, assistance for the disabled to make home modifications, affordable housing and homeowner programs, job creation and training through re-entry programs for ex-offenders and a new Small Business Development Fund, and facilities and programs for children and seniors such as after-school programs, Meals-on-Wheels, and senior satellite centers.

Skyway Concession Sale, *supra* note 55.

[60] Foote, *supra* note 56.

The exact terms of the deal with Cintra-Macquarie Consortium offer a concrete example of how at least one government has addressed many of the concerns that seem inherent in such agreements and which PPP enabling legislation often seeks to address. First, it should be noted that Cintra-Macquarie is a consortium composed of Cintra Concessiones de Infraestructuras de Transporte, S.A. and Macquarie Infrastructure Group. Cintra, a Spanish firm, is "one of the world's largest private-sector developers of transportation infrastructure" and Macquarie, an Australian company, is one of the world's "largest private developers and operators of toll roads."[61] The partnership has experience operating toll roads across the world, including private toll roads in Canada, Australia, Spain, Chile, Portugal and Ireland.[62] The very fact that the private operation of an American roadway is now being conducted by a foreign company has been an issue of contention for critics who often couch their complaints in anti-foreigner polemic.[63]

Other specifics of the deal included terms that address many of the issues that state governments have faced in drafting PPP legislation. The lease agreement itself is longer than is permissible under some state enabling legislation and certainly longer than the majority of other lease agreements now taking shape around the country. The current agreement authorizes Cintra-Macquarie to operate the Skyway for a period of 99 years.[64] The extensive length of the lease was justified by Chicago Mayor Daley based on the need to ensure that Cintra-Macquarie sees a return on its investment in what has been a troubled roadway system in need of considerable repair. The 99 year deal also ensures that the lease will outlast the life of the

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[61] *Skyway Concession Sale*, *supra* note 55.

[62] *Id.*

[63] *See* Shikha Dalmia & Leonard C. Gilroy, *Going Protectionist Over a Fantasy Highway: Xenophobes See a Threat to U.S. Sovereignty in a Texas Freeway Project that Would Ease Trade with Mexico,* L.A. TIMES, Sept. 20, 2007, available at http://www.latimes.com/news/opinion/sunday/commentary/la-oe-dalmia20sep20,0,1857215.story.

[64] Foote, *supra* note 56, at 1.

asset itself, which is important for tax purposes.[65] Another important feature of the deal is the cap imposed on the maximum permissible toll rate increases. As opposed to typical legislative approaches, the deal reached with Cintra-Macquarie actually stipulates the permissible toll rates that can be collected for the first fifteen years.[66] After fifteen years, the permissible toll hikes are tied to the corresponding rate of inflation.

Finally, it is worth exploring the problems that have since arisen with the privatization of the Chicago Skyway Bridge and how these problems are potentially related to the terms of the agreement. An examination of the actual outcome of this lease is particularly important because it represents the only private lease of a toll road in America that has been in existence long enough to study the outcome. First, it should be noted that the lease and operation of the Skyway has proceeded relatively smoothly. As mentioned above, the Skyway sees annual use by approximately 19 million motorists. In the past three years, Skyway motorists have seen the installation of electronic tolling, an overhauled toll plaza, as well as significant roadway repairs.[67]

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[65] Yvette Shields, *Windy City Windfall; Officials Bask in Chicago Skyway Deal*, BOND BUYER, Nov. 17, 2004, at 1.

[66] *Skyway Concession Sale*, *supra* note 55.

> Tolls for passenger autos on the Skyway are limited under the agreement to no more than $2.50 until 2008, $3.00 until 2011, $3.50 until 2013, $4.00 until 2015, $4.50 until 2017, and $5.00 starting in 2017, unless inflation is higher during that period, with later adjustments equal to the greater of 2% per year, the increase in inflation, or the per capita GDP increase.
>
> Limits on commercial vehicles are comparable to passenger autos except that the agreement includes a congestion pricing provision, which permits a further 40% increase in daytime commercial tolls if the operator has a program in place for granting a reduction equal to that amount for commercial vehicles between the hours of 8 p.m. and 4 a.m.
>
> In December 2004, Skyway Concession Company, LLC announced that tolls for passenger autos would increase to $2.50 on February 2, 2005.

[67] Theodore Kim, *What's Down the Road for Hoosiers? Skyway May Offer Glimpse of Toll Road's Future*, THE INDIANAPOLIS STAR, July 14, 2006, at 1.

This is not to say, however, that no problems have arisen or that the outcome has silenced critics of the original lease agreement. For instance, it is uncontested that roadway congestion along the Skyway has increased significantly over the past several years.[68] While critics and proponents disagree over the root causes, the congestion problem has become a significant issue and one that the consortium has thus far been unable to solve.[69] Tied to this has been the hesitance of the public to adopt electronic tolling. The current rate of adoption remains significantly below the rate that Cintra-Macquarie had originally projected.[70]

Of more significance to the privatization debate, criticism has also arisen concerning the public dissatisfaction with the rapid rise in toll rates over the past several years and the mass exodus of public Skyway employees when the roadway was turned over to the Consortium.[71] Despite the fact that the recent toll rate increases were provided for in the initial lease agreement, the unavoidable fact remains that rates have significantly increased from the time when the Skyway was operated by the City of Chicago.[72] In contrast, the decision of

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[68] *Id.*

[69] *Id.* An interesting point to note is that problems with construction delays and congestion undoubtedly existed prior to the privatization of the Skyway. Theodore Kim explains that while the problems may have remained the same, only the source of the blame has changed and along with it the public has imputed a new motivation onto the Consortium to explain the same problems. He writes that "[w]hile the road was under city control, commuters' frustrations were driven by the idea that government incompetence was to blame. That ire is now increasingly steered by skepticism about the consortium's profit-making goals."

[70] *Id.* At the introduction of electronic tolling "about one in every five Skyway vehicles was equipped with a transponder. That number is now closer to one in three."

[71] *Id.*

[72] Foote, *supra* note 56. John Foote notes the negative impact on the public in terms of higher user fees that are somewhat inherent in the operation of roadways as a strictly "for-profit" enterprise:

> While there are winners, there are also losers. In the case of the Skyway, the losers are the Skyway users who will be paying significantly higher tolls than they would have paid

the great majority of the city-employed Skyway workers to leave their positions when the lease came into effect was an entirely unforeseen problem. These workers were guaranteed alternate employment within the City government, which most accepted, however, this "left the partnership short-staffed on short notice, forcing it to reach out to community leaders to rebuild its work force."[73]

Ultimately, the verdict on the effectiveness of privatizing the Chicago Skyway Bridge in bringing increased benefit to the City of Chicago and its citizenry remains decidedly mixed. While more time is undoubtedly required to sort out many of the remaining questions, the use of the Skyway deal as a template for future privatization deals is highly questionable. At this point, this case study is useful as an example of the practical issues that will surely be raised by critics of transportation infrastructure privatization in any future initiatives around the country.

2. Indiana "Major Moves" Initiative

The Indiana "Major Moves" initiative is a significantly more ambitious privatization project that encompasses a significant portion of the entire State of Indiana's roadway system. The initial plan to lease the Indiana Toll Road system was introduced by Governor Daniels in 2005. In justifying the plan, the Governor's administration noted that a $1.8 billion gap existed between the state's available resources and the projected necessary funding for transportation projects over the next decade.[74] After approval of the Indiana General Assembly, the Governor was able to secure a $3.85 billion offer for the maintenance and operation of Indiana Toll Road system for a period of 75 years.[75] As opposed to the Chicago Skyway Bridge

> under City ownership... Under private ownership and with the agreement of the City, tolls on the Skyway will more than double in the next twelve years and continue to increase through the terms of the concession.

[73] Kim, *supra* note 66.

[74] Indiana Department of Transportation, About Major Moves, http://www.in.gov/indot/2276.htm (last visited Mar. 29, 2009).

[75] *Id.*

deal, the Indiana arrangement reinvests almost all proceeds directly into transportation infrastructure. According to Administration estimates, transportation funding for "new construction will quadruple during the program from $213 million in FY 2006 to $874 million in 2015."[76] The plan includes more than 200 new construction and 200 major preservation highway projects.[77]

As before, analyzing the specific terms of the deal and, in this case, the legislation enabling it, is the all-important initial step in determining its importance as a template for future privatization. Here, the specific language of the enabling legislation is particularly important as it is one of the first to be tested through the application of an actual privatization agreement. Viewed in its entirety, the Indiana enabling act would most likely fall on the more restrictive side of the spectrum under the factors considered above in section II. First and foremost, the Indiana Finance Authority retains ultimate control over the setting of toll rates.[78] In an unusual provision,

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[76] *Id.*

[77] *Id.*

[78] IND. CODE ANN. § 8-15-2-14 (West 2009). The section reserving ultimate toll rate authority with the state provides that the Authority may:

> (1) fix, revise, charge, and collect tolls for the use of each toll road project by any person, partnership, association, limited liability company, or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion and for placing thereon telephone, telegraph, electric light, or power lines;
>
> (2) fix the terms, conditions, and rates of charge for such use, including assessments for the failure to pay required tolls, subject, however, to the state's police power; and
>
> (3) collect tolls, user fees, or other charges through manual or nonmanual methods, including, but not limited to, automatic vehicle identification systems, electronic toll collection systems, and, to the extent permitted by law, including rules adopted by the authority under IC 8-15-2-17.2(a)(10), global positioning systems and photo or video based toll collection or toll collection enforcement systems.

the Indiana Act also prohibits any further agreements with private entities which would impose new tolls unless they are specifically provided for in a new statute.[79] As mentioned above, this is a significant limitation on the development of PPP projects but in this instance and considering the scale of the current project, it is likely that no new PPP projects would be proposed in the foreseeable future in any case. A final peculiarity of the Indiana law also mandates that revenue

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Section 8-15.5-7-1 of the Indiana Code additionally provides for absolute Authority control over rates established through third-party agreements with private operators:

> (a) Notwithstanding IC 8-9.5-8 and IC 8-15-2-14(j), the authority may fix and revise the amounts of user fees that an operator may charge and collect for the use of any part of a toll road project in accordance with the public-private agreement.
>
> (b) In fixing the amounts referred to in subsection (a), the authority may:
>
> (1) establish maximum amounts for the user fees; and
>
> (2) provide for increases or decreases of the user fees or the maximum amounts established based upon the indices, methodologies, or other factors that the authority considers appropriate.

[79] IND. CODE ANN. § 8-15.5-1-2 (West 2008).

> (a) This article contains full and complete authority for public-private agreements between the authority and a private entity. Except as provided in this article, no law, proceeding, publication, notice, consent, approval, order, or act by the authority or any other officer, department, agency, or instrumentality of the state or any political subdivision is required for the authority to enter into a public-private agreement with a private entity under this article, or for a toll road project that is the subject of a public-private agreement to be constructed, acquired, maintained, repaired, operated, financed, transferred, or conveyed.
>
> (c) Notwithstanding any other law, neither the authority nor an operator may carry out any of the following activities under this article unless the general assembly enacts a statute authorizing that activity.

Id. (emphasis added).

received through PPP agreements can only be used for transportation budget funding and cannot be diverted into the general operation budget.[80] This stands in contrast to the Chicago approach which distributed the increased revenue into almost every category of city spending except for transportation.

So what has been the end result of the Indiana enabling legislation and the "Major Moves" initiative? Obviously, the project has not been in operation long enough to examine its effectiveness in resolving Indiana's transportation problems in any comprehensive manner. However, the scope and ambition of the "Major Moves" project ensured that it received national attention, and in many ways, it has become the poster-child of the burgeoning privatization movement across the country for both critics and proponents. In this way, "Major Moves" has become one of the most thoroughly vetted state government projects in recent memory, and much scholarship had been produced by either side in the privatization debate over its merits and initial effectiveness. Unfortunately, ample fodder can be found to bolster an argument in either direction and at the moment, the verdict would have to be considered mixed at best.

To begin with the good news, there are many aspects of the Indiana approach that most observers agree have resulted in tangible benefits for the state. From an objective policy standpoint, the decision to reserve the increased revenue from the PPP agreement specifically for transportation funding was a

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[80] IND. CODE ANN. § 8-15.7-5-5 (West 2008).

> To the extent that the department receives any payment or compensation under the public-private agreement other than repayment of a loan or grant or reimbursement for services provided by the department to the operator, the payment or compensation shall be distributed at the direction of the department to the:
>
> (1) major moves construction fund established under IC 8-14-14;
>
> (2) department for deposit in the state highway fund established by IC 8-23-9-54;
>
> (3) alternative transportation construction fund established under IC 8-14-17; or
>
> (4) operator or the authority for debt reduction.

sound one. John Foote, in testimony before the House Transportation and Infrastructure Committee, notes that re-investing the revenue gained from toll road privatization directly into transportation infrastructure means that the Indiana motorists will necessarily see the benefits provided by the rates they pay on the toll road system.[81] The problem with an approach such as the one taken in Chicago is that for all the good that may be accomplished with increased revenue for general operating costs, state motorists are unable to see any tangible benefits of increased user fees on the roadway. In contrast, new transportation projects are springing up all over Indiana. In addition to the over 400 new state level transportation projects currently planned, the individual counties in which the Indiana Toll Road is located have received additional one-time payments of between $40 and $120 million for local transportation projects.[82] Thus, Indiana motorists can see the tangible results of the lease agreement on an everyday basis. Any objective assessment of the overall state of Indiana's transportation infrastructure shows a much brighter picture for the future than could have been imagined without the infusion of cash provided by the lease agreement.[83]

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[81] Foote, *supra* note 56. Inasmuch as the toll fares can be considered a "tax," the Indiana approach ensures that is a narrowly targeted one. Transportation funding in the state is now largely provided for only by those who use the roadways in the first place.

[82] About Major Moves, *supra* note 73.

[83] Geoffrey Segal of the Reason Foundation, writing on the overall effect of the lease on the state of transportation in Indiana notes that:

> Indiana is the only state in the entire country that has a fully funded transportation investment program. In fact, Hoosiers are earning upwards of $6 of interest, a second – more than $500,000 a day – while other states struggle to adequately invest in their infrastructure. The state is expected to spend $11.9 billion on road construction by 2015. US-31, 1-65 and I-69 are just a few of the beneficiaries of new investments.
>
> In comparison, Ohio has been scaling back new transportation projects; deferring projects until funding can be secured. Things will only get worse for other states too because the Federal Highway Trust Fund is now estimated to run out of money in the next two years.

While it is difficult to argue that increased transportation revenue is a boon to Indiana residents, the fairness of recent rate hikes levied by the Cintra-Macquarie Consortium and approved by the Indiana Finance Authority have been the subject of some debate. On one view, the tax rate increases have been hardly exorbitant and were actually long overdue. Tolls roads had not seen a tax increase in Indiana for twenty years and in some places were as low as 15 cents. "With… the government estimating it was costing about 34 cents just to collect those 15 cents," Geoffrey Segal writes that, "Gov. Daniels half-joked that the toll road should be shifted to the honor system."[84] Currently, a trip across the entire 157-mile length of the Indiana Toll Road costs $4.65, which, although significantly higher than a few years ago, is still relatively low when considering rates in neighboring Ohio and particularly Illinois.[85] Proponents of the lease agreement also note that significant portions of the Indiana Toll Road now collect fees electronically, making the burden of collection far lower on both motorists and the state.[86]

However, critics of the rate hikes put a different spin on the same set of data, noting that rates are projected to increase again to $8 next year when electronic tolling is fully implemented.[87] They also highlight the toll increases that truckers have faced which arguably can have an even more significant economic impact than tolls on individual motor vehicles. "Rates for trucks with five axles increased in May 2006 for the first time in more than 20 years, from $14.55 to $17.90," writes Tom Coyne. "It now costs $22.60 and will increase to

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Geoffrey Segal, *The Indiana Toll Road: One Year Later: Examining Predictions About the Toll Roads Lease Deal*, REASON, July 25, 2007, http://reasonorg.pjdoland.com/news/show/1002785.html.

[84] Id.

[85] *Id.*

[86] *Id.*

[87] Tom Coyne, *Toll Road Lease Debated Last Year; Critics Say Funds Depleted in 10 Years; Daniels Points to Projects Now Doable*, SOUTH BEND TRIBUNE, June 27, 2007, at A1.

$27.30 on April 1 and to $32 in 2009."[88] It is interesting to note that this criticism has occurred irrespective of the fact that the Indiana Finance Authority retains ultimate authority over toll rates and must approve each increase. Clearly, this legislative protection, while undoubtedly guarding against unchecked toll rate increases, does not ensure against claims that privatization necessarily leads to out-of-control rate hikes.

Finally, unexpected and vehement criticism of the Indiana Toll Road lease has arisen over the fate of the State's former highway personnel who were displaced when the roadway came under private operation. Toll Road workers were by no means "forced out" en masse upon the transfer to private operation, however, the protections afforded these workers under the agreement were considered insufficient by many and resentment remains to this day over the ultimate result. The actual agreement orchestrated by Governor Daniels initially guaranteed state highway personnel alternative employment with the state.[89] Indeed, the initiative only won passage in the Indiana General Assembly upon the promise of the Governor that no state worker would lose their job in the proposed transfer.[90] Cintra-Macquarie additionally provided the opportunity for all current toll road workers to interview for positions within the new organization.[91]

Despite these safeguards, problems have arisen in both the transition of state personnel into the new private operation as well as into alternative state employment. The main point of contention has been over whether compensation is equivalent for state employees who now work for Cintra. Although wage ranges have remained steady ($10.35 per hour to more than $14 per hour), critics have accused the new operator of reducing

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[88] *Id.*

[89] Keith Benman, *Indiana Toll Road Workers Brace for New Boss*, TIMES OF NORTHWEST INDIANA, June 28, 2006, *available at* http://www.indianaeconomicdigest.net/main.asp?SectionID=31&SubSectionID=197&ArticleID=27804.

[90] *Id.*

[91] *Id.*

benefits significantly.[92] Ultimately, 450 workers, roughly 15 percent of the original state highway work force, ended up taking the state on its offer of alternative employment – either by choice or as a result of an unsuccessful application to Cintra.[93]

III. CRAFTING THE IDEAL PPP ENABLING STATUTE

As the above case studies evidence, new public-private partnership agreements face numerous obstacles in actually coming to fruition from both within the legislative process as well as from the public at large. The existence of enabling legislation alone certainly does not guarantee that PPP transportation projects will soon follow or that they will be successful when they do.[94] Thus, the importance of crafting legislation that takes into account all of the competing interests surrounding PPP projects and provides adequate response to concerns raised becomes all-important. In this regard, New Jersey may actually be in a somewhat enviable situation as it can formulate its own enabling statute in light of the many state models that have already been enacted and the several PPP projects that have gone forward around the country.

The arguments presented here generally favor a more open and less restrictive approach to PPP legislation, but it also important to note that due to the political climate and current state of infrastructure in New Jersey, some trade-offs must be

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[92] Keith Benman, *Decision Day Arrives for Toll Road Workers*, THE TIMES (Munster, Ind.), Jan. 19, 2007, at B1.

[93] Nancy J. Sulok, *Some Toll Road Workers to Leave; Company Says No Interruption in Service Expected in Transition*, SOUTH BEND TRIBUNE, Jan. 20, 2007, at B1.

[94] Virginia's experience with PPP enabling legislation presents an interesting example of the problems that arise when a privatization project fails completely. In a 1990's deal that had some public-private partnership features, Virginia leased the Pocahontas Parkway to a non-profit entity but serious problems arose when the roadway attracted sixty percent of its projected traffic and revenue. The Parkway operating entity came dangerously close to defaulting on its toll revenue bonds. REASON FOUNDATION, ANNUAL PRIVATIZATION REPORT 2007 29 (Leonard C. Gilroy, ed., 2007).

made. It is unlikely that New Jersey would be able to adopt legislation akin to that of the most unregulated states such as Louisiana or the proposed Federal Highway Administration model legislation.[95] However, given the already heavily developed nature of the state's transportation infrastructure, it is not necessary that this be the case in order to reach a successful model for New Jersey. New Jersey does not need to provide incentives to new private construction as many western and southern states are currently doing,[96] but rather, must focus on obtaining the maximum benefit from its considerably lucrative toll road system.

With this in mind, there are at least three issues which deserve further study in any subsequent redrafting of PPP legislation in the state: (1) determining who has control of rate setting authority; (2) defining where the proceeds of a lease agreement will be allocated; and (3) addressing the fate of current state highway workers under new lease agreements. This is in no way meant to be an exhaustive list, but rather, an identification of several key factors in any enabling statute and an examination into how existing legislation around the country and current PPP projects shed light on the ideal formulation of these provisions for New Jersey.

A. CONTROL OF RATE-SETTING AUTHORITY

If there is any single issue that serves as a rallying cry for critics of PPP projects, it is most likely that privatization will inevitably lead to increased costs for the end user: the state's motorists.[97] As discussed above, this tension can be seen in the

[95] *See infra* Part II, § A(2) and C.

[96] *See generally* REASON FOUNDATION, ANNUAL PRIVATIZATION REPORT 2007 31-35 (Leonard C. Gilroy, ed. 2007). Of the states currently considering new PPP transportation construction, the overwhelming majority falls into the southern and western portions of the United States. States now considering projects involving new privately financed construction include: Arizona, California, Colorado, Florida, Georgia, Indiana, Kentucky, Oregon, Texas, and Utah. *Id.*

[97] *See, e.g.*, Steve A. Steckler, Editorial, *Don't Rule Out Toll Road Lease*, DAILY RECORD (Morristown, NJ), May 20, 2007, at Op. 3; Editorial, *For Whom the Toll Rise; State Must Go Slow Privatizing Highways*, RECORD (Bergen County, N.J.), Jan. 9, 2007, at L6; Tom Davis, *Lease New Jersey Toll Roads for $15 Billion?*, RECORD (Hackensack, NJ), Feb. 1, 2007, at A1.

various forms that state legislation has taken on the issue of control over the right to set rates on privately operated highways.[98] And, as the Federal Highway Administration notes in its PPP instructional resources, the answer that a state reaches on this issue is one of critical importance to the project as a whole.[99]

In states where PPP enabling legislation has been enacted, three basic forms of rate-setting authority have evolved. First, a state can choose to reserve full discretion over rate-setting by allowing the contracting authority to establish maximum rate increases under any formulation it sees fit.[100] As discussed previously, this allows state departments of transportation maximum discretion in drawing up contracts with private entities.[101] At the same time, it inserts a great deal of uncertainty into the process from the perspective of private parties wishing to engage in projects with the state. Alternatively, states can decide to peg the maximum permissible rate increases to some statutorily defined term such as "reasonable rate of return"[102] or some objective economic indicator such as the Consumer Price Index[103]. This was the tack taken by the now stalled legislation introduced in the New Jersey Senate – tying the permissible rate increases on the New

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[98] *See infra* Part II, Section A(1)(b).

[99] DEPT. OF TRANSPORTATION, FED. HIGHWAY ADMIN., OVERVIEW OF KEY ELEMENTS AND SAMPLE PROVISIONS: STATE PPP ENABLING LEGISLATION FOR HIGHWAY PROJECTS 1 (2005), http://www.ncppp.org/councilinstitutes/stlouis_2005/hedlund_4.pdf. The report notes that ideally:

> Both the responsible public entity and its private sector partner… should have this authority. Moreover, detailing when and by how much tolls can be modified is a critical component of the PPP agreement and will improve the project's ability to be financed on favorable terms.

Id.

[100] *See, e.g.*, IND. CODE ANN. § 8-15.7 (West 2009).

[101] *Infra* Part II, Section A(1)(b).

[102] VA. CODE ANN. § 56-566 (West 2009).

[103] FLA. STAT. ANN. § 338.165(3) (West 2009).

Jersey Turnpike and Garden State Parkway to the Consumer Price Index.[104] Finally, on the opposite end of the spectrum, a handful of states have left the rate-setting process largely unregulated within the statutory code.[105]

For the purposes of this analysis, it will be assumed that leaving rate-setting completely unregulated would not be politically feasible for New Jersey. Given the difficulties faced by the proposed bill, it is evident that New Jersey residents were reluctant to accept privatization of the state's toll roads even with significant safeguards against exorbitant toll increases. Thus, the political realities of the state dictate that any final version of PPP enabling legislation would likely involve much greater restriction on private entities' ability to raise toll rates. The two remaining models (full discretion left to the state or some form of objective standard) offer little in the way of concrete answers for New Jersey.

Perhaps the best guidance that can be offered on this issue lies in correctly framing the decision that the legislature will ultimately be forced to make. First, policy makers should recognize that irrespective of the entity at the reigns, toll rates in New Jersey will likely rise significantly in the coming years. Once all political rhetoric is stripped away, the underlying fact remains that the lack of adequate transportation funding is reaching crisis proportions in the state.[106] It is telling that Governor Corzine's current plan which involves issuing bonds securitized by future toll revenue includes proposed toll increases that by some estimates would raise rates by over 400 percent in the coming years.[107]

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[104] S. 2539, 212th Leg., Reg. Sess., § 8(b)(2) (N.J. 2007).

[105] *See, e.g.*, LA. REV. STAT. ANN. § 48:2084.5(D) (2009).

[106] REG'L PLAN ASS'N, REFORM, REVENUE, RESULTS: HOW TO SAVE NEW JERSEY'S TRANSPORTATION SYSTEM (2005), http://policy.rutgers.edu/vtc/documents/TransFin.RPA-ReformRevenueResults.pdf (assessing the state of the New Jersey Transportation Trust Fund and identifying potential sources of alternative funding). For at least the next fifteen years, almost all of the dedicated transportation funds raised through gasoline taxes and other measures will go directly to debt servicing. This means that any additional funding for transportation will necessarily be drawn from the state's general operating fund unless alternative resources are identified. *Id.*

[107] Hester, *supra* note 19, at A5 ("Corzine wants to increase tolls 50 percent in 2010, 2014, 2018 and 2022. Those increases would include inflation

In some sense then, contracting with a private entity could potentially guarantee more reasonable toll rates in years to come than leaving the decision in the hands of policymakers. Senator Lesniak's failed bill, for example, included not only a maximum permissible rate of toll increases tied to the inflationary index but also contained a provision that would have significantly constrained toll hikes on the Garden State Parkway.[108] While the economics of that particular proposal can be debated, the bottom line remains that if the state had found a willing partner in the private sector amenable to those terms, toll rates would have increased in an orderly fashion for the foreseeable future.

Thus, ideally the debate in New Jersey should not revolve around choosing between privatization and affordable toll rates on the state's roadways. Instead, the debate should focus on whether privatization would allow for better terms to be negotiated from a private entity when compared with simply borrowing against future toll rates by the government itself. The examples above demonstrate that PPP legislation can be sufficiently tailored to meet the particular needs of New Jersey. A model such as the one adopted by Indiana,[109] providing maximum discretion to the state in negotiating terms with private firms for individual projects, seems particularly suited to the task in this instance. Given the considerable price that a lease of the New Jersey Turnpike and Garden State Parkway would bring, it is likely that the state would be able to retain significant control over toll rates and still obtain a concession price that would alleviate the state's transportation woes.[110]

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adjustments, and after 2022 tolls would increase every four years until 2085 to reflect inflation.").

[108] S. 2539, 212th Leg., Reg. Sess., § 8(b) (N.J. 2007):

> ...[W]ith regard to the tolls charged on the Garden State Parkway, during ten years from the date of the agreement, tolls shall not exceed $0.50 and may be increased no more than $0.10 during each succeeding ten-year period, provided, that this limitation shall only apply to passenger motor vehicles.

[109] *Infra* Part II(A)(1)(b).

[110] Geoffrey Segal urges policymakers to consider each component of PPP enabling legislation as dial that can be turned up or down to meet the needs of a particular governing body. Of course dialing down on a particular provision

B. ALLOCATION OF CONCESSION PROCEEDS

Of all the lessons learned from surveying the landscape of current PPP projects in the country, none is clearer than the need to identify the funds that are to be raised through concessions and designate them for specific and narrowly targeted goals. John Foote noted that it is this aspect of the Chicago Skyway deal and the Indiana "Major Moves" deal that set the two apart and ultimately have made the Indiana agreement a model for success.[111] As highlighted above, the designation of all proceeds from the PPP agreement specifically for transportation related spending allows Indiana state motorists to see the tangible results of privatization on an everyday basis.[112] This, more than any other measure, has a positive impact on public sentiment regarding PPP agreements in general and is a policy that clearly should be implemented in any New Jersey legislation.

The proposed New Jersey PPP enabling legislation accomplished this goal in part but in any future legislation, this requirement should be significantly strengthened.[113] Under

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(such as the maximum increase in toll rates) will have a negative impact on the concession price, but ultimately, a legislature should in almost all cases be able to reach a setting that is amenable to all parties. *Testimony from Invited Guests Concerning Asset Monetization, Specifically the Possible Sale or Lease of the State's Toll Roads Before the Assemb. Trans. and Public Works Comm.*, 212th Sess. 13 (N.J. 2007) (statement of Geoffrey Segal).

[111] Foote, *supra* note 56.

[112] *Infra* Part II(D)(2).

[113] S. 2539, 212th Leg., Reg. Sess., (N.J. 2007). Section 12 states:

> (a) The monies received by the Treasurer as a result of the agreement in the form of a lease payment shall be deposited in a special fund to be known as the "Indebtedness Retirement Fund," to be established and held in the Treasury and kept separate and apart from all other funds of the State.
>
> (b) The monies in the fund shall be used for the following purposes:
>
> (1) The refunding, defeasing or retirement off the outstanding bonded indebtedness of the authority;
>
> (2) And with respect to the amount remaining after the purposes provided in paragraph (1) are carried out, that

Senator Lesniak's proposal, funds received under any PPP agreement would initially be used to retire the indebtedness of the New Jersey Turnpike Authority which is responsible for the New Jersey Turnpike and the Garden State Parkway. It is difficult to argue that the state's first priority should be in relieving the state's transportation related debts. This has the benefit of creating additional revenue streams in and of itself as the state is no longer using other funding for the payment of debt service.[114] However, an additional provision of the proposed bill allocated any additional proceeds to retirement of general indebtedness of the state.[115] While certainly a laudable goal, the experiences of Chicago and Indiana would suggest that the money could be better spent dedicated completely to reinvigorating New Jersey's ailing transportation infrastructure. Fortunately, New Jersey has a fund dedicated entirely to the transportation budget in the Transportation Trust Fund.[116] This fund is operating on the verge of insolvency and reinvesting in it would provide a sustainable source of transportation income for years to come.[117]

C. IMPACT ON STATE HIGHWAY WORKERS

Perhaps the most chronically overlooked aspect of the privatization process at the legislative level is the fate of a particular state's highway employees once state highways are turned over to privately run firms. Experiences such as those faced by Chicago and Indiana lawmakers suggest, however, that it is a consideration that should be faced well before coming to an agreement with a private operating firm. Again, the proposed New Jersey legislation provides a useful starting point in this analysis. Unlike most PPP enabling legislation examined, Senator Lesniak's bill did contain language addressing the fate

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amount shall be allocated to the retirement of the debt of the State of New Jersey.

[114] Segal, *supra* note 109, at 15.

[115] S. 2539, 212th Leg., Reg. Sess., § 12(b)(2) (N.J. 2007).

[116] REG'L PLAN ASS'N, *supra* note 105, at 1.

[117] *Id.*

of current state workers upon the privatization of the state's toll roads.[118] Specifically, it provided that a PPP agreement *must* address the fate of current state highway employees and that their positions would be guaranteed for approximately six years.[119]

Although no formulation of a PPP enabling statute would likely quell complaints from concerned state highway and toll workers, strengthening the provisions concerning state employees in a future bill could go a long way toward shifting public sentiment as a whole. Notably absent from the proposed legislation is any form of guarantee for alternate employment within the state once highway and toll workers are phased out from the private entity or immediately upon privatization. Presumably this is due to extremely large number of workers (more than 2,000) that are currently employed by the Turnpike Authority.[120] But as the Indiana example demonstrates, the number of employees who actually decide to transfer to another position within the state government was relatively small as a percentage of the total workforce.[121] A provision guaranteeing alternative employment for dissatisfied workers could accomplish a great deal on a symbolic level and would probably be worth the price paid by the state.

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[118] S. 2539, 212th Leg., Reg. Sess., § 9 (N.J. 2007).

> A public-private agreement shall address the following:
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> a. The employment of those employed by the authority on the effective date of the public-private partnership agreement. The agreement shall provide that those employees subject to a collective bargaining agreement… shall continue as employees of the authority for the term of two successive collective bargaining agreements of their respective bargaining unit or six years, whichever is longer, and at, the end of that period, they may be continued in employment by the authority at the absolute discretion of the authority or may be offered employment by the concessionaire, at the concessionaire's absolute discretion…

[119] *Id.*

[120] Davis, *supra* note 14.

[121] *Infra* Part II(D)(2).

IV. CONCLUSION

Ultimately, the passage of PPP enabling legislation in New Jersey would face a steep uphill battle and in the current political climate, the proposal appears to be stalled indefinitely. However, given the crises over transportation funding and the fact that Governor Corzine's current plan is almost as unpopular with lawmakers and the public as was his privatization initiative,[122] there is still plenty of room for discussion of alternatives. If PPP legislation is to be advance, it must be based on the best policy alternatives available and answer the fundamental concerns of its detractors. In surveying legislative approaches from other states and other PPP projects, it becomes clear that answers do exist for many of the problems cited by critics of privatization. While no legislative solution is ever perfect, New Jersey has a remarkable opportunity to build on the successes and failures of others in this process and ultimately craft a solution that is appropriate for the unique situation of the state.

[122] Hester, *supra* note 19, at A5.

COMPUTER FRAUD AND ABUSE ACT: ABUSING FEDERAL JURISDICTION?

Sarah Boyer[1]

File folders and cabinets, pads of paper, pens, pencils, and copy machines have been replaced by desktops, networks, laptops, PDAs, flash drives, and cell phones. The nature of business has been changed forever by the technological advances of the past twenty-five years. Instead of having to be in an office, at a desk by an office phone in order to conduct business, employees are able to be reached anywhere at anytime by cell phone, can access their office networks from their laptops, and can download files and information belonging to their companies onto tiny drives no larger than a thumb. In the past, if a dishonest employee were to steal files regarding company secrets, client lists, or other confidential information from his employer, he would have to round up all of the information, pack it up into boxes, and smuggle it out of the office. Now an employee can, with a couple clicks of a mouse, obtain the same amount, if not more, information without the same risks of being detected.

Due to concerns regarding computer crimes, in 1984 Congress enacted the Computer Fraud and Abuse Act ("CFAA") in order to combat the problem of people hacking into protected computer systems by making it a federal criminal offense. The Act has changed over the past twenty-four years, and now allows for a private cause of action under the language of the statute. In recent years, employers have been using the CFAA in order to take former employees to court on claims relating to the

[1] B.A., International Relations, Boston University (2005); J.D., Rutgers University School of Law -- Camden (2009). The author would like to thank Peter J. Boyer for his ideas and insight, as well as her family for their love and support.

incident where the former employee committed a wrongful act. These incidents are most often in the form of employees stealing client lists, marketing secrets, price indexes, and other company specific information in order to start a new company to compete unfairly with the former employer.

While claims of breach of contract, breach of fiduciary duty, and conversion are appropriate in these cases, the question of whether or not these traditionally state law claims should be hauled into federal court under the CFAA, a federal statute, is still to be determined. This note will explore the CFAA, its relationship to employers and employees, and how far it should extend in its reach. It will also discuss how Circuit Courts have thus far handled this issue, and offer recommendations for the future to Circuits that have yet to decide, including the Third Circuit. In certain circumstances, where an employer is able to assert a common law contract or tort action against a former employee, the employer should not also be able to bring a successful claim under the CFAA.

The issues of *unauthorized use* and *damage or loss*, which are elements of the CFAA statute, should be construed narrowly in order to keep this type of employer/former employee action out of federal court.[2] Otherwise, the federal court system will be overrun with claims by employers against their former employees. In addition to hearing the claim under the CFAA, the federal courts will have to also hear the contract and tort actions that are "so related to the [CFAA] claim" because they arise out of the "same case or controversy."[3] Allowing these

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[2] *See* 18 U.S.C. § 1030 (2008).

[3] 28 U.S.C. § 1367(a) (1990). In many cases where the Computer Fraud and Abuse Act has been invoked, employers have used it to bring claims against former employees regarding unauthorized access to the employers' computer systems. These claims often arise from underlying tort and contract claims such as breach of an employment contract or unfair competition on the part of the employee. The employer then brings these state tort and contract claims into federal court. Jurisdiction is based on supplemental jurisdiction, 28 U.S.C. § 1367. *See, e.g.*, Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1188 (E.D. Wash. 2003) (holding that federal question jurisdiction existed over claims for violation of Computer Fraud and Abuse Act, misappropriation of trade secrets, breach of confidentiality agreements and Washington common law duties); Dorel Juvenile Group, Inc. v. DiMartinis, 495 F.3d 500 (7th Cir. 2007) (hearing claims brought by former employer against former employee alleging violation of the Computer Fraud and Abuse Act, trade secrets misappropriation, unfair competition, breach of contract, and breach of

kinds of claims to fall under the CFAA will result in the federal court system being overrun with claims that are traditionally heard by state courts, which will be inefficient and expensive for the judicial system.

I. INTRODUCTION

A. THE RISE OF COMPUTERS IN THE UNITED STATES

Personal computers, also referred to as "home computers" and "desktop computers," entered the market in the 1970s and became common during the 1980s.[4] "A 1986 congressional speech estimated that there existed 56,000 large general purpose computers, 213,000 smaller business computers, 570,000 minicomputers, and 2.4 million desktop computers in use in the private business sector in addition to 6 million home computers."[5] In 2006, it was estimated that "more than 200 million Americans use computers to access the Internet today."[6] In fact, "more Americans use computers than drive cars."[7] The growth from computers becoming "common" in the 1980s and becoming second nature today has been fast and overwhelming. Walking into an office and *not* seeing a computer would be more strange today than walking into an office in the 1980s and seeing one. It has become expected that everyone has access to a computer, so much so that "[o]nly a hermit would be unaware of the degree to which computers have permeated every aspect of our lives."[8]

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fiduciary duty); Airframe Sys., Inc. v. Raytheon Co., 520 F. Supp. 2d 258, 262 (D. Mass. 2007)(evaluating "claims of copyright infringement, violations of the Computer Fraud and Abuse Act, and several related state-law causes of action" brought by employer against former employee).

[4] *Home Computer*, http://en.wikipedia.org/wiki/Home_computer (last visited Nov. 16, 2008).

[5] George Roach & William J. Michiels, *Damages is the Gatekeeper Issue for Federal Computer Fraud*, 8 TUL. J. TECH. & INTELL. PROP. 61, 63 (2006).

[6] *Id.*

[7] *Id.*

[8] Dodd S. Griffith, *The Computer Fraud and Abuse Act of 1986: A Measured Response to a Growing Problem*, 43 VAND. L. REV. 453, 453 (1990).

While this proliferation of computers has greatly affected individuals in their personal lives, it has likely affected businesses even more. Businesses have been able to take advantage of many of these technological advances, but also have had to learn how to deal with the complications that come along with things such as e-mail, cell phones, camera phones, instant messaging, internet bulletin boards, and other technological developments.[9] While these advances have allowed for better communication among employees and between companies and clients, better abilities to research, ability to be in touch with employees when they are out of the office (even while in transit), and the ability to get work done from home, they have also provided potential thieves with an easy way out. Instead of robbing a bank in a conventional way, by holding up the teller, for example, "[a] criminal can use modern technology to transfer extremely large sums of money that formerly would have been impossible to remove without detection."[10] In addition to opportunities for thieves, while "[l]aptop computers are a boon to business . . . [t]hese wonderful tools, however, carry their own potential for abuse, including . . . destruction of valuable company data by employees with axes to grind."[11] Also, while technology may be a friend to business and productivity, "[t]he digital world is no friend to trade secrets."[12] Therefore, in order to respond to the growing threat of computer and technology related crimes, in the form of both theft and destruction, Congress has been forced to react; "[b]ecause computers may be used for destructive as well as constructive purposes, their proliferation has forced Congress, in considering the need for and effectiveness of federal computer crime legislation, to search for legislative

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[9] Jerome P. Coleman, Karen M. Mitchell & Michele DeFalco, *Electronic Communications and Privacy in the Workplace*, 762 PLI/LIT 597, 599-605 (2007).

[10] Griffith, *supra* note 7, at 454.

[11] Helen Gunnarsson, *Employer Sues Ex-Employee Under Computer Fraud Law for Deleting Data—and Wins*, 94 ILL. B.J. 463, 463 (2006).

[12] Victoria A. Cundiff, *Living in a Digital World: How Digital Tools Can Destroy, and Sometimes Protect, Trade Secrets and What to Do About It*, 911 PLI/PAT 541, 545 (2007).

solutions that will prove suitable to the society of computer users that it foresees in the immediate future."[13]

B. THE BIRTH AND EVOLUTION OF THE COMPUTER FRAUD AND ABUSE ACT

The Computer Fraud and Abuse Act was enacted in 1984, in response to national media attention regarding incidents of "juvenile computer hackers."[14] It was originally "intended to prohibit the gaining of unauthorized access to 'federal interest' computers."[15] The Act was quite narrow at first, as "[l]egislators considered and rejected broader bills that criminalized the use of a computer as a part of a scheme to defraud that affected interstate commerce, choosing instead to protect only the most vital federal interests that could be injured by computer users."[16]

The 1984 Act essentially "prohibited the unauthorized use of or access to a computer in three comparatively narrow areas."[17] The Act made it a felony to knowingly, and without authorization, access a computer "to obtain classified United States defense or foreign relations information" while intending or having reason to believe that the information obtained could harm the United States or advantage another nation.[18] It also made it a misdemeanor to knowingly or without authorization access a computer to gain access to financial records of a

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[13] Griffith, *supra* note 7, at 455.

[14] Griffith, *supra* note 7, at 460. The statute continues, even today, to hold onto its roots as a criminal statute designed to punish hackers. *See* P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 510 (3d Cir. 2005)(noting that "the majority of CFAA cases still involve 'classic' hacking activities," since the CFAA is "a criminal statute, criminalizing and penalizing unauthorized access to computers"); Chas. S. Winner, Inc. v. Polistina, No. CIV.A.06-4865, 2007 WL 1652292 at *2 (D.N.J. June 4, 2007)(stating that "[t]he CFAA was historically a criminal statu[t]e penalizing unauthorized access, i.e., 'hacking' into computers").

[15] North Tex. Preventive Imaging, L.L.C. v. Eisenberg, No. CV 96-71, 1996 WL 1359212 at *4 (C.D. Cal. Aug. 19, 1996).

[16] Griffith, *supra* note 7, at 456.

[17] *Id.* at 460.

[18] *Id.*

financial institution or those in a consumer file of a consumer-reporting agency.[19] Finally, the 1984 Act made it a misdemeanor to knowingly, or without authorization, access a computer "in order to use, modify, destroy, or disclose information in, or prevent authorized use of, a computer operated for or on behalf of the United States if such conduct would affect the government's use of the computer."[20] The Computer Fraud and Abuse Act of 1984, therefore, essentially proscribed the access of a computer of federal interest for the purposes of obtaining information relating to national security, defense, financial records, as well as access that could affect the government's use of its computer system.

Since the original Act of 1984, "the CFAA has been amended eight times . . . and further amendments seem likely as the role of computers in the American way of life continues to change."[21] The nature of the technology that the Act was written to protect, as well as the technological procedures that it was aimed at preventing, have grown and changed in such a manner that rapid and frequent changes to the Act are required in order for it to retain its efficacy. Since the 1984 Act had some loopholes in it that prevented it from being as efficient as expected, it was amended first in 1986, and then in 1994.[22] The most substantial amendment to the Act for the purposes of this discussion occurred in 1994, when the Act was amended to include a "new, civil remedy for those harmed by violations of the CFAA."[23] Additionally, the 1994 amendments "expand[ed] the jurisdiction of the CFAA" to "cover all computers involved in interstate

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[19] *Id.*

[20] *Id.* at 460-61.

[21] Roach, *supra* note 4, at 63.

[22] North Tex. Preventive Imaging, L.L.C. v. Eisenberg, No. CV 96-71, 1996 WL 1359212, at *5 (C.D. Cal. Aug. 19, 1996).

[23] 139 CONG. REC. S16421-03 (daily ed. Nov. 19, 1993) (statement of Sen. Leahy) (reprinted at 1993 WL 490040). Senator Leahy addressed the Senate on November 19, 1993 to discuss the amendments that were later adopted into the Computer Fraud and Abuse Act. He discussed the policy considerations behind the Act in general, and how he considered these amendments to help the Act to achieve these policy goals in the future.

commerce, not just 'Federal interest computers.'"[24] These amendments were substantial in making the CFAA what it is today.

C. THE CURRENT COMPUTER FRAUD AND ABUSE ACT

Currently, the CFAA allows for both criminal sanctions and a civil remedy under the provisions of the statute.[25] The CFAA now proscribes seven, instead of the original three, actions. Under the CFAA, one can be held criminally or civilly liable for (1) obtaining government protected information, (2) obtaining information from a protected computer by means of interstate communication, (3) accessing a government computer, (4) obtaining anything of value by fraudulent means from a protected computer except for computer use worth less than $5,000 in a one-year period, (5) causing damage to a protected computer and/or its data or programming, (6) trafficking in passwords in some situations, and (7) threatening to damage a protected computer and/or its date or programming for purposes of extortion.[26] These actions "must be the result of the defendant having intentionally accessed a computer without authorization or in excess of authorization where accessing the computer furthers a wrongful activity."[27] Section (a) of the statute provides for the seven proscribed activities, section (b) mandates that attempting any of those activities will also be punished, section (c) lays out the punishments, section (d) gives the Secret Service the rights to investigate such activities, section (e) contains definitions of words that appear throughout the statue, and section (f) provides that "any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency" is not prohibited by the statute.[28] Section (g) provides that:

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[24] *Id.*

[25] *See* 18 U.S.C. § 1030(c).

[26] 18 U.S.C. § 1030(a)(1)-(7). *See also* Roach, *supra* note 4, at 63-64.

[27] Roach, *supra* note 4, at 64.

[28] 18 U.S.C. § 1030(a)-(f).

> Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.[29]

The introduction of the civil remedy provision as well as the expansion in jurisdiction to all protected computers, as opposed to computers with a federal interest, in 1994 has allowed for a new realm of claims to be brought under the CFAA. While there was some confusion about section (g) regarding the clause about subsection (a)(5)(B) and its requirements, courts have found that the reference does not "preclude relief for violations that are brought . . . under" another subsection besides (a)(5)(B), "provided that the claim . . . 'involves' one of the five enumerated results in § 1030(a)(5)(B)(i)-(v)."[30] The section that

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[29] 18 U.S.C. § 1030(g).

[30] P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 511-12 (3d Cir. 2005). Although *P.C. Yonkers* is the a Third Circuit case, most other courts treat this clause the same way and allow for civil relief under § 1030(g) if the proscribed activity is located in a section other than § 1030(a)(5)(B), most often § 1030(a)(4). § 1030(a)(5) provides:

> "(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and (B) by conduct

the types of claims which will be discussed within this note most often fall under are either § 1030(a)(5)(B) or § 1030(a)(4). Therefore, as the Third Circuit, and other courts as well, view the civil remedy provision of the CFAA, one can file a civil claim under the CFAA so long as (1) one of the seven proscribed acts have been violated, and (2) the result of the proscribed action is one of the results listed in § 1030(a)(5)(B)(i)-(v).

Increasingly, claims under the CFAA brought under the civil remedy provision have born less and less resemblance to the original intended proscribed activity of the statute: hacking. The question is which of these new types of claims are suitable under the language and intent of the CFAA and how far courts should extend the CFAA's federal jurisdiction. Principle terms in the statute that mandate which types of claims will be included within its jurisdiction include "without authorization," "exceeds authorized access" and "damage or loss."[31] The CFAA defines "exceeds authorized access," "damage," and "loss," but leaves out a definition of "without authorization."[32] Additionally, the definition of "loss" is so broad as to require substantial construction by courts.[33]

1. The New CFAA Claim: Employers Bring Former Employees into Federal Court

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> described in clauses (i), (ii), or (iii) of subparagraph (A), caused—(i) loss to 1 or more persons during any 1-year period aggregating at least $5,000 in value; (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals; (iii) physical injury to any person; (iv) a threat to public health or safety; or (v) damage affecting a computer system as used by or for a government entity in furtherance of the administration of justice, national defense, or national security."

[31] *See* 18 U.S.C. § 1030.

[32] 18 U.S.C. § 1030(e). Section (e)(6) provides that "'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." Section (e)(8) provides that "'damage' means any impairment to the integrity or availability of data, a program, a system, or information."

[33] *Id.*

Although the CFAA was enacted to hold hackers accountable for their unlawful access to protected computer systems, it can now be used to hold others accountable for other kinds of actions that can be construed as violations of the CFAA. Now that computers have become more available and widespread in use, "a host of new and novel legal issues have arisen."[34] One example of this type of new violation is a former employee who misuses the employer's computer system for his own personal gain or the gain of his new employer. As the Third Circuit points out, "employers . . . are increasingly taking advantage of the CFAA's civil remedies to sue former employees and their new companies who seek a competitive edge through wrongful use of information from the former employer's computer system."[35] Courts have yet to make consistent decisions regarding whether or not these types of claims belong in federal court as violations of the CFAA. In the instances where the courts have allowed parties to state claims of this nature and agreed to hear the CFAA claims, the federal court must also hear each related claim; the CFAA claim is often accompanied by a litany of state law based claims, such as breach of contract, breach of fiduciary duty, conversion, and unfair competition.[36] This note will argue that extending the CFAA to claims such as these is unsound

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[34] Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1188, 1194 (E.D. Wash. 2003).

[35] *P.C. Yonkers*, 428 F.3d at 510 (quoting *Pac. Aerospace*, 295 F. Supp. 2d at 1196).

[36] *See, e.g.*, *Pac. Aerospace*, 295 F. Supp. 2d at 1188 (holding that federal question jurisdiction exists under the CFAA, and therefore supplemental jurisdiction exists for claims of misappropriation of trade secrets, breach of confidentiality agreements and Washington common law duties); Calyon v. Mizuho Sec. USA, Inc., 2007 WL 2618658 (S.D.N.Y. 2007) (holding that there is federal jurisdiction under the CFAA claim, and thereby agreeing to hear "a number of state law causes of action" including "breach of fiduciary duty, inducing/aiding and abetting a breach of fiduciary duty, unfair competition, tortuous interference with business relationships, and civil conspiracy"); Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 478 (S.D.N.Y. 2004)(holding that supplemental jurisdiction over state law claims for "misappropriation of trade secrets under New York and North Carolina law, unfair competition under New York, North Carolina and South Carolina law, and tortious interference with prospective economic advantage and conversion under New York law" is appropriate "since they arise out of the same nucleus of operative facts as the federal claims").

because it is inconsistent with the policy underlying the Computer Fraud and Abuse Act, and it will overrun federal courts with claims that can be handled more efficiently in state court. Courts should therefore construe the terms "without access" and "loss" narrowly in order to exclude inappropriate claims from the jurisdiction of the CFAA.

II. THE SAMPLE PROBLEM: SAMMY SLY AND THE CASE OF THE STOLEN CLIENTS

For the purposes of this article, a sample case will be provided to illustrate the type of problem being discussed. Sammy Sly was hired by Get in Shape, Inc., a personal training company that employs trainers to help clients get into shape, in January 2002. Sammy, who had been a professional boxer in the past and was committed to helping people lose weight and get into shape, was so excited to be working at Get in Shape, Inc. that he agreed to sign any and all contracts that Get in Shape, Inc. required of him. Sammy signed an employment agreement which contained a confidentiality clause relating to any and all client lists, prices, and exercise tips that are exclusively created by Get in Shape, Inc. and are located on Get in Shape's computer system. The employment agreement also contained a non-competition clause which mandated that in the event that Sammy were to leave Get in Shape, Inc., whether he was terminated or he quit, he was not allowed to work for any other personal training company in New Jersey, New York, Pennsylvania, or Delaware for a period of two years. He was also not permitted to engage in personal training activities outside of another personal training company.

While employed with Get in Shape, Inc., Sammy routinely accessed the computer system, from which the daily operations were conducted. Each employee, including Sammy, had a personal logon name and password, and once logged on, could access client information, schedules, prices, and tips that were circulated throughout the company to each trainer. The employees were also given email accounts for the purposes of contacting clients and relaying messages to other trainers and managers regarding issues with clients, scheduling, and new ideas that trainers acquired while continuing their fitness educations. It is stated in Sammy's employment contract that

while logged onto the Get in Shape, Inc. system, only work related searches and business are to be conducted.

After two years at Get in Shape, Inc., Sammy began to have aspirations of becoming head trainer. Since he had been a model employee for two years, and had gotten wonderful results with clients, he expected that he was as much up for the job as anyone else. However, two other trainers, Suzie Sunshine and Sally Straightedge were chosen over Sammy over the course of the next year of employment. At first, after Suzie's promotion, Sammy worked even harder thinking that he would be chosen next time. However, Sally was chosen instead, and she had only been working as a personal trainer for three months. Feeling unfairly defeated, Sammy sent an e-mail to his best friend and workout buddy, Kyle Klepto, who also worked for Get in Shape, Inc., with a plan to get the best of Get in Shape, Inc. Since he and Kyle were the most popular trainers, especially with the female clients, Sammy knew that they would be able to successfully split off and start their own company. Sammy proposed that Kyle and he obtain from the Get in Shape, Inc. system client names and phone numbers, as well as a list of prices detailing how much each client currently pays for training sessions with Get in Shape, Inc. Kyle agreed, adding the idea that they should also take with them all of the training tips listed on the system, as well as all of the Get in Shape, Inc. locations in order that they could most optimally locate their new training company.

Six months later, Sammy and Kyle resigned from Get in Shape, Inc., and started their own personal training business, Fitness Fast. They offered consistently discounted prices that were tailored to each client that they took with them from Get in Shape, Inc., and set up locations within five miles of each Get in Shape, Inc. location. Essentially, Sammy and Kyle offered the same product for a lower price with locations that were just as convenient as Get in Shape, Inc. Fitness Fast started operating in January 2005. By January 2006, Get in Shape, Inc.'s profits had plummeted from $2.5 million in 2004 to $1.0 million in 2005. The majority of this loss can be directly attributed to Fitness Fast's opening, stealing clients from Get in Shape, Inc., and unfair competition practices of systematically discounting rates that Sammy and Kyle had stolen.

Get in Shape, Inc. hired a computer expert in order to investigate the manner in which Sammy and Kyle had obtained

this information so that they could prevent similar disasters in the future. The computer expert, Nelson Nerdy, determined that Sammy and Kyle had accessed the information from within their own logon accounts while at work and from their home computers. When Nelson asked the managers of Get in Shape, Inc. why trainers were able to logon from their home computers, the managers informed Nelson that it was more convenient for the trainers to be able to access their schedules and client lists from home in the event of an emergency, as well as being able to add to and read from the fitness tips page while at home so as to not take up precious gym time. Nelson also determined that all of the files were taken by e-mail and then downloaded onto a flash drive which was purchased by Sammy. Nelson charged the Get in Shape management $1,000 for his investigations.

Get in Shape, Inc. then called a meeting of all of its management where they brought Nelson to talk to the team of managers about how to devise better systems in order to prevent this kind of employee thievery in the future. Each manager had to travel to New York City, where the meeting was held. The company paid for the mangers' travel and hotel expenses, which totaled $10,000.

Get in Shape, Inc. has decided to sue Sammy, Kyle, and Fitness Fast. Get in Shape has decided that they would prefer to sue in federal court, where Sammy and Kyle will not be able to have as sympathetic of a home town jury. Get in Shape, Inc., in its complaint, claims several counts of breach of contract, conversion of the company files, breach of fiduciary duty, unfair competition, and violations of the Computer Fraud and Abuse Act (under which the federal court has jurisdiction). Sammy and Kyle, while privately admitting that what they did was wrong and that the state claims have merit, insist that the Computer Fraud and Abuse count fails to state a claim, as their access to the information was not "without access" and Get in Shape, Inc. did not suffer a "loss" of at least $5,000 as is contemplated by the statute.[37]

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[37] 18 U.S.C.A. § 1030. Get in Shape, Inc. alleges that the specific provisions of the CFAA violated by Sammy and Kyle is (a)(4), which provides that whoever "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period." In order to

Sammy and Kyle will move to dismiss the Computer Fraud and Abuse action for failure to state a claim under the Federal Rules of Civil Procedure 12(b)(6). They will claim that Get in Shape, Inc. has failed to state a claim under the 18 U.S.C. §1030(a)(4) because their access to the computer system at Get in Shape, Inc. was not "without authorization," and because the "loss" suffered by Get in Shape that is contemplated by the statute as loss amounts to only $1,000 at the very most. Get in Shape, Inc. will argue that Sammy and Kyle's authorization became void at the moment that they decided to use the computer system for proscribed activities that were not with Get in Shape's best interest in mind. Get in Shape will also argue that the lost profits of $1.5 million that resulted directly from the computer satisfy the $5,000 "loss" requirement under the CFAA.

Assuming that the suit is brought in New Jersey, as part of the Third Circuit, this case will be one of first impression for the Circuit Court. While the Districts within the Circuit have provided some guidance on this issue, other Circuits are split as to how they would handle the situation. The Third Circuit should dismiss the Computer Fraud and Abuse Act claim for failure to state a claim, thereby dismissing the state law claims for lack of federal jurisdiction on the grounds that Sammy and Kyle's access to the computer system was not "without authorization," as described in the CFAA, and the $1.5 million in lost profits do not qualify as "loss" under the Act.

III. DISCUSSION

A. THE "UNAUTHORIZED ACCESS" REQUIREMENT: WHAT CONSTITUTES UNAUTHORIZED?

Although the Computer Fraud and Abuse Act has changed substantially since its enactment in 1984, it still possesses some elements of its original construction. The Act was initially

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utilize section (g), the civil remedy provision of the statute, Get in Shape, Inc. must allege one of the five results listed in (a)(5)(B)(i)-(v). Get in Shape will most likely allege that they suffered a "loss" under (a)(5)(B)(i), which provides that the plaintiff must have suffered a "loss to 1 or more persons during any 1-year period . . . aggregating at least $5,000 in value."

geared towards holding "hackers" accountable for the damage that they caused to computer systems by accessing such systems without permission.[38] Although "[t]he CFAA has been amended eight times since 1984,"[39] it has retained its requirement that the defendant access the computer "without authorization" or in excess of authorization.[40] The requirement that the violator of the CFAA has accessed a computer system without authorization or in excess of authorization preserves the original essence of the statute which was its aim to hold hackers liable, who by definition do not have authorization to access the computer system that they have damaged.[41] However, questions of how to define "authorization," when authorization becomes "unauthorized," or "in excess of authorization" remain unanswered by the statute, precedent, or other definitive sources.[42]

The CFAA does its part, or so it purports to do, by providing a definition for part of the authorization requirement. The statute defines "exceeds authorized access" as meaning "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[43] While this definition may

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[38] *See* Griffith, *supra* note 7.

[39] Roach, *supra* note 4, at 63.

[40] 18 U.S.C. § 1030(a)(4); *see also Pac. Aerospace*, 295 F. Supp. 2d at 1195; *P.C. Yonkers*, 428 F.3d at 508 ("A claim under CFAA § 1030(a)(4) has four elements: (1) defendant has accessed a 'protected computer;' (2) has done so without authorization or by exceeding such authorization as was granted; (3) has done so 'knowingly' and with 'intent to defraud;' and (4) as a result has 'further[ed] the intended fraud and obtain[ed] anything of value.'").

[41] Hacker is defined as "[o]ne who illegally gains access to another's electronic system." WEBSTER'S II NEW RIVERSIDE DICTIONARY 310 (Houghton Mifflin Company, 1996).

[42] "The federal government, all fifty states, and dozens of foreign countries have enacted computer crime statutes that prohibit 'unauthorized access' to computers. No one knows what it means to 'access' a computer, however, or when access becomes 'unauthorized'." Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1596 (Nov. 2003).

[43] 18 U.S.C. § 1030(e)(6).

somewhat explain the legislature's intended meaning for "exceeds authorized access," an explanation of "authorization" and "access" are necessary to understand the definition provided by the statute. These definitions, if provided, would have been helpful to courts in interpreting the CFAA. Unfortunately, the legislature did not see fit to explain what unauthorized access or authorization meant for the purposes of this statute.

1. What Authorization Means in Everyday Life

In this new world of computers and other technology, the term "authorization" has become fairly commonplace. In order to sign onto the network at most offices and universities, the student or employee must be authorized to gain access to such a network. In order to prove such authorization, the student or employee will type in a user name and password, thereby gaining access to the network. However, once the user is logged onto the network, can he use the system for whatever he wishes to use it for? Or does authorization have limits?

Most likely all employers have rules about internet use at work, but most are willing to bend those rules and turn a blind eye to employees using the internet for less-than-strictly business purposes. This leniency is probably more a result of necessity than it is an easy-going attitude on the part of the employer. All employees, at some point during the workday, have "checked the latest weather forecast or traffic update on [their] office computers," which is technically "not 'related to the company's business,' as many e-policies provide."[44] However, realistic employers are aware "that prohibiting all personal use of a company's computer equipment not only is impossible to enforce but also would result in an available workforce of about 2 percent of the population."[45] Therefore, it is difficult to draw the line; if employees can check the weather or personal email accounts, can they transmit damaging data using the employer's network? Where does authorization end, such that employees

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[44] Angela McCorkle Buckler, *Lost in Cyberspace: Issues Affecting Employers and Employees in Today's Technological World*, 54 FED. LAW. 32 (2007).

[45] *Id.*

are operating "without authorization" or "exceeding authorized access?"[46]

2. What Does Authorization Mean Within the Confines of the CFAA?

As discussed above, it is unclear what authorization means in day-to-day life, let alone how the term should be interpreted in the CFAA statute. Even when it comes to defining the terms only within the CFAA, "[n]o one knows what it means to 'access' a computer . . . or when access becomes 'unauthorized,'" and though courts have interpreted these terms, they have done so with "widely varying interpretations."[47] There have been two main ideas presented by courts related to their understandings of authorization thus far. The first understanding is based upon a premise of a contract between a user and the owner or operator of the computer. In order for access to be unauthorized under this contract understanding of use, "a user can violate a contractual agreement" by using the system beyond the scope of the contracted right to use such a computer.[48] The second understanding of authorization is based on a set of code-based restrictions on access to a system. In order to violate the second type of access, "a user can circumvent" the restrictions "on the user's privileges" by bypassing "a code-based effort to limit the scope of the user's privileges," such as stealing a password to bypass a "gate designed to block access to a victim's account."[49]

The difference between these two types of authorizations can be illustrated using an example from the sample problem described in this article. When Sammy Sly decided to email Kyle Klepto the lists of client names and phone numbers that were on the Get in Shape, Inc. computer system, Sammy violated his employment contract by violating the confidentiality clause. He also most likely violated an implicit contract which

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[46] *See* 18 U.S.C. § 1030(a).

[47] Kerr, *supra* note 41, at 1596.

[48] *Id.* at 1599-1600.

[49] *Id.* Kerr, in this article, argues that only the second definition of authorization should be used in computer authorization statutes.

allowed him to use the e-mail system only to contact clients and relay messages to other trainers regarding training appointments and client issues. This violation of Sammy's access relates to the first type of authorization. However, suppose that Sammy needed a password that only the managers of Get in Shape, Inc. possessed in order to access the client lists. In the event that Sammy stole the password or somehow bypassed the password requirement in order to gain access to the client lists to then steal the information, he would be in violation of the second type of authorization. These two actions seem inherently different, and for good reason. Courts have not definitively gone either one way or the other as far as committing to either definition of authorization or what it means to violate such authorization.

a. "Authorization" in the Criminal Realm: the Second Circuit

The Second Circuit explored the question of access and authorization under the Computer Fraud and Abuse Act in 1991 in *United States v. Morris*.[50] The Second Circuit was faced with the question of whether the defendant could be convicted of "unauthorized access" to the damaged computers when he had explicit access to computers at Cornell, Harvard, and Berkeley, all of which were on a system called INTERNET, where the virus was ultimately planted by Defendant.[51] In addition, Defendant was "authorized to communicate with other computers on the network to send electronic mail (SEND MAIL), and to find out certain information about the users of other computers (finger demon)."[52] The defendant argued that since he already had authorization to access a computer in the network, he could not be guilty of "unauthorized access," but only of "exceeding

[50] United States v. Morris, 928 F.2d 504 (2d Cir. 1991). In this case, Defendant was convicted in the District Court for the Northern District of New York of violating the Computer Fraud and Abuse Act after Defendant created an internet virus which got out of control much faster than he expected and caused many computers around the country to crash, costing each installation that had been infected with the virus between $200 and $53,000.

[51] *Id.* at 509.

[52] *Id.* at 509-10.

authorized access."[53] However, the court pointed out that Congress did not intend to "[draw] a bright line between those who have some access to any . . . computer and those who have none," but instead "contemplated that individuals with access to some federal interest computers would be subject to liability under the computer fraud provisions for gaining unauthorized access to other . . . computers."[54]

Therefore, the court concluded that the jury had ample evidence to conclude that Defendant's "conduct here falls well within the area of unauthorized access."[55] Not only did the defendant infect the computers which he was authorized to access with his virus, but he intended for the virus to reach other computers which he was not authorized to access. In holding that the defendant was guilty of unauthorized access to the computers that he damaged, the Second Circuit created a "new standard for determining when access was unauthorized: the intended function test."[56] The court applied the test by reasoning that since the defendant obtained access to the computers in "unintended ways", which were not "related to their intended function," he was operating "without authorization."[57]

This intended function test can be viewed broadly or narrowly. In the case of *United States v. Morris*, Morris had used the INTERNET system in a way which was unintended since instead of using it to e-mail other users or to find out

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[53] *Id.* at 510.

[54] *Id.* In other words, the defendant's access to some of the computers on the network does not necessarily exclude him from falling within the "unauthorized access" violation when he accessed other computers on the network that he was not authorized to access.

[55] *Id.*

[56] Kerr, *supra* note 41, at 1632.

[57] *Id.* (quoting *Morris*, 928 F.2d 504). The court explained that since Morris did not use the SENDMAIL program to e-mail as intended and did not use the finger demon program to query information about others, but instead found holes in the programs that allowed him to access other computers with his virus, he had therefore accessed the computers with access that was essentially unauthorized under the statute.

information about other users, he exploited its weaknesses.[58] In its narrowest view, the "intended function test . . . derive[s] largely from a sense of social norms in the community of computer users."[59] Under this narrow version of the test, users are implicitly authorized to use computers to perform the functions intended by the providers, but users are not authorized "to exploit weaknesses in the programs that allow them to perform unintended functions."[60] However, there is a broader way to read the "intended function test." One could use the test to justify calling all employee use of work computers that is not condoned by employers as "without authorization." This reading of the test would dangerously expand liability under the CFAA.

Under the broad reading of the "intended function test" laid out by the Second Circuit, Sammy Sly would certainly have accessed the client lists and other confidential pricing information "without authorization" under the CFAA. Since the intended use of the email system that Get in Shape, Inc. had provided for the trainers was supposed to be used in order for the trainers to communicate with other employees relating to client and scheduling issues, Sammy would have been outside the scope of its intended use. Therefore, he would have accessed the information "without authorization." In fact, under this test, all employees who check their personal email accounts, the weather, the N.Y. Times Online, or other personal related tasks while at work would be accessing their work computers and internet systems "without authorization." This test is too broad for the purposes of both civil and criminal liability under the Computer Fraud and Abuse Act. Especially when applied to civil liability under the act in the context of employees and employers, the intended function test provides too broad a range of activities which would qualify as unauthorized, thereby opening the floodgates for federal courts to take jurisdiction over a huge number of state law claims where employees steal from or otherwise misuse information on employee owned computers and systems.

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[58] *Morris*, 928 F.2d. at 509-10.

[59] Kerr, *supra* note 41, at 1632.

[60] *Id.*

b. Exceeding Unauthorized Access in the First Circuit: *EF Cultural Travel BF v. Explorica, Inc.*

Presumably, due to the fact that the legislature defined "exceeding authorized access" for courts in the CFAA, this term should be less difficult to interpret. However, the definition does not provide a completely clear test for courts to apply. Under the statute, "'exceeds authorized access' means to access a computer without authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[61] Unfortunately, determining whether a defendant has exceeded authorized access, by definition, includes determining whether or not the defendant was operating "without authorization." Therefore, courts have had a hard time with determining both whether someone has "exceeded authorized access" and whether someone was "without authorization."

The First Circuit attacked this question in *EF Cultural Travel BV v. Explorica, Inc.*[62] In this case, a tour company sued a competitor and the competitor's executives alleging that the competitor used "scraper" software programs.[63] The competitor allegedly used the "scraper" program to access EF Cultural Travel's website where the program was able to amass large databases of price lists. The competitor then used EF Cultural Travel's price lists to undercut those prices and offer more competitively priced packages. The District Court applied a "default rule" defining conduct as "without authorization only if it is 'not in line with the reasonable expectations' of the website owner and its users."[64] After admitting that the definition of the phrase "without authorization" was "elusive," the Circuit Court decided instead to apply a test for "exceeds authorized access" to the facts of the case.[65]

In order to determine that the defendant had "exceeded

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[61] 18 U.S.C. § 1030(e)(6).

[62] EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001).

[63] *Id.* at 579.

[64] *Id.* at 582 n.10.

[65] *Id.*

authorized access," the Court found that "EF is likely to prove . . . excessive access based on the confidentiality agreement between" the defendant and EF.[66] The defendant violated the confidentiality agreement, which stated that the employee agrees to maintain strict confidence related to trade and business secrets as well as confidential information of EF.[67] This reading of the "exceeds authorized access" clause ignores the problem of defining "without authorization," applying a basic test of breach of contract to the CFAA. The confidentiality agreement between the defendant and EF was a contract between two private parties. While the defendant was clearly in violation of such contract by obtaining confidential information from EF and disclosing it to outside parties, this breach of contract claim should be handled by a state court. The First Circuit's explanation of exceeding authorized access essentially removes that qualification from the CFAA, creating a test that is even broader than the "intended function test" of the Second Circuit. Under the First Circuit's analysis regarding the authorized access requirement of the CFAA, any breach of contract relating to a confidentiality agreement between employer and employee will result in both criminal and civil liability under the Act.

c. Broadening the Test Even More*: Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*

The Western District of Washington took, by far, the broadest stand regarding "without authorization" in *Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc.*[68] The plaintiff and defendant in the case are competitors; the plaintiff alleged that the defendant hired key employees away from the plaintiffs in order to obtain trade secrets from the plaintiff's company.[69] While the defendant argued that the plaintiff could not maintain an action under the CFAA because defendant had

[66] *Id.* at 582.

[67] *Id.*

[68] Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121 (W.D. Wash. 2000).

[69] *Id.* at 1122.

full access to the information in question, the court disagreed. The court instead held that "for the purposes of this 12(b)(6) motion, they lost their authorization and were 'without authorization' when they allegedly obtained and sent the proprietary information to the defendant via e-mail."[70] In support of this proposition, the District Court cites *Morris* for the proposition that "a computer user, with authorized access to a computer and its programs, was without authorization when he used the programs in an unauthorized way."[71]

Citing to *Morris* in support of an overbroad interpretation of the CFAA epitomizes the problems with the "intended function test." Although the Second Circuit may have intended the test to apply in the narrow way described above, it was not sufficiently descriptive in its' holding, thereby allowing its decision to be used as authority for an even broader application of the statute. *Shurgard*'s holding sets forth a "strikingly broad" test for the "without authorization" requirement of the CFAA, which allows for satisfaction of the requirement whenever "an employee uses a computer for reasons contrary to an employer's interest."[72] An overly broad interpretation of the CFAA's authorization requirement destroys the reasoning behind the statute. Employees who betray their employers by stealing company secrets and selling them or bringing them to competitors can already be held liable for such behavior under other claims such as unfair competition, breach of contract, and other state claims. The use of the computer does not necessarily change these claims; the employees could have simply photocopied files and taken them to a competitor, producing the same result. Therefore, the CFAA is not aimed at activities such as those described in *Shurgard*, or in the problem with Get in Shape, Inc. described above. Sammy should not be held liable under the CFAA, and under the *Shurgard* ruling, he certainly would be

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[70] *Id.* at 1125.

[71] *Id.*

[72] Kerr, *supra* note 41, at 1633. The court in *Shurgard* used an agency approach to the authorization question, using the Restatement of Agency as authority: "Unless otherwise agreed, the authority of an agent terminates, if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal." *Id.* (citing *Shurgard*, 119 F. Supp. 2d 1121).

liable. Therefore, the *Shurgard* "without authorization" test does not serve the purposes of the CFAA, which are to provide computer system owners with a cause of action relating to newly developing problems due to technological advances.

d. The Third Circuit Punts on the Issue

The primary Third Circuit case which relates to the CFAA, *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*[73] fails to address or even mention the "without authorization" or "in excess of authorization" requirement of the statute.[74] In *P.C. Yonkers*, the plaintiff companies each operate retail stores selling discount party goods.[75] Defendant Andrew Hack worked for the plaintiff for a period of twelve years, after which he acted as a consultant for the company for a few months.[76] The plaintiffs alleged that defendant and former employee, Hack, opened his own party good stores purposely in the same vicinity as the plaintiffs' stores, thereby competing unfairly with the plaintiffs during the busiest part of the year.[77] According to the plaintiffs, Hack accessed Party City's computer system from his home "'without authorization and on behalf of defendant Celebrations and defendant Bailen,'" and obtained information from this access which helped him decide "'where to locate [Celebrations'] stores, where to focus marketing efforts and budgets, and to obtain valuable information as to sales

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[73] P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504 (3d Cir. 2005).

[74] *Id.*

[75] *Id.* at 506.

[76] *Id.* The Plaintiffs are seventeen Party City ("PC") retail stores, which are all franchises of Party City Corporation ("PCC") and the company which manages the operations of these stores, Party City Management Co., Inc. Defendant Celebrations! The Party and Seasonal Superstore, LLC, was formed by Defendants Hack and Bailen. Celebrations opened two locations near two existing PC stores in the summer of 2004, which plaintiffs said was "'just in time to compete with plaintiff PC stores during the biggest selling season – the weeks leading up to Halloween," and that "sales during this time of year are critical to a successful business year.'" *Id.*

[77] *Id.* at 506-07.

during the Halloween season.'"[78] Hack had a home office while he was employed by PCC and had been authorized to use his computer from home.[79]

The Third Circuit denied injunctive relief to the plaintiffs due to the fact that they failed to state a claim under the CFAA. While authorization is mentioned, the bulk of the discussion by the Court focuses on whether the CFAA allows for a civil remedy in addition to its criminal provisions and whether anything of value had been obtained by Hack during his alleged "unauthorized access" to the PCC system.[80] The Third Circuit emerges from a rather complicated statutory construction discussion by concluding that the civil provision, 18 U.S.C. § 1030(g), requires "that claims brought under other sections must meet, in addition, one of the five numbered (a)(5)(B) 'test'."[81] While the Court mentions that "unauthorized access

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[78] *Id.*

[79] P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 507 (3d Cir. 2005).

[80] *Id.* at 508-13.

[81] *Id.* at 512. § 1030(a)(5) provides that whoever:

> (A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and (B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused . . . (i) loss to 1 or more persons during any 1-year period...aggregating at least $5,000 in value; (ii) the modification or impairment or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals; (iii) physical injury to any person; (iv) a threat to public health or safety; or (v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security.

18 U.S.C. § 1030(a)(5).

Thereby, *P.C. Yonkers* stands for the proposition that, in order to qualify for a civil remedy under § 1030(g), the plaintiff must show that the defendant

has been shown," it provides no analysis to get to this conclusion, possibly due to the fact that the Court finds that the plaintiffs failed to show a claim under § 1030(a)(4) on other grounds.[82] The Court holds that "it is clear that PC plaintiffs do not know, have not shown, and cannot show, what information, if any, was taken," instead urging that the Court "draw inferences of intent and the obtaining of valuable information from the mere fact that unauthorized access has been shown."[83] While the Court's analysis is sound, it focuses on the fourth element of a violation of § 1030(a)(4), and does not create a Third Circuit test for the second prong, which requires that the defendant has accessed a computer "without authorization or by exceeding such authorization."[84]

While the Third Circuit has yet to articulate reasoning or to take a position related to the "unauthorized access"

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engaged in activity described by § 1030(a)(5)(A) in order to cause a result described by § 1030(a)(5)(B); *see* 18 U.S.C. § 1030. Many cases also focus on § 1030(a)(4) which says:

> [W]hoever . . . knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period.

18 U.S.C. § 1030(a)(4).

According to the Court in *P.C. Yonkers*, "[i]t is undisputed that the conduct complained of falls under" this subsection. *P.C. Yonkers*, 428 F.3d at 508.

> A claim under CFAA § 1030(a)(4) has four elements: (1) defendant has accessed a "protected computer;" (2) has done so without authorization or by exceeding such authorization as was granted; (3) has done so "knowingly" and with "intent to defraud;" and (4) as a result has "further[ed] the intended fraud and obtain[ed] anything of value."

Id.; *see also* Pac. Aerospace & Elecs., Inc. v. Taylor, 295 F. Supp. 2d 1188, 1195 (E.D. Wash. 2003).

[82] *P.C. Yonkers*, 428 F.3d at 509.

[83] *Id.*

[84] 18 U.S.C. § 1030(a)(4).

requirement, some District Courts within the Circuit have spoken on this issue. In *Brett Senior & Assocs., P.C. v. Fitzgerald*,[85] the Eastern District of Pennsylvania analyzes the meaning of "unauthorized access."[86] Plaintiff Brett Senior & Associates ("BSA") sued a former employee, Fitzgerald, alleging that the defendant, in violation of a confidentiality agreement that he had signed, "created a list, which he showed to several Fesnak [a competing firm] partners, of approximately 69 clients that he serviced at BSA," including "(1) the fees paid by 48 clients; (2) the services performed (either "review & tax returns," "compilation & tax returns," or "bookkeeping through tax returns") for 15 clients; and (3) a telephone number for 11 clients."[87] Fitzgerald then took a job with Fesnak. Before leaving BSA, Fitzgerald "made copies of certain information in his files."[88]

The plaintiff claimed that Fitzgerald violated § 1030(a)(4) "by accessing the BSA computer system to transfer files to Fesnak," specifically when he "(1) copied BSA's client files to an external hard drive and to a CD; (2) created a list of the clients he serviced at BSA; (3) transformed BSA's files to PDF or ZIP formats for the purpose of transferring them to Fesnak; and (4) emailed information relating to four BSA clients to Fesnak."[89] The Court finds that the critical question regarding these facts relates to whether or not Fitzgerald violated the second element of a claim under § 1030(a)(4), whether he accessed the information "without authorization or by exceeding such authorization."[90] The plaintiff alleges that Fitzgerald's access was unauthorized not because he was not authorized to access the information that he copied and took with him to the competitor firm, but because "the use of this appropriately-

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[85] Brett Senior & Assocs., P.C. v. Fitzgerald, No. CIV.A.06-1412, 2007 WL 2043377 (E.D. Pa. July 31, 2007).

[86] *Id.*

[87] *Id.* at *1.

[88] *Id.*

[89] *Id.* at *3.

[90] 18 U.S.C. § 1030(a)(4).

obtained information was improper."[91] This reasoning, employed by the plaintiff, resembles the reasoning of the First and Second Circuits' tests.[92] However, the Court disagrees with plaintiff's argument, and thereby the broad tests articulated by the First and Second Circuits, declaring that "the conduct targeted by section (a)(4) . . . is the unauthorized procurement or alteration of information, *not its misuse or misappropriation*."[93] The Court therefore concludes that the CFAA claim would fail because "there is no allegation that Fitzgerald lacked authority to view any information in the BSA computer system."[94]

The reasoning employed by the Eastern District of Pennsylvania in this case more accurately portrays the way that the CFAA *should be* construed relating to unauthorized access. It is unlikely that when the legislature drafted, or even amended the Act, that it intended for claims to be brought in federal court relating to employees who view and steal information which they are permitted to have access to on a regular basis. There are already appropriate remedies for such situations that can be brought by employers such as the state claims brought by the plaintiff in this case including misappropriation of trade secrets, misappropriation of confidential business information, unfair competition, tortious interference with former clients, unlawful conspiracy, and breach of contract.[95] Nothing makes the situation at hand unique that would require plaintiffs situated similarly to BSA to have a special remedy under a federal statute in order to make such plaintiffs whole.

However, another District within the Third Circuit, the Middle District of Pennsylvania, articulated a different view of

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[91] *Brett Senior & Assocs.*, 2007 WL 2043377 at *3.

[92] *See* United States v. Morris, 928 F.2d 504 (2nd Cir. 1991)(holding that access was unauthorized because defendant used the computer in unintended ways not "related to their intended function"); *see also* EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577 (1st Cir. 2001)(holding that activity "exceeded authorized access" since it violated the confidentiality agreement between employer and employee).

[93] *Brett Senior & Assocs.*, 2007 WL 2043377 at *3 (emphasis added).

[94] *Id.*

[95] *Id.* at *2.

"unauthorized access" in *Dudick ex rel. Susquehanna Precision, Inc. v. Vaccarro*.[96] In this case, the defendants assert that "Plaintiff's allegation that Andrew exceeded his authorization directly contradicts Plaintiff's allegation that Andrew was entrusted with access to SPI's proprietary and confidential information."[97] This assertion is consistent with the Eastern District's ruling in the BSA case. However, this Court instead cites *Shurgard* for the proposition that "an employee can act without authorization when he obtains proprietary information from his former employer's computers for the benefit of his new employer."[98] Therefore, the Court held that plaintiffs had stated a claim under the CFAA and that defendant was acting "without authorization" when he accessed SPI's proprietary information and obtained such information for the benefit of his new employer.[99]

Finally, the District of New Jersey briefly touches upon the authorization test requirement in *Chas S. Winner, Inc. v. Polistina*.[100] This case, similar to the previous cases discussed, involves a plaintiff alleging that defendant obtained information from plaintiff's company while employed there, and later took that information to a competitor where he later became employed.[101] While the majority of the opinion focuses on the damage or loss requirement, which will be discussed later in this article, the Court does note that "the only factual allegations in the complaint that concern the use or misuse of a computer are allegations that the individual defendants sent internal and external e-mails to further the interests of their prospective employer and in a manner disloyal to their former employer," but "[n]owhere in the complaint is it alleged that the individual defendants . . . caused any other harm to computers, or

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[96] No. CIV.A.3:06-CV-2175, 2007 WL 1847435 (M.D. Pa. June 25, 2007).

[97] *Id.* at *7.

[98] *Id.* (citing Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121 (W.D. Wash. 2000)).

[99] *Id.*

[100] Chas S. Winner, Inc. v. Polistina, No. CIV.A.06-4865, 2007 WL 1652292 (D.N.J. June 4, 2007).

[101] *Id.* at *1.

exceeded their authorized access to files."[102] The Court then goes on to point out that these allegations amount to "breach of employment covenants and the usual torts that attend such employment disputes,"[103] and therefore should not be heard in federal court under the CFAA.

Although the Court focuses on the failure of the plaintiffs to adequately claim a "loss" under the CFAA, it dances around the ideas implicated by the "unauthorized use" requirement of § 1030(a)(4). While discussing the conduct engaged in by the defendants, the Court remarks that "[g]athering evidence from a computer to prove your state law employment claims does not turn defendants' conduct – even disloyal conduct in breach of contract – into the kind of conduct that so concerned Congress that it criminalized it."[104] Finally, the Court interprets the CFAA's unauthorized access requirement, which describes the conduct required under the statute, to exclude activity such as defendants' "use of ordinary e-mail in a manner disloyal to their employer and in breach of their employment contract" which occurred in this case.[105] Reading the statute to include activity such as this under the CFAA would create a situation in which "there would be no principled limit to the kinds of business disputes that § 1030, and perforce its right of action, would reach."[106]

A lack of definitive opinion on the part of the Third Circuit has caused a difference of opinion amongst the Districts within the Circuit. The Eastern District of Pennsylvania and the District of New Jersey have taken a less popular, but more intuitive, course of action by reading the "unauthorized access" requirement narrowly to exclude behavior that already finds remedy in state law claims. The Middle District of Pennsylvania, however, has decided to follow the trend of the First and Second Circuits, which has paved the way for a reading

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[102] *Id.* at *2.

[103] *Id.*

[104] *Id.* at *4 n.7.

[105] *Id.* at *5.

[106] Chas S. Winner, Inc. v. Polistina, No. CIV.A.06-4865, 2007 WL 1652292 (D.N.J. June 4, 2007).

of the access requirement which is so broad that any employee using an employer owned computer in a way that is not in the employer's interest, or is not an intended function of the employer, results in liability under the CFAA. When considering which decision to make, the Third Circuit should be mindful that while the broad interpretations may make sense if you take the words "unauthorized access" in isolation, the other narrower tests articulated by Districts within the Circuit serve the legislative purpose of the CFAA much more faithfully. The Courts that have employed a narrow test have articulated such a test in light of the purpose of the CFAA, whereas the Circuits who have employed a broader test have done so despite the purpose. Thereby, the Third Circuit should create a test of unauthorized access which requires more than simple disloyalty on the part of an employee.

B. MORE ROOM TO EXPAND: THE DAMAGE/LOSS REQUIREMENT

Another important element of a CFAA claim necessitates that the damage or loss suffered by the victim be in excess of $5,000.[107] The statute defines each term and, treats damage and loss separately for the purposes of reaching the $5,000 minimum. For the purposes of the statute, "the term 'damage' means any impairment to the integrity or availability of data, a program, a system, or information."[108] "The term 'loss' means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and

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[107] *See* 18 U.S.C. §1030(a)(4), which provides that "Whoever knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, *unless* the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use *is not more than $5,000* in any 1-year period." (emphasis added). *See also* 18 U.S.C. § 1030(a)(5)(B)(i) which provides that the "loss to 1 or more persons during any 1-year period" must "aggregate[e] *at least $5,000 in value*" (emphasis added). In order to bring a civil claim under the CFAA's civil liability provision, a plaintiff must allege conduct described in subsection (a)(5)(B). 18 U.S.C. § 1030(g). Therefore, all civil claims brought under the CFAA must allege loss or damage in excess of $5,000 in a one year period.

[108] 18 U.S.C. § 1030(e)(8).

restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service."[109]

1. The Problem With Loss's Broad Definition and How it Differs From Damage

Whereas the statute's definition of damage seems to be directed at the physical harm to or deletion of software, computers, or stored information, the definition of loss seems to cast a broad net over other harm to the victim. The definition of loss goes so far as to say "any reasonable cost to any victim."[110] Though this broad phrase is followed by a list of more specific losses, the wording of the statute suggests that this list is exemplary, and not exclusive, as the word "including" introduces it.[111] Therefore, while subsection (e)(11) tells courts that loss can include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system or information to its condition prior to the offense" as well as "revenue lost" due to an interruption of service, it does not tell courts that these are the only kinds of losses to include when calculating the minimum of $5,000 damage/loss assessment.[112] Courts have therefore been required to interpret what is included in loss and what is not included in loss for the purposes of determining whether a plaintiff has successfully alleged a claim under the CFAA.

Both damage and loss are not necessary as long as one or the other reaches the $5,000 limit.[113] Given that no physical

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[109] 18 U.S.C. § 1030(e)(11).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See* Mitchell Waldman, *Civil Actions, Enforcement, and Liability; Disciplinary Actions*, AM. JURIS. 2D COMPUTERS AND THE INTERNET, § 85 (July 2007). This article summarizes the issue of loss under the Computer Fraud and Abuse Act. It explains that "natural and foreseeable costs are part of the damages amount in an action under the Computer Fraud and Abuse Act." It also explains a case in which there was no "damage" to a plaintiff company's data or systems, but nonetheless the court held the defendant liable under the

"damage" to any system is necessary to the CFAA claim, the construal of the definition of "loss" is particularly important. Taken without court interpretation, the term "any reasonable cost to any victim" could include anything, and everything, up to and including the lost profits from the alleged violation of the CFAA. For example, the cost of hiring a consultant to assess the damage to the system, the cost of bolstering the system's security, and anything else that plaintiffs were able to think of which related to the offense can be included.

Circuits have disagreed on what to include and what to disregard as loss for the purposes of a victim's CFAA claim. They have disagreed somewhat less, however, than they did in regard to the "without authorization requirement."[114] Plaintiffs attempt to throw all costs related to the alleged CFAA infraction into the mix in order to reach the $5,000; these types of damages resemble tort damages in that they are all conceivable losses resulting from the chain of events following the alleged wrong. In the example given above, Get in Shape, Inc. will allege that the $1.5 million loss in profits from 2004 to 2005 related to Sammy and Kyle's CFAA violation, plus the $1,000 the company paid Nelson to assess the security breach, and then finally the $10,000 in travel expenses for Get in Shape, Inc. management to learn about better and more secure computer practices to prevent this problem from occurring in the future. Though the Third Circuit has not yet discussed the issue of "loss," courts within the Circuit have.[115] In order to remain as true to the original policies underlying the Computer Fraud and Abuse Act, the Third Circuit should narrowly construe the term "loss," allowing only the most substantial claims to make it into

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CFAA because the company's "payment of consultant fees for the purpose of assessing whether its website had been compromised by a competitor's alleged violation" of the CFAA constituted "loss" under the statute. *Id.*

[114] *See supra id.* Part IIIA.

[115] *See* P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 509 (3d Cir. 2005)(holding that the Plaintiff's CFAA claim fails because "the plaintiffs do not know, have not shown, and cannot show, what information, if any, was taken"). The Circuit Court therefore never reaches the question of damage or loss under the statute. *Id. But see infra* for a discussion of other Circuits' takes on the question of damage or loss as well as District Courts' within the Third Circuit discussion of the issue.

federal court under the jurisdiction of the CFAA. In order to "avoid 'absurd' results,"[116] the Third Circuit should include in Get in Shape, Inc.'s "loss" only the $1,000 paid to Nelson in order to assess the harm. Therefore, Get in Shape, Inc.'s CFAA claim should fail and federal jurisdiction should be denied.

2. Damage: A Less Common, But Easier to Identify Result of a CFAA Violation

Although it is not required to show damage in addition to loss, it is important to be able to distinguish between the two because the statute treats them as separate harms. Damage, as noted above, is defined by the CFAA as "any impairment to the integrity or availability of data, a program, a system, or information."[117] This definition, while not entirely sufficient, provides a more finite set of harms which fall within its terms. "Damage" is not litigated often, because it seems clear to most courts when it exists.

For example, in *B&B Microscopes v. Armogida*,[118] the plaintiff was able to successfully bring a claim in federal court against the defendant, who was an ex employee, because the defendant had caused damage to the plaintiff's computer system.[119] The plaintiff company, B&B Microscopes ("B&B"), sold "very sophisticated imaging and microscope equipment," which was very expensive.[120] The defendant, Armogida, claimed to have advanced knowledge in computer hardware, operating systems, software, networking and programming languages, and an understanding of high resolution imaging.[121] B&B hired him to sell microscopes and custom imaging to customers.[122]

After being employed at B&B for a while, the defendant

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[116] *Shurgard*, 119 F. Supp. 2d at 1127.

[117] 18 U.S.C. § 1030(e)(8).

[118] B&B Microscopes v. Armogida, 532 F. Supp. 2d 744 (W.D. Pa. 2007).

[119] *Id.*

[120] *Id.* at 746.

[121] *Id.*

[122] *Id.*

committed to a project where he was to develop a system for one of B&B's customers. Since the defendant was the imaging specialist servicing this particular customer, it was his job "to develop the algorithm which would make the system fully automated."[123] After releasing the system to the customer, the defendant continued to work on it as it needed further development, and he was compensated for such work.[124] Although there was some dispute about who "owned" the system, the Court found that there was never any dispute that all work by the defendant on the system was done in the name of B&B, not the defendant or his new company.[125]

During the defendant's employment, B&B conducted a sales meeting where all sales representatives and imaging specialists were required to attend.[126] At one point during the meeting, all representatives and specialists were asked to turn in their laptops so that a vendor could install an upgrade to B&B's email system.[127] The defendant, at this time, went to his hotel room, locked the door, and "selectively deleted and overwrote thousands of files from the laptop."[128] After hiring a company to perform an investigation of the laptop, B&B learned that the defendant had "deleted or overwritten every file relating to" the system that he had designed, knowing that he was the only employee with the algorithm to make the system run properly.[129]

B&B therefore suffered "damage" to the laptop and to the customer's system, as the defendant had impaired both the "integrity and availability of data, a program, a system, or

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[123] *Id.* at 748.

[124] *B&B Microscopes*, 532 F. Supp. 2d at 748.

[125] *Id.* at 749. Defendant made claims that "he worked these hours" on the system "on non B&B time." In addition, he also filed for a patent application on the system in his own name without telling B&B about it. *Id.*

[126] *Id.* at 753.

[127] *Id.*

[128] *Id.*

[129] *Id.*

information."[130] The only "loss" mentioned in the case was the cost of hiring the company that investigated the defendant's laptop to assess the damage. Although the damage to the system and the deleted files on the laptop may be easy to identify, it is fairly difficult for courts to value. However, loss is easy to value and difficult to identify. The defendant in this case was held liable under the CFAA for the damage, but not under the sections that provide for liability for unauthorized access, because the defendant was permitted to access his own business laptop.[131] Instead, he was liable under 18 U.S.C. § 1030(a)(5)(A)(i), which permits liability when the defendant "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, *intentionally causes damage* without authorization, to a protected computer."[132]

The damage that the defendant caused to the plaintiff company's system was so clearly within the meaning of the CFAA that the court found a way to hold him liable under the statute. Damage, as demonstrated by this case, is a very distinct set of actions that could not be misperceived by courts. Loss, however, is much more difficult to identify.

3. From Damage to Loss: Finding the Scope of Loss in the CFAA

a. The First Circuit's Loss Requirement Before the CFAA Defines "Loss:" *EF Cultural Travel v. Explorica, Inc.*

In *EF Cultural Travel BV v. Explorica, Inc.*, the First Circuit

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[130] 18 U.S.C. § 1030(e)(8).

[131] *B&B Microscopes*, 532 F. Supp. 2d at 758.

[132] 18 U.S.C. § 1030(a)(5)(A)(i) (emphasis added). Notably, this court may have misconstrued the language of this subsection of the statute. Although this section is clearly aimed at intentionally damaging conduct, which the defendant certainly engaged in this case, it still contains the phrase "without authorization," and it is unclear whether that refers to the intentional damage or to the protected computer. One could argue that "without authorization" in this subsection means the same thing as it does in the above discussion about the "exceeds authorization" element of a CFAA claim.

adopts an overly broad definition of "loss."[133] The defendant in this case accessed the plaintiff's website and ran a program that "scraped" information on pricing for the plaintiff's tours.[134] The district court found that the plaintiff was likely to assert a successful CFAA claim because, in addition to showing that the defendant exceeded its authorized access to the website, the plaintiff also suffered a loss "consisting of reduced business, harm to its goodwill, and the cost of diagnostic measures it incurred to evaluate possible harm to [plaintiff's] systems, although it could not show that [defendant's] actions physically damaged its computers."[135] The First Circuit affirmed the district court's holding, adopting a similar line of reasoning.

Since the First Circuit did not have the benefit of the CFAA's definition of "loss" at the time it decided this case,[136] the court was able to draw its own conclusions about Congress's intent as to the "loss" requirement. In order to decide the meaning of "loss" in the context of the CFAA, the First Circuit looked to its everyday meaning: "[t]he word 'loss' means 'detriment, disadvantage, or deprivation from failure to keep, have or get.'"[137] The court then reasoned that, since physical damage will happen less often in "an increasingly electronic world," and the "value to the victim of what has been stolen and the victim's cost in shoring up its security features undoubtedly will loom ever-larger,"[138] a broad interpretation of "loss" under the CFAA was necessary or else the statute would become obsolete in the technologically advanced 21st century. The court stipulated that not all losses would be compensable under the CFAA. However, the only limit on "loss" imposed by the court was the threshold

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[133] EF Cultural Travel BV v. Explorica, Inc., 274 F.3d 577, 585 (1st Cir. 2001) (interpreting "loss" before a definition of "loss" was added to the CFAA).

[134] *Id.* at 579. *See also* discussion of this case *supra* Part IIIA2b.

[135] *Id.* at 580.

[136] *See id.* at 585. "In the absence of a statutory definition for 'loss,' we apply the well-known rule of assigning undefined words their normal, everyday meaning." *Id.*

[137] *Id.* (*citing The Random House Dictionary of the English Language* 1137 (2d ed. 1983)).

[138] *Id.*

monetary limit of $5,000.[139] The First Circuit declined, however, to put any substantive limits on the what constitutes a "loss" under the CFAA and what does not.

b. The Third Circuit and Districts Within the Circuit After Congress Added the Definition of "Loss" to the CFAA

After the definition of "loss" was added to the CFAA,[140] two district courts within the Third Circuit substantially narrowed the view of loss under the statute when compared to the First Circuit's broad "loss" interpretation. In *Dudick ex rel. Susquehanna Precision, Inc. v. Vaccarro*, the Middle District of Pennsylvania held that the plaintiff's costs that were responsive to the defendant's violation of the CFAA were included in "loss," but "lost revenue, loss of goodwill, and interference with his customers" are not "cognizable losses under the CFAA."[141] The plaintiff's lost revenue, loss of goodwill and interference with customers are all "reasonable cost[s] to any victim," as the definition of loss in the CFAA stipulates.[142] However, that definition encompasses far too large an array of possibilities when it comes to what can be counted as "loss" for the purposes of this statute. Therefore, courts had to take the definition and narrow it, as the Middle District of Pennsylvania did in this case.

The District of New Jersey constricted the meaning of "loss" even further in *Chas S. Winner*. In this case, the plaintiff alleged that two former employees orchestrated a plan to take customers away from the plaintiff's company in order to give the customers to a competitor.[143] The plaintiff's only link to the

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[139] *EF Cultural Travel*, 274 F.3d at 577. The Court stated that they "do not hold . . . that any loss is compensable. The CFAA provides recovery for 'damage' only if it results in a loss of at least $5,000. The Court "conclude[d] that expenses of at least $5,000 resulting from a party's intrusion are 'losses' for the purpose of the 'damage or loss' requirement of the CFAA." *Id.*

[140] 18 U.S.C. §§ 1080(e)(10) to (12) were added in the 2001 Amendments. The definition of "loss" is 18 U.S.C. § 1080(e)(11). *See* 18 U.S.C. § 1030.

[141] Dudick ex rel. Susquehanna Precision, Inc. v. Vaccarro, No. CIV.A.3:06-CV-2175, 2007 WL 1847435 at *6 (M.D. Pa. June 25, 2007).

[142] 18 U.S.C. § 1030(e)(11).

[143] Chas S. Winner, Inc. v. Polistina, No. CIV.A.06-4865, 2007 WL 1652292 at *1 (D.N.J. June 4, 2007).

CFAA concerning the "use or misuse of a computer" is the allegation that "the individual defendants sent internal and external e-mails to further the interests of their prospective employer and in a manner disloyal to their former employer."[144] The defendants in this case moved to dismiss the CFAA claims "because plaintiffs have not alleged that they suffered a loss cognizable under § 1030(e)(11)."[145] Relying on the Second Circuit's view of "loss" in *Nexans Wires S.A. v. Sark-USA, Inc.*,[146] the District of New Jersey held that "the meaning of loss under the statute must pertain to 'a cost of investigating or remedying damage to a computer, or a cost incurred because the computer's service was interrupted.'"[147]

Therefore, the court reasoned that the plaintiff's claim alleging their loss exceeded $5,000 because they spent more than that amount "to hire a computer expert to conduct an assessment and investigation" was not sufficient to constitute "loss" under the court's construction of the CFAA requirement.[148] The cost of hiring an expert can be sufficient so long as it is both over $5,000 and also it must be "related to

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[144] *Id.*, at *1-*2. This case contains facts very similar to the sample problem discussed throughout this article. The defendants in this case were taking information related to customers to try to bring these customers to their prospective employer while they were still working at their former employer. Sammy and Kyle were engaged in exactly the same behavior: stealing client information via email in order to divert these clients from Get in Shape, Inc. (the former employer) to Fitness Fast (the prospective employer).

[145] *Id.*, at *3.

[146] Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 473 (S.D.N.Y. 2004). In this case, the Southern District of New York, later affirmed by the Second Circuit, held that business trips taken by members of the plaintiffs' management team in response to the alleged computer violation did not constitute loss "because the cost was unrelated to investigating or remedying damage to the computer." Even though the business trips were "for the sole purpose of responding to the news that" the defendant had unlawfully accessed the system and certain files had been deleted, the cost was still excluded since the meeting did not involve examining computers or making computer assessments. *Id.*

[147] *Chas. S. Winner*, 2007 WL 1652292, at *4 (*citing* Nexans Wires S.A. v. Sark-USA, Inc., 319 F. Supp. 2d 468, 475 (S.D.N.Y. 2004), *aff'd*, 166 Fed. App. 559 (2d Cir. 2006)).

[148] *Id.*

investigating or remedying *damage* to the computer, or due to *interruption* of the computer's service."[149] By the District of New Jersey's construction of the loss requirement, either damage or interruption of service is required in order for loss to be cognizable under the statute, provided it is derived from the hiring of an expert to make an assessment.

Both the Middle District of Pennsylvania and the District of New Jersey have interpreted the definition of "loss" in the CFAA to be more constrained than its plain meaning seems to suggest. As discussed above, the definition of loss includes "any reasonable cost to any victim," then qualified by a list of possible reasonable costs.[150] However, the two courts which have taken a constrained view of "loss" seem to start from the exemplary list of reasonable costs in the statute, almost completely ignoring the "any reasonable cost" clause. The Third Circuit should heed this constricted view because the definition in the statute is overbroad and would produce results which were most likely not intended by Congress when the statute was formed.

c. The Third Circuit Declines to Confront the Problem of "Loss" As Well As "Unauthorized Access"

As discussed above, the Third Circuit, in *P.C. Yonkers*, held that the plaintiffs "had failed to demonstrate a likelihood of success on the merits of [their CFAA] claim," not because they did not claim that defendants' use "exceeded authorized access," or because they did not claim a cognizable "loss" under the statute.[151] Neither of these important parts of a CFAA claim are even discussed in the opinion. The court instead held that the plaintiffs had failed to state a claim under the CFAA because "[i]t is clear that PC plaintiffs do not know, have not shown, and

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

[150] 18 U.S.C. § 1030(e)(11). The reasonable costs listed include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *Id.*

[151] P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC, 428 F.3d 504, 507 (3d Cir. 2005).

cannot show, what information, if any, was taken."[152] After a long discussion about the statutory language of the Act, specifically the civil provision of the Act, the court affirmed the District Court's denial of an injunction against the defendants because there was not sufficient evidence of anything actually being taken from the plaintiffs' computer systems.[153] The only mention of the damage or loss requirement by the court comes without explanation. The court, in passing, at the end of the opinion, mentions that "the claim asserted by PC plaintiffs fits squarely within the class of claims eligible for injunctive relief, for it involves . . . the $5,000 loss provision of (a)(5)(B)(i)."[154]

The Third Circuit should adopt the constraining tests adopted by the districts within the circuit because the definition of "loss" provided for courts by Congress in the CFAA is overbroad and would produce results that expand federal jurisdiction beyond its intended bounds. Therefore, Get in Shape, Inc.'s claim should fail not only because it cannot claim that either Sammy or Kyle's access was in excess of authorization or without authorization, but also because it cannot claim a loss in excess of $5,000. There was no "damage" to the computer system, because Sammy and Kyle only removed information from it. They did not delete or destroy files, processes, or any computers themselves. Additionally, the $10,000 in costs to attend a management meeting to discuss the alleged computer violation should not be counted as loss because it is not closely enough connected to the alleged computer access itself. Only the $1,000 paid to Nelson to assess the access and to strengthen security to avoid such a problem from occurring in the future would be related closely enough. In addition, the profit losses due to Fitness Fast's unfair competition are not a cognizable loss under the CFAA.

As the District of New Jersey notes in *Chas. S. Winner*, "[w]e find nothing in the structure of language of the statute to suggest that Congress intended to create a private cause of

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[152] *Id.* at 509.

[153] *See id.*

[154] *Id.* at 512. 18 U.S.C. § 1030(a)(5)(B)(i) provides that as a result of the conduct described by the Act, there must be "loss to 1 or more persons during any 1-year period aggregating at least $5,000 in value."

action against employees whose crime, if you will, merely involved the use of ordinary e-mail in a manner disloyal to their employer and in breach of their employment contract."[155] Without limiting the types of claims that can fall under the CFAA's sometimes broad and ambiguous language, courts are in danger of enforcing "no principled limit to the kinds of business disputes that Section 1030, and perforce its private right of action, would reach."[156] Certainly, Get in Shape, Inc. has cognizable claims for breach of contract, unfair competition, misappropriation of trade secrets, and civil conspiracy, as well other claims that the state, not federal, courts have jurisdiction over. The District of New Jersey recognizes that "if Congress had intended to bring the kind of employment dispute found in this case and so common in state court within the jurisdiction of the federal courts merely because a disloyal employee used e-mail to further his disloyal conduct it would have done so much more directly and with resounding clarity."[157]

In order to refrain from overburdening federal courts with common employment disputes that will only continue to more frequently involve emailing and computers due to the technological nature of the business world today, courts should construe the ambiguous clauses of the CFAA more narrowly. Applying this construction would exclude claims such as *Chas. S. Winner* as well as the Get in Shape, Inc. problem from federal jurisdiction. Two elements of the statute that are ambiguous and have been interpreted in varying degrees of broadness are the "without authorization/in excess of authorization" requirement and the "damage or loss" requirement. The Third Circuit, having yet to rule on these issues, should decide to implement strict tests which constrict the meanings of both clauses.

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[155] Chas S. Winner, Inc. v. Polistina, No. CIV.A.06-4865, 2007 WL 1652292, at *5 (D.N.J. June 4, 2007).

[156] *Id.*

[157] *Id.*

RECENT DEVELOPMENTS IN SCHOOL SPEECH LAW – EXAMINING THE POTENTIAL FATE OF *HARPER V. POWAY UNIFIED SCHOOL DISTRICT*

Matthew Kohut*

I. INTRODUCTION

In *Harper v. Poway Unified School District*,[1] the Ninth Circuit held that a student's shirt bearing anti-homosexual slogans could be suppressed by the school without violating the student's First Amendment rights to free speech and expression. This Note will provide a brief account of the relevant facts of *Harper*, in addition to surveying the case's decision in the context of the history of First Amendment law in public school settings. Primarily though, the focus will be on predicting the ultimate fate of *Harper* in light of the recent Supreme Court decision in *Morse v. Frederick*,[2] which changed the landscape of school speech law after *Harper* was sent back down to the district court to begin a new review.

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[1] 445 F.3d 1166 (9th Cir. 2006), *cert. granted*, 549 U.S. 1262 (2007), *vacated as moot*, 127 S. Ct. 1484 (2007).

[2] 127 S. Ct. 2618 (2007).

II. SETTING THE STAGE: *HARPER V. POWAY UNIFIED SCHOOL DISTRICT*

In 2003, Poway High School allowed the Gay-Straight Alliance, a student organization, to engage in a "Day of Silence."[3] Ostensibly, the intended purpose was "to teach tolerance of others, particularly those of a different sexual orientation."[4] However, the event incited altercations brought on by students' anti-homosexual remarks, resulting in a number of suspensions.[5] In response to the "Day of Silence," a group of students informally organized a "Straight-Pride Day" during which shirts featuring derogatory remarks about homosexuality were worn.[6] This action again resulted in the suspension of a few students due to "an altercation."[7]

Despite the conflicts arising from the 2003 "Day of Silence," the school permitted the Gay-Straight Alliance to hold another such event in 2004.[8] Following up on the tradition established the previous year, the appellant, Tyler Chase Harper, wore a shirt displaying anti-homosexual slogans on the "Day of

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[3] *Harper*, 445 F.3d at 1171. The "Day of Silence" was characterized by students wearing duct tape over their mouths and refusing to speak in class, except through a designated representative. *Id.* at 1171 n.3. This act was meant to "symbolize the silencing effect of intolerance upon gays and lesbians." *Id.* Other activities included wearing shirts that said "National Day of Silence" and "contained a purple square with a yellow equal sign in the middle," and hanging posters promoting "awareness of harassment on the basis of sexual orientation." *Id.* at 1171.

[4] *Id.* This description of the event was given by the school's assistant principal. However, in his complaint, Harper expressed the belief that the real intent behind the "Day of Silence" was "to endorse, promote, and encourage homosexual activity." *Id.* at 1171 n.2.

[5] *Id.* at 1171. One of these altercations required physical separation of the students involved. *Id.*

[6] *Id.*

[7] *Id.* According to Lynell Antrim, the school's assistant principal, only some of the students were suspended as a result of wearing the "Straight-Pride" shirts, while others complied with the school's orders to remove the shirts. *Id.*

[8] *Id.* In order to prevent the kind of problems that had occurred the year before, the school conditioned the 2004 event upon a meeting with the principal to determine ways to minimize the potential for conflict. *Id.*

Silence"[9] as well as on the following day.[10] On the second day, David LeMaster, a teacher at the school, noticed the shirt and instructed Harper to remove it, stating that it was "inflammatory" and that it "created a negative and hostile working environment for others."[11] Harper refused and was promptly sent to the school's front office.[12]

Upon arrival at the office, Harper met with school officials regarding the incident.[13] Assistant Principal Antrim expressed the view that the shirt was "inflammatory under the circumstances and could cause disruption in the educational setting," recalling the problems that arose the year before.[14] Also influenced by the tensions that arose around the time of the first "Day of Silence," Principal Scott Fisher ultimately decided that Harper could not wear the shirt at school.[15] Harper then refused to remove the shirt, at which point he was instructed to remain in the front office for the rest of the day.[16] No

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[9] *Id.* Handwritten on the front of Harper's shirt was the message "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," while "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was handwritten on the back. *Id.*

[10] *Id.* The following day's shirt displayed the slogan "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and retained the same biblical reference on the back. *Id.*

[11] *Id.* at 1171-72.

[12] *Id.* at 1172.

[13] *Id.*

[14] *Id.* Antrim informed Harper that the purpose of the "Day of Silence" was not to promote homosexuality, but to encourage tolerance of others. *Id.* She also recommended some "ways that [Harper] and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt." *Id.*

[15] *Id.* In Fisher's words, Harper had informed him that he had already been "involved in a tense verbal conversation" that morning during a confrontation with other students. *Id.* However, according to Harper, these confrontations were merely "peaceful discussions wherein differing viewpoints were communicated." *Id.* at 1172 n.5. Fisher felt that Harper's derogatory remarks were not "healthy," and that his decision was compelled by the school's prerogative to "avoid physical conflict on campus." *Id.* at 1172.

[16] *Id.*

disciplinary action was taken against Harper and "he received full attendance credit for the day."[17]

III. HISTORY OF SCHOOL SPEECH LAW

The Supreme Court has decided three cases that have laid the foundation for determining the boundaries of free speech in public schools: *Tinker v. Des Moines Independent Community School District*,[18] *Bethel School District No. 403 v. Fraser*,[19] and *Hazelwood School District v. Kuhlmeier*.[20] These cases have classified three distinct types of scenarios involving expression in school, each of which has been assigned a different standard dictating the conditions under which the expression can be regulated.

A. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

In this case, three students were suspended for wearing black armbands protesting the Vietnam War, and were not permitted to return to school until they removed the armbands.[21] The students filed suit in the United States District Court for the Southern District of Iowa, Central Division, seeking an injunction preventing school officials and members of the board of directors of the school district from taking further disciplinary action.[22] The district court and the Eighth Circuit both upheld the constitutionality of the suspensions,[23]

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[17] *Id.* at 1173.

[18] 393 U.S. 503 (1969).

[19] 478 U.S. 675 (1986).

[20] 484 U.S. 260 (1988).

[21] *Tinker*, 393 U.S. at 504.

[22] *Id.*

[23] *Id.* at 504-05. The reasoning employed by the district court (and affirmed by the Eighth Circuit) was that the school's actions were "reasonable in order to prevent disturbance of school discipline." *Id.*

whereupon the students petitioned the Supreme Court, which granted certiorari.[24]

The Supreme Court reversed the Eighth Circuit.[25] While noting that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[26] the Court recognized that the special context of school-permitted restriction of speech when and only when that speech either "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[27] Thus, a school may not ban speech purely upon a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[28] The standard established here was said by the Court to govern cases of "pure speech," which in general "is entitled to comprehensive protection under the First Amendment."[29]

Applying this new test, the Court found that the circumstances could not have led school officials to conclude that other students' rights could potentially have been infringed upon or to reasonably "forecast substantial disruption of or material interference with school activities," and that no such problems actually occurred.[30] The conclusion was that the school must have been seeking only to suppress a viewpoint with which it disagreed and that was unpopular, and without more, this type of ban on "pure speech" by a school is not constitutionally permissible.[31]

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[24] *Id.* at 505.

[25] *Id.* at 514.

[26] *Id.* at 506.

[27] *Id.* at 513. It is worth noting that the test established in *Tinker* allows for viewpoint discrimination, provided that the requisite conditions are present.

[28] *Id.* at 509.

[29] *Id.* at 505-06. Noting that the type of speech in *Tinker* qualified as "pure speech," the Court gave some meaning to this term by providing examples of what would not constitute "pure speech." Such examples included wearing a certain "length of skirt[] or . . . type of clothing, to hair style, or deportment," or "aggressive, disruptive action or even group demonstrations." *Id.* at 507-08.

[30] *Id.* at 514.

[31] *Id.*

B. *BETHEL SCHOOL DISTRICT NO. 403 V. FRASER*

This next fundamentally important case concerned a speech which contained numerous instances of sexual innuendo made by a high school student, Matthew Fraser, at a school assembly.[32] Fraser's speech caused somewhat of a ruckus at the assembly, with some students joining in on the joke with antics of their own, while other students "appeared to be bewildered and embarrassed."[33] The next day, Fraser was informed that he would receive a three-day suspension for the incident under a school disciplinary rule[34] prohibiting the use of obscene language.[35]

Fraser then brought suit in the United States District Court for the Western District of Washington, alleging a violation of his right to freedom of speech under the First Amendment and seeking both injunctive relief and monetary damages.[36] The district court held that the sanctions did violate the First

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[32] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986). The speech was given by Fraser to nominate a fellow student for student government office. *Id.* at 677. Fraser gave the speech before "[a]pproximately 600 high school students, many of whom were 14-year-olds." *Id.* A running joke throughout the speech was to refer to the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78.

[33] *Id.* at 678. Reacting to the speech, "some students hooted and yelled; [while] some [made] gestures graphically simulat[ing] the sexual activities pointedly alluded to in [the] speech." *Id.* The disruption caused by the speech was substantial enough that one teacher devoted a portion of the scheduled class to discuss Fraser's speech with the class. *Id.*

[34] *Id.* The rule provides: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* Due to the incident, Fraser was also removed from a list of candidates for graduation speaker. *Id.*

[35] *Id.* Prior to taking legal action, Fraser appealed the disciplinary action through the school district's grievance procedures. *Id.* Upon review, the disciplinary action was upheld, with Fraser's speech being deemed "obscene" within the ordinary meaning of this term as used in the school's disciplinary rule. *Id.*; *see supra* note 34. The speech was characterized as "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." *Fraser*, 478 U.S. at 678-79.

[36] *Fraser*, 478 U.S. at 679. The suit was brought under 42 U.S.C. § 1983, which provides for a civil cause of action for violations of constitutional rights by state actors.

Amendment[37] and awarded damages, litigation costs, and enjoined the school district from preventing Fraser from speaking at graduation ceremonies.[38] The ruling was affirmed by the Ninth Circuit,[39] which rejected the school district's argument that Fraser's speech had a disruptive effect distinct from the nature of the expression in *Tinker*, as well as their view that the action was justified by an interest in protecting students from exposure to "lewd and indecent language."[40]

The Supreme Court granted certiorari[41] and reversed the decision of the Ninth Circuit.[42] In overruling the decision to apply the *Tinker* standard, the Court noted that there is a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech . . . ."[43] While recognizing that schools must tolerate unconventional student speech to a certain extent,[44] the Court

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[37] *Id.* The district court also held that the school's disciplinary rule was "unconstitutionally vague and overbroad," and that, since the rule makes no mention of a sanction, such as removal from graduation ceremonies, the action violated the Due Process Clause of the Fourteenth Amendment. *Id.*

[38] *Id.* Fraser was awarded $278 in damages, $12,750 in litigation costs and attorney's fees, and subsequently spoke at the school's graduation ceremonies. *Id.*

[39] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1365 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

[40] *Id.* at 1363-65. The Ninth Circuit reasoned that letting the school district judge what qualifies as "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in . . . public schools." *Id.* at 1363. The court also was not persuaded by the school district's argument that it had the power to control language used at a school-sponsored activity as a consequence of its responsibility for the school's curriculum. *Id.* at 1363-64.

[41] Bethel Sch. Dist. No. 403 v. Fraser, 474 U.S. 814 (1985).

[42] *Fraser*, 478 U.S. at 687.

[43] *Id.* at 680.

[44] *Id.* at 682 (noting that, despite the extensive First Amendment freedom to engage in public discourse that is "highly offensive to most citizens" (citing Cohen v. California, 403 U.S. 15 (1971)), the Court reasoned that it does not automatically follow that offensive expression which would be permissible when used by an adult would be protected in the case of a child in a public school).

reasoned that this freedom must be balanced with the mission of public education to "inculcate the habits and manners of civility"[45] that are "necessary to the maintenance of a democratic political system."[46] To this end, schools are permitted to regulate expression that is "plainly offensive," which was the case in *Fraser*.[47]

C. *HAZELWOOD SCHOOL DISTRICT V. KUHLMEIER*

The last of the landmark school speech cases dealt with a school's decision to remove two articles from the student newspaper.[48] One of the stories described some Hazelwood East students' experiences with pregnancy, while the other was concerned with the effect of divorce on Hazelwood East students.[49] Principal Robert Reynolds determined that the pregnancy article was unfit for publication since the pregnant

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See New Jersey v. T.L.O., 469 U.S. 325, 340-342 (1985) (reaffirming that students' constitutional rights in public school are not automatically coextensive with such rights generally).

[45] *Fraser*, 478 U.S. at 681 (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[46] *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

[47] *Id.* at 683, 685. The Court also characterized the type of speech and conduct which could be regulated under the decision as "vulgar" and "offensively lewd and indecent." *Id.* at 685. Such terms clearly distinguish the category of expression covered by *Fraser* with "pure speech" as exemplified by the "passive expression of a political viewpoint" in *Tinker*. *Id.* at 680.

[48] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988). Spectrum, the school newspaper, was written and edited by the Journalism II class at Hazelwood East High School. *Id.* During the Spring 1983 semester, the editorial process involved submitting articles to the journalism teacher, Howard Emerson, who then submitted page proofs to Principal Robert Reynolds for review. *Id.* at 263. On this occasion, Reynolds objected based on the content of the two stories. *Id.*

[49] *Id.* at 263. Due to time constraints, Reynolds decided to completely remove the pages containing the offending articles. *Id.* at 263-64. In doing so, other articles on "teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy" were also removed. *Id.* at 264 n.1. These articles were only deleted incidentally and Reynolds testified that there were no objections to these articles. *Id.*

students written about might have been identifiable,[50] in addition to his concern that references to sexual activity and birth control were unsuitable for some younger students.[51] The basis for excluding the divorce article centered on Reynolds' uneasiness with a student's remarks about her parents, which he felt required either "an opportunity to respond . . . or to consent to their publication."[52]

Three staff members of the school newspaper brought an action in the United States District Court for the Eastern District of Missouri, alleging that their First Amendment rights had been violated, and sought a declaration of the violation, injunctive relief, and monetary damages.[53] The district court held that, provided there was a "substantial and reasonable basis,"[54] schools could restrict speech made in the context of activities that are "an integral part of the school's educational function."[55] Finding no First Amendment violation, the Court deemed Reynolds' concern over student anonymity in regard to the pregnancy article to be "legitimate and reasonable,"[56] and that his actions were also justified by the sexual nature of the

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[50] *Id.* at 263. Though false names were used to keep the identities of the students in the article anonymous, Reynolds felt that they could still be identifiable from the text. *Id.*

[51] *Id.*

[52] *Id.* Reynolds was concerned that the student, who had been identified in the article by name, had criticized her father by stating that he "wasn't spending enough time with my mom, my sister and I," "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. *Id.* (citing App. to Pet. for Cert. 38). However, Reynolds was unaware that the student's name had been deleted from the article's final version. *Id.*

[53] *Id.* at 264.

[54] *Id.* (quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)) (internal quotation marks omitted).

[55] *Id.*

[56] Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1466 (E.D. Mo. 1985), *rev'd*, 484 U.S. 260 (1988). The court's finding was based on "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." *Id.*

material.[57] Likewise, it was held that the removal of the divorce article was a "reasonable response" in light of the concern for the privacy of the student's parents.[58]

Upon review, the Eighth Circuit analyzed the case under the *Tinker* standard and found that the school could not "reasonably forecast that [the articles] would have materially disrupted classwork or given rise to substantial disorder,"[59] nor could they have concluded that the articles would impinge on the rights of others.[60] It was thus concluded that there had been a violation of the First Amendment rights of the students.[61]

This decision was reversed by the Supreme Court.[62] In doing so, the Court distinguished the situation from the type addressed in *Tinker* in that it did not involve "a student's personal expression that happens to occur on the school premises," but rather concerned speech made through a "school-sponsored . . . expressive activit[y]" that "may fairly be characterized as part of the school curriculum."[63] In scenarios

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[57] *Id.* The court recognized the school's need "to avoid the impression that [the school] endorses the sexual norms of the subjects," as well as to protect younger students from being exposed to sexual content. *Id.*

[58] *Kuhlmeier*, 484 U.S. 260, 265 (1988). Additionally, since the student's parents had not been offered a chance to respond to the remarks, there was "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism . . . ." *Kuhlmeier*, 607 F. Supp. at 1467. It is also worth noting that the court held that the removal of the full two pages (and hence some non-offending articles), as well as the failure to offer the option of modifying the offending articles, was reasonably justified due to the exigent circumstances. *Id.* at 1466.

[59] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1375 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

[60] *Id.* at 1376. The Eighth Circuit concluded that the school's action would only be justified under the second prong of the *Tinker* standard if the articles could have given rise to tort liability to the school. *Id.* Since it was concluded that no cause of action for libel or invasion of privacy could have resulted from publication, this prong of the *Tinker* standard was not satisfied. *Kuhlmeier*, 484 U.S. at 266.

[61] *Kuhlmeier*, 795 F.2d at 1376.

[62] *Kuhlmeier*, 484 U.S. at 276.

[63] *Id.* at 271. The Court emphasized at length that a key to determining what type of situation is presented is to look at if the school showed a "clear

of the latter type, the Court held that instead of using *Tinker*, the test should be whether the expression-limiting actions were "reasonably related to legitimate pedagogical concerns."[64]

Applying this new test to the circumstances in *Kuhlmeier*, the Court held that the deletion of the articles was sufficiently reasonable.[65] Principal Reynolds' concerns over journalistic standards of fairness and balance regarding "controversial issues and personal attacks,"[66] the privacy of the individuals mentioned in the articles, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community"[67] comprised of adolescents were deemed "reasonably related to legitimate pedagogical concerns"[68] and hence compelling enough to trump the First Amendment rights at stake.[69]

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intent to create a public forum." *Id.* at 270 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985)). Also, the Court explained that such "school-sponsored . . . expressive activities" included "publications, theatrical productions, and other activities that . . . might reasonably [be] perceive[d] to bear the imprimatur of the school." *Id.* at 271. Such activities are to be considered part of the school's curriculum as long as "they are supervised by faculty members and [are] designed to impart particular knowledge or skills." *Id.*

[64] *Id.* at 273. According to the Court, such concerns include ensuring that students learn intended lessons, protecting younger students from inappropriate material, and preventing the views expressed from "erroneously [being] attributed to the school." *Id.* at 271. Examples where such concerns would be implicated would be with sensitive topics ranging from "the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting," *id.* at 272, expression reasonably perceived to "advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,'" *id.* (quoting Bethel Sch. Dist. 403 v. Fraser, 478 U.S. 675, 683 (1986)), or matters which could associate the school with controversial political positions. *Id.*

[65] *Id.* at 274.

[66] *Id.* at 276.

[67] *Id.*

[68] *Id.* at 273.

[69] *Id.* at 276. The Court also held that, given the time constraints imposed by the circumstances, it was reasonable for Reynolds to delete the full pages from the newspaper, rather than going through the more time consuming process of omitting or modifying the offensive articles. *Id.*

IV. *HARPER'S* INITIAL PATH IN THE COURTS

Harper initiated a lawsuit in the United States District Court for the Southern District of California on June 2, 2004, alleging violations of his right to free speech and free exercise of religion, as well as violations of the Establishment Clause, the Equal Protection Clause, and the Due Process Clause.[70] Harper moved for a preliminary injunction to prevent the school from suppressing any further similar statements, which was denied by the district court in its decision on November 4, 2004.[71] The court found that Harper had not demonstrated a likelihood of success because the school officials could have "reasonably . . . forecast substantial disruption of or material interference with school activities."[72] Harper subsequently filed an interlocutory appeal contesting the order denying the injunction on November 19, 2004.[73]

A. DECISION OF THE NINTH CIRCUIT

On appeal, the Ninth Circuit affirmed the lower court's decision.[74] First, the court declared that the school was justified

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[70] Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d. 1096, 1101 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006). Harper filed the suit under 42 U.S.C. § 1983, and also brought a state law claim under Cal. Civil Code § 52.1, which provides for a cause of action for violations of federal and state constitutional rights. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1173 (9th Cir. 2006).

[71] *Harper*, 445 F.3d at 1173. The school had also filed a motion to dismiss, which the district court granted as to the equal protection, due process, and state law claims, but denied as to the First Amendment claim. *Id.*

[72] *Id.* at 1175 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)).

[73] *Id.* On November 17, 2004, Harper filed an amended complaint with the district court adding his sister, Kelsie Harper, who was also a student at the school. The court granted in part and denied in part the school's motion to dismiss the amended complaint, denying Kelsie as a plaintiff due to lack of standing. However, Harper was granted leave to file a second amended complaint, which was done on November 4, 2005. The new complaint added Kelsie Harper as a plaintiff. *See* Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1075 (S.D. Cal. 2007).

[74] *Harper*, 445 F.3d at 1192.

in suppressing Harper's T-shirt because it "intrud[ed] upon . . . the rights of other students,"[75] one prong of the *Tinker* test.[76] The court indicated that schoolchildren, while on campus, have a right to be free from psychological attack[77] by means of hurtful and degrading remarks about a core identifying characteristic, such as race, religion, or sexual orientation.[78] In support of this proposition, the court acknowledged that such attacks against minority groups have been shown to make students feel inferior and compromise their sense of security, serving as a detriment to psychological health and well-being, as well as interfering with their opportunity to learn and ultimately succeed.[79] The

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[75] *Tinker*, 393 U.S. at 508.

[76] *Harper*, 445 F.3d at 1183. The majority remarked that the exception under *Fraser* did not need to be considered, as *Tinker* was sufficient to warrant suppression of Harper's speech. *Id.* at 1177 n.14. Also, *Kuhlmeier* clearly did not apply, as the speech was not "school-sponsored." *Id.* at 1177 n.15. *See also infra* note 89 (providing an in-depth discussion of these matters).

[77] *Id.* at 1178. Harper tried to argue that the "rights of other students" should be restricted to the right to be free from "direct physical confrontation." *Id.* at 1177. Harper attempted to support this interpretation by citing *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749, 751 (5th Cir. 1966), in which the speakers violated the rights of other students by "pinning . . . buttons on them even though they did not ask for one." *Id.* However, the court determined that *Blackwell* merely supported the proposition that such physical infringements were sufficient to violate the rights of others, but were not necessary, and that other forms of infringement had already been recognized in the case law. *See* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding that the mere "display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone"); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (noting that vulgar, lewd, obscene, indecent, and plainly offensive speech "by definition, may well 'impinge[] upon the rights of other students'") (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988)).

[78] *Harper*, 445 F.3d at 1178. The court emphasized that the "right to be let alone" would not necessarily apply in other contexts outside of school. *Id.* It noted that since students are required to attend school there is a duty placed on the school to fill in for the role of parents and "protect children – especially in a captive audience," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986), who are not in a position to avoid offensive communications. *See also* Hill v. Colorado, 530 U.S. 703, 716 (2000).

[79] *Harper*, 445 F.3d at 1178-79. The court surveyed a variety of articles from the social science literature to support these contentions. *See id.*

court thus concluded that schools are permitted to censor student expression that consists of verbal assaults on the basis of a core identifying characteristic.[80]

The court also rejected Harper's argument that the school's actions constituted impermissible viewpoint discrimination.[81] Although it was noted that generally speech cannot be suppressed or controlled by the government "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction,"[82] special rules apply when the speech is that of a student in school.[83] Therefore, the court held, if the conditions of the tests in either *Tinker*, *Fraser*, or *Kuhlmeier* are satisfied, a school may block student speech, even if the result amounts to viewpoint discrimination.[84]

The court seized on the language from *Kuhlmeier* and *Fraser* that "[a] school need not tolerate student speech that is inconsistent with its basic educational mission,"[85] and that part of this mission is to instill "fundamental values of habits and manners of civility essential to a democratic society."[86] Thus, schools can "permit, and even encourage, discussions of tolerance, equality and democracy without being required to

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[80] *Id.* at 1183.

[81] *Id.* at 1184.

[82] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[83] *Harper*, 445 F.3d at 1184.

[84] *Id. See* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004) (holding that "school regulations directed at specific student viewpoints" are still subject to *Tinker*); Scott v. Sch. Bd., 324 F.3d 1246, 1248 (11th Cir. 2003) (approving the school's ban on the Confederate flag where there was racial tension at the school); Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996) (drawing a distinction between the censorship of religious speech "solely because it is religious" and suppressing speech that is "religious and disruptive or hurtful").

[85] Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260, 266 (1988) (citation and internal quotation marks omitted).

[86] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (internal quotation marks omitted). For a discussion on using *Fraser* to prohibit "plainly offensive" speech versus using it to block speech inconsistent with the fundamental missions of schools, see *infra* note 89.

provide equal time for student or other speech espousing intolerance, bigotry or hatred."[87] The Ninth Circuit consequently ruled that because the school's actions were permissible under *Tinker*, Harper did not have a valid claim of viewpoint discrimination.[88]

B. THE DISSENT'S RATIONALE

In his dissenting opinion, Judge Kozinski analyzed the case under the *Tinker* test and came to the conclusion that its standard for acceptable school censorship had not been met.[89] He observed that the school had shown little evidence to suggest that Harper's T-shirt would "materially disrupt . . . classwork," the only evidence consisting of a teacher's observation that a few students had been somewhat distracted from their classwork while discussing the shirt, a common occurrence in any high

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[87] *Harper*, 445 F.3d at 1185.

[88] *Id.* In dealing with the issue of whether banning Harper's T-shirt was too one-sided, and that perhaps the subject of sexual orientation should have been suppressed altogether, the court reasoned that, under *Tinker*, a school is permitted to restrict "one particular opinion" if it would satisfy the *Tinker* test. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Schl. Dist., 393 U.S. 503, 509 (1969)). Thus, "a school may permit students to discuss a particular subject without being required to allow them to launch injurious verbal assaults that intrude upon the rights of other students." *Id.* at 1187.

[89] *Id.* at 1192-1201 (Kozinski, J., dissenting). Judge Kozinski noted that the case was not analyzable under *Fraser* or *Kuhlmeier*, as the speech was neither "plainly offensive" nor "school sponsored." *Id.* at 1193. Though *Kuhlmeier* was clearly not applicable, the question arises as to what the holding of *Fraser* actually is – does it merely allow censorship of "plainly offensive" speech or does it permit a school to more broadly suppress expression that is inconsistent with its fundamental missions? The majority seemed to employ the latter thinking in its reasoning, though in the end, based its decision on *Tinker*. *Id.* at 1183. The idea of fundamental missions of schools appears to merely have been the justification for the narrow exception made in *Fraser*, and thus does not necessarily extend to situations not involving speech that is "plainly offensive." *See also* Frederick v. Morse, 439 F.3d 1114, 1122 n.44 (9th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3290 (U.S. Dec. 1, 2006) (No. 06-278), *rev'd*, 127 S. Ct. 2618 (2007) (noting that *Fraser* "only enables schools to prevent the sort of vulgar, obscene, lewd or sexual speech that, especially with adolescents, readily promotes disruption").

school classroom.[90] As for the "substantial disorder" aspect of *Tinker*, Judge Kozinski remarked that there had not been examples of violence or interference with school functions as a result of the shirt – there had merely been a "tense verbal conversation" which had ended peacefully without the intervention of school officials.[91] Moreover, he opined that it was not reasonable to predict such disruption, as even the evidence of the previous year's altercations was not clearly connected to such T-shirts.[92]

As to the "rights of others" prong of *Tinker*, Judge Kozinski felt that the "passive display . . . of a message" did not seem "severe and pervasive" enough to amount to harassment and hence a violation of the rights of homosexual students, at least not to the extent required to trump the First Amendment.[93] He remarked that there is no "right not to be offended," and that the statements contained on Harper's T-shirt were not made in a demeaning manner, but were expressed simply to respond to the discourse regarding homosexuality that the "Day of Silence" had initiated.[94]

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[90] *Harper*, 445 F.3d at 1193 (Kozinski, J., dissenting). David LeMaster, a teacher at the school, had merely remarked that a few of his students were "off-task talking about [the] content of 'Chase's shirt' when they should have been working," an occurrence which Judge Kozinski noted is all too familiar in schools. *Id.* However, there was no evidence that the students "refused to get back on task once they were admonished, or that the T-shirt caused a commotion or otherwise materially interfered with class activities." *Id.* at 1194 (Kozinski, J., dissenting).

[91] *Id.* at 1194.

[92] *Id.* at 1194-95.

[93] *Id.* at 1198. In analyzing how combative Harper's message actually was, Judge Kozinski discussed the harassment standards adopted in other cases, notably *Saxe v. State College Area School District*, 240 F.3d 200, 204-10 (3d Cir. 2001), which cut-off First Amendment protection when speech is "so severe and pervasive as to be tantamount to conduct." *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting). However, he felt that the speech here seemed better characterized as a "simple act . . . of teasing and name-calling," held by the Supreme Court to be non-actionable in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999). *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting).

[94] *Harper*, 445 F.3d at 1198-1200 (Kozinski, J., dissenting). Judge Kozinski also dismisses the argument that the right of the homosexual students to "partake of the educational environment" was shown to have been infringed

Judge Kozinski also had trouble with the majority's idea that part of a school's mission is to teach tolerance, as he interpreted the situation as being better characterized as forcing contrary views as to controversial political topics down the throats of students and "an invitation to group-think."[95] Given both the school's and the majority's supposed concern for potential violence and disruption, he expressed the view that a more fair and sensible way of handling the situation would have been to prohibit the "Day of Silence" and counter-attacking statements, avoiding the problem altogether without favoring one particular side.[96] Additionally, he felt that it was not the place of the Ninth Circuit to make exceptions to or overrule the Supreme Court's precedent in *Tinker*, and that such judicial action would be better left to its review.[97]

C. ANALYSIS OF THE NINTH CIRCUIT'S OPINION IN *HARPER*

While the court surely made a compelling argument that, especially in a school context, psychological attacks against minority groups amounted to a violation of their "right to be left alone" and to beneficially take part in the educational process, the idea of preempting psychological attacks is a potentially dangerous one indeed. In response to cases like *Harper*, schools may begin to err on the side of caution whenever students may be offended by a particular instance of expression, leading to an overly sanitized environment which fails to prepare students for the harshness of the outside world.[98] In

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upon. *Id.* In addition to opining that such a claim was not self-evident, he pointed out that rather than record evidence, the majority had merely relied on "a few law review articles, a couple of press releases by advocacy groups and some pop psychology," which, in his mind, were "just not specific enough to be particularly helpful." *Id.* at 1198-99. He remarked that such materials would not seem to meet the standard for expert testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-94 (1993).

[95] *Harper*, 445 F.3d at 1196 n.7 (Kozinski, J., dissenting).

[96] *Id.* at 1197.

[97] *Id.* at 1207.

[98] Regarding this issue, there is substantial tension between the First Amendment and harassment law. *See Saxe*, 240 F.3d at 206-10, 206 n.6. However, it would certainly be overstepping the protections of the First

limiting its holding to public high schools and elementary schools, the court remarked that "[a]s young students acquire more strength and maturity, . . . they become adequately equipped emotionally and intellectually to deal with . . . verbal assaults"[99] However, it is somewhat difficult to see exactly how such skills would be developed when schools can shelter students as in *Harper*.

Despite such considerations, *Harper*'s application of *Tinker* was almost surely correct, at least given the facts. Although the First Amendment certainly should not be trumped any time speech offends another person, the argument that students are somewhat trapped while they are forced to be in school and thus are made into a captive audience, with school officials acting as de facto parents, does substantially change the balance of rights.[100] Also, factoring in the well-established impact of hate speech on teenage homosexuals' psychological development and ability to learn, it was correct to strike the balance, at least here, in favor of speech suppression.[101] Additionally, with age and exposure to the world outside of school, homosexuals will be able to develop the thick skin needed for them to feel at ease with their identity, at least comparably so, without having to be routinely subjected to school days filled with taunting and terror.[102]

Regardless, although the majority based its decision on the "rights of others" prong of *Tinker* and found no need to

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Amendment to simply allow censorship of any speech that another person finds offensive. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

[99] *Harper*, 445 F.3d at 1183.

[100] *See supra* note 78.

[101] The court did mention, of course, that the holding was limited to "instances of *derogatory* and *injurious* remarks directed at minority status," making clear that some taunting may be too innocuous to suppress. *Harper*, 445 F.3d at 1183 (emphasis added).

[102] The opportunity to develop an ability to deal with insensitive bullying certainly presents itself in the outside world, which offers much less shelter from name-calling. *See* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3rd Cir. 2002) (stating that "[o]utside the school context . . . much harassment by name calling . . . is protected").

investigate whether the school could have instead "reasonably . . . forecast substantial disruption of or material interference with school activities,"[103] this would most likely have been a sufficient basis on which to ban Harper's T-shirt. The confrontational events surrounding the previous year's "Day of Silence" would probably have justified the school's decision to suppress Harper's inflammatory speech, at least with some level of deference to the judgment of school officials.[104] Harper's T-shirt signaled a return to the previous year's ideological war, and thus made it likely that tensions could again rise to the breaking point. Add to this the serious nature of school violence, and it does not seem unreasonable for the school to preemptively step in to avoid such altercations.[105] While such mayhem had certainly not broken out before action was taken against Harper, signs that trouble was brewing were starting to arise, and the school made a fairly wise decision to affirmatively stop tension from giving rise to physical violence.

Judge Kozinski's point that perhaps the more prudent course of action would have been to do away with the "Day of Silence" does seem quite convincing, however. Once the previous year's event had proven to be a catalyst for confrontation, the school may very well have been better off leaving such a heated topic to the political realm outside of the educational environment, instead of trying to thrust controversial ideologies into the faces of determined, religious students. Instead, the school knowingly provoked these students and then was forced to suppress their foreseeable response.[106] Notwithstanding a school's prerogative

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[103] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[104] *See supra* notes 5-7 and accompanying text for a description of the previous year's events.

[105] While violence in high schools continues to be recognized as a serious problem, requiring prompt and cautious action by school officials, Judge Kozinski recommended that a better way of dealing with the situation here would have been to have "expel[led] students who attack[ed] other students on school premises," *Harper*, 445 F.3d at 1195 n.5 (Kozinski, J., dissenting), rather than preemptively banning the T-shirt. *But see* Karp v. Becken, 477 F.2d 171, 173, 175-76 (9th Cir. 1973) (deeming the mere threat of violence as going towards justifying the confiscation of protest banners).

[106] As Judge Kozinski noted, "a visible and highly publicized political action by those on one side of the issue will provoke those on the other side to express

to try to instill some level of civility and tolerance in its students,[107] at a certain point more harm is being done than good, and a difference of opinion must be accepted, leaving such dialogue to the province of parents, political debates, churches, and other more proper social institutions. The goals of the educational system should certainly have their limits with regard to their proper place in society.[108] Moreover, doing away with the "Day of Silence" altogether would have been a more equitable way of dealing with the situation instead of favoring one side of a contentious debate regarding a matter certainly unsettled in our nation.[109]

D. SUBSEQUENT PROCEEDINGS IN THE SUPREME COURT AND THEREAFTER

Following the Ninth Circuit's decision, Harper filed a petition for certiorari which the Supreme Court granted on March 5, 2007.[110] However, since Harper had graduated by this time and was no longer a student at the school, his claims were

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a different point of view, if only to avoid the implication that they agree." *Harper*, 445 F.3d at 1196 (Kozinski, J., dissenting).

[107] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)

[108] It does seem to be bad policy for a school, whose mission, as recognized in *Fraser*, is to "inculcate the habits and manners of civility" that are "*necessary* to the maintenance of a democratic political system," *Fraser*, 478 U.S. at 681 (emphasis added), to make one side of a contentious issue that is still being debated, like homosexuality, one of its educational initiatives.

[109] Judge Kozinski supported his contention that the acceptance of homosexuality is still a matter of debate by pointing out that "in 2004, San Francisco mayor Gavin Newsom issued marriage licenses to nearly 4,000 gay and lesbian couples. While some people view this as a courageous and principled action, others consider it an abomination." *Harper*, 445 F.3d at 1197 (Kozinski, J., dissenting). Indeed, this particular issue has still not been settled nationwide. *See* Matthew Fleischer, *California Supreme Court Set to Consider Gay Marriage*, LA WEEKLY NEWS, Feb. 27, 2008, *available at* http://www.laweekly.com/content/printVersion/175038 (last visited Feb. 9, 2009); Evan Wolfson, *Today is Freedom to Marry Day – Just Don't Say "Gay Marriage"!*, THE HUFFINGTON POST, Feb. 12, 2008, *available at* http://www.huffingtonpost.com/evan-wolfson/today-is-freedom-to-marry_b_86282.html (last visited Feb. 2, 2009).

[110] Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007).

held to be moot by the district court,[111] and so the decision of the Ninth Circuit was vacated by the Supreme Court.[112] The case was then remanded to the Ninth Circuit with instructions to dismiss the appeal as moot,[113] which was done on April 23, 2007.[114] While the issue of the preliminary injunction had been being dealt with in the higher courts, the case was still pending in the district court, with Kelsie Harper, Tyler Harper's younger sister, having been added as a plaintiff.[115] The parties had filed cross-motions for summary judgment, after which the court issued an order on January 24, 2007 denying Harper's motion in full and granting in part and denying in part the school's motion.[116]

V. RECENT DEVELOPMENTS: *MORSE V. FREDERICK*[117]

Tinker, *Fraser*, and *Kuhlmeier* had formed the foundation of First Amendment law in public schools until the Supreme Court's decision in *Morse v. Frederick*. This case significantly broke away from the established precedent and placed the status of the right of free speech for students in question.

A. FACTS OF THE CASE

The events of *Morse* arose on January 24, 2002 as the Olympic Torch Relay passed by Juneau-Douglas High School (JDHS), located in Juneau, Alaska.[118] The school's principal,

[111] Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1076-77 (S.D. Cal. 2007).

[112] *Harper*, 127 S. Ct. at 1484.

[113] *Id.*

[114] Harper v. Poway Unified Sch. Dist., 485 F.3d 1052 (9th Cir. 2007).

[115] *See supra* note 73.

[116] *Id.*

[117] 127 S. Ct. 2618 (2007).

[118] *Id.* at 2622. The torch relay was passing through Juneau on the way to Salt Lake City, Utah, where the winter Olympic games were being held. *Id.*

Deborah Morse, had decided to allow students to leave class and watch the relay from either side of the street, though the understanding was that it was a school-sanctioned "social event or class trip."[119] As the torchbearers passed by while being filmed by camera crews, Joseph Frederick, a JDHS senior, along with some friends, unfurled a 14-foot banner that displayed the phrase: "BONG HiTS 4 JESUS."[120] "Morse immediately crossed the street" and ordered that Frederick and his friends take the banner down.[121] Frederick was the only one who did not comply with the demand, and was sent to Morse's office, where he received a 10-day suspension.[122] Morse justified her actions by stating later that the banner violated school policy,[123] since she believed it to advocate illegal drug use.[124] This statement was echoed by the Juneau School District superintendent in a memorandum concerning the incident, which stated that the actions taken by Morse were "permissible because Frederick's banner was 'speech or action that intrudes upon the work of the

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[119] *Id.* (citing to App. 22-23) Supporting the idea that the event was "school-sanctioned" was the fact that it was supervised by teachers and school officials. *Id.* at 2622.

[120] *Id.* at 2622 (citing to App. to Pet. for Cert. 70a). The banner was "easily readable" by the other students watching the relay, some of whom had already begun to get "rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates." *Id.*

[121] *Id.* at 2622.

[122] *Id.* Upon administrative appeal, Frederick's suspension was upheld by the Juneau School District superintendent, though it was limited to eight days, the time that had already been served. *Id.* at 2623.

[123] *Id.* at 2622-23. "Juneau School Board Policy No. 5520 states: 'The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .'" *Id.* (quoting App. to Pet. for Cert. 53a). Also, Juneau School Board Policy No. 5850 states that the usual school conduct rules apply during "'approved social events and class trips.'" *Id.* (quoting App. to Pet. for Cert. 58a).

[124] *Id.* at 2622-23.

schools,'"[125] being as that it "'appeared to advocate the use of illegal drugs.'"[126]

B. LOWER COURT DECISIONS

Frederick filed suit in the United States District Court for the District of Alaska, alleging violations of his First Amendment rights.[127] The court granted summary judgment for Morse and the school board, holding that Frederick's First Amendment rights had not been infringed.[128] Determining that the case was governed by *Fraser* rather than *Tinker* due to the nature of the

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[125] *Id.* at 2623 (citing App. to Pet. for Cert. 62a).

[126] *Id.* (citing App. to Pet. for Cert. 61a). In the memorandum, which based its reasoning on the holding in *Fraser*, the superintendent made clear that the actions taken had nothing to do with a mere disagreement with the message. *Id.* The memorandum also contained the following passage further clarifying the district's position:

> The common-sense understanding of the phrase "bong hits" is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.

Id. (citing to App. to Pet. for Cert. at 61a-62a).

[127] Frederick v. Morse, No. J:02-008CV(JWS), 2003 U.S. Dist. LEXIS 27270 (D. Alaska May 27, 2003), *vacated*, 439 F.3d 1114 (9th Cir. 2006). The suit was brought under 42 U.S.C. § 1983, and sought declaratory and injunctive relief, compensatory and punitive damages, and attorney's fees. *Morse*, 127 S. Ct. at 2623.

[128] *Morse*, 127 S. Ct. at 2623. The Court also ruled that even if there had been a violation of Frederick's rights, Morse and the school board were entitled to qualified immunity. *Id.*

expression,[129] the court ruled that since the message on Frederick's banner "directly contravened the [school] board's policies relating to drug abuse prevention,"[130] it was permissible for Morse to take action at the school's event "so as not to place the imprimatur of school approval on the message."[131] Moreover, the court stated that an administrator's determination that a particular expression violates the school's policies is "generally not scrutinized so long as the administrator's interpretation is reasonable,"[132] which was held to be the case here.[133]

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[129] *Morse*, 2003 U.S. Dist. LEXIS 27270 at *18. The Court reasoned that the case differed from the situation in *Tinker* because it did not involve "a statement of personal opinion that was unrelated to the school's mission." *Id.* at *18-19.

[130] *Id.* at *19. Frederick attempted to argue that *Fraser* should only be applied where there is "lewd and obscene language," but the Court recognized that *Fraser*'s holding is not restricted as such. *Id* at *19-20. Instead, the Court said that *Fraser* allows a school to restrict expression when the school determines that its "basic educational mission" is threatened because the expression goes beyond "the boundaries of appropriate social behavior." *Id*. at *20. *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (ruling that a school could ban a Marilyn Manson shirt due to its connection to drug culture); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 528-29 (9th Cir. 1992) (recognizing that *Fraser* also applies to "plainly offensive" speech).

[131] *Morse*, 2003 U.S. Dist. LEXIS 27270 at *20. In fact, the court stated that Morse not only had the authority to order the banner taken down but, in light of the concerns at hand, was practically obligated as the school's principal to take action. *Id.*

[132] *Id.* at *22. Frederick attempted to argue that summary judgment was not appropriate since "his message [did] not clearly advocate drug use," and was not intended to do so. *Id.* at *21. However, the court felt that such facts were irrelevant as long as Morse's interpretation that the banner advocated drug use was reasonable. *Id*. at *21-22. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (disregarding the intent of the speaker and the interpretation of the students while recognizing the school's authority to set limits); *see also, e.g.*, McCann v. Fort Zumwalt Sch. Dist., 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999) (accepting decision that the song "White Rabbit" could be perceived to advocate drug use); Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 170 (D. Mass. 1994) (deferring to the administrator's determination that there was lewd speech).

[133] *Morse*, 2003 U.S. Dist. LEXIS 27270 at *22. While Frederick presented statements from other students claiming to have not interpreted the banner to advocate drug use, the court felt that the contrary determination was reasonable

Frederick appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit,[134] where it was reversed.[135] Despite accepting that Frederick's banner had "expressed a positive sentiment about marijuana use" during "an official school activity," the Ninth Circuit held that the circumstances were most like those in *Tinker*, in that Frederick's speech was arguably political, and that Morse was simply trying to suppress speech that was in disagreement with the viewpoint promoted by the educational system.[136] Under *Tinker*, the court ruled that the suppression of the speech was therefore unconstitutional, as there was not a "reasonable concern about the likelihood of substantial disruption to [the school's] educational mission."[137] The decision was then appealed to the Supreme Court, which granted certiorari.[138]

C. THE MAJORITY'S RATIONALE

The Supreme Court reversed the decision of the Ninth Circuit,[139] holding that it does not violate the First Amendment

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in light of Frederick's admission that the terms "bong" and "hit" "could be understood to refer to drugs." *Id.* at *21-22.

[134] Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006), *rev'd* 127 S. Ct. 2618 (2007).

[135] *Morse*, 127 S. Ct. at 2629.

[136] *Morse*, 439 F.3d at 1118-19, 1123. The Ninth Circuit decided not to review the case under *Fraser*, reasoning that Frederick's speech did not qualify as "plainly offensive" and did not "interfere with the school's basic educational mission," despite standing in contrast to it. *Id.* at 1122-23. Moreover, the situation was completely unlike that of *Kuhlmeier*, as Frederick's expression "was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity." *Id.* at 1119.

[137] *Id.* at 1123. It was also held that Morse was not entitled to qualified immunity excusing the violation of Frederick's First Amendment rights. *Id.* at 1123-25. The court felt that the right to display the banner under these circumstances was so "'clearly established' that a reasonable principal in Morse's position would have understood that her actions were unconstitutional." *Morse*, 127 S. Ct. at 2624.

[138] Morse v. Frederick, 127 S. Ct. 722 (2006).

[139] *Morse*, 127 S. Ct. at 2629. Since the Court ruled against Frederick as to whether he possessed a First Amendment right to display his banner, it did not

to suppress student expression at a school event "when that [expression] is reasonably viewed as promoting illegal drug use."[140] The majority began by again emphasizing that while students "do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school."[141] The Court then noted that the government has an "important – indeed, perhaps compelling" interest in deterring children from using illegal drugs.[142] Given this essential mission, the Court recognized the

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reach the question of whether Morse's actions could be excused by qualified immunity. *Id*. at 2624. Justice Breyer, concurring in the judgment in part and dissenting in part, advocated the position that the decision for Morse should be based on qualified immunity without addressing the First Amendment issue. *Id*. at 2638-43 (Breyer, J., concurring in part and dissenting in part). However, the majority stated that its problem with this approach was that since qualified immunity merely protects public officials from money damages, it was inadequate to decide the case, as Frederick had also requested declaratory and injunctive relief. *Id.* at 2624 n.1.

[140] *Id*. at 2625. The Court began its analysis by noting that this was certainly a school speech case (rather than normal public speech), agreeing with the superintendent's argument that Frederick cannot claim he is not at school while "'stand[ing] in the midst of his fellow students, during school hours, at a school-sanctioned activity.'" *Id*. at 2624 (quoting App. to Pet. for Cert. 63a). Additionally, the Court came to the conclusion that it was reasonable to interpret Frederick's banner as promoting illegal drug use. *Id*. at 2624. Two possible interpretations of the phrase on the banner were examined and were determined to do so. *Id.* at 2625. For one, it could be read to urge others to "'[Take] bong hits,'" a reference to smoking marijuana, as explained by Morse in her declaration. *Id.* Also, the phrase could be interpreted to simply celebrate drug use generally. *Id.* The Court also examined Frederick's contention that the banner was merely "'meaningless and funny,'" *Morse*, 439 F.3d at 1116, but concluded that dismissing the speech in this way "ignores [the] undeniable reference to illegal drugs." *Morse*, 127 S. Ct. at 2625.

[141] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503,506 (1969)).

[142] *Morse*, 127 S. Ct. at 2628 (quoting *Vernonia*, 515 U.S. at 661). The Court provided the following passage from *Vernonia* articulating the formidable danger that drug abuse poses to schoolchildren:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent

importance of peer pressure as a factor contributing to drug use among schoolchildren, stating that such illicit activity is considerably more likely "when the norms in school appear to tolerate such behavior."[143] Failing to act as Morse did, argued the majority, would have sent such a message of toleration to students.[144] Therefore, considering the importance of the crusade against student drug abuse, the Court concluded that the First Amendment does not require schools to permit student expression advocating the use of illegal drugs, and so Frederick's banner could have been taken down without violating his rights.[145]

D. THE CONCURRING OPINIONS

In his concurring opinion,[146] Justice Thomas expressed his complete agreement with the majority's reasoning, but wrote a separate opinion in order to state his view that the holding of

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> more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.

Vernonia, 515 U.S. at 661-62 (internal citations and quotation marks omitted). Noting statistics from the Department of Health and Human Services evidencing the prevalence of drug use among American high school students, the Court pointed out that Congress has declared that drug prevention is to be part of the mission of the schools, and has provided billions of dollars for drug-prevention programs. *Morse*, 127 S. Ct. at 2628. The Court also observed that thousands of school boards have adopted policies designed for these purposes. *Id*. at 2628.

[143] *Morse*, 127 S. Ct. at 2628 (citing Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring)). In support of these observations, the Court agreed that peer pressure may be "the single most important factor leading schoolchildren to take drugs . . . ." *Earls*, 536 U.S. at 840 (holding that drug testing imposed upon students participating in extracurricular activities did not violate the Fourth Amendment considering the need to prevent the substantial harm of student drug abuse).

[144] *Morse*, 127 S. Ct. at 2629.

[145] *Id*.

[146] *Id*. at 2629-36 (Thomas, J., concurring).

Tinker has no constitutional basis and should be overruled.[147] He pointed out that the historical understanding prior to *Tinker* was that the First Amendment did not apply to students in public schools.[148] Instead, Justice Thomas explained that schools historically possessed broad authority to control student behavior, which included suppressing expression, and this power was given great deference by the courts.[149]

Tinker changed all of this, said Justice Thomas, extending students' speech rights to heights completely beyond the level traditionally recognized (which was, in effect, none at all).[150] In his opinion, this decision let the courts interfere with the business of schools too much, and certainly substantially more than was ever done so in the past.[151] As a result, he points out, since *Tinker*, the Supreme Court has had to repeatedly carve out exceptions to its holding which have led to confusion and have underscored the folly of the *Tinker* decision in the first place.[152]

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[147] *Id.* at 2630, 2636.

[148] *Id.* at 2630. Justice Thomas mentioned this after noting that, as has been acknowledged, the original view of the First Amendment held that "'[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem.'" *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)); *see also* Cox v. Louisiana, 379 U.S. 536, 554 (1965).

[149] *Morse*, 127 S. Ct. at 2630-33 (Thomas, J., concurring). Justice Thomas discusses how, instead of respect for a right to free expression by the courts or the schools, American public schools in the nineteenth century (which is when they originated) were characterized by an authoritarian regime which did not "rely solely on the power of ideas to persuade; [but rather] relied on discipline to maintain order." *Id.* at 2631. These early public schools, Justice Thomas notes, were "not places for freewheeling debates or exploration of competing ideas," but were instead designed to teach children self-control and instill "'a core of common values.'" *Id.* at 2630 (citations omitted). He explains that under the doctrine of *in loco parentis*, schools were given great deference by the courts to conduct the academic environment as they saw fit, and this included essentially complete authority to regulate student speech. *Id.* at 2631-32.

[150] *Id.* at 2633.

[151] *Id.*

[152] *Id.* at 2634. The exceptions that Justice Thomas refers to are, of course, those of *Fraser* and *Kuhlmeier*. Aside from creating confusion, he also worries that developing this area of law through exceptions will result in inevitable litigation against schools and their administrators, and could be dealt with more

Justice Thomas opined that *Tinker* has substituted the judgment of the courts for the democratic process,[153] has undermined the authority of teachers and school administrators, and has surrendered schools to students.[154] Based on such reasons, Justice Thomas concurred in scaling back *Tinker*, but recommended that a more justified and effective approach would be to just overrule the case instead.[155]

The concurring opinion of Justice Alito,[156] joined by Justice Kennedy, agreed with the majority subject to the understanding that the holding "goes no further than . . . that a public school may restrict speech that a reasonable observer would interpret

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easily by simply doing away with *Tinker* altogether. Justice Thomas also argues that the central proposition of *Tinker*, that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), said to have been "the unmistakable holding of this Court for almost 50 years," *id*., is actually not supported by the cases cited on its behalf. *Morse*, 127 S. Ct. at 2636 n.8 (Thomas, J. concurring).

[153] *Morse*, 127 S. Ct. at 2635 (Thomas, J., concurring). Instead of judicial oversight by way of the Constitution, Justice Thomas argues that the policies of schools should be kept in check by the political process. *Id*. Parents who are dissatisfied with rules imposed by schools can "seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move." *Id*.

[154] *Id*. at 2633-34, 2636. Justice Thomas references the dissenting opinion of Justice Black in *Tinker*, who had criticized the Court for "subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students," *Tinker*, 393 U.S. at 525, and had pointed out that "'taxpayers send children to school on the premise that at their age they need to learn, not teach.'" *Morse*, 127 S. Ct. at 2635 (Thomas, J., concurring) (quoting *Tinker*, 393 U.S. at 522). *Morse*, Justice Thomas notes, provides a perfect example of surrendering the schools to students, and that it would be preposterous to recognize a constitutional right of a student to "utter at a school event what is either 'gibberish,' . . . or an open call to use illegal drugs." *Id*. at 2636. *See also* Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 50 (1996) ("Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools.").

[155] *Morse,* 127 S. Ct. at 2636 (Thomas, J., concurring).

[156] *Id*. at 2636-38 (Alito, J., concurring).

as advocating illegal drug use," and does not allow the restriction of expression "that can plausibly be interpreted as commenting on any political or social issue."[157] Instead, he characterized the case's holding as just another narrow exception to *Tinker*,[158] and stated that it did not necessarily justify any other such exceptions.[159] A point was made of mentioning that the First Amendment does not permit schools to suppress student speech simply because it interferes with the school's "educational mission."[160] Such a rule, Justice Alito declared, would present a danger of abuse of power by giving schools "a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed," again, a result contrary to the values of the First Amendment.[161]

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[157] *Id.* at 2636. Justice Alito mentions that the prohibition on restricting political speech would include such expression regarding "'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* (quoting Stevens, J., dissenting).

[158] *Id.* at 2637 (Alito, J., concurring). A comparison of the exception made in *Morse* is made to those of *Fraser* and *Kuhlmeier*. *Id.*

[159] *Id.*

[160] *Id.* at 2637. Morse and the United States made a plea for a rule of this sort in this case. *See* Brief for Petitioners at 21, Morse v. Frederick, 127 S. Ct. 2618, No. 06-278 (2007); Brief for United States as *Amicus Curiae* at 6, Morse v. Frederick, 127 S. Ct. 2618, No. 06-278 (2007).

[161] *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). Since the "educational mission" of schools is made by school officials, administrators, and faculty, there is an inherent danger that educational missions may be defined as "including the inculcation of whatever political and social views are held by members of these groups." *Id.* A rule based on the educational mission of the school may have led to the result in *Tinker* that the school could have banned the wearing of the armbands on the basis that they, for example, could have undermined an educational mission defined to include "solidarity with our soldiers and their families," or could have banned support for the troops on the ground that it approved of the war under a possible mission of promoting world peace. *Id.* Justice Alito also regarded the doctrine of *in loco parentis*, held in high esteem by Justice Thomas, as a dangerous idea based on the mistaken assumption that delegation of parental authority "somehow strips [schools] of their status as agents of the State," and that the notion that parents can control schools through the political process is unrealistic considering that most parents have "no choice but to send their children to a public school and little ability to influence what occurs in the school." *Id.*

Justice Alito instead argued that the exception being made in the present case is based on the "threat to the physical safety of students," a special characteristic of schools.[162] Since parents are not present to provide protection and students' freedom of movement and association are greatly restricted in the school environment, the school presents unique circumstances that should give rise to an authority to restrict speech that can lead to violence.[163] Such a justification is implicated in a situation involving student speech advocating the use of illegal drugs, remarks Justice Alito, as "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," even if the threat is not necessarily imminent.[164] However, he limits such an exception as not necessarily permitting further extensions.[165]

E. THE DISSENT'S RATIONALE

Justice Stevens, in a dissent joined by Justices Souter and Ginsburg, sharply disagreed with the majority on several

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[162] *Id.* at 2638.

[163] *Id.*

> School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

Id. Justice Alito also mentions that in the usual setting, the prevention of physical violence as a justification for suppressing speech is extremely narrow. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[164] *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

[165] *Id.*

distinct fronts.[166] Primarily,[167] he argued that even assuming that the school possessed a compelling interest in protecting its students from the dangers of drug abuse,[168] it was not reasonable to think that anyone would be persuaded by Frederick's supposed advocacy of drug use.[169] Instead, Justice Stevens accused the school of making a content-based exception to Frederick's speech merely because they disagreed with his views.[170] He pointed out that the test established by the

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[166] *Id.* at 2643-51 (Stevens, J., dissenting). Justice Breyer, while concurring in part with the majority, also dissented in part in a separately written opinion. *See supra* text accompanying note 139.

[167] Another component of Justice Stevens' dissent was that the message on Frederick's banner was not displayed in order to advocate the use of marijuana, but rather, by the admission of Frederick himself, was designed to get the attention of the television cameras. *Morse*, 127 S. Ct. at 2643 (Stevens, J., dissenting). The school (and the majority) had focused on their claim that Frederick's message could be reasonably interpreted by an observer to advocate the use of drugs as the relevant consideration. *Id.* However, Justice Stevens responded that aside from the fact that the banner could hardly be determined to objectively advocate this, *id.* at 2649-50, there is no basis in the case law for taking into account the interpretations of third parties in analyzing a First Amendment claim. *Id.* at 2647-48. Instead, he observes, such questions have always turned on the subjective intentions of the speaker. *Id.*

[168] *Id.* at 2643-44. Justice Stevens makes a point of mentioning that the entire discussion ignores the reality that the real motive involved here was that Frederick simply wanted to get the attention of the television cameras (rather than advocate a pro-drug message). *Id.* Ironically, Justice Stevens declares that "concern about a nationwide evaluation of the conduct of the JDHS student body" would have been sufficient to permit the school to take the challenged action, even if the banner had displayed a more innocuous statement such as "Glaciers Melt!" *Id.*

[169] *Id.* at 2649. In ordinary First Amendment jurisprudence, the suppression of advocacy of illegal conduct is only constitutional when it is an "'incitement to imminent lawless action.'" *Id.* at 2645 (quoting Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)). However, Justice Stevens accepts for the sake of argument that a relaxed standard could apply to schools given the "'custodial and tutelary'" relationship between schools and students, "'permitting a degree of supervision and control that could not be exercised over free adults,'" *Id.* at 2646 (Stevens, J., dissenting) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995)). Even under this relaxed standard, Justice Stevens argues that it is highly implausible that Frederick's banner would lead to a change in behavior in any student. *Id.* at 2649 (Stevens, J., dissenting).

majority "invites stark viewpoint discrimination,"[171] and reaffirmed that school speech cases should be controlled by the doctrine of *Tinker* – that to suppress student expression, a school must show that its action was not caused by a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[172] Rather, the school must show that the expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[173] To instead make exceptions to the freedom of speech based on content, he argued, finds no support in the case law and conflicts with the values of the First Amendment.[174]

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[170] *Id.* at 2645. In fact, such discrimination based on the particular view that Frederick was expressing was readily admitted by Morse, noting of course that both she and the majority had a different take on its constitutionality. *Id.* (citing App. at 25-a).

[171] *Id.* at 2643.

[172] *Morse*, 127 S. Ct. at 2645 (Stevens, J., dissenting) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)) (internal quotation marks omitted).

[173] *Id.*

[174] *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Keeping with this theme, Justice Stevens also mentions that it would be inimical to First Amendment values to prohibit speech advocating changes in the law, even for high school students, stating that "a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views." *Morse*, 127 S. Ct. at 2651 (Stevens, J., dissenting) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). Using the examples of the Vietnam War and the prohibition of alcohol in the 1920's and early 1930's, Justice Stevens worried that suppression of speech of the kind that had occurred here may lead opponents of the war on drugs to keep silent so as not to run afoul of the majority, and that these historical experiences should make us wary of not allowing a discussion of the costs and benefits of existing law or policy. *Id.* at 2651 (Stevens, J., dissenting).

F. ANALYSIS OF THE COURT'S OPINION IN *MORSE*

The major theme of *Morse* was the Court's further drift away from *Tinker*'s approach to school free speech. Put another way, this case can be seen as continuing the tradition begun by *Fraser* in making exceptions to *Tinker*'s respect for student expression in the interest of furthering educational prerogatives. The views of Justice Thomas as to *Tinker*'s foolishness in introducing free speech rights into the schools in the first place seemed to be implicitly supported here, as the Court indicated an increasing willingness to carve out such exceptions to *Tinker* and signaled a trend of reluctance to identify speech as political and thus subject to the *Tinker* standard.[175]

An issue that naturally suggests itself is the extent to which the Court had the freedom to disregard *Tinker* considering the arguably political nature of Frederick's speech. The Court did conclude that the banner "advocated" and "promoted" the use of illegal drugs, and that for this reason, the school could suppress it.[176] Justice Alito then argued in his concurrence that such an exception to *Tinker* was permissible, but should not be interpreted to justify restricting speech that could "plausibly be interpreted as commenting on [a] political or social issue."[177] Thus, the Court may have been making a distinction between advocating the use of illegal drugs (despite the fact that they are illegal) and speech arguing that drugs should be legalized.[178] Justice Stevens, however, felt that the message could have been taken as advocating just such a change in the law, despite Frederick's admission that his banner had simply been a prank.[179] At the end of the day, such distinctions may not

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[175] "Political speech" here simply refers to the kind of "pure speech" that *Tinker* protects, which a school may seek to avoid simply to not have to deal with "an unpopular viewpoint" that is being expressed to assert a position on an issue, as opposed to suppression of merely disruptive speech. *See supra* note 29 for further discussion.

[176] *Morse*, 127 S. Ct. at 2625, 2629.

[177] *Id.* at 2636 (Alito, J., concurring).

[178] With regard to the former interpretation, *see supra* note 169 on First Amendment protection of advocacy of illegal conduct.

[179] *See supra* notes 167-68.

particularly matter, as even if the Court had viewed the banner as political speech, their holding was but an exception to *Tinker*, rather than a ruling that its strictures did not apply.[180]

However, the business of making exceptions to precedent is surely a dangerous one, and if taken too far, does not properly respect the doctrine of stare decisis. Allowing too much of a possibility for formulating exceptions to hard line rules introduces unreasonable amounts of uncertainty into the law, and leaves decisions to the whims of particular judges.[181] Thus, exceptions should not be taken to the point where they are merely a way of subverting precedent. As long as *Tinker* is still on the books, courts should defer to its holding, which, although still intact after *Morse*, has been put in further danger of losing precedential value.

Of course, a key aspect of the decision which must be clarified is whether the exception the Court was making was in the interest of the physical safety of students or whether the Court was simply deferring to the broader and more substantive pedagogical mission of the school to spread an anti-drug message. The distinction is important, as the goal of protecting the physical safety of the students is much more easily justifiable due to its more compelling and urgent nature, rather than the more politicized, abstract, and long-term rationale of furthering educational campaigns.[182] Additionally, if the door to making exceptions for pedagogical initiatives rather than mere safety has been further thrust open by this case, the possibilities for other such exceptions down the road is much more likely. This could not only lead to a swallowing of the *Tinker* rule, but could result in dangerous levels of inculcation of societal standards in

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[180] In justifying this approach, the Court said that "*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the [*Tinker*] 'substantial disruption' analysis . . . ." *Morse*, 127 S. Ct. at 2627.

[181] *See, e.g.*, Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification.").

[182] The *Tinker* "substantial disruption" standard would readily be satisfied, thus justifying speech suppression, whenever it could be demonstrated that there was at least a reasonable possibility of violence. *See Morse*, 127 S. Ct. at 2638 (Alito, J., concurring).

public schools, transforming schools from institutions of learning, in which capacity for original thought is fostered, into conformity factories.[183] Of course, reasonable room should be made for the missions of schools if they are to perform their function at all, but the courts must be careful to preserve *Tinker*'s spirit in doing so.

Despite Justice Alito's assurances to the contrary, the *Morse* opinion appears to support the development that school missions can trump First Amendment rights if the mission is compelling enough. The mission in *Morse* could then arguably be deemed especially important and fundamental enough to warrant such an exception. The notion that an exception was made here to protect the safety of students is less tenable, as the harm to be suffered is too far attenuated from the speech act, with too many intervening forces to be considered sufficiently urgent so as to fall under such a justification.[184]

Even so, regardless of how the speech suppression was justified here, either by concern for safety or instead by deference to educational missions, the issue of whether such interests were threatened substantially enough to warrant censorship is worth examining. Assuming the compelling nature of the drug abuse problem among youth, the majority's point that permitting such student expression contributes to a culture of acceptance of drug activity is well-taken. Not only does this one instance affect the school's norms regarding drugs, leading to increased use via peer pressure and disrespect for school officials, but permitting even just this one instance could establish a precedent and result in further instances of drug advocacy which would gradually undermine the anti-drug cause.[185]

On the other hand, Justice Stevens had a rather cogent argument regarding this matter. His view that the drug-related speech here was merely a joke designed to attract attention from

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[183] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1196 (9th Cir. 2006) (Kozinski, J., dissenting); *see supra* text accompanying note 95.

[184] Considering that the source of the justification for censoring speech when the physical safety of students is at stake is *Tinker*'s "substantial disruption" prong, such attenuated possibilities of harm would not seem to qualify. *See Hilton*, 502 U.S. at 202.

[185] *See supra* text accompanying note 143.

television cameras, and would not be taken seriously by other students enough to lead to a change in their behavior or attitude toward drugs, does appeal to common sense at first glance.[186] However, such a view would require taking the events as an isolated incident and out of the context of a school environment, disregarding the possibility of opening the floodgates to increasingly audacious attacks on anti-drug norms and undermining of the ability of schools to get their message across due to loss of respect. Therefore, assuming that schools have a compelling interest in deterring drug use among their students, such actions would have been justified under either a concern for general safety or for the effectiveness of the anti-drug campaign.

VI. DISCUSSION OF *HARPER'S* FUTURE

A. CURRENT PROCEEDINGS

After the district court denied Harper's motion for summary judgment on January 24, 2007,[187] Harper was permitted to file a motion for reconsideration, which the district court denied in an order issued on February 11, 2008, almost a year after the Supreme Court's decision in *Morse*.[188] The issue on reconsideration was what the outcome should be, taking into account that the decision of the Ninth Circuit had since been vacated, as well as that *Morse* had since been decided.[189] Harper argued that the district court should have declined to follow the ruling of the Ninth Circuit, claiming the standard it articulated was "'overly-broad [and] viewpoint discriminatory'"

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[186] *See* cases cited *supra* notes 167-69 and accompanying text.

[187] Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072, 1095 (S.D. Cal. 2007).

[188] Harper v. Poway Unified Sch. Dist., 545 F. Supp. 2d 1072 (S.D. Cal. 2008).

[189] *Id.* at 1096. As to the precedential value of the vacated opinion, the district court cited DHX, Inc. v. Allianz AGF MAT, Ltd., 425 F.3d 1169, 1176 (9th Cir. 2005), which stated that "at minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value." (internal citations omitted).

and since it would "'categorically remove[] certain viewpoints from the reach of First Amendment protection on campus.'"[190]

However, the district court was not of the opinion that the Ninth Circuit had erred.[191] Instead, it reasoned that the intervening decision in *Morse* had merely strengthened the arguments made by the Ninth Circuit, affirming that "insulat[ing] vulnerable students from harmful speech at school"[192] is a legitimate governmental justification for the suppression of speech, despite any possible viewpoint discrimination.[193] The court also rejected Harper's contention that the application of *Morse* should be restricted to its admittedly narrow holding – that is, that the exception created was merely for speech regarding illegal drug use.[194] Instead, the court felt that *Morse* lent support to finding in Harper's case that student speech may be restricted if school officials consider it harmful to the well-being of other students.[195] The court then found that it was clear that the speech here was "disparaging of, and emotionally and psychologically damaging to, homosexual

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[190] *Harper*, 545 F. Supp. 2d at 1099 (citing Doc. 162 at 3). Harper had also expressed the view that the Ninth Circuit's standard was "'inherently vague and provide[d] an unworkable guideline for public school officials'" since it requires distinguishing between "offensive" and "derogatory or demeaning" speech, which cannot be distinguished, and since it limited restriction to remarks concerning "chore [sic] characteristics" or "minority status," terms which are not definable. *Id.*

[191] *Id.* at 1099-1100.

[192] *Id.*

[193] *Id.* at 1100 n.9. The district court did not construe the *Morse* decision as making a "'sweeping change in First Amendment jurisprudence' by invalidating all viewpoint discrimination arguments." *Id.* Rather, the decision was interpreted to permit viewpoint discrimination in the instances where there is a "compelling governmental interest," such as that of protecting vulnerable students from harmful speech. *Id.*

[194] *Id.* at 1100-01.

[195] *Id.* at 1101. The court used *Morse* as support for the proposition that *Tinker*'s "substantial disruption test" is not absolute – that rather than merely permitting suppression of speech, the governmental interest involves a "duty to protect students . . . from degrading acts or expressions that promote injury to the student's physical, emotional or psychological well-being and development which, in turn, adversely impacts the school's mission to educate them." *Id.*

students and students in the midst of developing their sexual orientation" and thus the school officials were simply exercising their legitimate interest in protecting the affected students' well-being.[196]

B. ANALYSIS OF THE NEW *HARPER* DECISION

Although the court recognized that the exception made under *Morse* had been restricted to simply cover speech regarding illegal drugs,[197] it signaled that the value of the case was not limited as such. The reasoning employed by the court almost seemed to forego an analysis under *Tinker*, as the Ninth Circuit had ventured, and instead used *Morse* in a persuasive way (rather than precedential) to provide support for the general policy of making exceptions to *Tinker* where there is harm to students at stake.[198] Though somewhat unclear, this approach suggests that courts may be more likely to make such exceptions in the future, and may be more inclined to create new exceptions when faced with more compelling concerns than the free speech rights of children.[199]

C. PREDICTION OF *HARPER'S* FATE AND JUSTIFICATIONS

If Harper appeals the decision of the district court, it seems likely that the Ninth Circuit will similarly stick to its guns, this time with even better justification by way of *Morse*. However,

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[196] *Id.* at 1101. The court also based its holding on the "legitimate pedagogical concern of promoting tolerance and respect for differences among students." *Id.*

[197] *Id.* at 1100-01.

[198] *Id.*

[199] *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007) (ruling that *Morse* provided support to allow the transfer of a student to an alternative education program based on journal writings threatening a Columbine-style attack in the interest of physical safety). Harper's argument here, *see Harper*, 545 F. Supp. 2d at 1099, claimed that the Ninth Circuit's holding allowed viewpoint discrimination. However, not only is such discrimination permissible if *Tinker* allows it, *see supra* note 84, but it is also allowed if any of the exceptions of *Fraser*, *Kuhlmeier*, or now *Morse* happen to apply. *See* cases cited *supra* note 84 and accompanying text.

the Supreme Court's decision to hear the case, only to vacate the Ninth Circuit's opinion and declare the case moot, suggests that it felt that the reasoning of the lower courts was incorrect, and will thus be in favor of reversing decisions against Harper when the case comes back up.[200] Consequently, Harper will almost surely appeal the new ruling of the district court to the Ninth Circuit and then to the Supreme Court.

Considering that after *Morse* there appears to be even stronger support for the school district than before, the question arises as to how the Supreme Court will be able to justify a ruling in Harper's favor. The Court could follow Judge Kozinski's reasoning in his dissent to the Ninth Circuit opinion, ruling by similar arguments that under *Tinker*, Harper's T-shirt did not and could not have been reasonably predicted to "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."[201] However, the Court will also have to deal with the additional complication that *Morse* presents. An effective way of discounting *Morse* will be to focus on that its holding was stated narrowly as permitting an exception to *Tinker* only "when that [expression] is reasonably viewed as promoting illegal drug use."[202] This interpretation

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[200] According to Jordan Lorence, a lawyer for the Alliance Defense Fund (the organization that brought the case on behalf of Harper), "'[t]he Supreme Court could have simply denied cert[iorari] in this case, but it did not . . . .'" Tony Mauro, *Court Vacates 9th Circuit Ruling Against Anti-gay T-shirt*, FIRST AMENDMENT CENTER, Mar. 6, 2007, http://www.firstamendmentcenter.org/analysis.aspx?id=18251. Rather, the Court has previously remarked that they vacate a judgment to "'clea[r] the path for future relitigation of the issues . . . and [to] eliminat[e] a judgment, review of which was prevented through happenstance.'" Anderson v. Green, 513 U.S. 557, 560 (1995) (per curiam) (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950)) (alterations in original). Lorence suggests that this implies that "'the justices reached out to eliminate a poorly-reasoned Ninth Circuit decision.'" Mauro, *supra*.

[201] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). For similar reasons as before, the exceptions of *Fraser* and *Kuhlmeier* would not apply.

[202] Morse v. Frederick, 127 S. Ct. 2618, 2625 (2007); *see, e.g.*, DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 639-40 (D.N.J. 2007) (observing that *Morse* is merely a "third exception to *Tinker*" and holding that it did not apply there given the student's "absence of any mention, allusion or reference to illegal drug activity").

can be preferred instead of a more general one that allows speech suppression in the interest of any school mission that purports to be in the interest of preventing harm to students. The Court could justify avoiding the creation of a similar exception in Harper's situation by pointing out that the mission in *Harper*, as Judge Kozinski had concluded, was not necessary to prevent harm to homosexual students and was really just "brainwashing." This could be argued to stand in contrast to the mission of deterring drug use by teenagers, which could be characterized as dealing with a harm that is very real and pervasive.[203]

VII. CONCLUSION

Harper has certainly been a controversial case, dealing with contentious and fundamental issues such as civil liberties, homosexuality, and religion. Complicating matters further has been the fact that the case arose while First Amendment law in schools was still evolving, with the new Supreme Court apparently continuing the post-*Tinker* shifting of gears toward being more deferential to the determinations of school officials and narrowing the constitutional rights of schoolchildren. *Morse* evidenced this shift, and although it seems to substantially bolster already compelling arguments under existing law to rule for the school district in *Harper*, the increasingly conservative political tendencies of the Court may nonetheless lead them to sidestep the direction their ideologies were taking the law to permit expression of a likeminded view. Whether this bias is sinister or not is difficult to determine, as good faith justifications are certainly viable since the evaluation

[203] This argument would, of course, be strange for multiple reasons. First, just as the majority in *Morse* had uncovered substantial outside evidence with respect to the dangers of drugs, the majority in *Harper* had uncovered corresponding literature detailing the very real problem of psychological and physical abuse of homosexuals, signaling that the mission in *Harper* was not simply some ideological initiative, but rather a practical response to an urgent social problem. Additionally, any actual and potential harm in *Harper*, where there was a notable possibility of violence brought upon by the T-shirt, seems more pressing than the attenuated risk of harm in *Morse*, where the predicted harm that would stem from a reading of Frederick's banner was much further down the line.

of the countervailing concerns which are tied to the content of the speech will naturally and rightfully be colored by personal views. Nevertheless, the circumstances suggest that the direction *Morse* took the law of free speech in schools will most likely fail to result in *Harper* going along with the trend, and the state of this area of the law, as well as the larger debate regarding our nation's principles, will become even more divisive, politicized, and unsettled.

"WHISTLEBLOWING" AND THE INTENTIONAL DISTORTION OF NEWS

Jessica Bisignano[1]

Jane Akre and Steve Wilson were faced with a dilemma: alter a news story in a way inconsistent with the truth, or face retaliation from Fox News. After eighty-three drafts, all failing to satisfy the requirements of the Fox News attorneys, the team was fired. Akre and Wilson were an award-winning investigative team hired by Fox News for a new news program. Having been hired to expose crime, corruption, and scandal, the team began researching the use of bovine growth hormones (BGH) in the dairy farming industry. This industry uses BGH to stimulate IGF-1 in cattle, which increases milk production by thirty percent. The resulting report exposed the potential danger to public health, linking BGH consumption to breast and colon cancer. In addition to uncovering the health risks associated with BGH, the team's four-part story showed that many people were consuming BGH-enhanced milk unknowingly due to lack of appropriate labels on milk cartons. The journalists never had the opportunity to air their program on BGH once Monsanto, a producer of BGH, strongly advised the Fox network to revise the story.

Akre and Wilson tried to comply with the requests to redraft the story, but they refused to distort it. The corporate pressure Fox News faced from Monsanto prevented the accurate reporting of an extremely important public health story about the consumption of milk and resulted in the team's termination. Unfortunately, the team was fired because they refused to

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participate in an activity that was against public interest, though they were not protected by state whistleblower statutes.

I. INTRODUCTION

According to the Federal Communications Commission's ("FCC") policy regarding licensing broadcasting companies, "[r]igging or slanting the news is a most heinous act against public interest."[2] Despite the Commission's emphasis on the honesty of news, on February 14, 2003, the Second District Court of Appeals handed down an opinion in *New World Commc'ns. of Tampa, Inc. v. Akre* that removed legal consequences for the intentional distortion of news.[3] The appeals court stated that the Commission's policy against the intentional distortion of news was not an "adopted" rule within the meaning of the private sector whistle-blower's statute, essentially holding that it is not illegal to intentionally distort the news.[4] According the judge's reasoning, since the FCC never published their policy against the distortion of news, the policy is not a legal regulation, but rather a policy developed through adjudication.[5]

Whistleblower and anti-retaliation statutes evolved as a policy exception from strict freedom of contract rights in order to protect employees who disclose or abstain from activities within the workplace that are or appear to be illegal or against public policy. Since employees often have firsthand knowledge of the activities of a company, whistleblower protections seek to create a safe environment where illegal or immoral practices will be reported. Legislatures enacted these statutes because corporations and business entities retaliate against employees who report wrongdoing within a corporation by terminating

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[2] Serafyn v. FCC, 149 F.3d 1213, 1217 (D.C. Cir. 1998).

[3] 866 So. 2d 1231 (Fla. Dist. Ct. App. 2003).

[4] *Id.* at 1234. "'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." FLA. STAT. § 120.52(16) (2008).

[5] *New World Commc'ns.*, 866 So. 2d at 1233.

employment, reducing hours, taking disciplinary action, or other discriminatory practices.

Whistleblower statutes exist in a number of different forms. There are state, federal, and common law expressions of these protections, designed to protect employees from discriminatory practices resulting from disclosure of conduct or conditions that are considered illegal, immoral, or go against public interest.[6] Some states grant broad protection to employees whereas other states uphold the employment-at-will doctrine leaving whistleblowing employees little remedy for retaliation outside the scope of their employment agreements. Despite the variations within the statutes, courts have consistently ruled that each requirement of the statute governing the claim must be met in order for protection to be granted.

Whistleblower protections are crucial in providing employees rights against the demands of their employers. These protections are particularly necessary in an industry like news broadcasting, where integrity of performance should be the top priority. However, Akre and Wilson were unfortunately not afforded whistleblower protections after they reported the misconduct of Fox News to the FCC.

The FCC is vested with the authority to regulate news-broadcasting agencies. This authority includes the power to grant and revoke licenses to companies if it serves the "public interest, convenience, and necessity."[7] The intentional distortion of news has been deemed to be a reason for the FCC to revoke or deny a broadcasting license because it serves the public interest to deny licenses to broadcasters who falsify news.[8] Pursuant to its role as the regulatory body for broadcast news, the FCC requires each company to have a policy of requiring honesty and ensuring "reasonable precautions to see that news is fairly handled."[9] Since news media is a predominant source of information widely relied upon by the

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[6] Frank J. Cavico, *Private Sector Whistleblowing and the Employee-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 548-49 (2004).

[7] Communications Act of 1934, 47 U.S.C. § 309(a) (2006).

[8] *Serafyn*, 149 F.3d 1213.

[9] *Id*. at 1217.

public, it is important to require journalists to report with integrity and accuracy. Broadcasting companies do not, however, face any legal consequences for violating their duty to accurately report the news since the regulatory effect of the FCC is limited to policy, not law.

The distinction between law and policy may exclude reporting employees from the protections of whistleblower statutes, as was seen by the narrow rule of the District Court in *New World Commc'ns*.[10] The absence of whistleblower protections for news broadcasters creates a situation where employees who blow the whistle on their employers are left vulnerable to retaliation. Whistleblower protection would serve to provide legal recourse to employees against retaliatory action of their employer if those employees choose not to falsify the news or distort material elements of a news story.

This note argues that the FCC's policy against the intentional distortion of news needs to have actual enforcement capacity. Alternatively, and at a minimum, whistleblower statutes should be read broadly enough to recognize this policy. Affording broadcasters whistleblower protections will serve a dual purpose: (1) it will allow employees of broadcasting companies the right to abstain from and report instances of deliberately distorted news; and (2) it will promote notification to the FCC and the public of misconduct by broadcasting companies.

Section II of this note will cover whistleblower statutes, examining the evolution of these protections and the policy reasons behind them. Section III looks critically at the FCC, the effect of mass media, and the intentional distortion of news. Finally, Section IV reviews the Akre case, arguing that the jury's finding that Jane Akre should have been protected as a whistleblower should have been upheld.

II. WHISTLEBLOWER STATUTES

"Whistleblowing" is the act of disclosing to higher authorities company conduct that violates the law or public policy, such as to the Board of Directors of that company or a regulatory agency. When an employee alerts higher authorities to the misconduct of the company, employers tend to respond with

[10] *New World Commc'ns*, 866 So. 2d 1231.

retaliatory actions in the form of discharge, punishment or discipline. Protections in the form of whistleblower statutes exist to protect employees from suffering injustices due to their acting in a way that favors public policy.

Whistleblower activities generally fall into the following three categories: disclosure, assistance, and objection.[11] Disclosure occurs when the whistleblowing employee is faced with knowledge or asked to participate in illegal or immoral activity or conduct, and discloses or threatens to disclose the activity or conduct to an upper level officer within the company or to an outside authority.[12] Assistance is a situation in which an employee suffers retaliation for assisting in a governmental investigation of an employer.[13] Finally, objection occurs when an employee objects to a condition or conduct existing in the workplace, and therefore refuses to participate in the activity.[14]

Legislatures have a difficult task of clearly establishing the protections afforded to employees and codifying the common law public policy, without exposing corporations to an overwhelming number of whistleblower claims.[15] The concept of employee protection for whistleblower conduct is extremely inclusive, expanding from activities that are a violation of the law to conduct that is deemed to be against a moral code or public policy.[16] The Model Whistleblower Protection Act was developed by the National Whistleblower Center as a guideline for legislatures developing these statutes.[17]

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[11] Cavico, *supra* note 5, at 549.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 556-57.

[16] *Id.* at 548.

[17] NATIONAL WHISTLEBLOWER CENTER, PROPOSED WHISTLEBLOWER PROTECTION AMENDMENT FOR REPORTING VIOLATIONS OF FEDERAL LAW, MISUSE OF TAXPAYER MONIES AND PROTECTING FEDERAL WITNESSES (2007), *available at* www.whistleblowers.org/storage/whistleblowers/documents/model.bill.senate.pdf. The whistleblower statutes address the need to protect employees who report valuable information to the appropriate authorities. The National Whistleblower Center reviews protective bills and models their proposals after effective laws.

State courts for the most part have interpreted the statutes with a broader view more consistent with the Model Act proposed by the National Whistleblower Center. Affording more protections to employees, some jurisdictions have read the term "violation" as "not to require an actual violation but rather only a reasonable belief that a violation has occurred or will occur."[18] Statutes extend protective cover even if there is a suspected wrongdoing disclosed despite accuracy; the only requirement is that the disclosure is made in good faith and with reasonable belief.[19] There are a few jurisdictions that still refuse to read any further into a statute beyond what is explicitly stated despite the trend in offering greater protections. [20]

The primary purpose of the Model Act is to offer broad protection for "employees who advance the public interest by providing information about the possible violation of federal laws to the appropriate authorities or who testify on federal law enforcement or oversight proceedings." *Id.* The protection offered in the Model Act is much broader than any of the state and federal statutes entertain. *See* Cavico, *supra* note 5, at 547. The Model Act calls for the protected disclosure of information "for which the employee reasonably believes constitutes a violation of any federal law, rule or regulation, the gross mismanagement or gross waste of federal monies or a danger to the public health or safety." *Supra*, at 2. Contrary to the promulgated laws with whistleblower components, the Model Act seeks to cover all disclosure of illegal activities or activities against public policy. Most state and federal statutes do not include violations of public policy in the language of the statute, and consequently the courts do not include public policy violations as a statutorily protected issue. *See* Cavico, *supra* note 5, at 565.

The Model Act also calls for protection of disclosure of information if an employee "reasonably believes" that the conduct is in violation of the law or public policy. *Supra*, at 2. The National Whistleblower Center takes an extremely liberal approach to protection because it is necessary to provide safeguards to employees in order to be able to best discover and regulate wrongdoing within a company, however many jurisdictions require the activity or conditions to have occurred or to be ongoing. *See* Cavico, *supra* note 5, at 568. The Model Act includes a "reasonableness" standard, which allows an employee to disclose information if the employee reasonably believes, without legal certainty, that an activity or condition is in violation of the law or public policy. *Id.*

[18] Cavico, *supra* note 5, at 568.

[19] *Id.* at 569.

[20] *Id.* at 555.

A. EVOLUTION OF WHISTLEBLOWER STATUTES FROM THE AT-WILL DOCTRINE

Whistleblower statutes were derived from a public policy exception to the employee-at-will doctrine, which protects employers from some lawsuits stemming from the termination of employees. The exception states, "[a]n employer may fire an employee for any reason or no reason, but not for a reason which violates a clear mandate of public policy."[21] The recognition of additional employment rights outside of the contractual rights between the employer and employee met a great deal of resistance constitutionally, but eventually states and the federal government began to recognize the need for these protections.

Historically, employers had full authority to hire or not hire anyone for any reason including the person's race, gender, or religion.[22] Employers' rights were protected constitutionally under the right to contract,[23] so there was very little interference permitted by the courts.[24] At common law, at-will employment protected the right of an employee and an employer to terminate the contract at any point, with or without cause.[25] Statutes that offered additional employee protections were frequently held as unconstitutional by the court system since they violated the right to contract.[26]

The Supreme Court continually upheld the at-will employment doctrine starting with *Adair v. U.S.*[27] in 1908. Using precedent set by *Lochner v. New York*, the court held that a federal law protecting employees from termination on the

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[21] STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER'S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 5 (1988).

[22] *Id.* at 9.

[23] U.S. CONST. art. I, §10, cl. 1.

[24] KOHN & KOHN, supra note 20, at 9.

[25] Cavico, *supra* note 5, at 550.

[26] *Id.*

[27] 208 U.S. 161 (1908).

basis of membership in a union was unconstitutional.[28] Though exceptions to the supremacy of the at-will doctrine existed, the court was reluctant to recognize these exceptions. The Great Depression changed the atmosphere of employment law, and the Court began recognizing rights of employees with the inception of the Congress of Industrial Organizations union, and the National Labor Relations Act.[29] The Supreme Court created an opening for arguments protecting employees from retaliation due to whistleblower conduct, initiating a trend towards protecting the rights of employees.[30]

Jurisdictions vary in the extent to which they choose to acknowledge whistleblower protections. The trend has been to recognize, both statutorily and at common law, a more expansive protection of employees engaging in whistleblower activities. However, some states still do not uphold these protections or only allow extremely narrow protections for whistleblowing conduct. These jurisdictions typically do not look further than the four corners of the employment agreements, and do not afford employees additional protection than that which was laid out in the contract.[31] Conversely, other jurisdictions offer many additional protections including whistleblower and wrongful discharge statutes; these states virtually negate the at-will employment doctrine.[32] Most states recognize these protections as supplementary to the at-will employment agreement, by protecting disclosure of and objection to activities and conditions in violation law.

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[28] KOHN & KOHN, *supra* note 20, at 10 (*citing* Adair v. U.S., 208 U.S. 161 (1908)). *See generally* Lochner v. New York, 198 U.S. 45 (1908) (reasoning that a state does not have the power to regulate the hours of bakery employees, since it is not the proper exercise of police power, which cover policing for safety, health, morals and general welfare of the public; the right to contract in relation to one's business is a part of the liberty of an individual protected by 14th Amendment, but the statute in question in *Lochner* only limited the rights to labor and to contract.)

[29] KOHN & KOHN, *supra* note 20, at 11-12.

[30] *Id.* at 12-13 (*citing* NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937)).

[31] Cavico, supra note 5, at 551.

[32] *Id.*

Federal whistleblower statutes protect employees against retaliation for disclosure in a number of specified situations. Initially, federal protections were based in a free speech argument and were limited depending on whether an employee was a government or private agent.[33] Now federal whistleblower

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[33] KOHN & KOHN, *supra* note 20. Kohn argues the following:

> Under the First and Fourteenth Amendments to the U.S. Constitution, state and local government officials are prohibited from retaliating against whistleblowers. In 1968 the Supreme Court held that the First Amendment protects government employees who express public dissent. The First Amendment protects employees who blow the whistle either publicly, or privately and directly to their supervisors. Whether any specific exercise of free speech or disclosure of potential wrongdoing is protected under the First Amendment depends upon a case-by-case analysis under the rule pronounced in *Pickering v. Board of Education*: "absent proof of false statements knowingly or recklessly made . . . [the] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."
>
> The rights of federal employees under the First Amendment were severely restricted by the Supreme Court in *Bush v. Lucas*. Essentially, if an administrative remedy is available to a federal civil servant, the federal employee must utilize that administrative remedy and cannot bring an independent tort action under the First Amendment. If a federal employee is not covered, however, under a federal administrative scheme (i.e., the Federal Civil Service Reform Act), or if the administrative remedy does not cover the retaliation alleged by the employee, the federal whistleblower may be able to use the First Amendment as the basis of whistleblower retaliation cause of action. Retaliatory discharge committed by certain public officials may be non-actionable due to the immunity granted some government officials and state governmental bodies.
>
> In order for a state or local public employee's speech to be protected it must pass a two-prong test. First, a court must determine whether the speech can be "fairly characterized as constituting speech on a matter of public concern," and not just a matter of "personal interest." Second, the court must balance "the interest of the (employee) as a citizen, in commenting upon matters of public concern and the interests of the state, as an employer, in promoting the efficiency of the public service it performs through its employees." Whistleblowers are covered under

protections are incorporated within the federal legislation governing the protected activity. For example, whistleblower protections are statutorily invoked if an employer discriminates against an employee for whistleblowing in situations of environmental concerns, potential securities fraud, violations of Department of Transportation rules and regulations pertaining to commercial motor carriers, violations of Federal Aviation Administration rules and regulations, and violations of Nuclear Regulatory Commission rules and regulations.[34]

Eventually state governments and the federal government began to recognize the need for employee protections slowly eroding the strong sentiment in favor of employer rights. In general, employees are disadvantaged when it comes to negotiations and contractual agreements with employers, so in many cases the state and federal governments moved in a more protectionist direction in favor of employee rights. Whistleblower statutes have increasingly been incorporated by state legislatures to serve the purpose of protecting employees from having to choose between job termination or other retaliatory actions and participating in or condoning illegal or immoral activities.

> this constitutional approach: "An employee's First Amendment interest is entitled to more weight where he is acting as a whistleblower exposing government corruption."
>
> Even if the employee's speech was subject to constitutional protection, the employee still must state a claim sufficient to meet the *Mt. Healthy* test. Under *Mt. Healthy* an employee has the initial burden to demonstrate that the protected speech or conduct was a "motivating factor" in the adverse employment decision. Once this is demonstrated, the burden shifts to the employer to demonstrate, "by a preponderance of the evidence" that it "would have" taken the same action absent the employee's protected conduct. The *Mt. Healthy* test has been applied to analyzing the legality of employer actions under other wrongful discharge statutes.

Id. at 18-19 (citations omitted).

[34] U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (OHSA) FACT SHEET: WHISTLEBLOWER PROTECTION – OENERAL (2003), *available at* http://www.osha.gov/OshDoc/data_WhistleblowerFacts/whistleblower_protections-general.pdf.

B. PUBLIC POLICY FOR WHISTLEBLOWER STATUTES

The evolution of whistleblower protection stemmed from the government's recognition of the need to protect employees who advance public interest by coming forward and alerting authorities of the illegal or immoral conduct of employers. Absent whistleblower statutes, employees' attempts to disclose information regarding their employer's illegal or immoral conduct are often met by retaliatory actions by the employer.[35] Employees have the most information regarding the practices and conditions of the employer. Prior to the establishment of whistleblower statutes, employees were given a disincentive to follow the law or public policy and go against the trend of company activity. In many cases employees who resisted illegal or immoral conduct were alienated as disloyal and in some cases terminated from employment.[36]

The act of whistleblowing creates a kind of psychological tension within the employee who is concerned by some employer conduct. In a court decision, the court

> clearly recognized the "loyalty" conflict inherent in whistleblowing: "we recognize that there is a tension between the obvious societal benefits in having employees with access to expose activities which may be illegal . . . nevertheless we conclude that on balance actions which enhance the performance of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public."[37]

Despite the tension, an employee serves as an important resource for alerting government agencies of unsound conduct within a company, so it is important for governments to

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[35] Whistleblower Protection Enhancement Act of 2007, H.R. Res. 985, 110th Cong. (2007). This enhancement act intends to clarify and expand upon the protections afforded to federal employees under the federal Whistleblower Statute.

[36] *See, e.g.*, KOHN & KOHN, *supra* note 20.

[37] Cavico, *supra* note 5, at 548.

facilitate and protect disclosures. As the legislature points out in the Whistleblower Protection Enhancement Act of 2007, "unfortunately, whistleblowers too often receive retaliation rather than recognition for their courage."[38]

State and federal whistleblower statutes are designed to protect employees from employer retaliation predicated on employee disclosure. The statutes offer legal protection for whistleblowing employees if an employer makes any negative change to their employment that is motivated by retaliation. The enacting legislatures seek to provide protection and incentive for the employees with information to come forward for the betterment of competition, good business practices, and the health and safety of the public.[39]

Despite a policy of providing incentives for employees, it is often difficult for employees to bring claims under the various whistleblower statutes. Employees must meet strict requirements in order to be protected by the whistleblower blankets.[40] Courts generally apply these blankets narrowly, only protecting disclosures of violations against actual laws, and do not use the 'reasonableness' test requiring legal certainty that the conduct and conditions are in violation of protected statutes.[41]

Jurisdictions should adopt a broad view when interpreting the statutory language of whistleblower statutes. The purpose of these statutes is to enhance the ability to regulate employer activity to ensure that businesses are acting in accordance with the law and in the public interest.

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[38] H.R. REP. NO. 110-42, pt. 1, at 3 (2007).

[39] *See generally* U.S. DEP'T OF LABOR, *supra* note 33.

[40] 82 AM. JUR. 2D *Wrongful Discharge* § 121 (2007). In many states, courts require (1) that an employee was "engaged in a protected whistleblowing activity," (2) that the employee "suffered adverse employment action," and (3) "that there was a causal connection between whistleblowing activity and adverse [employment] action." *Id.*

[41] Cavico, *supra* note 5, at 587-88.

III. THE FEDERAL COMMUNICATIONS COMMISSION AND NEWS MEDIA

A. THE AUTHORITY VESTED IN THE FEDERAL COMMUNICATIONS COMMISSION

In 1934, Congress passed the Communications Act in order to regulate the various forms of communications that were advancing at the time. This Act, implemented as part of the New Deal legislation, created the FCC, a Congressionally funded organization, vested with the authority to oversee and enforce the regulations over communications. The Act's purpose is:

> [R]egulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.[42]

The provisions of this Act vested power in the FCC to regulate the communication industry as an independent governmental organization.[43]

Though the Communications Act extends to Cable, there have been many developments within the communications industry since 1934. Perhaps the most recent development in the communications world is universal access to the Internet and the increased use of personal computers since the 1980s, creating a unique demand on the FCC's regulatory capacity.[44]

Title III of the Communications Act deals with requirements of broadcasting agencies. One requirement is that broadcasting

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[42] Communications Act of 1934, 47 U.S.C. § 151 (2006).

[43] Fritz Messere, *Analysis of the Federal Communications Commission*, http://www.museum.tv/archives/etv/F/htmlF/federalcommu/federalcommu.htm (last visited Oct. 28, 2008)(*available at* http://www.oswego.edu/~messere/FCC1.html).

[44] *Id.*

companies obtain a license in order to engage in communication activities in order for the FCC to "maintain the control of the . . . channels."[45] Companies may acquire a license such that they have access to use of these channels for a period of time without ownership properties.[46] The Act prohibits any participation in broadcasting "except . . . in accordance with this [Act] and with a license in that behalf granted under the provisions of this [Act.]"[47] Applications for these licenses, renewals of already existing licenses and construction permits may be submitted to the FCC in writing consistent with Section 308 of the Act.[48] The subsequent section of the Act grants power to the FCC to determine "whether the public interest, convenience, and necessity will be served by the granting of such application" and to grant such application "upon examination of such application and upon consideration of such other matters."[49]

Despite the authority granted to the FCC, it rarely interferes in the content of broadcasted news, deferring to the broadcasting companies to determine the appropriate nature of the news reports. Broadcasters are constitutionally protected by the First Amendment and, as such, may use their discretion to determine which stories to report and the position the story takes, creating a difficult balance for the FCC.[50] The Commission must determine how and when to regulate slanted or distorted stories without infringing on the constitutional rights of the broadcasting companies.[51]

The Commission often receives complaints from members of the public that "networks, stations, news reporters, and/or commentators give inaccurate or one-sided news reports or

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[45] Communications Act of 1934, 47 U.S.C. § 301 (2006).

[46] *Id.*

[47] *Id.*

[48] *See* Communications Act of 1934, 47 U.S.C. § 308 (2006).

[49] *See* Communications Act of 1934, 47 U.S.C. § 309 (2006).

[50] FCC Consumer Facts, Complaints About Broadcast Journalism, http://www.fcc.gov/cgb/consumerfacts/journalism.html (last visited Dec. 31, 2008).

[51] *Id.*

comments, fail to cover certain events, or cover events inadequately"[52] and "that the news has been staged or that news reports overemphasize or dramatize certain aspects of events."[53] Although broadcasters are "public trustees" who are trusted to not distort the news, the FCC is selective about the situations in which they choose to review a license.[54] Balancing between the demands of consumers to regulate the news from intentional distortion and the demands of consumers who fear excessive governmental interference, the FCC acts in situations where it determines that intervention is "appropriate."[55] The Commission essentially reviews the process by which the news story was written and reported in order to determine whether the agency in question properly checked its facts and whether there was instruction from upper level management to distort or slant the story in a material way.

The Commission gives great discretion to news broadcasters, which can be dangerous given the amount of power news media has in exposing the public to information. The FCC faces a very real challenge in balancing between the public interest of accurate reporting and the First Amendment rights of the broadcasting company. However, it is important for this regulatory agency to recognize its authority and put greater weight on its duties to ensure that news is reported in a reasonably accurate fashion.

B. THE INCREASING NATURE OF MASS MEDIA AND ITS IMPACTS

A multi-dimensional relationship exists between government, media and the public. In the past decade, there has been a major increase in the availability of news with both the rise of 24-hour news programming and up-to-the-minute reporting on the Internet. The ever-present nature of news

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[52] *Id.*

[53] *Id.*

[54] *Id. See also* In re CBS Program 'Hunger in America,' 20 F.C.C.2d 143, 145 (1969).

[55] FCC Consumer Facts, *supra* note 49. *See also* In re CBS Program 'Hunger in America,' 20 F.C.C.2d 143.

media impacts this country in two different ways. First, the public relies on the extensive coverage for notification of current affairs and factual information of events occurring both domestically and internationally. However, the public's exposure to information is limited by the business decisions of the broadcasting companies. Second, news broadcasters are able control what issues gain attention and support having an effect on political decisions surrounding certain events. Given the far-reaching power broadcasting companies wield, it is imperative for the FCC to reevaluate the discretion it grants these agencies and take a more dominant role in regulating this industry.

1. The changing landscape of news broadcasting determines the information disseminated to the public.

The evolution of news media has increased both the public's access to information and the power of broadcasting agencies. According to the Pew Research Center, Americans are more frequently tuning into 24-hour news channels like CNN, Fox News, and MSNBC than to traditional news sources such as newspapers and local news broadcasts.[56] In addition to the increased viewership of 24-hour news channels, the use of online news sources has increased ten-fold in less than a decade.[57] The Pew Research Center reports that at least 48 percent of Americans stated that cable news talk programs contributed to information learned about the presidential election in 2004.[58] At least for a large portion of the population,

[56] Richard Forgette & Jonathan S. Morris, *High-Conflict Television News and Public Opinion*, 59 POL. RES. Q. 447 (2006). Forgette and Morris conducted a research experiment to determine the magnitude to which conflict-laden news coverage influences public perceptions. Using a the State of the 2003 Union Address because of the immediate effect it had on the American public, they conducted an experiment over the course of the multi-day news coverage. Using only CNN formats, they recruited undergraduate students as subjects to assess whether more conflict-laden formats had greater appeal to the public. They found that conflict-ridden cable coverage "negatively affects approval of political institutions and the system as a whole, as well as lowering trust." *Id.* at 454.

[57] *Id.* at 447.

[58] *Id.* at 448.

cable news sources provide information about political events influencing the way they perceive candidates and institutions.

Broadcasting companies select the information circulated to the public based on certain criteria in an effort to grab the public's attention and continue to boost ratings. "[J]ournalists' criteria for choosing what to cover are dominated by five elements: (1) can have a strong impact on the lives of audience members; (2) involves violence, conflict, disaster, or scandal; (3) is familiar; (4) has audience proximity; and (5) is timely and novel."[59] Other factors include: "geographic proximity to Western countries, costs, logistics, legal impediments . . . risk to journalists, relevance to national interest, and news attention cycles."[60] Broadcasting companies have to consider their ratings when they select stories to report on, so in many cases whether an event is reported on in the news depends on the speculation of the company as to whether the report will increase viewership, thus maintaining or increasing profits.

The current news media frenzy oversaturates the public with information. Despite the increase in availability, Americans have become news "grazers," not actual watchers. This decline in the number of Americans who "watch or read traditional news at a regularly scheduled time compared to earlier generations"[61] affects the way broadcast companies operate as a business and a news source. In order to promote viewing, news agencies have switched to a more controversial format promoting conflict and drama over a more traditional format.[62] With an eye toward achieving a "more entertaining news

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[59] Philip J. Powlick & Andrew Z. Katz, *Defining* the *American Public Opinion/Foreign Policy Nexus*, 42 MERSHON INT'L STUD. REV. 29, 40 (1998).

[60] Peter Viggo Jakobsen, *Focus on the CNN Effect Misses the Point: The Real Media Impact on Conflict Management Is Invisible and Indirect*, 37 J. PEACE RES. 131, 133 (2000).

[61] Forgette & Morris, *supra* note 55, at 448. "Since the cable and Internet news boom, declines have been dramatic in traditional media use. The proportion of Americans regularly watching the nightly network news has been about halved in less than a decade from 60 (1993) to 32 percent (2002). Only 41 percent read a newspaper daily compared to 48 percent just four years ago." Because of the decrease in habitual viewers, Forgette and Morris argue that news-broadcasting companies select stories based on controversy. *Id.*

[62] *Id.* at 447.

story,"[63] broadcasting companies focus on "conflict-oriented" coverage in order to captivate audiences and augment ratings.[64]

Media are also engaged by governmental and non-governmental organizations in order to notify the public about ever-changing agendas and to promote support for certain causes. International governments employ American public relations companies to promote a positive spin on their countries to the American public.[65] Around the clock media exposure provides a conversational forum that governmental organizations can use in order to promote their strategies, address conflicts and stories immediately after they occur, and control the way in which they are perceived by the public.[66]

Broadcasting companies are a major source of disseminating information since they act as the gatekeepers, filtering what information is distributed to the public. Unfortunately, the "important role [news media plays] in determining what problems and concerns have the opportunity to activate public opinion"[67] is impaired by the propensity of broadcasting companies to focus on ratings. "Americans appear to trust television news more than other sources of information,"[68] so they rely on this information when forming opinions resulting in action that influences governmental decisions. Without exposure to a story, the public is unlikely to discuss it so the "public opinion on that issue remains latent."[69] Given the power of news media, it should be within the public interest of the government to regulate this industry in order to ensure that the information is disseminated with integrity.

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[63] *Id.*

[64] *Id.* "Cable news talk shows present a more adversarial approach to covering politics replacing or at least supplementing the traditional 'talking heads' coverage with a more compelling 'screaming heads' news format."[64]

[65] Jakobsen, *supra* note 59, at 140.

[66] *Id.*

[67] Powlick & Katz, *supra* note 58, at 40.

[68] *Id.* at 39.

[69] *Id.*

2. News Media Influences Political Decisions through what is termed the "CNN Effect."

The goal of news media is to capture the interest of the public, but news media also influence political decisions about current affairs, particularly conflict management. This theory is often referred to as the "CNN Effect." "The causal mechanism of the CNN effect is usually conceived in the following way: Media coverage (printed and televised) of suffering and atrocities → journalists and opinion leaders demand that Western governments 'do something' → the (public) pressure becomes unbearable → Western governments do something."[70]

The CNN Effect argues that when news media decide to promote a news story, the publicity causes pressure from the public, resulting in a "'something-must-be-done' school, of which, of course, radio and television are the founder members, along with the newspapers."[71] This selective coverage of certain events has a large impact on conflict management since broadcasting companies usually choose conflicts to cover after the violence breaks out instead of reporting on the pre-violence, violence and post-violence phases of the conflict in an effort to promote ratings. This is because "coverage of conflicts that *might* explode in violence is unlikely to boost ratings."[72] The broadcasting industry's decision to promote ratings and its choice to focus on outbreaks already occurring has caused political decisions that focus on "short-term emergency relief" over "long-term development projects" aimed at prevention of these outbreaks. These decisions also distort public perception surrounding the conflict.[73] Since there is a strong relationship between media attention and funding, "the media has the power to pressure governments to alter their priorities and channel funds to emergencies."[74]

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[70] Jakobsen, *supra* note 59, at 132.

[71] Nicholas Jones, *24-Hours Media*, 3 J. PUB. AFFAIRS 1 (2003).

[72] Jakobsen, *supra* note 59, at 133.

[73] *Id.*

[74] *Id.* at 139.

News media have a tremendous effect on global affairs and how the American public perceives events and issues. It is a major influence in defining the global environment. Media control what events and issues are made known to the general public; it shapes how the public perceives these stories, having an effect not only on the political decisions about how to deal with different issues domestically and internationally, but also on how the public views these decisions. Having the power to spin stories and manipulate public opinions affords news broadcasting companies the opportunity to influence the decisions of political leaders. More importantly, this control affects the election of those leaders. Given the environment where news broadcasters become the guardians of what information is disseminated, it is important to require a high standard of integrity.

Congress has granted the FCC the authority to oversee the licensing and regulation of broadcasting companies in order to ensure that these companies are reporting stories with integrity and accuracy. Despite the emphasis that the Commission puts on its authority, it still gives news broadcasters immense authority to be guardians of information.[75] Since the public relies on the information reported, it is important for the regulations set out by the FCC to have actual meaning for companies that intentionally distort the news. Broadcasting is a large industry which lends itself to news companies choosing stories and reporting on them in a way that will grab the public's attention, which can lead to and has lead to slanting and distorting the report in order to be profitable in this competitive market. Unfortunately, the need to compete in the market can be contrary to the role of broadcasters as "public trustees."[76]

C. INTENTIONAL DISTORTION OF NEWS

The FCC faces a conflict when regulating the intentional distortion of news. The Commission tries to balance the interests of "consumers [who] have urged the FCC to set guidelines to prevent bias or distortion by networks and station licensees or to supervise the gathering, editing and airing of

[75] FCC Consumer Facts, *supra* note 49.

[76] *Id.*

news and comments" and "consumers [who] fear possible government intimidation or censorship of broadcast news operations."[77] Absent the authority to censor broadcast news, the FCC has the challenge of regulating against the deliberate distortion of news without violating the right to free speech and broadcasting.[78] Despite this limitation, the FCC still has the responsibility to regulate the intentional distortion of news. However, it refuses to act unless "it has received *documented evidence* of such rigging or slanting."[79] The FCC maintains that its ability to grant, review and revoke licenses does not mean regulating whether or not broadcasting companies are reporting matters truthfully.

The FCC's position on its authority to regulate the intentional distortion of news is that its authority is limited to determining whether or not the broadcasting company acted intentionally and deliberately to falsify material or significant aspects of a news report, and whether that directive came from top management.[80] In *In re CBS Program 'Hungry in America'* the Commission opined that it is an "inappropriate" role for the Commission

> [T]o hold an evidentiary hearing and upon that basis (i.e., credibility or demeanor judgments), make findings as to the truth of the situation. The truth would always remain a matter open to some question, and unlike a tort or contract case, where a judgment must be made one way or another, that is not the case here. The issue presented here by the complaints is not one under the fairness doctrine, concerned with presentation of

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[77] *Id.*

[78] *Id.* Broadcasting agencies are both protected by the Communications Act, which forbids censorship, and the First Amendment, presenting a challenge for the FCC when regulating against the intentional distortion of news.

[79] *Id.* (emphasis added). Case law shows an extremely high burden placed on a party complaining of the intentional distortion of news. The court has developed a two part test, both prongs of which must be met in order for the evidence to be considered sufficient to show rigging or slanting, emphasizing "orders from station management to falsify the news." *Id.*

[80] *In re* CBS Program 'Hunger in America,' *supra* note 53, at 150.

> contrasting viewpoints . . . but rather, whether to find the licensee has sought deliberately to slant the news.[81]

Now, under *Serafyn*, the courts look to a two-prong test to deal with the issue of the claim's substantiality. The distorted reporting must be "deliberately intended to slant or mislead" and must be in reference to a significant and material element of the broadcast.[82]

In *Serafyn v. FCC*, the United States Court of Appeals reviewed a claim in which Serafyn challenged the FCC's dismissal of a petition to deny CBS's broadcast license. The plaintiff requested a hearing to review CBS's license for allegedly intentionally falsifying and distorting the news during a specific segment of *60-minutes*.[83] Serafyn brought the claim under §309 of the Communications Act, which provides for third parties to petition the FCC regarding the denial of a license if it is against the "public interest, convenience and necessity" so long as they provide specific allegations and claims.[84]

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[81] *Id.* at 147. The issue that the FCC was commenting on was whether or not the CBS engaged in "sloppy journalism" or was "recklessly indifferent" in showing a dead baby, claiming it died from malnutrition, not whether the baby actually died of malnutrition. *Id.* This case was brought against CBS alleging that they portrayed a dead child and represented that he had died of malnutrition, without having interviewed the treating physician or the child's parents, without checking the medical records, without attempting to properly identify the child and his cause of death, and without obtaining permission from the parents to use footage of this child. Congressman Gonzales alleged that the documentary was 'totally false in part and erroneous or misleading in other parts,' claiming that CBS used the picture knowing that is was a misrepresentation and without properly ascertaining facts. *Id.* at 144.

[82] *Serafyn v. FCC*, *supra* note 1, at 1217.

[83] *Id.* The appellant brought a claim to deny or set a hearing for CBS's station license on the grounds that in one of its broadcasts of 60 Minutes called "The Ugly Face of Freedom," CBS intentionally falsified its depiction of modern Ukraine. The segment described the situation in Ukraine as being excessively anti-Semitic by likening the situation to Nazi-Germany. In addition to the interviewer calling Ukrainians "'genetically anti-Semitic' and 'uneducated peasants, deeply superstitious,'" the broadcast depicted Boy Scouts walking to church with sounds of marching boots and mistranslated a Ukrainian word for Jew as an ethnic slur. *Id.*

[84] *Id.* at 1216. *See also* 47 U.S.C. § 309(a) (2006).

Serafyn argued that the program intentionally distorted its recount of the circumstances in the Ukraine by depicting the country as anti-Semitic. A major issue before the court was to determine whether or not falsification or distortion of news raises the question of the licensee's ability to serve public interest.[85] The determination that the intentional distortion of news was contrary to public policy was made after looking at both the substantiality and materiality of the claim.[86] The court laid out a two-prong test to deal with the issue of substantiality of the claim. The distorted reporting must be "deliberately intended to slant or mislead" and must be in reference to a significant and material element of the broadcast.[87] The court held that it was not sufficient to "dispute the accuracy of a news report" or "question the legitimate editorial decisions of the broadcaster."[88]

The FCC's policy for revoking or denying a license because it is against "public interest, convenience and necessity" requires "extrinsic evidence" that the "licensee, including its principals, top management, or news management" were involved in the "distortion or staging of the news."[89] The FCC has defined extrinsic evidence as evidence of the intent to distort and falsify more than just the broadcast itself. In *Serafyn*, the court held that extrinsic evidence includes "written or oral instructions from station management, outtakes, or evidence of bribery" to show knowledge on behalf of the licensee and its leaders that material elements of the news report were false or distorted.[90] A licensee is not considered responsible for the attempts to distort

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[85] *Id.*

[86] *Id.*

[87] *Id.* at 1217.

[88] *Id.*

[89] *Id. See also, In re Network Coverage of the Democratic National Convention*, 16 FCC 2d 650, 657 (1969) WL 16511 (F.C.C.). The FCC held that it was not the position of the government to engage in activities that would limit the rights of broadcasting companies. Inquiry as to the staging of news would be limited to circumstances where there was a "material indication, in the form of extrinsic evidence." *Id.*

[90] *Id.* at 1219.

news made by employees. The extrinsic evidence must come from "the licensee, including its principals, top management, or news management."[91]

Although the FCC deems "rigging or slanting" news stories "a most heinous act," claiming that "no act [is] more *harmful* to the public's ability to handle its affairs," it looks narrowly upon which situations are appropriate for the Commission's inquiry, so as not to violate the news media's First Amendment protections.[92] The Commission recognizes its scope as a regulating body, not a rulemaking body, so it only acts in situations where it deems its authority is "appropriate."[93] "[The FCC] shall act to protect public interest in this important respect . . . no Government agency can authenticate the news . . . [the FCC] will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself."[94]

The intentional distortion of news is a serious issue of public concern, given the public's strong reliance on news media for information. Similar to environmental concerns and corporate corruption, the prevention of deliberate news distortion is within the public interest. Unfortunately, the Commission refuses to extend its function as a regulatory body to include actual enforcement of its policy against deliberate news distortion.

State court systems can augment the policy against the intentional distortion of news by reading their whistleblower statutes broadly. Providing protection to employees who disclose, abstain or object to all activities against public interest will help to reduce slanted news reports. Since the regulation of

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[91] *In re* CBS Program 'Hunger in America,' *supra* note 53, at 150. While the FCC will inquire into situations where station employees intentionally falsify the news, the licensee will not be subjected to any risk of revocation. The deliberate distortion of news by employees is a reflection on "whether the licensee is adequately supervising its employees, but normally will not raise an issue as to the licensee's character qualifications." *Id.*

[92] *Id.* at 151.

[93] *Id.*

[94] *Id.*

news broadcasting is an important governmental interest, whistleblower statutes should be read broadly to provide an incentive for disclosure of these activities that are against public policy.

IV. *NEW WORLD COMMUNICATIONS V. AKRE*

On August 18, 2000, Jane Akre was victorious after a unanimous decision by a jury in her claim against Fox News subsidiary WTVT. The jury held that she should collect damages for suffering retaliation in the form of terminated employment after she threatened to report the news company to the FCC for the intentional distortion of news.[95]

Jane Akre was hired with her husband, Steve Wilson, by Fox News to create a series of investigative reports which were extensively promoted as a *60-Minutes* type program. In commercials, Fox promoted the team as the Mod Squad, walking as a deep voice promoted, "'The Investigators: uncovering the truth, getting results, protecting you!'"[96] The husband/wife team had 50 years' combined experience in broadcast news and had received a number of awards when Fox News recruited them in 1996 in order to augment its investigative reporting unit.[97]

With promises from Fox News to Akre and Wilson that Fox would protect the team and never crumble under the pressure of disgruntled advertisers to pull or change an unflattering story,[98] in 1997 they started to investigate the use of bovine growth hormone (BGH) in the dairy farming industry.[99] BGH, a product manufactured by Monsanto Corporation, is used in dairy farming in order to promote production and is

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[95] *New World Commc'ns*, 866 So.2d 1231.

[96] Steve Wilson, *Fox Continues News Distortion After Loss*, http://www.foxbghsuit.com/jaswo82600.htm (last visited Dec. 31, 2008).

[97] *Id.*

[98] *Id.*

[99] Project Censored, *The Media Can Legally Lie,* (2004), http://www.projectcensored.org/top-stories/articles/11-the-media-can-legally-lie/ (last visited Dec. 31, 2008).

controversial since it is linked to cancer.[100] In the four part series produced by the team, information was uncovered regarding health risks and the selling of BGH milk in supermarkets after it was claimed that the milk was not from BGH-treated cows.[101]

Monsanto sent two letters to Fox News after learning that this investigation. Monsanto's legal team alerted the news company of the dire consequences which would befall Fox if they chose to air the story without major editing.[102] On February 21, 1997, Monsanto sent Fox its first letter detailing the investigation carried out by the Wilson/Akre team, highlighting their bias against the hormone and questioning their investigative integrity. The letter requested that the senior news executives "consider thoroughly what is at stake and the enormous damage that can be done by the reckless presentation of unsupported speculation as fact and the equally reckless publication of unsupported accusations or innuendo of fraud, deception, and bribery."[103] One week later, Monsanto sent a second letter finding it "nothing short of amazing" that there had been no change in the situation after the "detailed letter" about Monsanto's concerns. The legal department noted that both parties' common interest in finding fact seemed contradictory to the interest of the investigatory journalists.[104]

The pressure from Monsanto caused Fox News to act in the following ways: (1) they attempted to have other reporters cover the story; (2) they threatened to fire journalists who would not cooperate with the plan to change or bury the story; (3) they bribed journalists with a six-figure offer to get on board with the changes to promote Monsanto; (4) they had Akre re-write the story 83 times over nine months without success in making it

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[100] Wilson, *supra* note 95.

[101] Project Censored, *supra* note 98.

[102] Wilson, *supra* note 95.

[103] Letter from John J. Walsh, Counsel for Monsanto, Cadwalader, Wickersham & Taft, LLP, to Roger Ailes, Chairman and CEO, Fox News (Feb. 21, 1997; Feb. 28, 1997), *available at* http://www.foxbghsuit.com/mon2ltrs.pdf (last visited Dec. 31, 2008).

[104] *Id.*

acceptable to air; (5) they threatened to suspend the journalists' pay for three weeks unless they provided a script in accordance with the attorneys' demand; and (6) they fired the team in 1997 for no cause.[105]

In the aftermath of the termination of Akre and Wilson from Fox, the two filed suit under the Florida Whistleblower statutes which offer protection for employees who experience retaliation for their refusal to participate in, or to report any activity that is illegal. The complaint alleges that WTVT breached their employment contract, sought declaratory judgment clarifying the rights of the Employment Agreements, and was in violation of the Whistleblower Act (Florida Statutes §§448.101-.105).[106]

Over the course of a month, the jury reviewed the evidence of the case and unanimously decided in favor of Akre on her whistleblower claim, awarding her $425,000.[107] The jury instructions were clear in that they were only to rule in favor of Akre if the evidence showed that retaliation was the only reason for her termination. According to the jury instruction it was required that the

> Plaintiffs establish that WTVT's station or news management acted intentionally and deliberately to falsify or distort the Plaintiff's news report on BGH . . . the alleged falsification or distortion must have involved a significant event or a matter that affected the basic accuracy of the news report and not merely a minor or incidental aspect of the report.[108]

After satisfying her burden of proof that Fox intentionally distorted the BGH story, Akre established the three elements of the Florida Private Whistleblower Statute:

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[105] Wilson, *supra* note 95.

[106] Pls.' Compl., Akre v. New World Commc'ns of Tampa, Inc., 866 So.2d 1231 (Fla. Dist. Ct. App. 2003), *available at* http://www.foxbghsuit.com (last visited Dec. 31, 2008).

[107] Wilson, *supra* note 95.

[108] *Id.*

> A) that he or she threatened to blow the whistle to the FCC about the unlawful editing, 'and, or in the alternative, that B) he or she objected to or refused to participate in the unlawful slanting or distortion in connection with the editing of the BGH story. . . .,'[C)] each plaintiff must prove that the station took retaliatory personnel action because of the reporter's threat to disclose AND/OR because the reporter objected to pr [sic] refused to participate in the editing which the reporter had a reasonable, good-faith belief that such editing amount [sic] to deliberate distortion or falsification of the news if the story were broadcast.[109]

The jury ruled in favor of the whistleblower claim.[110] The team subsequently won the "Goldman Environmental" prize for their efforts in investigating the BGH issue.[111]

WTVT issued a press release after the trial, highlighting Fox News' victory in a two-year ordeal by jury verdict. The press release painted a desperate picture of Wilson and Akre, claiming that they "have been traveling around the world telling anyone who would listen that WTVT management ordered them to falsify a news report on a controversial hormone injected into dairy cows."[112] The press release stated that the court had

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[109] *Id.*

[110] *Id.* At the culmination of the trial, Fox reported that it was vindicated by the unanimous jury verdict, spinning the story to focus on the dropped breach of contract claims and down play that Akre was successful on one claim. Phillip Metlin, Fox VP of News, was quoted as saying, "I think today is a wonderful day for Fox 13 because I think we are completely vindicated on the finding of this jury that we do not distort news, we do not lie about the news, we do not slant the news, we are professionals." *Id.* 80.

[111] Project Censored, *supra* note 98. The Goldman Environmental prize is an award given to grassroots environmentalists because "[T]heir efforts to protect the world's natural resources are increasingly critical to the well-being of the planet." The award began in 1990 to honor "individuals for sustained and significant efforts to protect and enhance the natural environment, often at great personal risk." Goldmanprize.org, http://www.goldmanprize.org/theprize/about (last visited Dec. 31, 2008).

[112] News Release, Fox Television Station, Jury Vindicates WTVT (January 3, 2005), http://www.foxbghsuit.com/wtvtrelease.pdf (last visited Dec. 31, 2008).

thrown out the breach of contract claim and ruled in favor of the station on three out of four jury issues, failing to mention that Akre was successful in receiving whistleblower protection for refusal to participate in intentional distortion and falsification of a news story.[113] The news release concluded by publicizing that the jury's verdict "was a huge step in the right direction."[114]

Fox News appealed the verdict in February 2003, winning its appeal when the Florida Second District Court of Appeals overturned Akre's settlement. The court held that Akre was not within the protection of the whistleblower statute when she and Wilson sent a ninety-eight page Petition to Deny to the FCC, which claimed that it is not within the public interest to renew Fox News' broadcasting license.[115]

Fox News, in their appeal, argued that Akre "failed to establish that . . . '[a] law, rule, or regulation'. . . [was] involved."[116] In their memorandum, Fox News claimed that the respondent's failure occurred because the deliberate distortion of news is not an adopted "law, rule, or regulation" and the licensing standard of the Communications Act cannot be violated as it is an enabling provision.[117]

Fox News first asserted that the "FCC's policy against deliberate news distortion is not a 'law, rule, or regulation' as

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[113] *Id.*

[114] *Id.*

[115] Press Release, Jane Akre and Steve Wilson, Journalists Challenge License of Fox TV in Tampa on Evidence of False and Distorted News Reports (January 3, 2005), http://www.mindfully.org/GE/2005/Fox-TV-Akre-Wilson3jan05.htm.

[116] Def.'s Mem. at 2, New World Commc'ns of Tampa, Inc. v. Akre, 866 So.2d 1231 (2003), *available at* http://www.foxbghsuit.com.

[117] *Id.* at 15-16. Fox News' full argument on appeal was as follows: Akre 1) failed to provide evidence to support her claim that she suffered actual damages from her objection to participate; 2) failed to establish a violation of a "law, rule, or regulation" requisite to the Florida Whistleblower Statute; 3) failed to establish evidence supporting that "she held an objectively reasonable, good-faith belief that WTVT engaged in violation of a law, rule or regulation"; 4) failed to establish specific conduct violating an "law, rule, or regulation, as is required by the plain language of the private whistleblower statute"; and 5) Akre's claim is preempted by other FCC policies and should be dismissed on primary jurisdiction doctrine. *Id.* at 2-3.

defined by Florida's Private Whistleblower Act,"[118] arguing that it had not been adopted within the meaning of the statute. Defendant argued that there was a deliberate requirement in the private whistleblower statute that a rule be adopted in order to "protect regulated entities . . . from being unfairly subjected to liability based on rules that have not been subjected to public rulemaking procedures."[119] In addition to claiming that the FCC's policy against the deliberate distortion of news was not an adopted rule within the meaning of Florida's statutes, the defendant argues that the rule at issue was not a federally adopted rule since it "has never been codified, issued for notice-and-comment, or even set forth in one definitive version and filed for public inspection."[120] The defense's memorandum highlighted the distinction between rule and regulation, claiming that the FCC's policy could not be a rule because it lacked 'future effect.'[121] The appellate court agreed with Fox News' interpretation of the statute, stating that the policy regarding the intentional distortion of news was "developed through the adjudicatory process in decisions resolving challenges to the broadcasters' licenses" which has never been "published with definitive elements and defenses."[122]

The decision further stated that "the 'public interest, convenience, and necessity' standard of §309(a) of the Communications Act of 1934 . . . is merely an enabling provision by which Congress delegated authority to the FCC, and therefore cannot be 'violated' by a licensee."[123] Akre's argument invoked the broad power of the FCC to grant and revoke licenses based on public interest, so that a violation of the policy through the intentional distortion of news results in a violation of §309(a) of the Communications Act.[124] However,

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[118] *Id.* at 15.

[119] *Id.* at 21.

[120] *Id.* at 22.

[121] *Id.*

[122] *New World Commc'ns*, 866 So.2d at 1233.

[123] Def.'s Mem., *supra* note 115 at 15-16.

[124] *Id.* at 25.

Fox News argued that this cannot be a violation since this is not a rule, but rather an "enabling" clause, which granted authority to the FCC.

Fox News also argued that their First Amendment rights would be violated if the FCC started to act as "an arbiter of truth or falsity of a broadcast."[125] Broadcast journalists reserve the right to use their discretion to determine what constitutes suitable and accurate broadcasting. The FCC maintains that they do not have the authority to regulate the content of news broadcasting because its policy against the intentional distortion of news is solely a policy and the scope of its authority is limited by First Amendment protections.[126] Any violation of a broadcaster's discretion is tantamount to governmental intervention. The FCC, in *In re TriState Broad. Co.*,

> [E]xplicitly rejected the notion that a prohibited news distortion could be predicated upon the claim that too much, or not enough, coverage was given to a particular point of view, emphasizing that: "[f]or us to weigh the emphasis given to petitioner's role in the coverage of the trial would be government intervention more dangerous to the public interest than any possible slanting of the news here."[127]

Fox News argues that the FCC policy against the distortion of news is vague, so any liability that a news company would face as a result of this policy is an imposition on its fundamental rights.[128]

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[125] *Id.* at 32 (citing In re CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150, 152-5 (1971)).

[126] *Id.* at 33-34.

[127] *Id.* at 37 (citing In re TriState Broad. Co., 59 F.C.C.2d 1240, 1245 (1976)) (emphasis in original).

[128] *Id.* at 37. Fox News argued on appeal:

> [E]ven if the FCC did have a policy against an alleged slant in "tone" or "balance" of a news report, such a policy would plainly be invalid as a violation of the news media's First Amendment rights. As courts have held again and again, the protection for the press embodied in the First Amendment and articulated in such cases as *New York Times Co. v. Sullivan*, 376 U.S. 254

Five major media groups filed briefs in support of Fox's claim that there are "no written rules against distorting the news in the media," claiming that "the station argued that it simply wanted to ensure that a news story about a scientific controversy regarding a commercial product was presented with fairness and balance."[129] The supporting companies argued that upholding Akre's claim would have detrimental effects because it would "'convert personnel actions arising from disagreements over editorial policy into litigation battles in which state courts would interpret and apply federal policies that raise significant and delicate constitutional and statutory issues.'"[130] Fox News and its supporting parties invoked First Amendment protections, which tend to favor employer rights.

Akre responded to the invocation of the First Amendment, stating:

> "There are no greater supporters of the First Amendment than Steve and I . . . [b]ut the First Amendment is certainly not a license to lie and no broadcaster should be allowed to put its own financial interests ahead of the public interest. The public interest is by law the primary obligation of every broadcaster who uses our public airwaves to make their corporate fortune, especially when broadcasting the news."[131]

Akre and Wilson are accusing the broadcasting company of hiding behind the shelter of the First Amendment both to the

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(1964), prohibits such vague standards from being applied to impose liability against the news media. As the U.S. Court of Appeals for the Ninth Circuit has explained, imposing liability based on the "overall message of a broadcast," rather than on proof of specific falsehoods is impermissible because it "would make it difficult for broadcasters to predict whether their work would subject them to tort liability creating uncertainty that "raises the specter of a chilling effect on speech." Auvul v. CBS 60 Minutes, 67 F.3d 816, 822 (9th Cir. 1995). Def.'s Mem. at 37-38.

[129] Project Censored, *supra* note 98.

[130] *Id.*

[131] Press Release, *supra* note 114.

detriment of public interest and in a way that disregards their duty to report the news with integrity.

On appeal, the Second District Court stated that they "need not address each challenge because we find as a threshold matter that Akre failed to state a claim under the whistle-blower's statute."[132] The court reasoned that the FCC's policy was not ever published "as a regulation with definitive elements and defenses."[133] The policy was the result of a series of adjudicatory proceedings taken together.[134] Holding that this policy is not an "adopted" rule with in the meaning of the statute, the court reasoned that upholding jury's award for Akre would not be in accordance to the deliberate choice of the legislature to use "adopted" because it provides legitimate notice.[135]

The Appellate Court stated that Akre's claim failed on two different points. The court first explained that federal law does not consider rulemaking and adjudication as having the same authority. Secondly, the court stated that, "while federal agencies may have discretion to formulate policy through the adjudicative process, the same is not true under Florida law."[136] Under Florida law, agencies must formally adopt agency statements and policy formed during the adjudicatory process within the statutory definition of "rule" such that it can be consistent with the legislature's intent in the whistleblower's statute.[137]

The effect of the *Akre* case was that the Florida appellate court ruled that it was not illegal to distort the news. Relying on

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[132] *New World Commc'ns*, 866 So.2d at 1233.

[133] *Id.* The policy was developed through adjudication as a part of evaluating broadcast licenses, arising in 1949, with the FCC's concern that "'[a] licensee would be abusing his position as a public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news of facts concerning a controversy or to slant or distort the news.'" *Id.*

[134] *Id.*

[135] *Id.* at 1234.

[136] *Id.*

[137] *New World Commc'ns.*, 866 So.2d at 1234.

the fact that the policy was developed over time throughout the adjudicatory process, the court stated that Akre's actions were not protected by the whistleblower statute because threatening to petition the FCC to report the occurrence of news distortion was not a protected activity. The FCC policy, which the Commission created and developed through the adjudicatory process, is not an 'adopted' rule within the meaning of Florida's statutory definition. The court's decision to hold in favor of the Fox News subsidiary, in essence, removed any legal implication for the distortion when it stated that it was not in violation of the anti-retaliation policy within the Florida Private Whistleblower Statute.

V. CONCLUSION

Jane Akre failed to satisfy the first prong of proving a whistleblower claim, according to the court, in that she did not demonstrate that she was participating in a protected whistleblower activity. This case shows that the courts as well as the Commission are unwilling to look at the policy against the intentional distortion of news as a legal matter.

The FCC has adjudicated a number of complaints in regard to the intentional rigging or slanting of news; they have been ineffective in regulating the issue of deliberately distorted news. Without holding news companies liable to anyone other than the shareholders, there is nothing stopping companies from reporting information inaccurately. Despite the balancing act the FCC engages in with regard to its regulation of broadcasts, they should take a stronger stance on enforcing their policy against the intentional distortion of news. News media are the guardians of information, which affords them the power to control what information this country has access to and the scope of the information received. Since the public relies on this information to make informed decisions about politics and social policy as well as decisions about their personal life, it is extremely important for the news to be reported with integrity.

Alternatively, whistleblower protections should be extended to protect employees within a broadcasting company who report incidents of the deliberate distortion of news. This issue is extremely important to the public welfare, so the government should provide an incentive for reporters and employees of

broadcasting companies to report a broadcasting company's abuse of its position as a "public trustee." Given the FCC's position, it is imperative to extend whistleblower protections to employees who disclose the deliberate distortion of news. Providing this incentive will help the government regulate the accuracy of the information distributed nationwide. Improving the integrity of news broadcasts will allow the public to form an informed public opinion on current events resulting in an improved discourse, which could lead to a more effective government.

PRESERVING THE BEST INTERESTS OF THE WORLD'S CHILDREN: IMPLEMENTING THE HAGUE TREATY ON INTERCOUNTRY ADOPTION THROUGH PUBLIC-PRIVATE PARTNERSHIPS

Lisa Myers[1]

I. INTRODUCTION

Hundreds of thousands of parentless children die each year from neglect, poverty, malnutrition, and disease.[2] They die in institutions and on the streets of cities throughout the world. While many international organizations and world leaders have taken up these children's causes, assistance has been slow and sporadic at times due to wide and passionate disagreements as to how best to allocate resources and care for needy children. Among all of the debated policies, international adoption is the most hotly contested solution to orphaned and abandoned children's problems. While some countries have encouraged this solution, others have outlawed it.

Multilateral treaties have only recently recognized international adoption as an acceptable and important option

[1] J.D., Rutgers School of Law – Camden (2008); Masters in Public Administration, Rutgers-Camden Graduate School (2008). Adoption Clerk, Camden County Surrogate's Court, New Jersey.

[2] THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ET AL., CHILDREN ON THE BRINK 2004: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION (UNAIDS/UNICEF/USAID eds., 4th ed. 2004), *available at* http://pdf.usaid.gov/pdf_docs/PNACY333.pdf [hereinafter Joint Report] (also indicating that "institutional life tends to promote dependency and discourage autonomy").

for children without families.[3] These treaties have the potential to be far-reaching and to profoundly impact the world's population of orphaned, neglected, and abandoned children. One of the main agreements, the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (hereinafter Hague Treaty), is an impressive step forward for international adoption. However, the Hague Treaty is limited in that it only applies to adoptions between countries that have (1) signed onto the Hague Treaty and (2) taken the necessary steps to fully comply with its tenets.[4] Both the "sending" country, where the child is originating from in the adoption process, and the "receiving" country, where the adoptive parents reside, must be signatories to the Hague Treaty for the child to receive the Treaty's protections. Many countries have failed to adopt or fully implement the Hague Treaty because they do not support international adoptions or their governments are simply unwilling to comply with the agreement. However, many countries also seem concerned that they do not have the necessary resources to comply with all of the Hague Treaty's requirements and therefore choose not to become signatories to this important treaty.[5]

Despite the growing population of orphaned and needy children and the Hague Treaty's formal acceptance of international adoption as a legitimate option for many children, opponents of international adoptions still seek to restrict them in countries that have not yet become a part of the Hague Treaty as well as in those countries struggling to properly adhere to the Hague Treaty's requirements. This Note outlines the ways in which misinterpretations of the Hague Treaty, and poor implementation of its safeguards, have jeopardized international adoptions. Specifically looking at Guatemala, this Note examines the ways in which the possibility of adoption has

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[3] Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?,* 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 365 (2007).

[4] G. PARRA-ARANGUREN, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 14, (1994), *available at* http://www.hcch.net/upload/expl33e.pdf (indicating that the Hague only works between two Hague countries).

[5] McKinney, *supra* note 3, at 394-401.

virtually been eliminated for thousands of needy children, even within those countries that have adopted the Hague Treaty. Additionally, this Note outlines permitted, alternative implementations of the Hague Treaty that would ensure safer, more manageable procedures to facilitate international adoption in developed and developing nations. Ultimately, Hague Treaty countries must be allowed to pursue methods of implementation that suit their unique needs and resources, whether their chosen implementation utilizes wholly public adoption systems or partnerships between government agencies and accredited, private adoption service providers.

The Hague Treaty's inclusive and flexible approach to methods of ratification allows for the greatest likelihood of success among the greatest number of countries. Without compromising the best interests of children, the Hague Treaty struck a balance between hard-and-fast rules and flexible implementation options left to individual governments' discretion. An assessment of the Hague Treaty's reach in late 2006 revealed that an equal number of sending and receiving countries had signed onto the Treaty.[6] As long as Hague contracting countries thoroughly apply the Treaty's strictures and criminalize child-trafficking practices, they are free to implement the Treaty through wholly public means or via public-private partnerships.[7] Through the use of public-private partnerships, countries are able to monitor and reduce corrupt practices while maintaining steady adoption caseloads. With the United States' full ratification and the Hague Treaty's "entry into force" within this country as of April of 2008, the world

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[6] Permanent Bureau, Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption 3, 14 (2005) (unpublished report, on file with the Hague Conference on Private International Law and also *available at* http://www.hcch.net/upload/wop/genaff_pd09e2006.pdf).

[7] Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 (1993) [hereinafter Hague Conference].

now has a well-established working model of a public-private adoption system that meets Hague Treaty standards.[8]

The United States accounts for more foreign adoptions than all other countries combined, making it an influential participant in the international adoption process.[9] Following ratification, the United States became well positioned to partner with countries struggling to implement the Hague Treaty and adoption safeguards. The United States' established public-private adoption system represents a workable alternative for many countries that are unable to support wholly public systems. Hague Treaty countries should be encouraged to participate in the way that best suits their resources so that adoptions are not unintentionally stifled or eliminated through misapplications of law and the erection of impossible bureaucratic barriers. Hague Treaty countries must be permitted to facilitate well-integrated, efficient systems that protect children who lack parental care. Increasing the number of Hague contracting countries will help to further strengthen and extend the reach of the Treaty's safeguards as well as ensure the future of international adoptions.

A. THE WORLD'S GROWING POPULATION OF ORPHANS AND ABANDONED CHILDREN

In a perfect world, all children would grow up loved and cared for by parents who are available, willing, and able to meet their needs from the day they are born. Unfortunately, millions of the world's children are forced to grow up or die without parental care, ultimately living on the streets or in state-run institutions.[10] Additionally, children living outside the care of

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[8] Press Release, U.S. Dep't of State, U.S. Ratifies the Hague Convention on Intercountry Adoption (Dec. 12, 2007) (on file with author), *available at* http://www.state.gov/r/pa/prs/ps/2007/dec/97148.htm.

[9] Press Release, U.S. Dep't of State, A Milestone for Intercountry Adoption (Dec. 12, 2007) (on file with author), *available at* http://travel.state.gov/news/press/press_3898.html.

[10] ANDREW DUNN ET AL., INT'L SAVE THE CHILDREN ALLIANCE, A LAST RESORT: THE GROWING CONCERN ABOUT CHILDREN IN RESIDENTIAL CARE (2003), *available at* http://www.savethechildren.net/alliance/resources/last_res.pdf.

their families are "always at a greater risk from trafficking, exploitation, forced labour and forced recruitment."[11]

While government institutions may provide greater safety than life on the street, these institutions are often overcrowded to such a degree that children live in "inhuman" and "life-threatening" conditions.[12] Worldwide investigations reveal that children in institutions, even those institutions considered the best available, often receive inadequate nutrition and health care and are subjected to abuse, exploitation, and harsh punishments.[13] An analysis published by the American Academy of Pediatrics indicated that the "medical and psychosocial hazards of institutional care . . . cannot be reduced to a tolerable level even with massive expenditure."[14] The article goes on to say that young children subjected to even limited periods of time within an orphanage are, at a minimum, more likely to contract infectious diseases and experience delays in language development. Young children living in institutions for periods exceeding several months begin to suffer social and

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[11] *Id.* at 14.

[12] Improving Protection for Children Without Parental Care: A Call for International Standards 8, (Aug. 2004) (unpublished Joint Working Paper, on file with Int'l Soc. Serv. & UNICEF), *available at* http://www.iss.org.au/documents/ACALLFORINTLSTANDARDS.pdf [hereinafter International Standards]; *see also* Zeynep Simsek, Nese Erol, Didem Oztop & Kermin Munir, *Prevalence and Predictors of Emotional and Behavioral Problems Reported by Teachers Among Institutionally reared Children and Adolescents in Turkish Orphanages Compared to Community Controls*, 29 CHILDREN AND YOUTH SERVICES REVIEW 883, (2007) (detailing a study of children ages eight to eighteen living in orphanages throughout Turkey and determining that all orphanage children are at greater risk for emotional and behavioral problems but the youngest children admitted were at the highest risk); The St. Petersburg-USA Orphanage Research Team, *Characteristics of Children, Caregivers, and Orphanages for Young Children in St. Petersburg, Russian Federation*, 26 J. OF APPLIED DEVELOPMENTAL PSYCHOL. 477, (2005) (initially critical of the lack of empirical evidence of developmental delays related to orphanages, this article concludes that a large number of orphanage children have "poor perinatal circumstances, and most fall far below the average local Russian norms on physical, cognitive and psychological development").

[13] *See* International Standards, *supra* note 12.

[14] Deborah A. Frank et al., *Infants and Young Children in Orphanages: One View from Pediatrics and Child Psychiatry*, 97 PEDIATRICS 569, 569 (1996).

intellectual damage that extends throughout the child's life, meaning almost all orphans that are not adopted or removed from the institution before four years of age become psychiatrically impaired and economically underproductive adults.[15] Even in the most superior, well-funded orphanages, children have little to no privacy or personal attention and are not given any preparation for their life after they must leave the institution.[16] Additionally, in state-run institution environments, the relationship between the institution worker and the orphan typically remains professional rather than personal or parental due to issues of understaffing, overcrowding, and the employee-client environment.[17] As a result, institutional children often spend years in state-run facilities without making personal connections, forcing them to struggle individually with the social stigma associated with being an orphan.[18] The importance of a stable, permanent family environment in a child's life is well documented, and the Hague Treaty's recognition of the value of international adoption is an affirmation of every child's right to a family.[19]

Diverse circumstances prevent millions of children from growing up with families and, instead, force them to live on the streets or in state-run institutions. Some children are the result of unwanted pregnancies and are born to women and men who do not choose to be parents.[20] Mental and physical illnesses, financial hardships, lack of social services, addictions, and death also prevent parents throughout the world from ensuring their

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[15] *Id.* at 571-75.

[16] DUNN ET AL., *supra* note 10, at 13.

[17] *Id.* at 1.

[18] *Id.*

[19] *See* Frank et al., *supra* note 14; *see also* JOHN BOWLBY, WORLD HEALTH ORG., MATERNAL CARE AND MENTAL HEALTH 67-69 (1952); American Academy of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1148-49 (2000) [hereinafter *Developmental Issues*].

[20] EVAN B. DONALDSON ADOPTION INST., PRIVATE DOMESTIC ADOPTION FACTS, http://www.adoptioninstitute.org/FactOverview/domestic.html (last visited Dec. 16, 2008).

children's healthy futures.[21] These problems transcend specific countries, cultures, and races. While social and cultural conditions vary among countries, many developing nations face unique challenges and therefore have higher populations of refugees, abandoned children, and orphans than industrial nations. Regardless of the cause, countries throughout the world are hard-pressed to meet the needs of these desperate children.[22]

Currently, there are 600,000 children in the U.S. foster care system.[23] In comparison, 1.5 million children in Central and Eastern Europe are forced to live in orphanages or foster homes.[24] These children are without families for a myriad of reasons. Some are abandoned or given up because their parents cannot afford, or are not prepared, to care for them while others are orphaned through the tragedies of disease and genocide. For instance, in 2005, 14 million children worldwide were orphaned due to HIV/AIDS.[25] This problem is growing, and experts estimate that approximately 25 million children will have lost either their mother or both parents to this terrible epidemic by the year 2010.[26] Although the ravages of HIV/AIDS have left many children without families, tragic and increasingly pervasive circumstances such as civil war, genocide, famine, and poverty have pushed the number of sub-Saharan orphans to over 43 million.[27] Of equal concern, the orphan population in Asia was estimated at 87.6 million in 2004.[28] No matter what the cause, the fact remains that millions of children throughout

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[21] JOINT REPORT, *supra* note 2, at 3-4.

[22] *Id.*

[23] International Standards, *supra* note 12, at 2.

[24] *Id.*

[25] JOINT REPORT, *supra* note 2, at 7.

[26] DUNN ET AL., *supra* note 10, at 5.

[27] JOINT REPORT, *supra* note 2, at 3-4 (for purposes of the UNICEF study, "orphan" included any individual under the age of 18 that was without one or both parents).

[28] *Id.*

the world lack parents, food, shelter, medicine, and protection from exploitation and abuse.

B. THE CONTROVERSY OVER INTERNATIONAL ADOPTION

Both critics and champions of international adoption seek to prevent the exploitation, suffering, and death of these children, who truly represent the most vulnerable and innocent members of our global society. Many of the world's leaders, human rights organizations, and leading scholars have publicly recognized that international adoption often represents the only means of saving orphaned or abandoned children from lives of abuse, neglect, or exploitation.[29] During discussions of the Hague Treaty's purpose and content, numerous leaders from diverse cultures, including Bolivia, Columbia, and Sweden, communicated the overarching importance of a child's right to be raised in a family environment.[30] UNICEF, an organization that had previously been grouped with opponents of international adoption, recently made a public statement indicating their support of intercountry adoption when no domestic alternatives to institutionalization exist for orphaned or abandoned children.[31] While their statement includes

[29] *See generally* Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181 (1996) (discussing various approaches to the plight of orphaned children by countries throughout the world, this article concludes that more must be done and countries to meet the needs of these countries and accommodate the twin goals of protecting children from baby-selling while also making adoption available to as many children as possible); Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with The Hague Convention on Intercountry Adoption*, 21 B.U. INT'L. L.J. 179, 190 (2003) (criticizing the approaches of treaties and countries that do not provide for international adoption and analyzing the need for more information on the world's population of orphaned children); Press Release, UNICEF, UNICEF's Position on Inter-Country Adoption, *available at* http://www.unicef.org/media/media_41118.html (last visited Dec.16, 2008) (explaining that UNICEF's position on international adoption has been misunderstood to rule out adoption as preferable to a child living in his country of origin, in an institution).

[30] PARRA-ARANGUREN, *supra* note 4, at ¶¶ 237-46.

[31] Press Release, UNICEF, UNICEF's Position on Inter-Country Adoption, *available at* http://www.unicef.org/media/media_41118.html (last visited Dec.16, 2008).

cautions about adoption abuses, this public message is also an endorsement of the Hague Treaty and its widespread implementation.

Opponents of international adoption, however, argue that it detracts from other, more important efforts to properly support families who want to continue to raise needy children in their countries of origin.[32] By eliminating the option of international adoption, these advocates believe that they are protecting families from divisive forces and children from potential adoption abuses such as kidnapping, child trafficking, and other exploitation by unscrupulous individuals.[33] Many critics also argue that allowing international adoptions diverts attention, and thereby important resources, from in-country programs such as foster care and relief for struggling families.[34] Additionally, opponents of international adoption argue that children deserve and even need to be raised by members of their own culture to properly preserve the child's heritage, identity, and ethnicity.[35]

These vocal critics too often overlook the best interests of orphaned children that do not have any viable options for healthy, secure homes in their countries of origin.[36] The critics

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[32] BARONESS EMMA NICHOLSON, ALLIANCE OF LIBERAL & DEMOCRATS FOR EUROPE, MY POSITION ON INTER COUNTRY ADOPTIONS (2006), http://emmanicholson.info/work/my-position-on-inter-country-adoptions.html (indicating that corruption and "rampant abuses" in Romania's intercountry adoption program during the 1990's have convinced her that Romania's ban on these adoptions should continue, and greater efforts should be invested in domestic foster care systems).

[33] David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006).

[34] Meave Garigan, *Guatemala's Adoption Industry*, 27 SAIS REV. 179 (2007); *see also Marc Lacey, Guatemala System Is Scrutinized As Americans Rush In to Adopt*, N.Y. TIMES, Nov. 5, 2006, at A1, 8.

[35] Smolin, *supra* note 32 at 127.

[36] In China, the "one child per family" policies have led parents to abandon unwanted children, particularly daughters. In other countries, particularly in Latin America or Sub-Sahara Africa, poverty, disease, and civil war have left children without parents and families without enough resources to adopt them. *See* Nili Luo & David Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 600-03

reduce their portrayal of international adoption to an inherently corrupt process that allows wealthy couples from industrialized nations to take children away from their home countries, thereby depriving the children of their heritage while taking a precious resource from less affluent cultures.[37] These critics fail to address the fact that the majority of adoptable children are barely surviving desperate conditions in impoverished nations where in-country adoption is simply not available. These children have immediate and pressing needs for the food, shelter, medical care, and emotional support necessary to live well-adjusted lives. The arguments against international adoption often ignore the very immediate dangers facing these children, the significant limitations of the countries where they live, and the ability and willingness of foreign parents to offer adopted children a secure life that also integrates aspects of their heritage, ethnicity, and cultural differences.[38] While international systems may not be perfect and certainly warrant improvements to protect the best interests of families and children, focusing exclusively and disproportionately on problems and reducing the entire practice to a corrupt violation of children's rights is a deadly oversimplification. Millions of children are languishing in terrible conditions throughout the world and, as Hague member states have recognized, international adoption may be their only hope for a life free of misery and pain.

(2005); PETER KATEL, INT'L SOC. SERV., CHILDREN ABANDONED: GUATEMALA'S YOUNG PEOPLE AND THEIR SEARCH FOR A FUTURE (2003).

[37] David M. Smolin, *Intercountry Adoption As Child Trafficking*, 39 VAL. U. L. REV. 281 (2004) (indicating that intercountry adoption does not have enough criminal penalties and policing to prevent child trafficking). *Compare* Elizabeth Bartholet, *Slamming the Door on Adoption: Depriving Children Abroad of Loving Homes*, WASH. POST, Nov. 4, 2007, at B7 (stating that although "the critics argue that we should develop foster-care alternatives for children in the countries they are from, and UNICEF's official position favors in-country foster care over out-of-country adoption . . . foster care does not exist as a real option in most countries that allow children to be adopted abroad, and the generally dire economic circumstances in these nations make it extremely unlikely that comprehensive foster care programs will soon be developed").

[38] Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 ADOPTION 104, 112-14 (1993).

C. INTERNATIONAL DIPLOMATIC RESPONSE TO ABANDONED AND ORPHANED CHILDREN

Numerous world leaders have acknowledged the precarious position of many children in their countries and have taken formal steps to protect the rights of these particularly vulnerable members of their society.[39] By enacting domestic laws and signing international treaties, both developing countries and industrial nations have worked to protect children from forced labor, poverty, disease, and exploitation. Comprehensive children's rights laws, such as the United Nation's Convention on the Rights of the Child and the Hague Convention on International Cooperation and Protection of Children in Respect of Intercountry Adoption, place a legal emphasis on the "best interests of the child" when any decisions are made regarding children.[40] The child's best interests must be paramount in any decision concerning their care or placement.

In compliance with these international treaties, countries have implemented laws to remove children from dangerous circumstances and place them in the most loving and safe environments available.[41] While some of these laws involve foster placements and institutional care, many countries have responded to recent research on child development and welfare by focusing on more permanent solutions to the problems of orphaned children.[42] Finding safe and lasting homes for each child, as early in the child's life as possible, has become an integral part of securing the child's best interests. To this end, an increasing number of countries and international

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[39] Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm; *see also* International Labor Organization [IPO], *Report of the Committee on Child Labour*, ILC 87 (June 1999), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chil.htm.

[40] Hague Conference, *supra* note 7.

[41] *See id* at 1135. *See also* Adoption and Safe Families Act of 1997, 42 U.S.C. 1305 (2006) (encouraging adoption and linking federal funding to moving children from the United States foster care system into permanent, adoptive homes as quickly and safely as possible).

[42] *See* BOWLBY, *supra* note 19, at 67-69; *Developmental Issues*, *supra* note 19, at 1148-49; *see also* 42 U.S.C. §1305.

organizations have legally recognized intercountry adoption as a valid option for children without a family to care for them.[43]

The Hague Treaty represents the most recent and comprehensive effort by world leaders to recognize international adoption as a legitimate method of securing the futures of parentless children who are otherwise forced to live in poverty. Intercountry adoption offers an important means of ensuring that at least some orphaned or abandoned children enjoy the necessary consistency, security, and care to live a healthy, well-adjusted life.[44] The Hague Treaty specifically states that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."[45]

Despite this formal recognition of the value of international adoption, certain human rights activists and isolated diplomats continue to assert that international adoption is just another method of exploiting children because, they claim, international adoption undermines alternative efforts to empower families and destroys a child's cultural identity.[46] Baroness Emma Nicholson is a leading and outspoken opponent of international adoption. Having previously served on the European Union Entrance Committee, Baroness Nicholson used this position and her disdain for international adoption to speak out against the practice and prohibit it wherever possible. She has written several press releases and position papers on the subject, even going so far as to deny Romania entrance into the European

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[43] INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 2-7 (Howard Altstein & Rita J. Simon eds., Praeger 1991); CHILDREN ON THE MOVE: HOW TO IMPLEMENT THEIR RIGHT TO FAMILY LIFE 63 (Jaap Doek et al. eds. 1996).

[44] Carrie A. Rankin, *Romania's New Child Protection Legislation: Change in Intercountry Adoption Law Results in a Human Rights Violation*, 34 SYRACUSE J. INT'L. L. & COM. 259 (2006).

[45] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, Convention Opening Statement (1995), *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=69.

[46] BARONESS EMMA NICHOLSON, ALLIANCE OF LIBERAL & DEMOCRATS FOR EUROPE, WHY I SET UP THE CHILDREN'S HIGH LEVEL GROUP CHARITY (2006) (on file with the author), *available at* http://emmanicholson.info/media/why-i-set-up-the-children's-high-level-group-charity-2006.html.

Union unless they outlawed international adoptions.[47] Critics who align with the Baroness' unequivocal rejection of international adoption opposed the passage of the Hague Treaty and focused specifically on the Hague Treaty's allowance for public oversight of private agency contributions to the adoption process.[48] Critics of international adoption continue to advocate for either full cessation of foreign adoptions or for entirely government-run adoption systems in Hague Contracting countries.[49] In some cases, these critics' insistence on fully public systems, rather than public oversight of some private functions, has had a similar effect as their efforts to ban adoptions in non-Hague Treaty countries. Many countries that have opted for a fully government-run system with no accredited private actors contributing to the government effort have caused a de facto moratorium on international adoptions.[50] Several

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[47] Diane Kunz & Diane Reese, *A One-Woman War Against Intercountry Adoption*, WALL ST. J. EUR., Feb. 4-6, 2005, *available at* http://www.adoptionpolicy.org/pdf/WSJE_CAP.pdf.

[48] Ajanette Hamilton, *Privatizing International Treaty Implementation*, 58 ADMIN. L. REV. 1053 (2006); *see also* GERALDINE VAN BUREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD, 97, 100 (1995) (indicating that the use of private agencies is one of the most controversial aspects of the Hague Treaty).

[49] *See* Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 325-26 (2000).

[50] Statistics on visas issued for adopted children retrieved from the United States Department of State and information on the ratification of the Hague Treaty by countries throughout the world show a decline in children adopted from sending countries by American families once the Hague has been implemented. The decrease is particularly pronounced in Latin American countries where fully public systems have been adopted. Adoptions overall show a steady increase from 1990 to the year or two leading up to ratification by each country. For example, Chile adopted 302 children to American parents in 1990, 266 children in 1991, 179 children in 1992, no adoption in 1993, 79 in 1994, 90 in 1995 and 63 in 1996. The Hague Treaty entered into force in 1998 and no visas were issued for children adopted from Chile in the two years proceeding ratification, and no further visas have been issued up to 2006. (Statistics on file with the author). *See also* Immigrant Visa Statistics Issued to Orphans Coming to U.S., *available at* http://travel.state.gov/family/adoption/stats/stats_451.html and HCCH.net, Status Table ,*available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Dec. 16, 2008).

governments laboring to facilitate adoptions through fully public systems are often unable to handle the extensive work required to properly oversee all aspects of each adoption and, as a result, adoptions slow to a trickle or stop altogether.[51] While not true in all cases, for those countries least equipped to employ a wholly public system, the impact of Hague ratification amounts to a de facto stoppage.

II. HAGUE TREATY REQUIREMENTS AND ADOPTION SAFEGUARDS

The Hague Treaty, which entered into effect in 1995, represented the first substantive, legal recognition of the importance of intercountry adoption and the need for comprehensive, uniform standards to prevent potential abuses of this growing practice.[52] Article 1 concisely lays out the Hague Treaty's primary objectives, including the establishment of "safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law."[53] Member states elaborated upon the meaning of these principles during discussions of the Hague Treaty standards and subsequent analyses of the application of the Hague Treaty in member countries.[54] The "best interests of the child" is an inherently nebulous standard but member states sought to solidify the protections under this general standard by upholding two main requirements: (i) that international adoption be considered a valid option but only pursued if a permanent home was not available in the child's country of

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[51] McKinney, *supra* note 3, at 365; *see also* HCCH.net, Hague Questionnaire Response from Australia, *available at* http://www.hcch.net/upload/adop2005_au.pdf.

[52] Bartholet, *supra* note 29, at 208-09.

[53] Hague Conference, *supra* note 7, at 1139.

[54] Permanent Bureau, Guide to Good Practice Under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (2005) (unpublished report, on file with the Hague Conference on Private International Law), *available at* http://www.hcch.net/upload/wop/ado_pd02e.pdf.

origin and (ii) that placements be based on non-discrimination principles.[55] Additionally, practical measures were built into the Hague Treaty procedures to ensure the physical safety of the child, a fundamental preservation of the child's best interest.[56] These measures include safeguards to guarantee that each child is adoptable (rather than a victim of kidnapping or defrauding of his or her family), that information about the child is preserved, and that the child is matched to a suitable family.[57]

A. RESPONSIBILITIES OF SENDING AND RECEIVING COUNTRIES

In accordance with these general measures, the Hague Treaty minimum standards must be met for adoptions to proceed between member countries. Competent authorities within the child's country of origin, also known as the "sending" country, must establish several key factors before an adoption may proceed.[58] First and foremost, the child must be determined to be adoptable.[59] Although the Hague Treaty leaves the definition of specific components of adoptability to Hague member states, "adoptability" typically requires that a child is either orphaned, in that his known parents are deceased, or that the child's biological parents have freely and knowingly consented to the adoption of their child.[60] As is the prerogative of Hague member states, the United States has asserted its own definition of "orphan" which includes requirements that the child has suffered the "death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for

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[55] *Id.*

[56] Permanent Bureau, *supra* note 6, at 18.

[57] *Id.*

[58] Hague Conference, *supra* note 7.

[59] *Id.* at 1139.

[60] *Id.*

emigration and adoption."[61] The Hague Treaty does stipulate that the parents must be fully informed of their rights and of the consequences of agreeing to the adoption and must show that no financial incentives were provided to induce their consent.[62] Other requirements, including careful scrutiny of financial expenditures by the biological parents and other major parties involved in the adoption, are enumerated in the Treaty as part of an overall attempt to eliminate abuses such as "baby selling" and child trafficking.[63]

Since its initial approval, 76 countries have signed onto the Hague Treaty, including the United States.[64] Despite the United States becoming a signatory country in 1994, the Hague Treaty did not enter into force within the United States until April of 2008.[65] The process for full ratification was lengthy, including passage of the Intercountry Adoption Act of 2000 which in the federal law implementing the Treaty, adoption of federal regulations, a period of notice and comment to solicit feedback from adoptive parents, adoption agencies, scholars, critics, and other adoption experts, and extensive agency accreditation to comply with the Hague Treaty requirements.[66] After several years of debate and testimony from stakeholders, including adoptive parents, adoption service providers, and human rights activists, the United States has finally fully implemented the Hague Treaty.[67] Upon completing the ratification process, the

[61] 8 U.S.C. § 1101(b)(1)(F)(i) (2004).

[62] Hague Conference, *supra* note 7, at 1143.

[63] *Id.*; *see also* Laura Beth Daly, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620 (2007).

[64] Status Table, *supra* note 49, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Dec. 16, 2008).

[65] Press Release, U.S. Dep't of State, *supra* note 8.

[66] *See* Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 42 U.S.C. §§ 14901-14954 (2000).

[67] U.S. DEP'T OF STATE, The Hague Convention on Intercountry Adoption: A Guide to Outgoing Cases From the United States 4, *available at* http://travel.state.gov/pdf/Guide_to_outgoing_cases.pdf (last visited Dec. 18, 2008).

United States will be one of only a few countries utilizing private agencies in the adoption process.[68]

Countries such as China and the United Kingdom have likely chosen to implement fully public systems due to their extensive government resources. However, other countries struggling to implement wholly public systems are doing so not because that is necessarily the best system given their unique resources and circumstances but instead because adoption critics and members of the media have emphasized a narrow interpretation of the Hague Treaty and the shortcomings of other adoption practices.[69]

The recent pressure for nations to utilize fully public systems is exceptional given the modern trend towards government service privatization and the special attention paid to public-private partnerships within the final Hague intercountry adoption agreement.[70] The United States and other industrialized countries have begun contracting services out to private actors, including child welfare services, and developing nations have also partnered with organizations, such as the World Bank, to pursue the privatization of utilities such as water, sewer, and power.[71] At the same time that these countries are utilizing the strength and flexibility of the private sector, critics of international adoption and certain human rights organizations have chosen to ignore the Hague Treaty's specific allowance of public-private partnerships and instead insist on wholly public systems.

Both the strongest critics and strongest proponents of international adoptions have united on one point; their

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[68] *See* Hague Conference on Private International Law: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Questionnaires & Responses, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=69 (last visited Dec. 16, 2008).

[69] Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 599-602 (2005).

[70] *See* INTERNATIONAL HANDBOOK ON PRIVATIZATION 30-33 (David Parker & David Saal eds., 2003).

[71] MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES 249, 293-94 (2003).

opposition to the Hague Treaty.[72] While critics indicate that the Treaty is too flexible and does not have teeth to limit and police adoptions, proponents claim that the Treaty is too flexible and easily manipulated to limit international adoptions. Outspoken critics of international adoption like David Smolin, a law professor and published author, have been joined by newer detractors that have labeled international adoption "child laundering," stating that the Hague Treaty practically condones unethical practices by not requiring punishment for child traffickers and other individuals illegally profiting from international adoptions.[73]

This could not be further from the truth. The Hague Treaty and subsequent follow-up papers from the Hague Conference definitively state that any illegal movement or financial exploitation of children is criminal and each member country is obligated to prosecute and punish any such behavior.[74] Although the treaty itself does not impose specific punishments, it outlines the steps necessary to prevent child trafficking practices and encourages punishment of "baby sellers" as sovereign countries deem most appropriate.

Certain international adoption proponents have joined critics in opposition to the Hague Treaty. While many acknowledge the importance of the Hague Treaty's endorsement of international adoption, proponents of international adoption object to the ways in which the Treaty has been used to stop adoptions.[75] Countries and critics of international adoption have manipulated the Treaty to prevent adoptions from

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[72] McKinney, *supra* note 3, at 365; *see also* Smolin, *Child Laundering, supra note 32; Smolin, Intercountry Adoption as Child Trafficking*, *supra* note 36.

[73] *See* Gina M. Croft, *The Ill Effects of the United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L & COMP. L. 621 (2005); *see also* Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 572 (2005); Smolin, *Intercountry Adoption as Child Trafficking*, *supra* note 36.

[74] Permanent Bureau, Guide to Good Practice Under the Hague Convention, *supra* note 53.

[75] McKinney, *supra* note 3.

occurring and delaying the process, thereby trapping children in institutions. However, the flaw does not lie within the Treaty but in its interpretation and often manipulated applications.

International agreements demand flexibility to allow the widest, most successful implementation among diverse nations. Widespread ratification of the Hague Treaty is of particular importance since children are only protected by its tenets when they are adopted between participating countries. Although the Hague Treaty has at times been narrowly interpreted to limit rather than enable adoptions, this Treaty is a valuable, carefully crafted agreement that allows countries to choose the most effective method of application while also requiring signatories to enforce a clear set of principles to protect children's best interests.

B. ALLOWANCES FOR HAGUE ADOPTIONS THROUGH PUBLIC-PRIVATE PARTNERSHIPS

Hague member states understood that many governments would not be able to perform all responsibilities and aspects of international adoptions. For this reason, non-member countries were invited to discuss a multi-national agreement to standardize and secure intercountry adoptions.[76] High-ranking officials from member states, as well as non-member states, met with scholars in the child welfare field, nonprofit agencies, and private adoption providers to create universally workable provisions that would ensure the best interests of the children. The final version of the Hague Treaty deliberately included provisions for public-private partnerships regarding intercountry adoptions[77] while also delineating numerous safeguards against potential corruption and guidelines for proper implementation of Hague Treaty provisions.[78]

Several sections of the Hague Treaty indicate the Convention's understanding of the potential need for and benefit of public-private partnerships. First, Article 11 of the

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[76] PARRA-ARANGUREN, *supra* note 4.

[77] *Id.*; *see also* Permanent Bureau, Guide to Good Practice Under the Hague Convention, *supra* note 53.

[78] Hague Conference, *supra* note 7, art. 11.

Hague Treaty requires that accredited bodies working with the central authority "pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation."[79] The Treaty's recognition of private actors is accompanied by further safeguards that require that every private adoption service providers be entirely subject to the review of the state authority, particularly with regard to their composition, general practices, and financial condition. Second, the Hague Treaty additionally requires that the staff and management of any agency charged with an adoption service be "qualified by their ethical standards and by training or experience."[80] The Hague Treaty also indicates that accredited agencies are restricted to partnering in the adoption process only in those countries that have given them authorization to act.

The Hague Treaty's requirements were carefully crafted to ensure that the state authorities would be empowered without being overburdened. By allowing countries to choose between adoption systems that are entirely government run and those that are controlled by the government but also assisted by accredited agencies, the Hague Treaty provided the necessary flexibility for adoptions to continue while also preserving fundamental safeguards.[81]

The committees that worked on this international adoption treaty understood that it was in the best interests of the world's children for the greatest number of countries to ratify the treaty. The drafters did not want to put treaty compliance out of the reach of certain countries, particularly the world's sending countries. These intentions are evidenced in the Hague Committee records which state "it would be wrong to believe that the ratification, acceptance, approval of or accession to the [Hague Treaty] must necessarily cause extraordinary administrative expenses to the Contracting States, because of the role assigned to the Central Authorities."[82]

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[79] *Id.*

[80] Hague Conference, *supra* note 7, art. 11, sec. b.

[81] THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS 257-59 (Maria Rita Saull & Flaminia Kojanec eds., 1995).

[82] PARRA-ARANGUREN, *supra* note 4, at 31.

Drafters of the Hague Treaty gave careful consideration to the need for private participation in the adoption process. The issues relating to accrediting bodies and qualification for accreditation received particularly extensive attention. The resulting Treaty was written to clearly delineate public responsibilities and the ways in which private nonprofits could contribute to the international adoption process.

Numerous experts and contracting states weighed in on the best means of protecting the international adoption system from corruption. In particular, the International Social Service "stressed the useful and necessary complementarity between the services provided by the Central and competent Authorities on the one hand and the adoption bodies accredited by the receiving countries on the other hand."[83] This widely respected international human rights organization went on to state that properly accredited bodies "can supplement the resources and expertise of Central Authorities, for example with the preparation and psycho-social support of the child, the family of origin and the adoptive parents, through the whole adoption process, or the assessment of the reliability and integrity of local contacts of the prospective adoptive parents in the country of origin."[84]

III. IMPLEMENTATION OF THE HAGUE CONVENTION

Despite the careful consideration given to the issue of private and nonprofit participation in international adoptions, many groups continue to push for a narrow interpretation, arguing that only a wholly public implementation can adequately protect children and parents against corruptive influences and abuses of the system. Interpreting the Hague Treaty to require this particular method of enactment has likely dissuaded countries, particularly sending countries, from adopting the Hague Treaty or ever attempting to comply with its tenets.[85] This argument is

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[83] Jennifer Degeling, *A Discussion Paper on Accreditation Issues* 8 (2005), http://www.hcch.net/upload/wop/ado_pd03e.pdf.

[84] *Id.*

[85] *See* Kimball, *supra* note 72, at 581-83.

flawed in that public systems, particularly in the world's main sending countries, are extremely susceptible to corruptive influences.[86] These critics fail to recognize that government organizations are not immune from corruption. In fact, the creation of monopolies often results in increased corrupt behavior and profiteering by those in control.[87]

Inadequately staffed and poorly funded government offices can become highly prone to corruptive influences. Those services, which cater to a small constituency or benefit individuals with little political power or capital within the country, are often overlooked by higher-level government officials. International adoptions and child services often fit into this low priority category in countries throughout the world. In countries straining to build the necessary infrastructure for their residents to survive, child welfare services may be pushed aside as the government focuses on roadway construction, sewage disposal, crop irrigation, and accessible medical services. Divisions of government that are largely considered a low priority are often underfunded and overburdened. As a result, public employees receive inadequate training, are under compensated, and often overworked. The employees working in these low priority divisions also may receive little supervision from higher government officials. Experts have argued that a highly centralized and isolated system is consistently more likely be corrupted by bribery and extortion.[88] For the employees that

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[86] S. M. Ghazanfar & Karen S. May, *Third World Corruption: A Brief Survey of the Issues*, 25 J. SOC. POL. & ECON. STUD. 351, 353-65 (2000); *see also* Gerald Acquaah-Gaisie, *Combating Third World Corruption* (2003), http://www.buseco.monash.edu.au/mgt/research/governance/pdf-downloads/g-acquaah-wshop.pdf.

[87] CRITICAL ISSUES IN CROSS-NATIONAL PUBLIC ADMINISTRATION: PRIVATIZATION, DEMOCRATIZATION, DECENTRALIZATION 1-8 (Stuart S. Nagel ed., 2000); *see also* POLITICAL CORRUPTION IN TRANSITION (Stephen Kotkin & Andras Sajo eds., 2002).

[88] Ernita T. Joaquin, *Decentralization and Corruption: The Bumpy Road to Public Sector Integrity in Developing Countries*, 6 PUB. INTEGRITY 207 (2004), *available at* http://faculty.unlv.edu/ejoaquin/publication/Public_Integrity_article.pdf; *see also* Raymond Fisman & Roberta Gatti, *Decentralization and Corruption: Evidence Across Countries* (2000), http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/wps2290.pdf.

are underpaid, poorly trained, and receive little oversight from higher authorities, bribes may become commonplace and simply part of the job. Even in well-run government systems, the offices controlling the wholly public government service act as an absolute monopoly, giving those served no choice but to "do business" with the government office in charge of the required service. Critics of public-private partnership systems fail to recognize that some government officials are susceptible to corruption and that a wider distribution of responsibility can check many of the abuses inherent to an unsupervised monopoly. Particularly in developing countries, public officials are "more likely to use and receive bribes" than public officials in more industrialized nations. [89] An extremely centralized system that is answerable only to those few, underpaid officials within the isolated government office can create more problems than it solves. For this reason, organizations such as the United States Agency for International Development (USAID) have worked with African countries that are prone to corruption to decrease governmental authority and increase accountability through privatization.[90] While efforts to implement public-private partnerships in developing countries may meet some resistance from entrenched bureaucrats, decreasing the influence of monetary bribes and gifts in the context of adoptions is worth pursuing in every possible context.

Critics of international adoption have used the press to broadly publicize their message by highlighting instances of unethical activity and advertising rumors of impropriety, particularly among private actors.[91] While some claims are legitimate and every effort must be made to correct flaws in the adoption system, the level of negative publicity and criticism is

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[89] Soma Pillay, *A Cultural Ecology of New Public Management*, 74 INT'L REV. OF ADMIN. SCI. 373, 94-96 (2008); *see also* R. Kingshott, *Determinants of Public Service Employee Corruption: A Conceptual Model From the Psychological Contract Perspective*, 50 J, OF INDUS. REL. 69, 85 (2008).

[90] JOHN MUKUM MBAKU, CORRUPTION IN AFRICA 311-14 (2007).

[91] U.S. Dep't of State, The "Baby Parts" Myth: The Anatomy of a Rumor, http://usinfo.state.gov/media/Archive_Index/The_Baby_Parts_Myth.html (last visited Nov. 12, 2008) [hereinafter U.S. Dep't of State, The "Baby Parts" Myth]; *see also Dateline: To Catch a Baby Broker* (NBC television broadcast Jan. 20, 2008).

often an exaggeration of the system's actual flaws. However, the widespread reports of abuse, and occasional reliance on horrific rumors, has the effect of embarrassing countries into complying with the critics' demands to end adoptions or implement fully public systems that do not work.[92] Consequently, many developing countries that have ratified the Hague Treaty have attempted to enforce the Treaty's provisions through entirely public agencies. These efforts have met with little success given the shortage of government staff and resources to accommodate the demands of proper adoption procedures. As a result, adoptions granted by these countries have begun to decline at the same time as orphanage and foster child populations increase.[93]

A. FULLY PUBLIC SYSTEMS: NOT ALWAYS IN THE CHILD'S BEST INTERESTS

Although government corruption and the potentially self-serving motives of public officials are important concerns when employing a fully public adoption system, these are not the only considerations. Understaffing and lack of training are also significant reasons why programs entirely run by government agencies may fail to detect abuses or maintain a steady caseload. Participants in the drafting of the Hague Treaty, including public officials from throughout the world and well-respected human rights advocates, have decisively stated that unnecessary delays in international adoption are *not* in the child's best interest.[94] Placing children in institutions within their own country, domestic foster homes, or with biological family members who are not motivated or able to care for the child "is not preferable to a permanent home elsewhere."[95] Yet these circumstances are exactly those endured by children when a new

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[92] Molly S. Marx, *Whose Best Interest Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373 (2007).

[93] *See supra* note 49.

[94] Permanent Bureau, *Guide to Good Practice Under the Hague Convention*, *supra* note 53, at 16.

[95] *Id.*

member country attempts to implement the Hague Treaty through a fully public system that is ill equipped to meet the demands of adoption procedures.

This is not to say that public systems do not work. China is often cited as an example of a well-run, fully public system facilitating a high level of international adoptions each year.[96] However, it is important to realize that each country has its own strengths and weaknesses and what works for one fairly industrialized, communist nation may not work for a more agrarian, developing, capitalist nation. Countries must be allowed to assess their own capabilities and formulate a plan for Hague implementation that accounts for their limitations and fully utilizes their strengths.[97] The help and guidance of existing member states is certainly beneficial, but the public officials from the new, implementing country should not be pressured to adopt procedures incompatible with their existing structures by foreign individuals or organizations who do not fully understand the country's unique characteristics. Too often, a country's submission to such pressures has resulted in the very environment that the Hague Treaty was designed to prevent; orphaned or abandoned children are trapped in the country with no hope of adoption, or they are adopted out through a government system that is poorly staffed and susceptible to corruption.

Hague Contracting States that undertake a fully public international adoption system must first ensure that their government agencies are properly trained and adequately staffed to accommodate the extensive and ongoing demands of international adoptions.[98] If the country is a receiving state, the government staff must be prepared to complete thorough home studies of potential adoptive parents.[99] The government staff

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[96] Luo, *supra* note 68, at 600-03.

[97] Permanent Bureau, *Guide to Good Practice Under the Hague Convention*, *supra* note 53, at 10-12.

[98] Hague Conference, *supra* note 7, art. 5.

[99] Proper home studies are quite involved, requiring multiple visits by trained staff to adoptive family homes, several interviews, financial background checks, health statements, criminal background checks, family histories, references and interviews with references. These elements happen over several months, including time before the child is placed and after. *See* Childwelfare

must also investigate whether or not the child is adoptable, meaning has the child truly been abandoned or are the parents both deceased. Where the parents are not deceased or the child is in the custody of family members or an organization, the sending country's government office must confirm that all relevant parties with custody rights have freely and knowingly consented to the adoption. A full report on the child's medical history and current health conditions must be included in an overall assessment of the child's needs and, if the child is of sufficient age, his or her personal preferences for a permanent home.[100]

Once the government agencies have determined that the child is adoptable, then the child must be matched with potential parents and all home study information must be reviewed with the best interests of the child in mind.[101] The Hague Treaty and other international agreements also stress the importance of first finding the child a suitable home within his country of origin.[102] As a result, government staff must show that they diligently searched for a suitable family for the child domestically before considering families in foreign countries.

Government staff must also ensure that no financial expenditures have been made that violate the Hague agreement or other domestic laws.[103] In the United States, parents are only allowed to pay reasonable adoption fees for the services of home studies conducted in their own countries, legal fees, necessary travel expenses, and some medical expenses for the biological mother. Above all, the government staff must ensure that no compensation has been offered to any party to induce consent to the adoption. Adoptions must be determined entirely on an assessment of the child's best interests and without the influence of financial gain or other promises of compensation. This is a strict tenet of the Hague Treaty because this issue is

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Information Gateway, The Adoption Home Study Process (2004), http://www.childwelfare.gov/pubs/f_homstu.cfm.

[100] *Id.* at art. 4.

[101] *Id.* at art. 1.

[102] *Id.* at Introductory Statement.

[103] *Id.* at art. 1.

central to the overarching goal of eliminating child trafficking and baby selling.

These steps can take months or years and require numerous hours of investigation, site visits, and written reports to ensure that all requirements are met, no abuses have occurred, and that the adoption is ultimately in the child's best interest. The process and adoption requirements begin long before the child is placed and can extend well past the placement of the child with a family. In addition to the required actions for specific adoption cases, contracting states must continuously exchange records and information on adoption procedures and finalized adoptions with other contracting states. The steps required to properly comply with the Hague Treaty and other governing laws within the sending and receiving countries are extensive and highly involved.[104] Individuals executing these steps must keep thorough records as well as possess social service skills and a working legal knowledge of court and immigration requirements within both the sending and receiving countries.

Many of The Hague Treaty's contracting countries have attempted to ratify and enforce the treaty requirements through wholly public means, rather than public oversight of nonprofit organizations. This has proven particularly difficult for many sending countries that do not have the government resources to properly comply with all Hague requirements. While some fully public systems appear to be successful, most have resulted in fewer adoptions and increased institution populations within the sending countries.[105]

This misconception that the Hague Treaty requires complete or almost full government implementation of international adoption systems has likely discouraged some countries from joining the treaty and has certainly delayed adoptions in countries like Guatemala now trying to accommodate demands for fully public systems. Countries that have joined, but without any nonprofit participation and little governmental resources,

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[104] *Id*. at art. 16.

[105] Elisa Poncz, *China's Proposed International Adoption Law: The Likely Impact on Single U.S. Citizens Seeking to Adopt from China and the Available Alternatives*, 48 HARV. INT'L L.J. ONLINE 74 (2007), http://www.harvardilj.org/attach.php?id=113.

are often unable to accommodate the demands of international adoptions, particularly with the new treaty requirements.

The strength of the Hague Treaty is highly dependent on the number of countries that adopt and implement its requirements; Hague standards need not be applied to adoptions between non-Hague countries or adoptions between a Hague contracting country and a non-Hague country. For example, now that the United States has ratified the Treaty, it must follow Hague procedures for adoptions of children from Brazil or Mexico, which are also Hague countries, but if American parents are adopting a child from Ethiopia, a country that has yet to sign onto the Hague Treaty but remains a top sending country to the United States, Hague requirements will not apply.

B. BENEFITS OF PUBLIC-PRIVATE PARTNERSHIPS

Although a more thorough analysis of the benefits of public-private partnerships within the context of international adoption is needed, existing studies regarding the privatization of social services provide some insight into the potential successes and challenges of using accredited private actors for certain aspects of international adoption. Additionally, studies assessing levels of corruption in governments throughout the world provide an indication of the potential risks of creating government-run monopolies of adoption services.[106] Speaking of the value of privatization, the World Bank has stated that "[a] lack of economic reform can help perpetuate corruption because elite interests become more entrenched as their financial might accumulates through monopolistic structures."[107] Analyses of international privatization and decentralization efforts help to better explain some of the ways in which adoption services could benefit from public-private partnerships. While many of these studies examine the privatization of utilities rather than social services, valuable inferences may be drawn, particularly when viewed in conjunction with studies of the privatization of child welfare services within the United States.

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[106] WORLD BANK, CURBING CORRUPTION: TOWARD A MODEL FOR BUILDING NATIONAL INTEGRITY 89-92 (Rick Stapenhurst & Sahr John Kpundeh eds., 1999).

[107] *Id.* at 91.

Utilizing accredited private and nonprofit actors that are overseen by a central government authority will help introduce competitive services into the international adoption system. Competition can benefit the adoption process in four significant ways. First, many economists and statesmen view competition as the best method of decreasing costs while maintaining the highest level of services.[108] Second, competition and privatization will help ensure that adoptions are handled by individuals with the greatest possible expertise. Third, competition can limit the likelihood of successful bribes and the susceptibility of adoption officials to corrupt behavior. Lastly, competition among adoption service providers will help encourage innovation and greater access to safe adoptions in the future.

1. Keeping Costs Manageable for Governments and Parents

By allowing the government to oversee the services of different, competing adoption service providers, these public-private partnerships will help to keep costs manageable, thereby limiting bribery and baby selling practices. Sending countries that do not have sufficient funds to create a fully public system will not have to choose between corrupt systems or no adoptions at all. Receiving country adoption agencies will also likely seek those agencies that offer the most thorough, reliable, and affordable services to ensure that the adoption is legal and manageable for the adoptive parents.

Parents most often have altruistic intentions. They are willing to pay the market price for proper, legal, reliable services to guarantee a secure start to their family. They do not want to risk adopting a kidnapped child, thereby beginning their family through unethical means and jeopardizing the future of such a large emotional and financial investment. Just as families have more to lose through the adoption of a kidnapped child than they have to gain by knowingly contracting with child traffickers, adoption agencies and facilitating attorneys do not

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[108] David Parker & Colin Kirkpatrick, *Privatization of Developing Countries: A Review of the Evidence and Policy Lessons*, 41 J. DEVELOPMENTAL STUD. 513 (2005), *available at* http://www.informaworld.com/smpp/section?content=a714003681&fulltext=713240928.

want to risk a malpractice action, criminal charges, or other government censure.

Additionally, expanding the number of individuals and authorities ultimately responsible for approval of the adoption will reduce the likelihood of corruption from a small, united group of decision makers. The competitive system assures decentralization of power and a level of checks and balances. Parents in developed countries where the children are typically immigrating to do not want to risk having their adoptions overturned by a government agency suspecting unethical practices at any stage of the adoption process. Agencies operating in receiving nations such as the United States do not want to have the embarrassment or financial responsibility of illegal adoptions. As a result, they will choose the most honest and forthright agency. In a fully public system, receiving countries do not or cannot thoroughly investigate the foreign adoption liaisons because there is no other choice but to work with the government officials.

2. Expertise

By using existing adoption agencies, the United States is able to capitalize on the expertise of individuals who are educated and trained social workers. In addition to their training, these individuals have spent years familiarizing themselves with relevant foreign and domestic laws. In other countries, private agencies can offer many of the same benefits. Unencumbered by unionized workers, employment contracts, bureaucratic priorities, political agendas, public budgets, the agencies will have more flexibility to train employees and seek social workers that are already experienced and well qualified. Well trained and experienced employees will not only produce higher quality work but also be more efficient. The agencies will also be able to keep abreast of changing technologies and innovations by seeking leaders and employees who are familiar and committed to the adoption process.

3. Proper compensation and Deterrents to Bribery

The money spent on adoptions will be designated to those organizations that offer the best, most reliable services. Parents, adoption agencies, and governmental central authorities will

seek out the most reliable providers of adoption services. Agencies known for shoddy paperwork or unethical practices will ideally receive no accreditation from their governmental central authorities. However, even those that are able to somehow obtain accreditation can be avoided by agencies in developed countries. Parents and agencies are free to choose other adoption service providers and report suspicious activity to government authorities. In a fully public system, families are left with no choice but to "do business" with the government officials in power, even if unethical behavior is suspected. Additionally, the larger government body may try to cover up indiscretions by its own officials and complaints about unethical practices fall on deaf ears. Although all sending and receiving countries must remain vigilant to protect against unethical practices by both public and private actors, competition and the diversion of funds from poor performing, unethical agencies to trusted, compliant agencies will help decrease the influence of corrupt actors. Proper adoption fees may then be spent by reputable agencies on hiring and retaining the most qualified individuals.

In contrast, fully public adoption services will only receive the amount of money that the government can afford based on the nation's resources and government officials' priorities.[109] These limitations and internal policies could easily leave the government adoption offices severely understaffed and poorly run by individuals who are not properly trained or compensated. As a result, these overworked individuals could become susceptible to bribery or may simply fail to fully investigate the circumstances of potential adoptions, thereby allowing unethical practices to persist.

4. Future Progress and Fostering Innovation

Additionally, many global nonprofits and financial organizations such as the World Bank are working with developing countries to transfer suitable services into the private sector with varying degrees of governmental oversight.[110]

[109] Nagel, *supra* note 86, at 1-21.

[110] CENTER FOR GLOBAL DEVELOPMENT, REALITY CHECK: DISTRIBUTIONAL IMPACT OF PRIVATIZATION IN DEVELOPING COUNTRIES 327-28, (Nancy Birdsall & John Nellis eds., 2005).

In an effort to maximize resources and avoid corruptive influences, these organizations have been encouraging and assisting countries working to decentralize and privatize many traditional government functions. Aspects of public services being transferred include water and sewer management, electricity, telecommunications, air travel, and railway freight and transportation.[111] Industrial countries, such as the United States and Great Britain, are joined by developing countries in a recent global trend toward privatization.[112] Services relating to everything from military action to foster care systems have been transferred from wholly public management and execution to fully private or public-private efforts.

Privately run adoption services that are overseen and certified by the government will also help to incorporate modern technologies and maximize available resources. Government agencies are generally too encumbered by the requirements of long-term public contracts and policy renegotiations to take advantage of new technologies, trainings, or staffing alterations.[113] As resources become available or the public's demands change, privately run organizations are able to adapt quickly by buying computers, updating software, firing or hiring staff, and taking other steps necessary to stay abreast of changing laws and market pressures. All of these changes and innovations can happen at significantly greater speed and less cost than if they were attempted within the context of a wholly public system. Public systems are constrained by changing political agendas, budgetary cycles, and employment contracts to a much greater extent than any similar encumbrances within private or nonprofit organizations. For this reason, countries classified as everything from developing to industrial have begun expanding public and private partnerships.[114]

Requiring or pressuring Hague contracting countries to implement fully public systems jeopardizes the purpose of the Hague Treaty and the future of adoptions in countries that do

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[111] Nagel, *supra* note 86.

[112] PIERRE GUISLAIN, THE PRIVATIZATION CHALLENGE 2-10 (1997).

[113] *Id*. at 22-30.

[114] FREUNDLICH & GERSTENZANG, *supra* note 70, at 293-94.

not have the governmental resources for an entirely public program. While some countries may be predisposed to a public system, such as communist China, other countries are better equipped to draw on the strengths of existing private enterprises and governmental oversight agencies.[115] Members of the media and academic scholars have pointed to the exceptional, wholly public system employed by China as an example for other countries to follow. While China's system may work well for some countries, many nations, including developing countries that do not have the extensive governmental infrastructure present in an established Communist nation like China, are not able to readily create the necessary public system full compliance requires. Trying to force fully public systems under these circumstance may effectively deny the progress realized in other privatization efforts in important areas such as children's social services and adoption. Many difficulties encountered by countries seeking privatization of government services arise from the awkward transition from fully public to fully private systems.[116] Implementing a system that draws on the strengths of both the public and private sectors from the outset of Hague Treaty ratification may avoid the problems experienced in later transitioning from public to private systems.

VI. THE PROBLEM WITH GUATEMALA

Up until several months ago, Guatemala was a top sending country of adopted children to the United States. The country's proximity to the United States, high birthrates, high poverty rates, and poor health care all likely contributed to its status as a top sending country.[117] The country's adoption-friendly policies and relatively short waiting periods likely also created a further preference for adoption from Guatemala.[118] The system,

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[115] McKinney, *supra* note 3, at 400.

[116] GUISLAIN, *supra* note 8, at 287-90.

[117] PETER KATEL, CHILDREN ABANDONED: GUATEMALA'S YOUNG PEOPLE AND THEIR SEARCH FOR A FUTURE 5- 29 (2003).

[118] Lacey, *supra* note 33; *see also Dateline: To Catch a Baby Broker*, *supra* note 89.

however, was run by private attorneys and notaries and therefore largely existed outside of direct government supervision. While the system's private nature may have accounted for its ability to handle large caseloads quickly, it also left the entire system open to profiteers and widespread accusations of corruption. Although many accusations and reports amounted to nothing more than exaggeration and rumor, investigations uncovered a significant number of unethical practices and, in certain extremes, kidnapping and outright baby-selling. [119]

The extent of the negative press and the persistent lobbying of international adoption critics have led Guatemalan officials to seek a wholly public system under the Hague Treaty. [120] On December 11, 2007, the Guatemalan Congress passed Bill 3735 to create a Central Authority as well as to implement the necessary procedures to fully ratify the Hague Treaty.[121] Although three members of the Central Authority have been appointed by the Guatemalan Supreme Court as required by the new law, the process to build a complete government office capable of fulfilling all of the Hague Treaty requirements from scratch will take a significant amount of time and resources. The United States government has warned prospective adoptive parents that the process may take considerable time and that they should not initiate adoptions with Guatemala.[122] This proposal for public implementation to the exclusion of any

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[119] U.S. Dep't of State, The "Baby Parts" Myth, *supra* note 89; *see also Dateline: To Catch a Baby Broker*, *supra* note 89.

[120] U.S. Dep't of State, Immigrant Visas Issued to Orphans Coming to U.S., http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Nov. 12, 2008).

[121] *See* Joint Council on International Children's Services, Guatemala, http://www.jcics.org/Guatemala.htm (last visited Dec. 16, 2008) [hereinafter JCICS, Guatemala]; *see also* U.S. Dep't of State, Department of State Urges Citizens Not to Start Adoptions in Guatemala (2007), http://travel.state.gov/family/adoption/intercountry/intercountry_3825.html (last visited Nov. 12, 2008).

[122] Press Release, U.S. Citizen and Immigration Services, USCIS Announces New Guatemalan Adoption Legislation (Jan. 25, 2008), *available at* http://www.uscis.gov/files/pressrelease/Guatemala_Adoption_Law_Update_01.25.08.pdf.

nonprofit or private involvement has been highly motivated by past abuses of the private Guatemalan system and the negative media attention that has followed.[123] This policy, however, does not seem to take into account the limitations of the Guatemalan government or the strengths of the private system. Those lobbying for a wholly public system continuously cite alleged abuses but provide no solutions for the thousands of children that will be institutionalized as Guatemala struggles to create a new governmental division capable of meeting all of the demands of the Hague Treaty.

While Guatemalan officials continue to debate which international adoption policies will be ratified, many children eligible for adoption are forced to live outside a permanent home, either in an institution or, for a few children, in foster care. American parents, adoption activists, and isolated American officials have continued to encourage the Guatemalan government to consider a public-private system or policies besides a complete moratorium on all foreign adoptions.[124] The country's legislature is currently struggling to formulate workable adoption policies while news stories depicting the worst offenses and rumors rage in the local and international media. Unfortunately, a similar, aggressive media campaign resulted in the adoption moratorium imposed in Romania that stranded thousands of children in a country without the resources to care for them.[125]

There is little doubt that a strong central authority is absolutely essential to ensure uniform standards and proper oversight.[126] The isolated abuses that have existed under the prior system must be stopped to protect the children and families directly impacted as well as to ensure that other

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[123] Sara Miller Llana, *Why Adopting in Guatemala is Getting Harder,* CHRISTIAN SCI. MONITOR, Sept. 12, 2007, *available at* http://www.csmonitor.com/2007/0912/p01s03-woam.html; *see also* Lacey, *supra* note 33.

[124] JCICS, Guatemala, *supra* note 114.

[125] Marx, *supra* note 90.

[126] Mary E. Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption* (Berkeley Electronic Press, Working Paper No. 1385, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=6337&context=expresso.

children may continue to be safely adopted in the future. Children deserve to grow up in healthy, supportive homes. Corruption and widely publicized or exaggerated abuses jeopardize the safety of those children adopted as well as those children who are yet to be adopted under a system that accepts international adoption as a safe alternative to institutions or life on the street.[127] Although the number of parentless and needy Guatemalan children continues to grow, a vocal group of legislators and international nonprofits continue to push for an adoption moratorium while the country tries to comply with the Hague Treaty and create a fully public adoption system. This approach denies thousands of abandoned or orphaned children the possibility of a permanent and loving home.

Children in Guatemala are particularly susceptible to abuse, neglect, and other ravages of poverty. Sixty-eight percent of children under the age of six live in poverty.[128] Many of these children have been abandoned or their mothers have placed them for adoption through local attorneys. The International Social Service organization indicated that the only census figures available were from 1998. These figures revealed that there were 12,186 orphans under the age of 15, possibly up to 10,000 children living on the street, and 2,450 young people being exploited as prostitutes in brothels.[129]

Even once the moratorium is lifted, the wholly public system outlined in the current legislation will still likely produce significant delays in placement as well as overall decreased capacity for adoption review and approval. This means that fewer children will be adopted and the ones that are approved for adoption will be forced to spend additional time outside of a permanent family setting. This puts the children being adopted at even greater risk for long-term physical or psychological

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[127] Elizabeth Bartholet, *International Adoption*, *in* CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE 63-95 (Lori Askeland ed., 2005), *available at* http://www.law.harvard.edu/faculty/bartholet/pdfs/IAChapter5 FINAL.pdf.

[128] *See also* FAMILIES WITHOUT BORDERS, UNICEF, GUATEMALAN ADOPTION, AND THE BEST INTERESTS OF THE CHILD: AN INFORMATIONAL STUDY 12-13 (2003), http://www.familieswithoutborders.com/FWBstudyGuatemala.pdf.

[129] KATEL, *supra* note 109, at 1.

harm.[130] The World Health Organization has repeatedly revisited the role permanent homes and consistent cargivers play in early child development.[131] One particular expert committee report that has received renewed attention from pediatric experts indicates that the continuity of relationships to parental figures is important for all children but particularly so for young children.[132] As a result of its comprehensive studies encompassing orphanage populations from throughout the world, the World Health Organization has concluded that "NO child under three years should be placed in a residential care institution without a parent/primary caregiver. When high-quality institutions are used as an emergency measure, it is recommended that the length of stay should be no more than 3 months."[133]

V. CONCLUSION

Adoption is an important means of preventing the suffering and neglect of children who have no parents or families to care for them. International adoption allows families with the necessary will and financial means to provide for a child who resides in a country where no adoptive parents are available and his only alternative is to fend for himself on the streets or live

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[130] Frank et al., *supra* note 14.

[131] KEVIN BROWNE ET AL., MAPPING THE NUMBER AND CHARACTERISTICS OF CHILDREN UNDER 3 IN INSTITUTIONS ACROSS EUROPE AT RISK OF HARM 2, 11 (2004). *See also* JOINT UN/WHO EXPERT COMMITTEE, THE CARE OF WELL CHILDREN IN DAY-CARE CENTRES AND INSTITUTIONS (1963), http://whqlibdoc.who.int/trs/WHO_TRS_256.pdf; JOHN BOWLBY, MATERNAL CARE AND MENTAL HEALTH 67-69 (1952), http://whqlibdoc.who.int/monograph/WHO_MONO_2_(part2).pdf

[132] JOHN BOWLBY, MATERNAL CARE AND MENTAL HEALTH 67-69 (1952), http://whqlibdoc.who.int/monograph/WHO_MONO_2_(part2).pdf; *See* American Academy of Pediatrics, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1148-49 (2000), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;106/5/1145.pdf.

[133] KEVIN BROWNE ET AL., MAPPING THE NUMBER AND CHARACTERISTICS OF CHILDREN UNDER 3 IN INSTITUTIONS ACROSS EUROPE AT RISK OF HARM 11 (2004).

within a government institution.[134] The Hague Treaty is a critical step in recognizing the importance of international adoption and eliminating adoption abuses. The Hague Treaty provides clear guidelines that encourage international adoptions, allow for national sovereignty and innovation, and prevent abuses. However, like any tool, the Hague Treaty can be misused and manipulated to defeat its fundamental purpose of eliminating child suffering and exploitation. Countries must be allowed to implement the Hague Treaty in the manner that best suits each country's resources. Forcing incompatible systems on member states will dissuade potential signatories and erode the success of new Hague Contracting states.

Proper oversight is also critical to prevent abuses of a country's chosen adoption system. Checks and balances that utilize different government offices as well as partnerships between public and private organizations will help disperse authority, thereby eliminating opportunities for bribery, unethical practices, and exploitation. Transparency and open reporting methods will also help to keep all actors accountable and prospective adoptive parents informed. Public oversight of accredited organizations allows adoptions to continue and to take place within a time frame that prevents lifelong damage to the child's development and promotes important bonding between the adoptive parents and their new child.[135]

An emphasis on full government implementation of the Hague Treaty may dissuade important sending countries from adopting the treaty due to inadequate resources and the significant costs and training required to staff a public agency.[136] This further weakens the Hague Treaty's potential impact on

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[134] Bob Graham, *Romania's Orphans Claim Years of Abuse*, SUNDAY TIMES, Sept. 24, 2006, http://www.timesonline.co.uk/tol/news/world/article648815.ece.

[135] Mary E. Hansen & Daniel Pollack, *Tradeoffs in Formulating a Consistent National Policy on Adoption*, 46 FAM. CT. REV. 366 (2008); Daniel Pollack, *Intercountry Adoption: Who Are the Good Guys?*, 63 POL'Y & PRAC. 28 (2005).

[136] Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483 (2004) (explaining that the strength of the Hague lies in comprehensive implementation, particularly by the world's top sending and receiving countries).

child trafficking and abuse throughout the world. An expansive implementation of the Hague Treaty which harnesses the strongest methods of oversight that each country has to offer is the only way to ensure that children that lack families to care for them are safely adopted into loving, secure homes as quickly as possible.

Full public implementation in those countries that do not have the necessary governmental resources also serves to decrease the number of adoptions processed each year. As a result, more children are forced to live in orphanages, poorly regulated foster care systems, or on the street. Depriving these children of a permanent home is a direct contradiction to the intentions of the Hague Treaty and a growing number of human rights policies. Domestic policies adopted to implement the Hague Treaty should draw on each country's strengths and seek to facilitate well-policed international adoptions in the manner most compatible with existing resources.

International adoption systems that include a strong central authority and the contributions of well-trained, accredited staff can ensure that adoptions continue to remain a safe option for orphaned, abandoned or relinquished children.[137] Limiting the ways in which the Treaty is implemented, particularly by requiring wholly governmental systems, jeopardizes adoptions within the Treaty country and dissuades non-Hague countries from adopting the treaty. Rather than forcing a narrow reading of this important treaty, advocates for children's rights should promote the Hague Treaty's flexibility to ensure the widest application of reliable international adoption practices to protect the best interests of the world's children. Countries that implement the Hague Treaty in ways that maximize and build on their existing resources have the greatest hope of successfully preventing exploitation, helping their neediest children find homes, and better meeting the challenges of the twenty-first century.

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[137] D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005).

A CALL TO THE COURTS TO NARROW THE SCOPE OF THE DEFINITION OF LEARNING DISABILITY WITHIN THE AMERICANS WITH DISABILITIES IN EDUCATION ACT

Mark F. Kowal[1]

I. INTRODUCTION

When Congress enacted the Individuals with Disabilities Education Act ("IDEA"), the purpose was "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[2] Ambiguous drafting and poor Congressional oversight, however, have caused school districts and parents to look to the courts for guidance. This de facto policymaking by the courts has led to an erosion of the fundamental definitional standards of learning disability and FAPE. Furthermore, this liberal interpretation of the definitional standard of learning disability and FAPE within IDEA by the courts has spawned significant litigation between parents and school districts concerning the scope and protection of IDEA.

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[1] B.S., Health & Physical Education, The College of New Jersey (1988); J.D., Rutgers University School of Law – Camden (2009). The author would like to thank his Wife Amy, and daughter Zoe, for their love patience and support, and his Mother and Father for their love and encouragement.

[2] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400(d)(1)(A) (2004).

The purpose of this Note is to identify statutory ambiguity in IDEA and to propose an alternative approach to the definitional standard of learning disability contained within IDEA that is more attuned with balancing the public school districts' responsibilities to all students with the educational rights of learning disabled children and their parents. Part II examines the history and purpose of the Individuals with Disabilities Education Act, from the development of IDEA's predecessors starting in 1965 when the Elementary and Secondary Education Act ("ESA") was passed, through the Education for all Handicapped Children ("EAHCA") of 1975, and culminating in 1990 when IDEA was established to replace the EAHCA.[3] In addition, this section will also briefly elaborate on recent changes to IDEA. Part III explores Congressional and judicial treatment of individuals with disabilities in education and identifies issues that support and challenge the Court's ever more broad interpretation of learning disability and FAPE under IDEA. Within this section, special emphasis is placed upon the consequences of the Court's permissive interpretation of what constitutes a learning disability, including the significant increase in the number of students qualifying for special education services and the overwhelming burden placed upon school districts to meet these concerns. Part IV will discuss the varying approaches taken by the circuit courts in defining the scope of IDEA, and how these varying standards confuse school districts, parents, and students. In response to these ambiguous, confusing standards, Part V proposes an alternative method of analysis to balance the rights of parents, students and school districts with the intent of Congress when it enacted IDEA.

II. THE EVOLUTION AND SCOPE OF IDEA

Part B of IDEA provides parents and disabled students with a right of action when a public school district, operating within a state, deprives a disabled individual of a free and appropriate

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[3] Parents United Together – Legislative History of Special Education, http://www.parentsunitedtogether.com/page15.html (last visited Feb. 15, 2009). *See also* Elizabeth Palley, *The Role of the Courts in the Development and Implementation of the IDEA*, 77 SOC. SERV. REV. 605, 606 (2003).

public education.[4] The first question relevant to this inquiry is whether an individual is considered disabled under (IDEA) and the second question is whether the accommodations by the school district in response to this individual's disability constitute a free and appropriate public education.

A. THE DEFINITION OF "DISABILITY" UNDER 20 U.S.C. § 1400

Historically the federal government did not routinely involve itself with special education.[5] In fact, few federal laws existed that provided direct benefits to people with disabilities, and those that did exist were antiquated.[6] With no structured federal law in place, local school districts were often left with the responsibility of developing and administering special education services to their disabled students. Many times these services were inadequately provided, if they were provided at all.[7] In 1973, for example, Congress estimated that there were likely one million students denied enrollment in public schools because of their disability.[8]

The driving force behind the enactment of the IDEA began

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[4] 20 U.S.C. § 1400(d)(1)(B) (2004). *See also* RONALD M. HAGER & DIANE SMITH, NEIGHBORHOOD LEGAL SERVICES, THE PUBLIC SCHOOL'S SPECIAL EDUCATION SYSTEM AS AN ASSISTIVE TECHNOLOGY FUNDING SOURCE: THE CUTTING EDGE, 3 (2003), http://www.nls.org/pdf/special-ed-booklet-03.pdf. Part B of IDEA guarantees that all students with disabilities aged three through twenty-one have the right to a free appropriate public education (FAPE).

[5] Wade F. Horn & Douglas Tynan, *Time to Make Special Education "Special" Again*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, at 23 (Chester E. Finn et. al., eds., 2001), *available at* http://www.ppionline.org/documents/SpecialEd_complete_ volume.pdf.

[6] *Id.* (noting that these laws were mostly in the form of grants to states for residential asylums for the "deaf and dumb" and "to promote education of the blind"; however, these laws were in the tradition of providing residential arrangements for persons with serious disabilities, services that had existed since colonial times). *See also* JAMES J. CREMINS, LEGAL AND POLITICAL ISSUES IN SPECIAL EDUCATION 4-9 (1983) (describing in greater depth the historical evolution of special education in the United States).

[7] *Id.*

[8] *Id.*

many years prior to any federal legislation specifically addressing educating disabled children. The genesis of this movement is found in two distinctly different groups which came together to force Congress to address education of children with disabilities.[9] These grass roots groups were the catalyst which led Congress to enact the Elementary and Secondary Education Act of 1965 ("ESEA").[10] This act provided a comprehensive plan for economically underprivileged children and was the basis for early special education legislation.[11]

In an effort to expand on the scope and coverage of the ESEA, Congress passed the Rehabilitation Act of 1973.[12] This Act included §504, which at the time was the most substantial legislation on behalf of disabled individuals.[13] Congress created a mandate when it passed §504 because this statute "precludes any organization receiving federal funds (including public and private primary, secondary schools, and universities) from 'discriminating' against people with disabilities."[14] This

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[9] *See* Tyce Palmaffy, *The Evolution of the Federal Role*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, at 3 (Chester E. Finn et. al., eds., 2001), *available at* http://www.ppionline.org/documents/SpecialEd_complete_volume.pdf (noting that civil rights advocates inspired by the Supreme Court's decision in *Brown v. Bd. of Educ.* who viewed the court's striking down racial segregation as a clear sign that the public schools' exclusion of children with disabilities were also unconstitutional, and parents who claimed that the problems their children had in school were caused by learning disabilities which could be categorized as medical problems of children were instrumental in Congressional attention to education of children with disabilities).

[10] Parents United Together, *supra* note 3.

[11] *Id.*

[12] *See* Palmaffy, *supra* note 9, at 5.

[13] *Id.* (noting that "[s]ection 504 was a broad antidiscrimination statute that applied not only to public schools but also to any institution that received federal funds").

[14] MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 37 (1997). *See also* Rehabilitation Act of 1973, Pub. L. No. 93-112 (defining disability as "persons with physical or mental impairments which substantially limit one or more major life activity").

protection includes learning disabled students.[15] At one time, however, the Office of Civil Rights interpreted this protection differently by than it does today.[16] Recognizing the need to expand the protection granted to disabled students in §504, Congress, in 1975, passed the education for all handicapped children act ("EAHCA").[17] The EAHCA was considered landmark legislation and mandated that all disabled children be provided a FAPE in the least restrictive environment ("LRE").[18] Congress drafted this act poorly, however, failing to define succinctly the meaning of FAPE and LRE.

In 1990, the mandate of the EAHCA became clearer with the passage of IDEA.[19] Congress justified this legislation for two reasons, to promote long-term investment in the nation's economic health and as an antidiscrimination measure.[20] Unlike §504 of the Rehabilitation Act, but in accordance with the EAHCA, IDEA requires that each state receiving federal financial support for its special education programs provide a

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[15] *See* Sanders v. Marquette Pub. Sch., 561 F. Supp. 1361, 1368 (W.D. Mich. 1983) (noting that "Louise is evidently a member of the class that Congress intended to reach by means of the Rehabilitation Act; she has been determined to have learning disabilities, such that she may be considered 'handicapped' within the meaning of the Act"); *see also* 42 U.S.C. § 12102(1) (2009) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual"). *But see* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 409 (1979) (denying a hearing-impaired woman enrollment in a community college nursing program by focusing on §504's "otherwise qualified" language and held that it "is reasonably clear that [§504] does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program").

[16] KELMAN & LESTER, *supra* note 14, at 244-45 n.6 (noting that the Office of Civil Rights is the administrative body charged with overseeing compliance with §504).

[17] Palley, *supra* note 3, at 606.

[18] *Id.*

[19] Palmaffy, *supra* note 9, at 5.

[20] *Id.* (noting that "[t]he goal was to make small educational investments early in a disabled child's life that might lead to him or her becoming a self-sufficient, productive adult who would need fewer social services later on").

FAPE in the LRE to all children with disabilities.[21]

As a result of this definitional standard, as a practical matter, §504 is more inclusive than IDEA and significantly more individuals will qualify for a §504 plan than will qualify for an individual education plan ("IEP"). In other words, an individual may meet the requirement of §504 but not possess a learning disability which triggers protection of IDEA. Those qualifying for an IEP, however, will receive considerably more educational support. [22] These support measures, when appropriately determined by the school district, include but are not limited to out of district placement. Even with the passage of IDEA, however, Congress once again failed to address appropriately the vagueness surrounding the definitions of FAPE and LRE.

Congress attempted, however, to implement a more precise concept of what is implied when accommodating disabled students in public schools. As a result, the definition of disability under IDEA differs from the inexact definition of §504.[23] Under the IDEA definition, in contrast to the definition

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[21] KELMAN & LESTER, *supra* note 14, at 37 (noting that the education includes "education to all children with disabilities, including learning disabilities, which is individualized, appropriate to their specific needs, and in the least restrictive environment possible"). This differs from §504 inasmuch as §504 does not specifically protect individuals with learning disabilities. Section 504 refers only to "the need to protect persons with a 'physical or mental impairment which substantially limits one or more of such person's major life activities. . . . Court cases have also consistently recognized [learning disabilities] as a handicapping condition within the meaning of the act." *Id.* at 37-38.

[22] *Id.* at 4 (noting that "[s]ection 504's regulations overlap substantially with those in IDEA, but are less detailed . . . .[T]hough §504 protects a broader class of persons: all persons (not just students) for whom a physical or mental impairment interferes with one or more 'major life activities,' such as learning").

[23] *Id.* at 38.

> Generally speaking, §504 enunciates rather inexact antidiscrimination principles, demanding, in broad terms, that disabled persons not be victimized by either aversive prejudice or wrong-headed stereotypical assumptions about their limitations. . . . IDEA, in contrast, attempts to implement a more particular conception of what the . . . broad antidiscrimination norm implies in the context of accommodating disabled students in public schools.

Id.

under §504, there are several enunciated disabilities, any of which, if a child manifests, will trigger protection.[24] Regardless of Congressional intentions, IDEA has continued to be a statute wrought with vague and confusing statutory construction.

B. 1997 CHANGES TO IDEA

Recently, however, Congress has attempted to clarify significant aspects of IDEA. Noteworthy amendments to IDEA were made in 1997; the intention of these changes can best be understood by Congress' belief that education of children with disabilities can be made more effective by including several different objectives.[25] These amendments enhanced services to children, strengthened the role of parents, and increased the use

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[24] 20 U.S.C. § 1401(3)(A) (2004) (defining the term "child with a disability" as meaning a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services").

[25] *See* HAGER & SMITH, *supra* note 4, at 2. Congressional findings responsible for the 1997 amendments to IDEA included:

> (1) having high expectations and ensuring access to the general curriculum to the maximum extent possible, (2) strengthening the role of parents and ensuring that families have meaningful opportunities to participate in the education of their children, (3) coordinating the IDEA requirements with other school improvement efforts to ensure that students benefit from those efforts and that special education becomes a service for children rather than a place where they are sent, (4) providing appropriate special education and related services and *aids* and *supports* in the regular classroom whenever appropriate, (5) supporting high-quality, intensive professional development for all personnel working with children, (6) providing incentives for whole-school approaches and pre-referral interventions to reduce the need to label children to obtain services, and (7) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

Id. (emphasis in original) (internal quotations omitted).

of assistive technology in the classroom.[26]

Advocates of IDEA claim that fundamental changes were made to the text of the law in 1997.[27] These proponents claimed that these changes strengthened the roles of parents, enhanced services available to disabled children and increased the use of assistive technology to ensure that students would receive a free and appropriate public education.[28]

Critics, however, criticized these amendments by noting the inclusion of several new categories of disability that were added to the list of handicapping conditions.[29] These opponents claimed that in addition to the new disability categories, Congress lengthened the list of "related services" that schools must provide.[30] Therefore, those critical of the changes claim

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[26] *Id.*

[27] *Id.*

[28] *See* 20 U.S.C. § 1400(c)(5) (2004).

> The education of children with disabilities can be made more effective by [1] having high expectations . . . and ensuring their access to the general . . . curriculum . . . to the maximum extent possible . . . , [2] strengthening the role . . . of parents and ensuring that families . . . have meaningful opportunities to participate in the education of their children . . . , [3] coordinating [IDEA requirements] with other . . . school improvement efforts . . . to ensure that [students] benefit from [those] efforts and that special education becomes a service for children rather than a place where they are sent, [4] providing appropriate special education and related services, and aids and supports in the regular classroom . . . whenever appropriate, [5] supporting high-quality, intensive . . . professional development for all personnel [working] with children . . . , [6] providing incentives for whole-school approaches . . . and [pre-referral interventions] to reduce the need to label children [to obtain services] . . . , and [7] focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

Id.

[29] Palmaffy, *supra* note 9, at 9.

[30] *Id.* (noting that "[s]ocial work services, rehabilitative counseling, and transition from school to work are just a few of the services that have been added since 1975").

that the 1997 amendments extended the population of individuals who would qualify under IDEA as well as increase the magnitude and depth of the procedures school districts need to follow to be in compliance with IDEA.[31]

1. The Definition of " Learning Disability" under 20 U.S.C. § 1400

Of interest to this inquiry is the definition of learning disability.[32] A learning disability cannot include disabilities that result from physical disabilities.[33] This definition is often referred to as a negative definition that leads to unique interpretations of who is, and who is not, considered to have a learning disability under IDEA.[34] In application, the law considers students to be learning disabled if there is a discrepancy between their intellectual ability and their achievement.[35] This unique and often confusing standard leaves

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[31] *See* Anna B. Duff, *How Special Education Policies Effect Districts*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, at 135 (Chester E. Finn et. al., eds., 2001), *available at* http://www.ppionline.org/documents/SpecialEd_complete_volume.pdf (noting that "[i]n trying to make sure that special-needs children get an education, federal and state governments have created a massive procedural maze that frustrates teachers, parents, and administrators alike").

[32] The term "specific learning disability" is defined as "a disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations." This definition includes "such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 20 U.S.C. § 1401(30)(A)-(B) (2004).

[33] "Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural or economic disadvantage." 20 U.S.C. § 1401(30)(C) (2004).

[34] KELMAN & LESTER, *supra* note 14, at 19 (defining the federal definition as "essentially 'negative,' or exclusionary, rather than affirmative"). "A student is said to have a learning disability not when we observe any particular set of neurological traits, but when we decide we *cannot* explain poor academic performance on the basis of either low IQ or a set menu of excluded non-neurological factors." *Id.*

[35] Palmaffy, *supra* note 9, at 8 (noting that intellectual ability is usually measured on an IQ test and actual achievement is usually measured through

to school districts the difficult task of determining what factors are causing the student's poor performance.[36] Often schools cannot determine an educationally sound cause of a student's poor achievement, and thus will categorize students as learning disabled when in fact there are developmental issues that do not rise to the level of disability causing their poor performance.[37] As a result, many underachieving students who possess no true "learning disability" receive special education services. Thus, in theory, in a competitive academic environment, these misdiagnosed children can gain an educational advantage over their non-classified classmates. This predicament has led many to criticize IDEA, reiterating the often-heard claim "that special education services are given to children who are failing in school but who don't suffer from an identifiable learning disability".[38]

The vague and confusing wording of the statute has also led to significant litigation over whether states and school districts have met the procedural requirements of IDEA. In addition to the procedural dilemma, there exists tremendous confusion surrounding how educators, parents and courts are to interpret the meaning of the terms in the statute. Often, because of this poor construction, the Court is called to interpret IDEA, frequently with remarkably different results.[39] As a result, since

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standardized tests; when there is a discrepancy between these two measurements, a student is said to be "underachieving").

[36] *Id.* (citing Kelman & Lester, "[i]n theory, schools must determine whether this discrepancy is the result of factors other than a specific learning disability, but in practice it is difficult if not impossible to isolate which factor causes a child's inability to measure up to his potential").

[37] KELMAN & LESTER, *supra* note 14, at 18-19 (noting that "some would argue that even if learning disabilities exist and can be diagnosed, the enterprise of distinguishing [learning disabled] students from other students is ill founded, because there is no set of educational interventions that is uniquely apt to improve the performance of the [learning disabled group]").

[38] Palmaffy, *supra* note 9, at 8.

[39] *Compare* Schaffer v. Weast, 546 U.S. 49, 51 (2005) (noting that "[i]f parents believe that their child's IEP is inappropriate, they may request an 'impartial due process hearing'" and holding that "the burden [of persuasion at such a hearing] lies, as it typically does, on the party seeking relief."), *with* Oberti v. Bd. of Educ., 995 F.2d 1204, 1207 (3rd Cir. 1993) (holding that "the school bears the burden of proving compliance with the mainstreaming

the passage of the EAHCA in 1975 students considered to have a disability have increased dramatically. Between 1975 and 2000 for example, the number of students who qualify for special education services increased 65 percent.[40]

2. The Definition of "Free and Appropriate Public Education" under 20 U.S.C. § 1400

Generally, IDEA guarantees a FAPE for all students with disabilities between the ages of 3 through 21.[41] In addition to this general provision, IDEA also employs a concept known as "zero reject."[42] Furthermore, Congress when drafting IDEA endeavored to include parents to the maximum extent possible in the development and implementation of their child's individual education plan ("IEP").[43]

The immediate problem facing the courts as they endeavor to clarify the scope and parameters of IDEA, however, is that Congress did not use objective measures to determine whether or not a child with a disability was receiving a FAPE. In other words, nowhere in the act did Congress define FAPE and LRE.[44] Hence, the Court, in an attempt to rectify this ambiguity, chose to defer to the opinions of local professionals to determine what constitutes a free and appropriate public education in the least

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requirement of IDEA, regardless of which party (the child and parent or the school) brought the claim under IDEA before the district court").

[40] Horn & Tynan, *supra* note 5, at 27.

[41] 20 U.S.C. §§ 1401(8), 1412(a)(1)(B), 1419(b)(2) (2004).

[42] *See* HAGER & SMITH, *supra* note 4, at 63; *see also* 20 U.S.C. § 1412(a)(3)(A) (2004). *Compare* Timothy W. v. Rochester N.H. Sch. Dist., 875 F.2d 954, 962 (1st Cir. 1989), *with* Williams v. Gering Pub. Sch., 463 N.W.2d 799, 808 (Neb. 1990).

[43] Bd. of Educ. v. Rowley, 458 U.S. 176, 183 n.6 (1982) (noting that "[t]he requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize involvement in the education of each handicapped child").

[44] *See generally* 20 U.S.C. § 1400 (2004).

restrictive environment.[45] Unfortunately, even with the choice to defer to professionals, the courts are presently being called upon by schools, parents, and their disabled children to determine whether the IEP and related services that the school district has developed for their child are appropriate. Remarkably, these challenges occur even when the educational professionals the courts have deferred to determine the IEP and related services are sufficient. This approach to this problem has regrettably put the courts in the exact position from which they have attempted to extricate themselves. Sadly, too many times, the courts, in an effort to allow education professionals to make decisions concerning the parameters of an IEP and the subsequent FAPE, become more interested in whether the district has followed the procedural rules embodied within IDEA instead of whether the resultant IEP and FAPE serve the child.[46] Consequently, since the inception of IDEA school districts must continually increase their special education budgets to serve the ever-growing population of classified students as well as to insure compliance with the procedural requirements of IDEA.[47]

3. Determining the Least Restrictive Environment under IDEA

In *Pa. Ass'n for Retarded Children v. Commonwealth*, the court interpreted state statutory law to create, in all school

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[45] Palmaffy, *supra* note 9, at 10; *see also* Bd. of Educ. v. Rowley, 458 U.S. at 206 (holding that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities when they review" and that nothing in the Act "suggest[s] that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself").

[46] Palmaffy, *supra* note 9, at 11.

[47] JAY G. CHAMBERS ET AL., CTR. FOR SPECIAL EDUC. FIN., WHAT ARE WE SPENDING ON SPECIAL EDUCATION SERVICES IN THE UNITED STATES, 1999-2000?, 6 (2004), http://csef.air.org/publications/seep/national/AdvRpt1.PDF (noting that "[s]ince 1968-69, when the earliest study on special education expenditures was conducted, the total per pupil spending on students with disabilities has risen from $5,961 to $12,474 in constant dollars").

districts within the state of Pennsylvania, the right to an education for disabled children and expressed a clear preference for mainstreaming, with homebound instruction or residential placements used in only the most rare circumstances.[48] IDEA aligns itself with this philosophy, but nowhere in IDEA does Congress give a definitive meaning of what an LRE actually requires.[49] Nonetheless, a school district can loosely interpret IDEA to conclude that the more removed from the regular education classroom a disabled student is, the more restrictive the environment.[50]

The effects of this mandate add to the already tremendous burden on school districts. The necessity of school districts to educate disabled children in the least restrictive environment without corresponding federal assistance, or concrete statutory guidance, creates sometimes-insurmountable obstacles for school districts to overcome. These obstacles are particularly vexing when a student with severe learning disabilities requiring tremendous accommodations cannot be educated in a more appropriate setting.

4. How the States and School Districts Comply with 20 U.S.C. § 1400

IDEA requires special education systems in local school districts across the United States to first classify students into

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[48] 334 F. Supp. 1257 (E.D. Pa. 1971).

[49] *See* 20 U.S.C. § 1412 (a)(5)(A) (2004). The LRE requirement is generally codified as the following:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id.

[50] *See* Palmaffy, *supra* note 9, at 12.

one or more federally defined disability categories.[51] Following classification, students are then eligible for special education services and accommodations.[52] Teachers or parents can initially refer a child for initial screening. This screening includes participation by individuals including a school administrator, parents, classroom teacher and an educational specialist.[53] During the initial screening process, classroom performance along with standardized test scores are analyzed. If the team of individuals assembled to investigate the possibility of a learning disability suspects a significant problem, they may recommend that the child be evaluated with a more sophisticated, multi-disciplinary evaluation.[54] Following these evaluations, the team will have a follow up meeting and attempt to determine whether the child meets the classification criteria for any one of the several mandated special education categories. If the child does meet any criteria, and is considered learning disabled, the team will develop an IEP for that child designed to meet their unique educational requirements.[55]

The system described above creates dramatic differences between, and within, states in the thoroughness and quality of identifying, classifying and providing services for children with disabilities.[56] Consequently, special education programs are significantly more proficient in wealthier, suburban districts where parents have access to attorneys, other advocates and outside specialists. In these districts, most referred children do qualify and receive services. Unfortunately, this is not the case in many rural or inner city areas. In these places, parents

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[51] *See* Horn & Tynan, *supra* note 5, at 25.

[52] *Id.*

[53] *Id.*

[54] *Id.* (noting that "[s]uch an evaluation typically includes testing by an educator as well as a psychologist, and may also involve evaluations by specialists in speech and language, occupational therapy, and physical therapy").

[55] *Id.*

[56] *Id.* at 26 (noting that "[w]ithin states, and between school systems, there exists enormous variability regarding which students are found to be eligible for special education services").

generally neither have opportunity to, nor possess the ability to secure advocates, attorneys and specialists. As a result of this inequality, their children are more likely to be refused special education services.[57]

Many times these disparities lead parents to relocate to school districts that are more sophisticated or challenge the IEP or placement of their child. Many school districts frightened by a protracted and expensive legal battle will simply relinquish control to the wishes of the parents.[58] This acquiescence by school administrators to the wishes of parents creates situations where children do not possess a valid educational disability but are treated as having such because schools believe it will be more cost effective to classify the child. In addition, this non-confrontational approach, in its worst incarnation, often forces schools to pay for out of district placements of children in school settings their parents believe to be appropriate when in actuality the setting lacks the appropriate educational programs for their child.[59] Invariably, an educational atmosphere such as this creates a negative tension between parents and educational professionals. This tension of distrust and manipulation often pits the parents against the administration with resultant damage to the child who may or may not have a legitimate learning disability.

C. ALTERNATIVE REASONS FOR THE INCREASE IN STUDENTS QUALIFYING FOR SPECIAL EDUCATION BENEFITS UNDER IDEA.

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[57] *See* Horn & Tynan, *supra* note 5, at 25. *See also* DANIEL J. RESCHLY, THE FUTURE OF CHILDREN, IDENTIFICATION AND ASSESSMENT OF STUDENTS WITH DISABILITIES, at 40-53 (1996), *available at* http://www.futureofchildren.org/usr_doc/vol6no1ART3.pdf (discussing an in-depth analysis of the methods parents employ).

[58] Nanette Asimov, *Extra-Special Education at Public Expense*, S.F. Chron., Feb. 19, 2006, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/02/19/MNG8THBH4V1.DTL (discussing the emerging trend of parents of special education students seeking extra special education at public expense: private day schools, boarding schools, summer camps, aqua therapy, horseback therapy, travel costs, personal aides and more).

[59] *Id.*

There are several reasons one must consider, in conjunction with judicial interpretation of the parameters of disability under IDEA, which may be responsible, at least in part, for the remarkable increase in students qualifying for special education services.[60] Other causes of this astonishing increase in diagnosis include the extraordinary growth in the identification by medical professionals of specific learning disabilities.[61] This growth may be attributed, in part, to more sophisticated screening techniques as well as greater understanding of particular illnesses, as is the case, for example, with attention deficit hyperactivity disorder ("ADHD").[62] Furthermore, as alluded to earlier, states may feel the pressure of including students as learning disabled, and as a result eligible for IDEA services, because of economic incentives. Yet another significant problem, which prompts inclusion of otherwise non-disabled children, is IQ-achievement discrepancy in the

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[60] *See* RICHARD ROTHSTEIN WITH KAREN H. MILES, ECON. POL'Y INST., WHERE'S THE MONEY GONE?: CHANGES IN THE LEVEL AND COMPOSITION OF EDUCATIONAL SPENDING 50 (1995), *available at* http://www.epinet.org/books/moneygone.pdf.

> Public schools now handle severely handicapped cases that previously were treated in non-educational public or private institutions. State schools for "palsied children" in 1967 were part of state hospital systems and would not normally be included in education expenditure data for that year. Public schools now accommodate students of chronological school age who are so developmentally retarded that they are not toilet-trained. In 1967, such children were often housed in private charitable institutions without benefit of school reimbursements. Children with less severe mental retardation were also cared for privately and did not attend public schools.

Id.

[61] *See* Thomas B. Parrish, *Who's Paying the Rising Cost of Special Education*?, 14 J. SPECIAL EDUC. LEADERSHIP 4 (2001), *available at* http://www.csef-air.org/publications/related/jsel/parrish_JSEL.pdf.

[62] *See* American Academy of Pediatrics, *Clinical Practice Guideline: Diagnosis and Evaluation of the Child with Attention-Deficit/Hyperactivity Disorder*, 105 PEDIATRICS 1158 (2000) (noting that attention deficit hyperactivity disorder (ADHD) is now the most frequently diagnosed neurobehavioral disorder of childhood).

identification of students with learning disabilities.[63] This standard was enacted in 1977, soon after the passage of the EAHCA. It was intended to "objectively and accurately" distinguish children with learning disabilities from children with other academic deficiencies.[64]

The primary motivation for the enactment of this criterion was because the EAHCA definition of learning disability provided very little practical guidance.[65] In addition to the aforementioned problems with the sudden increase of children being diagnosed as learning disabled, Lyon et. al. believes that this disproportionate number is further inflated by pedagogical, experimental, and socio-educational factors.[66]

III. CONGRESSIONAL AND JUDICIAL TREATMEMT OF INDIVIDUALS WITH DISABILITIES IN EDUCATION

A. CONGRESSIONAL INTENT OF IDEA

When the precursor to IDEA, the EAHCA, passed in 1975,

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[63] *See* G. Reid Lyon, et al., *Rethinking Learning Disabilities*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY, at 265 (Chester E. Finn et. al., eds., 2001), *available at* http://www.ppionline.org/documents/SpecialEd_complete_volume.pdf.

[64] *Id.* at 265.

[65] *Id.* (noting, inter alia, that "the IQ-discrepancy component [was added] as an additional criterion and that "[i]nherent in this criterion is an implicit classification of low-achieving students into those who are [learning disabled] (those with unexpected underachievement) and those who simply underachieve (those with expected underachievement").

[66] *Id.* at 263.

> The disproportionate increase in the numbers of older children identified as [learning disabled] during the late elementary to middle school years is, in part, attributable to the following: (1) the limited effectiveness of remediation after age nine; (2) measurement practices that are biased against the identification of children before age nine; (3) socio-educational factors operating within the public school enterprise.

Id.

many thought it to be "landmark" legislation, finally protecting the rights of disabled individuals. Congress, through the EAHCA, sought to rectify the history of discrimination perpetrated against individuals with disabilities in education.[67] Congress boldly mandated that it would pay 40 percent of the special education budgets of each state by 1980.[68] Today, Congressional funding still falls critically short of the 40 percent guaranteed by Congress.[69] This failure equates to an unfunded

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[67] *See* 20 U.S.C. § 1400(c)(2) (2004).

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94–142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because— (A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system and from being educated with their peers; (C) undiagnosed disabilities prevented the children from having a successful educational experience; or (D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

Id.

[68] DEMOCRATIC POLICY COMMITTEE, SENATE DEMOCRATS ARE COMMITTED TO PROVIDING PROMISED RESOURCES FOR IDEA, April 8, 2004, *available at* http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=fs-108-2-106.

> The original EAHCA authorized the federal government to pay 40 percent of the cost of providing special education services. The federal share of that cost – known as the "full-funding" amount – was determined to be 40 percent of the national average per-pupil expenditure (APPE) times the number of children served. The EAHCA recommended phasing in full-funding over five years, reaching the 40 percent level in 1980. In describing that formula, Representative Brademas stated that the federal government makes a commitment to pay a gradually increasing percentage of the national average expenditure per pupil times the number of handicapped children receiving special education and related services.

Id. (citing *Congressional Record*, November 18, 1975, H-37024).

[69] For fiscal year 2008, the authorized funding level for IDEA was $19.23 billion while Congress only appropriated $10.7 billion. Despite the $200 million increase in the appropriated amount from the 2006 levels, the there was a drop in federal share from 17.6% to 17.2%. "In FY2008 the national average per

mandate and severely burdens each state and public school district by requiring districts to fund the majority of their ever-growing special education budgets.

B. CONGRESSIONAL FAILURE TO PROVIDE FUNDING

Congressional tinkering with IDEA since its inception has had a debilitating effect on individual states. Congress has not substantially increased federal funding to the states, but the amendments it has made to IDEA have increased the number of disability categories, as well as the number of students receiving special education services.[70]

Recently, Congress has attempted to address the issue of funding.[71] In these most recent amendments to IDEA, Congress finally authorized specific funding levels to allow the federal share of special education funding to grow to 40 percent by 2011.[72] However, federal funding of IDEA presently, in 2007, three years after these most recent amendments, is a staggering 135 percent below the 40 percent promised by Congress in

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pupil expenditure (APPE) will be $9,288 and that 6,855,000 children will be served by IDEA Part B. Multiplying these two numbers the total estimated national expenditure…for children with disabilities. The federal share should be 40% …but has never risen above 19%." AMERICAN SPEECH LANGUAGE HEARING ASS'N, IDEA FUNDING FOR FY2009 & BEYOND, *available at* http://www.asha.org/NR/rdonlyres/E221879D-F3BA-4D3B-A828-98E853AE9CE3/0/IDEAFundingBriefWithTalkingPoints.pdf.

[70] *See* Sheldon Berman et al., *The Rising Costs of Special Education in Massachusetts: Causes and Effects*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 184 (Chester E. Finn, et. al., eds., 2001), *available at* http://www.ppionline.org/documents/SpecialEd_complete_volume.pdf (noting that the U.S. Department of Education's Office of Special Education Programs reported that "in 1999 almost 5.5 million students ages 6 to 21 with disabilities were served by schools under the IDEA. The average increase over the 10 years (1989-1999) was 29 percent").

[71] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

[72] *See* AMERICAN SPEECH LANGUAGE HEARING ASS'N, IDEA FUNDING FOR FY2009 & BEYOND, *available at* http://www.asha.org/NR/rdonlyres/E221879D-F3BA-4D3B-A828-98E853AE9CE3/0/IDEAFundingBriefWithTalkingPoints.pdf. *See also* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004).

1975.[73]

While it is evident Congress had the best interest of individuals with disabilities in mind when they it IDEA, it has fallen woefully off its mark. The increase in the number of students requiring special education services since the inception of IDEA due to poor statutory construction, coupled with Congress' consistently increasing the categories of individuals with disabilities, has forced states and local school districts to redirect significant funding to meet this Congressional mandate.[74] More alarming, however, is Congress' blatant refusal to assist states and local school districts with the funding it had promised to them. Moreover, IDEA conditions educational funding upon compliance with its provisions.[75] This mandate has put states and school districts in a difficult position. States and local school districts, to receive federal funds, must continue to expand their special education services in compliance with Congressional requirements with no significant increases in federal funds. Even more alarming, special education expenditures are growing at a staggering pace and congressional appropriations are reducing the per disabled pupil contributions to special education budgets, an act which

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[73] AMERICAN SPEECH LANGUAGE HEARING ASS'N , *supra* note 69, at 3.

[74] *See* Horn & Tynan, *supra* note 5, at 23 (noting that IDEA has had some negative consequences, including the "creation of incentives to define an ever-increasing percentage of school-aged children as having disabilities, an enormous redirection of financial resources from regular education to special education, and, perhaps most importantly, the application of an accommodation philosophy to populations better served with prevention or intervention strategies").

[75] *See* 20 U.S.C. § 1412(a) (2004).

> A state is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the state meets each of the following conditions: (1) free appropriate public education . . . (2) full educational opportunity . . . (3) child find . . . (4) individualized education program . . . (5) least restrictive environment.

Id.

more severely strains the budgets of local schools.[76]

In effect, poor statutory construction and irresponsible Congressional decision-making have caused state and local school district special education budgets, and their accompanying procedural requirements, to spiral out of control and negatively influence the direction, and effectiveness, of the American public school system.

IV. THE CONFUSING INTERPRETATION OF 20 U.S.C. §1400 BY THE COURTS AND THE SUBSEQUENT EFFECT ON THE STATES

A. THE ROLE OF THE COURTS IN DEVELOPING IDEA

The courts have had a significant role in developing IDEA and judicial decisions have sought to clarify ambiguous provisions within the statute. In some instances, these determinations have helped to clarify the parameters of IDEA as well as further define what a free and appropriate public education and least restrictive environment is and is not.[77] This vague statutory construction of IDEA, however, has led the courts to differing interpretations of what a FAPE and the LRE constitute.

The Supreme Court in *Board of Education of Hendrick Hudson School District v. Rowley*[78] first attempted to define the meaning of FAPE.[79] In this decision, the Court conservatively defined what they believed the ceiling of what a FAPE should

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[76] *See* ROTHSTEIN & MILES, *supra* note 60, at 49 (noting that between 1967 and 1991 special education expenditures rose from 4% to 18%, a net drain on new revenues to the districts of 38%).

[77] Palley, *supra* note 3, at 608.

[78] 458 U.S. 176 (1982).

[79] *See id.* (interpreting the EAHCA (the precursor to IDEA)). In this case, a deaf girl was mainstreamed into a regular education classroom (LRE). Her parents requested a sign language interpreter for her. The child did well in school and was an excellent lip reader. The school district denied the request, asserting that the child was getting enough from her classes and was successful in school without one.

consist of.[80] The Court did state, however, that the program prescribed to a disabled student must be one which is based on the student's individual needs and designed to enable the student to benefit from her education.[81] Furthermore, the Court recognized the importance of developing procedural safeguards in the development of a child's IEP. Because of this concern, the Court established a two-prong test to determine whether a program is appropriate. First, the Court said that Congress did not exaggerate their intentions when they put equal emphasis upon compliance with procedural requirements designed to include parents in the development and administration of their child's IEP and the measurement of the IEP against a substantive standard.[82] Second, the Court required the IEP to be reasonably calculated to enable the child to receive educational benefit.[83]

Disability rights advocates viewed *Rowley* as a major setback because of the Court's low standard of "some educational benefit."[84] In other words, the majority of special education advocates believed that, for a school district to comply with

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[80] *Id.* at 199. The Supreme Court ultimately sided with the school district stating that, "[t]o require . . . the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go."

[81] *Id.* at 203.

> Insofar as a state is required to provide a handicapped child with a "free and appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP . . . [I]f the child is being educated in the regular classrooms of the public education system, should reasonably be calculated to enable the child to achieve passing marks and advance from grade to grade.

Id.

[82] *Id.* at 205-06.

[83] *Id.* at 207.

[84] Palmaffy, *supra* note 9, at 10.

Rowley it only had to show that the child showed *some progress* [emphasis added].

Later, because the *Rowley* decision was narrow and did not answer the question of what constitutes the conditions of a LRE, the Eleventh Circuit, in *Greer v. Rome City School District*,[85] endeavored to define these parameters.[86] Since this decision, "a disabled student's IEP must document the extent to which the disabled student is to be educated in the regular classroom."[87] Because IDEA places a presumption of inclusion of handicapped students in the regular education classroom to the maximum extent possible on the school district, only when the regular education classroom cannot meet the handicapped child's unique needs is the presumption in favor of mainstreaming overcome. [88] As a result, students with learning disabilities are generally educated in a resource room (a room which is designed to facilitate supplementary instruction of students with an IEP who are in this room for more than 21% of the day but no more than 60% of the day)[89] or, the regular education

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[85] 950 F.2d 688 (11th Cir. 1991).

[86] *Id.* at 696. The court stated:

> [F]irst we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. . . . If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child [put the child in the LRE] to the maximum extent appropriate.

Id. (citation omitted). *See also* Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (delineating the two part test the Eleventh Circuit used to ensure the school district was in compliance with the LRE); Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F., 526 U.S. 66, 77 (requiring participating states to educate handicapped children with nonhandicapped children whenever possible).

[87] Palmaffy, *supra* note 9, at 12.

[88] Kelman, *supra* note 14, at 95.

[89] U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, DATA ANALYSIS SYSTEM, EDUCATIONAL PLACEMENTS FOR STUDENTS WITH DISABILITIES (1996), http://www.ed.gov/pubs/OSEP96AnlRpt/chap3b.html.

classroom.[90]

Other courts applying *Rowley*, however, have held that *Rowley* supports a more broad interpretation of the scope of the educational rights of the educationally disabled individual, while still, in their opinion, protecting the spirit of the *Rowley* decision.[91] For example, the Second Circuit, in *Mrs. B v. Milford Board of Education*[92] expanded on *Rowley* by citing the Third Circuit's ruling in *Polk*, saying "a child's ability to advance from grade to grade does *not* [emphasis added] mean that he is

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[90] KELMAN & LESTER, *supra* note 14, at 95.

> Nationally, more than three quarters of pupils labeled LD are served either in the resource room (56.1 percent) or exclusively in the regular education classroom (20.7 percent). It is an open question however, how many of those served in self contained classes (21.7 percent) or separate schools, residential facilities, or hospitals (1.5 percent) are "true" LD pupils as opposed to deliberately or inadvertently misclassified students with other problems.

Id.

[91] *See, e.g.,* Hall v. Vance, 774 F. 2d 629, 636 (4th Cir. 1985).

> *Rowley* recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children. Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial.

See also, Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988) (noting that a student with severe mental and physical disabilities was entitled to physical therapy by a licensed physical therapist as part of his IEP). The court held that,

> [T]he use of the term "meaningful" [in Rowley] indicates that the Court expected more than *de minimus* benefit. We note in this regard that the facts of *Rowley* clearly indicate that the "benefit" Amy [Rowley] was receiving from her educational program was substantial, and that "some benefit," in the case of Amy, meant a great deal more than a negligible amount.

Id.

[92] 103 F.3d 1114, 1121 (2d Cir. 1997).

receiving a FAPE."[93]

B. THE COURTS' APPROACH TO DEALING WITH POOR STATUTORY CONSTRUCTION OF IDEA

The differences among circuits as to the interpretation of IDEA, even with the Supreme Court's attempt to clarify the issue in *Rowley*, are due to the failure of Congress to successfully articulate, and define, FAPE and LRE. Consequently, the courts have used a case-by-case approach to determine whether school districts have satisfied the requirements of a FAPE and a LRE for their learning-disabled students.[94] Under this case-by-case approach, a school district's interpretation of what constitutes a FAPE and LRE can be all-inclusive and maximize a disabled child's potential or, conversely, can be a plan that delivers only the minimal requirements.[95] The effect of this case-by-case approach, coupled with the tremendous disparity in court decisions often times causes school districts to become uncertain of whether or not they are providing adequate services for the disabled students within their districts. Consequently, many schools have chosen to employ an inclusionary philosophy in regards to students who may, but are not categorically proven to, possess a learning disability. This philosophy has resulted in significant numbers of children being classified as possessing a learning disability which qualifies them for coverage under IDEA simply because school districts are unsure as to whether or not they have legal standing to deny services to a student that the school district believes does not qualify for services.

C. APPLICATION OF THE CASE-BY-CASE MODEL AND THE EFFECTS OF THIS CONFUSING STANDARD ON PARENTS, STUDENTS, SCHOOL DISTRICTS, AND STATES

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[93] Rowley Supra note 78, n. 23 at 207

[94] Palmaffy, *supra* note 9, at 11.

[95] KELMAN & LESTER, *supra* note 14, at 69-74 (discussing in-depth how socioeconomic status within the school district influence the scope of a special education services provided by school districts).

While the Court in *Rowley* diligently attempted to define, what constitutes a FAPE under the EAHCA, poor statutory construction coupled with dissimilar judicial interpretation of *Rowley's* conservative holding have led to remarkably different decisions by the circuit courts.

1. Liberal and Conservative Interpretations of FAPE

a. Liberal Interpretations of FAPE

As noted earlier, *Hall v. Vance*, *Polk v. Central Susquehanna Intermediate Unit 16,* and *Mrs. B v. Milford Bd. of Education,* have all interpreted *Rowley* to include different, more expansive entitlements centered on a FAPE that grants more than a de minimus educational benefit. Many other cases, however, support the same liberal interpretation of what constitutes a FAPE. For example in, *Carter v. Florence County Sch. Dist. No. 4*,[96] the parents of a disabled child sued the school district, superintendant, and school board members claiming that they failed to provide their child with a FAPE. The child was diagnosed with a "comparatively severe" learning disability. The diagnosis of this child's learning disability occurred after the child was tested for a second time because the first round of tests failed to diagnose a problem.[97]

In this case, the United States District Court for the District of South Carolina found for the child and her parents and ordered the school district to reimburse the student for private school tuition and other costs.[98] On appeal, the school district claimed that it had not failed to provide a FAPE, and that the school the parents enrolled their child in was not approved by the state and was therefore a bar to reimbursement. The Fourth Circuit found that the child's IEP as drafted by the school district failed to satisfy IDEA's requirements of "more than minimal progress" and that there was no bar to reimbursement

[96] 950 F.2d 156 (4th Cir. 1991).

[97] *Id.*

[98] *Id.* at 160 (noting that the district court retroactively reimbursed the child for $35,716.11 plus prejudgment interest).

because the alternative school was not approved by the state. The court concluded that even though the school was not approved by the state, reimbursement was appropriate because the private school succeeded in providing an appropriate education.[99] The court explained that to rule otherwise would ameliorate the rights provided to a student under IDEA when choosing an alternative educational setting once the school district fails to provide a satisfactory FAPE and the state defaults on its statutory obligations.[100] In another case, *Capistrano Unified School District v. Wartenberg*,[101] the parents of a child with learning disabilities and a conduct disorder sued the school district for reimbursement of tuition at an alternative school. The parents contended that the reason their child presented significant disciplinary problems, which manifested itself in extremely poor academic progress, was rooted in their son's learning disability and not his conduct disorder.[102] Therefore, if the reason that their son was doing poorly in school could be directly linked to his learning disability and not his conduct disorder, they would be eligible for reimbursement for tuition expenses at the alternative school the family had chosen.[103] Relying on evidence from the hearing officer and the district court the *Wartenberg* court found that placing this student out of district was appropriate because the school district did not create an adequate IEP.[104]

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[99] *Compare* Carter, 950 F.2d 156, where the court indicates a need for more than trivial educational progress *with* Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988), where the court explains that there is no clear obligation on the state to maximize the potential of the handicapped children. This comparison emphasizes the different interpretations of what the state's responsibilities are in relationship to educational progress for disabled students.

[100] *Carter*, 950 F.2d at 164-65.

[101] 59 F.3d 884 (9th Cir. 1995).

[102] *Id.*

[103] *Id.* at 892-93.

[104] *Id.* at 897.

> The evidence overwhelmingly supported this rejection of mainstreaming. Jeremy was placed in regular classes in the seventh grade and failed. When he started at Capistrano, he received minimal special attention and was included in

b. Conservative Interpretations of FAPE

Contrary to the previous cases, there are a several cases which are significantly more conservative in their holdings. For example, the Second Circuit found, in *J.D. v. Pawlett School District*,[105] that based on the child's level of academic performance a child with an emotional problem that was performing at or above grade level was not eligible for special education services under IDEA. Likewise, the Eight Circuit Court in *Zumwalt School District v. Clynes*[106] found in favor of the school district when the parents requested reimbursement for an out of district placement of their child. Further supporting a more conservative approach to IDEA entitlement, *JSK v. Hendry County School Board*[107] found that a child diagnosed as mentally retarded was only entitled to what the

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> regular ninth grade classes to the greatest extent possible. He failed every one. Then the school placed him in a special day class within the normal school setting. Still, he failed. As the district court found, when he began attending Mardan, with its increased attention and comprehensive behavior management plan, he succeeded. This result is consistent with the predictions of the doctors at College Hospital, who said Jeremy needed a very structured environment in order to benefit from his education. Congress expressed a preference for mainstreaming where "appropriate." Congress provided for separate teaching of disabled children where education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." Mainstreaming which results in total failure, where separate teaching would produce superior results, is not appropriate and satisfactory. Congress expressly limited its presumption in favor of mainstreaming to cases where mainstreaming is "appropriate" and mainstream education can be provided "satisfactorily."

Id.

[105] 224 F.3d 60, 65 (2nd Cir. 2000).

[106] 119 F.3d 607 (8th Cir. 1997). In this case, the Eighth Circuit found for the school district when the parents of a learning disabled student sought reimbursement for tuition from the school district when they enrolled their disabled child in an alternative school specializing in disability education.

[107] 941 F.2d 1563, 1572-73 (11th Cir. 1991) (citing Todd D. v. Andrews, 933 F.2d 1576, 1580 (11th Cir. 1991), which interpreted the application of the provisions of the EAHCA under *Rowley* to this case).

Rowley decision mandates--access to services which meet state educational standards and which comport with the child's IEP. The Eight Circuit went on to stress its previous ruling in *Todd D. v. Andrews*, where it emphatically stated, "when measuring whether a handicapped child has received educational benefits from an IEP and related instructional services, courts must only determine whether the child has received the basic floor of opportunity."[108] Moreover, the court said that the requirements of the EAHCA are satisfied when the educational benefits are adequate based on surrounding and supporting facts,[109] only requiring a de minimus improvement.[110] Finally, in *Kerkam v. McKenzie*,[111] the district court erroneously used a maximizing standard when deciding that parents of a severely mentally retarded child were eligible for reimbursement of costs for a private placement.[112] Consequently, the appeals court reversed and remanded the case and the district court again ruled that the school district's proffered IEP did not meet the requirements of a FAPE; once again, the school district appealed the decision.

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[108] *Id.* at 1572-1573.

[109] *Id.* at 1573.

[110] *Id.* "While a trifle might not represent 'adequate' benefits . . . maximum improvement is never required. Adequacy must be determined on a case-by-case basis in the light of the child's individual needs." *Id.* (citation omitted).

[111] 862 F.2d 884 (D.C. Cir. 1988).

[112] *Id.* at 888-89.

> Remarks in the opinion conflict in their implications as to the principle by which the court reached this view. At one point the court said that it "seems that it is impossible for Alexander . . . to make *the same gains* while living at home and attending school as is being accomplished while Alexander is attending the school and living in the group home in Scranton." The court's unspoken premise appears to have been that since Alexander was making progress at Willow Street-Keystone, it followed that any inferior placement was not appropriate. Appealing as that view must be, it is inconsistent with the "some educational benefit" standard of *Rowley* and is strongly suggestive of reliance on the potential-maximizing standard that *Rowley* forbids.

Id. (citation omitted) (quoting Kerkam v. Bd. of Educ., 672 F.Supp. 519, 524 (D.D.C. 1987)).

The appeals court found that the decision the district court made on remand turned on its understandable concern for the student's best interests rather than on the appropriateness of the educational program proposed by the DCPS.[113]

2. Liberal and Conservative Interpretations of LRE

Circuit courts faced with determining the second requirement of IDEA, whether a disabled child is receiving a FAPE in the LRE, often vary considerably in their decisions.

As noted, the Fifth Circuit has developed a two-part test to determine whether a school district complies with the mainstreaming requirements of IDEA.[114] The requirement within IDEA to educate disabled students in the LRE creates a tension between the strong preference for mainstreaming and the requirement that schools provide individualized programs tailored to the specific needs of each disabled child.[115] Because

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[113] Kerkam v. Superintendent D.C. Pub. Sch., 931 F.2d 84, 87 (D.C. Cir. 1991).

> In reaching its decision, the district court gave insufficient weight to the findings of the hearing officer. The court rightly observed that a decision without "reasoned and specific findings" deserves "little deference." The officer's final determination, to be sure, offers only the bare conclusion that the program at Mamie D. Lee could meet Alexander's educational needs. But when it is read together with the two determinations that preceded it, and in light of the statutory preference for the least restrictive educational environment appropriate to the needs of the child, 20 U.S.C. § 1412(5)(B), the basis for the conclusion becomes clear. Contrary to the conclusion of the district court, a residential placement far from home is more restrictive than a local extended-day program.

Id. (internal citation omitted).

[114] Daniel R.R. v. Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989).

[115] Oberti v. Bd. of Educ., 995 F.2d. 1204, 1214 (3d Cir. 1993). *See also* Daniel R.R., 874 F.2d at1044.

> By creating a statutory preference for mainstreaming, Congress also created a tension between two provisions of the Act. School districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs. §§ 1412(1) and (5)(B). Regular classes, however, will

of this tension, schools are often in a difficult position where they are forced to walk the very narrow line between providing a free and *appropriate* public education and ensuring the least restrictive environment possible for their disabled students. Often this dilemma presents itself when a disabled student is mainstreamed to meet the requirements of the LRE but, because of mainstreaming, the appropriateness of her education fails to be sufficient.

a. Liberal Interpretations of LRE

In *Oberti v. Board of Education*,[116] the parents of a child with Down's syndrome who possessed significant behavioral problems rejected the determination by a child study team that a placement in a segregated special education classroom for educable mentally retarded children was appropriate. On appeal, the Third Circuit decided that the school district did not prove that a disabled child with Down's syndrome could not be educated in a regular education classroom with supplementary aids and services.[117]

In *T.R. v. Kingwood Township Board of Education*,[118] the Third Circuit decided whether the school district had given a child, who had been diagnosed as preschool handicapped, a FAPE in the LRE possible. The court found that the IEP developed by the school district for the child was appropriate but vacated the district court's holding concerning whether the FAPE was administered in the LRE. The court remanded the case because they felt that the school district, by not looking at

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> not provide an education that accounts for each child's particular needs in every case. The nature or severity of some children's handicaps is such that only special education can address their needs. For these children, mainstreaming does not provide an education designed to meet their unique needs and, thus, does not provide a free appropriate public education.

Id.

[116] 995 F.2d at 1208.

[117] *Id.* at 1223.

[118] 205 F.3d 572 (3d Cir. 2000).

alternative settings, which were "*within a reasonable distance of [the child's] residence*," [emphasis added] did not comply with the requirements of the LRE.[119]

b. Conservative Interpretations of LRE

In *Hartmann by Hartmann v. Loudoun County Board of Education*, [120] the parents of an eleven-year-old autistic boy sued the school district claiming that their son was not educated with non-handicapped children to the maximum extent possible. In clear and concise language, the Fourth Circuit stated that IDEA confers no statutory power to allow federal courts to run local schools.[121] Consequently, the Fourth Circuit found that the district court erred when determining that a school district did not deliver a FAPE in the LRE because the district court did not pay deference to the findings of the educational professionals.[122]

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[119] *Id.* at 575 (noting that the reason the court vacated and remanded was to determine "whether the Board failed to consider any appropriate, state-qualified alternate placements within a reasonable distance of [the disabled child's] residence").

[120] 118 F.3d 996 (4th Cir. 1997).

[121] *Id.* at 1001.

[122] *Id.* at 1005.

> The IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit. The evidence in this case demonstrates that Mark Hartmann was not making academic progress in a regular education classroom despite the provision of adequate supplementary aids and services. Loudoun County properly proposed to place Mark in a partially mainstreamed program, which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible. This professional judgment by local educators was deserving of respect. The approval of this educational approach by the local and state administrative officers likewise deserved deference from the district court, which it failed to receive. In rejecting reasonable pedagogical choices and disregarding well-supported administrative findings, the district court assumed an educational mantle, which the IDEA did not confer. Accordingly, the judgment must be reversed, and the case remanded with directions to dismiss it.

In *Poolaw v. Bishop*, [123] the Ninth Circuit found that a school district was within its rights under IDEA when it did not mainstream a profoundly deaf Native American child. After determining that the child would get no educational benefit at the public school, the district enrolled the child in a school specializing in educating deaf and blind children. Consequently, the parents sued, claiming that the specialized school, *which was 280 miles from their home*, was not in the LRE.[124] The court found for the school district, stating:

> The district court's finding that Lionel [the child] will receive no educational benefit from continued mainstreaming is not clearly erroneous. *The IDEA only requires a state educational agency to mainstream a disabled student to the maximum extent appropriate.* It would be inappropriate to mainstream a child when he can receive no educational benefit from such a policy.[125]

D. EFFECTS OF THESE CONFUSING DECISIONS ON SCHOOL DISTRICTS

As evidenced by the preceding cases, there is tremendous ambiguity as to how the Circuit Courts interpret the meaning of what constitutes a FAPE and a LRE under *Rowley*. This uncertainty produced by the courts has manifested itself by forcing states and local school districts to significantly increase special education funding (often times at the expense of general education funding) to successfully serve the greater number of students classified with a learning disability under IDEA.[126]

Id.

[123] 67 F.3d 830 (9th Cir. 1995).

[124] *Id.*

[125] *Id.* at 837-38 (emphasis added).

[126] *See* SAS OUTPUT, TABLE B-1 CHILDREN SERVED UNDER IDEA, PART B, AGES 3-21 BY STATE, 1976 THROUGH 2005, https://www.ideadata.org/docs/PartBTrendData/B1.html (noting that the total enrollment prevalence rate for children with disabilities in all 50 states and Washington D.C. has risen from 8.33 in 1975 to 13.78 in 2004).

Remarkably, because of this influx of students qualifying for services, budgets for special education and general education from 1982 to 1999 rose 117% to 69% respectively.[127] New York for instance, spends on average $12,457 on each special education student *above* what would have been spent on the student otherwise.[128] This court-generated confusion has led school districts in New York and many other states, often, out of fear of reprisal from parents or reduction of funding from the state, to knowingly misclassify students in response to adverse financial incentives.[129] Surely, this protective posture personified in New York and other states is neither what Congress intended IDEA to perpetuate, nor what the Supreme Court envisioned would be the outcome of its ruling in *Rowley*.

While it is understood that Congress constructed IDEA poorly, the onus of interpretation rests with the courts. It is in this arena, where a statute must be given flesh, which I believe our courts have failed. Courts, exercising their responsibility of interpreting the construction of a statute, should strive for uniformity. Why then, if courts should be endeavoring to create a uniform doctrine do we have such confusing disparity between circuits? For instance, in *Poolaw,* the Ninth Circuit found 250 miles away from a child's home not to be too far, but in *T.R.*, the Third Circuit found that a school district failed to provide an

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[127] Thomas B. Parrish, *Who's Paying the Rising Cost of Special Education*?, 14 J. SPECIAL EDUC. LEADERSHIP 6 (2001), *available at* http://www.csefair.org/publications/related/jsel/parrish_JSEL.pdf.

[128] *See* JAY P. GREEN & MARCUS WINTERS, EMPIRE CENTER FOR NEW YORK STATE POLICY, HELPING KIDS, SAVING MONEY: HOW TO REFORM NEW YORK'S SPECIAL EDUCATION SYSTEM, 3 (2005), http://www.empirecenter.org/Documents/PDF/sr02-05.pdf.

[129] *Id.* at 3.

> [S]pecial education enrollments in New York, along with several other states, have been inflated by schools responding to an adverse financial incentive to misclassify some students as disabled. . . . Research indicates that a substantial amount of the growth in New York's special education population can be explained by adverse financial incentives rather than real increases in the percentage of students who have a true disability.

Id.

education to a disabled child in the LRE because they failed to look for an alternative placement closer to home.[130] It is precisely this type of confusion that leads school districts to practice "over inclusion" of children not specifically classified as having a learning disability as a means to protect themselves from parents and disabled students, who believe they are entitled to more than IDEA actually provides.

V. AN ALTERNATIVE MODEL WHICH BALANCES THE RIGHTS OF PARENTS AND SCHOOL DISTRICTS WITH CONGRESSIONAL INTENT OF IDEA

The intentions of Congress, when it enacted IDEA, were noble. Furthermore, Congress has attempted, through the recent amendments of 1997 and 2004, to address some glaring insufficiencies in IDEA. These Congressional attempts to evolve and restructure the parameters of IDEA, at the least, show Congress' recognition of the shortcomings of IDEA. The courts, however, have not followed suit; their reasoning fails to evolve and consider the aggregate effect of including children not educationally affected by their disability under the protections of IDEA.

The spirit of IDEA can be preserved if courts, while determining whether a student with a disability is entitled to IDEA benefits, would put significant emphasis on qualifying a child for coverage. Emphasis under this approach would not be placed on whether or not a child actually possesses a listed disability under §§ 602(3)(A)(i), but whether under §§ 602(3)(A)(ii), the child "*by reason thereof, needs special education and related services.*"[131] Recently, the First Circuit had an opportunity, in *Mr. I. ex rel. L.I. v. Maine School Administrative District No 55*, to forge a new path in how IDEA coverage is determined by supporting such a provision.[132] Here, the school district believed that the child, while diagnosed with

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[130] 205 F.3d at 575.

[131] *See* 20 U.S.C. § 1401(3)(A)(ii) (2004).

[132] 480 F.3d 1 (1st Cir. 2007).

Asburger's syndrome, did not qualify for coverage under the Maine department of education regulations defining the disabilities under IDEA.[133] The school district believed that a student should be eligible for coverage "only if the student's condition imposes a significant negative impact on the child's educational performance."[134] The court, however, felt that the school district overlooked the structure of IDEA's eligibility standard, which requires that a student not only have one of the enumerated disabilities but also by "reason thereof" needs special education and related services.[135] In other words, the court was saying that §§ 602(3)(A)(ii) is a sufficient filter to reduce the number of students who qualify for special education benefits. This reasoning, however, fails to sufficiently answer why there is such a tremendous increase in students receiving special education services. In fact, the court dodged the seminal aspect of the school district's appeal by not tackling the question of what constitutes the scope of §§ 602(3)(A)(ii).[136] In addition, the court ignored "Congressional admonishments against identifying too many students as 'children with disabilities' under the IDEA."[137]

The First Circuit, in their opinion, proffers a purely textual argument as to the parameters of inclusion under IDEA, one that is devoid of any evolving standards of application. This court decided to ignore Congressional intent, national statistics, and blatantly refused to tackle the toughest question presented to them by the school district.

Ironically, this case is remarkably similar to *Pawlett*, in as much as both students suffered from behavioral problems but still excelled academically. Here, the court ruled in favor of giving special education services while the *Pawlett* court ruled

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[133] *Id.*

[134] *Id.* at 11.

[135] *Id.* at 5 (interpreting 20 U.S.C. § 1401(3)(A)(ii)).

[136] *Id.* at 13.

[137] *Id.* at 15 (noting that Congress voiced concern about "over identifying children as disabled . . . particularly in urban schools with high proportions of minority students" (quoting H.R. Rep. No. 105-98, 89 (1997)).

against services.[138] In essence, instead of delineating a sounder, objective standard of what constitutes coverage under IDEA, the First Circuit only continues to confuse the standard.

VI. CONCLUSION

The question of what constitutes a FAPE in the LRE under IDEA has been answered in several ways by circuit courts. Each of these approaches has been remarkably inconsistent and has proven to confuse parents, students and educators. The Supreme Court has attempted to define these standards, but the Court has not addressed this issue since 1982. Without a clear definitional standard of FAPE and LRE, courts should strive for consistency in their future rulings. Consistency such as this could have a tremendous positive effect on the already strained state educational budgets and give parents of disabled children a clear understanding of what protection their child is entitled to receive.

This Note suggests a model of analysis of IDEA claims that recognizes Congressional intent and supports the spirit of IDEA while recognizing the shortcomings of the structure of the statute. Under this analysis a court, while deciding an IDEA claim, should read the statute to put great emphasis on §§ 602(3)(A)(ii) as a true filter to erroneous claims. A court should ask two straightforward questions; (1) does this individual possess an enumerated disability, and (2) does this disability have an adverse effect on educational performance. Paramount to the success of this analysis is to limit the court's inquiry to these two questions; courts should not entertain the question of whether or not the disability adversely affects the individuals' educational experience. Using this approach will help to alleviate the present confusion within the courts and remarkably reduce the number of individuals erroneously qualifying for IDEA coverage.

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[138] *Compare id.* (affirming the judgment of the district court where a female with Asburger's syndrome who was succeeding academically in school was entitled to special education services under IDEA), *with* J.D., 224 F.3d at 68 (holding that an academically gifted child with an emotional-behavioral disability is not eligible for special education under IDEA and corresponding Vermont regulations).

LIMITING CONTINUATIONS: A PHARMACEUTICAL BASED PERSPECTIVE

Hedwig A. Murphy[1]

I. INTRODUCTION

The United States patent system provides an intrinsic set of rules and regulations providing inventors with an incentive to publicly disclose their inventions in exchange for exclusive rights and privileges of that invention.[2] The justification for patents is often that "the public will offer to inventors limited monopolies over their inventions, creating incentives to encourage investment in research, while inventors will in turn give to the public a timely disclosure of these ideas so that follow-on innovation will not be unduly retarded, and the invention itself will ultimately be made available for public use after the limited monopoly expires."[3] "The right to exclude others from a specific market, no matter how large or small that market, is an essential element of the patent right."[4]

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[1] J.D. Candidate, Rutgers School of Law – Camden (2009); MPH Drexel School of Public Health (2006) B.S. John Carroll University (2004).

[2] Republic Eng'g & Mfg. Co. v. Moskovitz, 376 S.W.2d 649, 656-57 (Mo. Ct. App. 1964).

[3] Stuart J.H. Graham, *The Determinants of Patentees' Use of 'Continuation' Patent Applications in the United States Patent and Trademark Office*, 1980-99, *in* INTELLECTUAL PROPERTY RIGHTS 217-218 (Brigitte Andersen ed., 2006). Although often stated that a patent creates a monopoly, it is a misnomer since mere possession of a patent and the right to exclude, does not entitle patent holders to market power from an antitrust standpoint.

[4] Polymer Techs., Inc. v. Bridwell, 103 F.3d 970, 976 (Fed. Cir. 1996).

During the patent term,[5] the patent owner has the right to exclude all others from making, using or selling the invention throughout the United States.[6] After being approved by Congress, the Patent Reform Act of 2007 comprised new proposed regulations on January 3, 2006 that would limit a patent applicant's ability to file unlimited numbers of continuation applications.[7] These rules were slightly altered on August 21, 2007 and were to be implemented on November 1, 2007, but due to impending litigation contesting the rules there has been a temporary injunction prohibiting the United States Patent and Trademark Office ("Patent Office")[8] from its implementation.[9] The proposed rules make changes to continuation applications and their implementation has been widely debated.[10] The majority of scholarly work has focused on the effect that limiting continuations will have on the

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[5] A "patent term" is the time period during which issued patents are in force; it expires twenty years after the original filing date.

[6] 60 Am. Jur. 2d *Patents* § 7 (2008). *See also* Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 730 (2002) (stating a patent holder's temporary monopoly is a property right).

[7] Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, 71 Fed. Reg. 48 (Jan. 3, 2006) (to be codified at 37 C.F.R. pt.1), final rule, *available at* http://www.uspto.gov/web/offices/com/sol/notices/71fr48.pdf.

[8] The U.S. Patent & Trademark Office ("Patent Office") is a federal administrative agency of the U.S. Department of Commerce; it is responsible for the examination and issuance of U.S. patents and trademarks. U.S. Patent & Trademark Office, Our Business: An Introduction to the USPTO, http://www.uspto.gov/web/menu/intro.html (last visited Nov. 2, 2008).

[9] Tafas v. Dudas, 511 F. Supp. 2d 652, 671 (E.D. Va. 2007) (On October 31, 2007, Judge Cacheris of the Eastern District of Virginia issued an Order temporarily enjoining the Office from implementing the rules that were set to become effective on November 1, 2007); Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 72 Fed. Reg. 46,716 (Aug. 21, 2007) (to be codified at 37 C.F.R. pt. 1), final rule, *available at* http://www.uspto.gov/web/offices/com/sol/notices/72fr46716.pdf.

[10] Continuation, continuation-part, and divisional applications are commonly referred to as continuing applications.

overarching category of biotechnology, but no work has been devoted solely to the pharmaceutical industry.

This Note will explore the particular nature of pharmaceutical innovations (primarily the production of drugs), the regulatory agencies that supervise the pharmaceutical industry, and the production of generic counterparts. The pharmaceutical arena is a critical area of interest since "[p]rescription drug spending as a share of national health expenditures increased from 5.8 percent in 1993 to 10.7 percent in 2003 and was the fastest growing segment of health care expenditures."[11] This increase in pharmaceutical expenditure is alarming for both the individual consumer and health plans whether private or governmentally funded.[12] "A significant factor in health care costs is the price of [brand name] pharmaceuticals still under patent, so it is not surprising that this has become a particularly tempting target."[13] Once patent protection for a particular pharmaceutical drug expires, generic manufacturers may produce and market the drug, often at a lower price. The production of "[g]eneric drugs play[s] an important role in containing rising prescription drug costs, by offering consumers therapeutically identical alternatives to brand-name drugs, at a significantly reduced cost".[14]

Since the pharmaceutical industry commonly uses continuation applications, this paper will explore the effects of this type of application and will be limited to a discussion of the pharmaceutical industry. Decreasing the number of continuations will allow generics to enter the market earlier, thereby changing the market structure between generic and

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[11] *Barriers to Generic Entry: Hearing Before the Spec. Comm. on Aging*, 109th Cong. 1 (2006) (prepared statement of the Federal Trade Commission) (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, PRESCRIPTION DRUGS: PRICE TRENDS FOR FREQUENTLY USED BRAND AND GENERIC DRUGS FROM 2000 THROUGH 2004, No. 05-779, at 1 (2006)), *available at* http://www.ftc.gov/os/2006/07/P052103BarrierstoGenericEntryTestimonySenate07202006.pdf.

[12] *Id.*

[13] Daniel R. Cahoy, *Patent Fences and Constitutional Fence Posts: Property Barriers to Pharmaceutical Importation*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 623, 624 (2005).

[14] *Barriers to Generic Entry*, *supra* note 11.

brand name pharmaceutical manufacturers. This Note will discuss the market effects of continuing applications, the effects on innovation and effects on number of patents settlement. With the earlier entrance of generics into the market, brand name pharmaceutical companies will lose their ability to patent drugs which would have resulted from continuation applications. This will de-incentivize pharmaceutical manufacturers, discouraging them from inventing and innovating new drugs because they will be unable to recoup the large research and development costs. Additionally, pharmaceutical manufacturers will try to recoup costs by increasing the number of patent settlements. Based upon this, it is imperative to address the effects that limiting continuations will have on the pharmaceutical industry. Because pharmaceutical innovations play an important role in society, it is imperative to address the effects that limiting continuations will have on this industry.

II. PATENT BASICS: WHAT ARE CONTINUATION APPLICATIONS?

A. THE USE OF CONTINUATION APPLICATIONS PRE-PATENT REFORM ACT OF 2007

In order to obtain a patent, an inventor submits a patent application to the Patent Office and the inventor must persuade the Patent Office examiner that the invention meets the requirements of the patent statute. For a patent to issue, the patent must be patentable subject matter,[15] be useful,[16] novel,[17]

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[15] *See* 35 U.S.C. § 101 (2008). *See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (determining that man-made living micro-organisms are patentable subject-matter).

[16] *See* 35 U.S.C. § 101(2008). *See also* Brenner v. Manson, 383 U.S. 519 (1966) (upholding examiner's determination that the output of a chemical process was not useful if merely similar to a useful compound).

[17] *See* 35 U.S.C. § 101(2008); 35 U.S.C. § 102 (2002). *See also* Jamesbury Corp. v. Litton Indus. Prods., Inc., 756 F.2d 1556 (Fed. Cir. 1985) (finding that an invention was "novel" when no prior art was precisely equivalent).

and not obvious.[18] The process is inclusive of a back and forth debate between the applicant and the examiner, ultimately resulting either in the issuance of the patent or a rejection.

After the filing of an initial patent, inventors may subsequently file applications for continuations and continuations-in-part to cover new improvements or different aspects of their already disclosed inventions.[19] Whether or not a continuation application is granted is contingent upon the fact that the earlier application ("parent" application) has not yet been issued or abandoned. Since continuations are new applications based upon their predecessor "parent" or "grandparent" applications, they may incorporate amended claims while retaining priority-in-time for the core technologies disclosed in the initial application.[20] The continuation application uses the same claims filing priority date of the parent and must name at least one of the same inventors as in the parent application.

Until recently, there was no limit to the number of such continuation or continuation-in-part applications, allowing an applicant to generate an unlimited number of continuations from a single initial application (claiming the initial filing date).[21] These continued applications, also referred to as re-filed applications, restart the examination process and avoid a final decision as to the patentability of the parent application.[22] The ability to re-file an application and to claim the initial priority date is unique to the United States Patent System.

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[18] 35 U.S.C. § 103(a) (2004). *See also* Graham v. John Deere Co., 383 U.S. 1 (1966) (finding an invention invalid on grounds that the improvement would have been obvious to a person of ordinary skill in the art).

[19] 60 AM. JUR. 2D *Patents* § 120 (2008) (discussing the fact that the act of filing applications for continuations and continuations-in-part is, in essence, re-filing).

[20] 35 U.S.C. § 120 (2000) (stating that continuations "benefit of the [earlier] filing date" in the United States).

[21] *Id.*

[22] 35 U.S.C. § 132 (2002).

B. THE USE OF CONTINUATION APPLICATIONS POST-PATENT REFORM ACT OF 2007

Under the final rules for the Patent Reform Act of 2007, an applicant may file only two continuation or continuation-in-part ("CIP") applications and a single request for continued examination ("RCE") in a patent application family as a matter of right, thereby providing an applicant with four rounds of prosecution per basic invention.[23] However, for every continuation application, "the applicant will have to identify each claim that finds support in the prior-filed application."[24] The revised rules would require that second and subsequent continuations "be supported by a showing as to why the amendment, argument, or evidence presented could not have been previously submitted."[25] If the support can not be provided, the continuation will lose its priority.[26] The proposed rules are designed to increase the USPTO's ability to examine new (non continuation applications) opposed to reworked continuation applications.[27]

Accordingly, the statistics provided by the Patent Office "show a steadily growing inventory of unexamined patent applications that currently exceeds 900,000."[28] "[E]ach continued examination filing, whether a continuing application or request for continued examination, requires the [Patent Office] to delay taking up a new application and thus contributes

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[23] Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 72 Fed. Reg., *supra* note 9, at 46,716.

[24] Stephen A. Becker & Astrid R. Spain, *Perspective Lost: Alleviating the Patent Office's Backlog at the Expense of Innovation*, 18 No. 6 INTELL. PROP. & TECH. L.J. 10, 11 (2006).

[25] Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, *supra* note 7, at 48.

[26] Becker, *supra* note 24, at 11.

[27] *Id.*

[28] *Id.* at 10.

to the backlog of unexamined applications before the Office." [29] The Patent Office "claims that the various types of continuing applications make up about one-third of all applications filed, and the number of such applications has been increasing."[30] It is suggested that the elimination of these continuations would increase the efficiency of the Patent Office, since some studies have suggested grant rates as high as 97% and, more reasonably, at least 85% due to continuing applications.[31] A case study examining the numerically calculated grant rate suggests that the rate is closer to 75%.[32] The average wait time "between filing a new application and receiving a first Office Action . . . ranges from eight months . . . to 130 months" depending on the technology area.[33] Therefore, according to the Patent Office, continuation applications produce the backlog of patents at the Patent Office.

As the Patent Reform Act of 2007 attempts to change an inventor's unlimited use of continuation applications, the justification for this drastic change lies in the Patent Office's hope "that the proposed change will 'improve the quality of issued patents, making them easier to evaluate, enforce, and litigate' and give 'the public a clearer understanding of what is patented.'"[34] Advocates for limitation of continuation state that unlimited continuation application ultimately abuses the patent system. It has been stated that applicants abuse the system by filing divisional patent applications which incorporate new or revised claims to obtain multiple patents that all cover

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[29] Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, *supra* note 7, at 48.

[30] Becker, *supra* note 24, at 10.

[31] Lawrence B. Ebert, *Patent Grant Rates at the United States Patent and Trademark Office*, 4 CHI.-KENT J. INTELL PROP. 108 (2004).

[32] *Id.* (stating "the analysis Quillen and Webster is flawed both legally and methodologically, and that recent work by Clarke, which places the corrected grant rate at less than 75%, is more accurate").

[33] Becker, *supra* note 24, at 10.

[34] Matthew Sag & Kurt Rohde, *Patent Reform and Differential Impact*, 8 MINN. J. L. SCI. & TECH. 1, n.183 (2007) (quoting 71 Fed. Reg. 48, 48 (proposed Jan. 3, 2006) (to be codified at 37 C.F.R. pt.1)).

essentially the same invention.[35] In the case of *MedImmune, Inc. v. Genentech, Inc.*, the question of "evergreening" patents was presented as both abusing and compromising the integrity of the patent system.[36] Evergreening allows inventors to file endless continuation applications, issuing patent after patent based upon on a single original patent filing.

> The process of continuing and patenting and continuing and patenting can continue until the 20-year patent term is finally exhausted. The entire 20-year patent term can be consumed before the public has a full and final understanding of what can be patented based upon that single, original patent filing. This is not how the patent system was ever intended to work.[37]

It has been stated that "continuation clearly does not meet . . . the goal of shortening the time between filing a patent application and receiving a patent."[38]

From comments submitted to the Patent Office, it is evident that there are only a handful of organizations, agencies, corporations, and associations in favor of the new rules.[39] The

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[35] Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. Rev. 63, 101 (2004).

[36] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007). "Evergreening" has been described as obtaining multiple patents that all cover essentially the same invention, a tactic that allows for prolonging patent protection for periods of time that would not normally be permissible under the law.

[37] Robert A. Armitage, *The Conundrum Confronting Congress: The Patent System Must Be Left Untouched While Being Radically Reformed*, 5 J. MARSHALL REV. INTELL. PROP. L. 268, 289 (2006).

[38] Robert M. M. Seto, *A Federal Judge's View of the Most Important Changes in Patent Law in Half-A-Century*, 11 J. TECH. L. & POL'Y 141, 148 (2006).

[39] U.S. Patent & Trademark Office, Comments Regarding Continuation Practice, http://www.uspto.gov/web/offices/pac/dapp/opla/comments/fpp_continuation/continuation_comments.html (last visited Nov. 30, 2008) (collecting public comments submitted to the PTO regarding the proposed continuing application rule).

consequences of a new proposed rule is rebutted by the Patent Office's justification for the rule change (which is the backlog at the Patent Office), stating that the "new rules will lead to inefficiencies that [will] more than offset any marginal reduction in application backlog."[40] Furthermore, inventors may begin filing multiple initial applications, "to have 'placeholder' applications on file to preserve the option for more complete patent protection that otherwise would have been pursued through the continuation process."[41] While there are speculative arguments for and against the new proposed rules, there have also been arguments attempting to find balance, stating that "if a small dose of continuing application practice is permitted, the addiction [of submitting numerous continuation applications] can be kept in control."[42]

It is expected that these rules will make the exchange between examiners and applicants more efficient and effective and that they will help reduce the significant backlog that exists at the Patent Office. As noted in the Patent Office's Federal Register summary notes, "[t]he cumulative effect of these continued examination filings is too often to divert patent examining resources from the examination of new applications to new technology and innovations, to the examination of applications that have already been examined, have been issued patents, or have been abandoned." [43] The proposed changes strive to make the Patent Office more administratively efficient.[44] This debate will be discussed more fully when the effect of continuations on pharmaceutical companies is discussed.

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[40] Stephen T. Schreiner & Patrick A. Doody, *Patent Continuation Applications: How the PTO's Proposed New Rules Undermine an Important Part of the U.S. Patent System with Hundreds of Years of History*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 556, 564 (2006).

[41] Id. at 565.

[42] Armitage, *supra* note 37.

[43] Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, *supra* note 7, at 49.

[44] Id. at 48.

C. THE CONTROVERSY SURROUNDING THE IMPLEMENTATION OF THE CONTINUATION APPLICATIONS POST-PATENT REFORM ACT OF 2007

As of October 31, 2007, Judge Cacheris of the Eastern District of Virginia heard the consolidated case of *Tafas v. Dudas* and *Smithkline Beecham Corp. v. Dudas*.[45] The significance of this case lies in how several plaintiffs joined together to successfully but temporarily block the implementation of a set of new patent prosecution rules proposed by the Patent Office, which were to become effective on November 1, 2007. This is only a preliminary injunction and is not a decision on the merits of the rules, thus the Patent Office may still appeal once a full decision is reached. The main argument presented by Smithkline "GSK" is that the rules issued in August 2007, were very different from the rules that the public had commented on in January. Arguments were presented to the court with respect to whether the new rules were "substantive" or "procedural."[46] GSK argued that the rules were substantive primarily because the rules represent a break with over 100 years of substantive patent practice (focusing primarily on the ability to file unlimited continuations, excepting very narrow prosecution situations that should be applied on a very limited case-by-case basis).[47] The Patent Office responded by arguing that the final rules are procedural because they do not affect the substantive rights of applicants to file, and do not even limit the number of continuations that an applicant can file. To file additional applications (i.e., more than the 2 + 1), the applicant need only file a petition, which would be decided on a "case-by-case basis."[48] Although, for the purposes

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[45] Tafas v. Dudas, 511 F. Supp. 2d 652 (E.D. Va. 2007).

[46] *Id.* at 664; QuickMBA, Law and Business, http://www.quickmba.com/law/sys/ (last visited Nov. 2, 2008) ("Substantive law creates, defines, and regulates legal rights and obligations," while "procedural law defines the rules that are used to enforce substantive law," moreover it prescribes methods for enforcing rights or obtaining redress and is associated with litigation).

[47] *Tafas*, 511 F. Supp. at 665.

[48] *Id.*

of this Note, the exact procedural continuation changes are not imperative, what is imperative is the overall substantive effect that those new proposed rules would have on continuations. This, in essence, is what GSK argued in *Tafas v. Dudas*. In effect, the rules would limit the number of continuation applications that may stem from any original patent applications.

II. THE PHARMACEUTICAL INDUSTRY AND THE UTILIZATION OF CONTINUATION APPLICATIONS

There are many legitimate reasons why pharmaceutical companies have come to rely on continuation practices as a means of obtaining adequate patent protection, including the complex nature of the subject matter, the time and expense required to carry out experimental testing, and the length of the time period for product development. The following section addresses why this Note focuses only on the pharmaceutical drug industry and the potential uses of continuation applications by brand name pharmaceutical manufacturers.

A. CONTINUATION APPLICATIONS ARE EMPLOYED FOR NUMEROUS INDUSTRIES: WHY FOCUS ON PHARMACEUTICAL INDUSTRY?

Scholars have noted that "the pharmaceutical industry is demonstrably different from other industries in terms of its innovation characteristics – and therefore meaningful comparisons with other industries are difficult, if not impossible."[49] Some additional differences that exist between biotechnology and pharmaceuticals will be explored, however, these are just a few of many that set them apart. While biotechnology products can include "biologics [which] are large molecules, are created through biologic processes such as fermentation or cell culture then purified, and require special delivery systems such as injections into the bloodstream because

[49] Graham, *supra* note 3, at 225.

they are readily degraded by the digestive system." [50] This focuses on a broad array of disciplines, with a very limited number of potential drug treatments. On the other hand, pharmaceuticals' focus is on specifically the development and marketing of drugs that treat numerous ailments, including cancer, cardiovascular disease, respiratory diseases, HIV, and depression. Usually a biotechnology firm's focus is not upon potential drug treatments. Thus, "[p]harmaceuticals are small molecules, can be chemically synthesized, and are orally available."[51] Even more fundamentally, pharmaceutical companies inherently act differently than all other biotechnology companies, due to having to deal with U.S. Food and Drug Administration ("FDA") approval processes, the Hatch-Waxman Act, and the threat of generic manufacturers' entry into the marketplace.

Drug spending has increased into the range of approximately $252 billion each year, with "American companies account[ing] for 60 percent of global pharmaceutical sales."[52] Recently, there has been moderation in this growth of prescription drug expenditures which can be attributed to various factors, including the availability of important and widely used generic drugs, recent safety concerns, and the continued increase in cost sharing for employees in employer-sponsored health plans.[53] Since 1990 national health expenditures on prescription drugs

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[50] Henry G. Grabowski, David B. Ridley, & Kevin A. Schulman, *Entry and Competition in Generic Biologics*, 28 Managerial & Decision Econs. 439, 439-40 (2007) *available at* http://fds.duke.edu/db?attachment-25--1301-view-323.

[51] *Id.* at 439.

[52] *Id.*; *See also* James M. Hoffman et. al., *Projecting Future Drug Expenditures – 2007*, 64(3) AM. J. HEALTH-SYS. PHARMACISTS 298 (2007) *available at* http://www.medscape.com/viewarticle/551606. Drug spending increased "5.5% from 2004 to 2005, with total spending rising from $239 billion to $252 billion," with a predicted a growth rate of 5-7% for hospital drug expenditures, 9-11% for clinic-administered drug expenditures, and 7-9% for retail drug expenditures during 2007; Joseph Fuller & Brock Reeve, *Will We Lose in the Stem Cell Race?,* WASH. POST, Feb. 3, 2007, at A15 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/02/AR2007020201525.html?referrer=emailarticle.

[53] Hoffman, *supra* note 53.

have quadrupled.[54] As a result, pharmaceutical companies rely heavily upon rights granted and enforced under patents. This is due primarily to the nature of the companies' innovations, which are the development and making of drugs and diagnostics.[55] All patents covering pharmaceutical products in the United States are recognized as personal property rights.[56] These pharmaceutical companies rely upon the "absolute power of an injunction to deter generic companies from entering the market before patent expiration" to recoup the huge costs of drug development. [57]

The drug industry is subject to regulation by the FDA, which requires applications for marketing approval from companies wishing to commercialize drugs. For a drug patent, the majority of the term runs during pre-clinical, clinical development, and regulatory review, and not during the period that is most valuable to pharmaceutical companies; drug commercialization.[58] This is due to the drug approval processes that the pharmaceutical industry must undergo. The regulatory review period for a new drug takes about 14 years.[59] This period runs concurrently with any patent term for the drug. Thus, the regulatory review period usually erodes much of the patent term. Therefore, pharmaceutical companies try to prolong their

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[54] John M. Simpson, Consumer & Public Interest Groups Back New U.S. Patent Rules That Would Curtail Abusive Behavior By Applicants, CONSUMER WATCHDOG.ORG, Dec. 20, 2007, available at http://www.consumerwatchdog.org/patients/articles/?storyId=13137.

[55] Christopher M. Holman, *Biotechnology's Prescription for Patent Reform*, 5 J. MARSHALL REV. INTELL. PROP. L. 318, 325 (2006).

[56] 35 U.S.C. § 261 (2000) (stating "Subject to the provisions of this title, patents shall have the attributes of personal property").

[57] Stephen B. Maebius, Patent Reform Bill: Will it Benefit Nanotechnology?, 4 NANOTECHNOLOGY L. & BUS. 171, 173 (2007).

[58] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 120 (4th ed. 2004) (1988); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 43, 122 (5th ed. 1998) (1973).

[59] Mircea Achiriloaie & Dennis Fernandez, The Patent Gives and the FDA Takes: Strategies for Drug Commercialization in Light of Recent Hatch-Waxman Ac Amendments, available at http://www.ipmall.info/hosted_resources/gin/DFernandez_Strategies-for-Drugs_051003.pdf.

patent monopoly by strategically staggering the filing of drug patents. Although recently the FDA has allowed for pharmaceutical companies to petition for the term time lost during clinical trial to be added to the patent term, the pharmaceutical companies are still faced with generic drug competitors.

"The pharmaceutical regulatory regime in the United States adds a layer of complexity to the intellectual property scheme in an attempt to balance the interests of patent owners against the public's interest in obtaining generic versions of patented drugs as soon as possible."[60] This balance between brand name pharmaceuticals and generics was achieved through the enactment of the Hatch-Waxman Act[61] which sought to strike the proper balance between the interests of the innovative drug companies, the generics manufacturers, and the public.[62] "The Act streamlined the approval process by eliminating the need for [generic drug] sponsors to repeat duplicative, unnecessary, expensive and ethically questionable clinical and animal research to demonstrate the safety and efficacy of the drug product."[63]

More specifically, a brand name pharmaceutical company must file a New Drug Application ("NDA") containing the results of extensive human clinical trials, before receiving approval of a new drug for commercialization. FDA review of the NDA is focused on a risks and benefits analysis.[64] However, the Hatch-Waxman Act provided "a statutory 'experimental use' exception that permitted a generic competitor to use a patented drug or treatment for the creation of data for submission to a federal regulatory agency during the term of the patent, though

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[60] Cahoy, *supra* note 13, at 632-33.

[61] Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417 (1984) (codified as amended at 21 U.S.C. § 355 (2003)).

[62] Robin J. Strongin, *Hatch-Waxman, Generics, and Patents: Balancing Prescription Drug Innovation, Competition, and Affordability*, NATIONAL HEALTH POLICY FORUM (June 21, 2002), *available at* http://nhpf.ags.com/pdfs_bp/BP_HatchWaxman_6-02.pdf.

[63] Justina A. Molzon, *The Generic Drug Approval Process*, 5 J. PHARMACY & L. 275, 276 (1996).

[64] 21 U.S.C. § 355(b)(1) (2008).

marketing approval would still be delayed until the patent expired."[65] Thus, a generics manufacturer only has to file for approval of commercialization of a copycat drug through an Abbreviated New Drug Application ("ANDA").

This is substantially different than an NDA application since, although it contains a full report of investigations of safety and effectiveness of the proposed product, the application typically relies at least in part upon published literature providing pre-clinical or clinical data.[66] An ANDA contains results of limited clinical trials as its FDA review is focused on bioequivalency of the ANDA compounds to the corresponding original NDA.[67] This greatly diminished the previous "safe and effective" standard to which generic companies were forced to abide, prior to the Hatch-Waxman Act. According to the FDA, "[a] generic drug is identical, or bioequivalent to a brand name drug in dosage form, safety, strength, route of administration, quality, performance characteristics and intended use."[68] In order "[t]o gain FDA approval, a generic drug must: contain the same active ingredients as the innovator drug (inactive ingredients may vary); be identical in strength, dosage form, and route of administration; have the same use indications; be bioequivalent; meet the same batch requirements for identity, strength, purity, and quality; be manufactured under the same strict standards of

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[65] Cahoy, *supra* note 13, at 634.

[66] To show the complexity of an NDA application, the pre-clinical or clinical data for phase 1, 2, or 3 is normally similar to the following: Phase 1 trials are usually conducted in healthy volunteers and are designed to determine the pharmacological actions of the drug and its side effects. Results of these trials are used to design valid Phase 2 studies, which are small scale safety and efficiency studies. Phase 3 clinical trials are large scale – hundreds or thousands of patients – controlled trials designed to yield results on safety and effectiveness that may be extrapolated to the general population. U.S. Food and Drug Administration, CDER Handbook, *available at* http://www.fda.gov/cder/handbook/index.htm (last visited Nov. 2, 2008).

[67] Robert W. Pollock & Gordon R. Johnston, *Pharmaceutical Patent and Exclusivity Complexity: Implications for Generic Product Introductions*, PHARMACY TIMES, https://secure.pharmacytimes.com/lessons/200208-01.asp.

[68] Office of Generic Drugs, *What are Generic Drugs?*, Food and Drug Administration: Center for Drug Evaluation and Research, http://www.fda.gov/cder/ogd/ (last visited Nov. 2, 2008).

FDA's good manufacturing practice regulations required for innovator products."[69]

Also, "generic companies were given the ability to challenge all listed patents before marketing a product by virtue of the [Hatch-Waxman] Act's declaration that the submission of an ANDA constitutes a technical infringement, thus satisfying the 'case and controversy' requirement of the U.S. courts."[70] Even though a typical ANDA "contains a 'Paragraph IV' certification that the patent is invalid or not infringed," now the brand name manufacturer can file an infringement suit against the generic manufacturer.[71]

The result of filing an ANDA is that the first company to submit it to the FDA "has the exclusive right to market the generic drug for 180 days."[72] It is important to note that during this time period of 180-days, the first generic filer and the brand name manufacturer are the only firms that receive authorization to sell that pharmaceutical. "At the close of this period, other independent generic competitors may obtain marketing approval and enter the market, ordinarily resulting in lower prices for generic medicines."[73] These provisions taken together are significant because the production of new generic drugs can not only be started earlier but also can rely upon the NDA pre-clinical or clinical trials substantially resulting in decreased research and development costs.

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[69] *Id.*

[70] Cahoy, *supra* note 13, at 634.

[71] Michael A. Carrier, *Pictures at the New Economy Exhibition: Why the Antitrust Modernization Commission Got it (Mostly) Right,* 38 Rutgers L.J. 473, 483 (2007).

[72] Office of Generic Drugs, *supra* note 69.

[73] JOHN R. THOMAS, CONG. RESEARCH SERV.: THE LIBRARY OF CONG., AUTHORIZED GENERIC PHARMACEUTICALS: EFFECTS ON INNOVATION (2006), *available at* http://digital.library.unt.edu/govdocs/crs//data/2006/upl-meta-crs-9508/RL33605_2006Aug08.pdf.

B. THE USE OF CONTINUATIONS IN CONTEXTUAL ENVIRONMENT OF PHARMACEUTICAL PATENTS

It is quite clear that with numerous obstacles facing pharmaceutical patents, the pharmaceutical companies have relied upon continuation applications. The Patent Statute has never restricted the number of continuation applications that an inventor can file.

> But this long-standing practice will go by the wayside if proposed regulations are implemented: the [Office] seeks to impose a restriction essentially limiting inventors to a single continuation application in most cases, and will allow subsequently-filed continuations only if the applicant satisfies "subjective" criteria in addition to the statutory criteria.[74]

Prior literature has suggested several possible explanations for the use of such continuation applications. The four major justifications for maintaining continuations are: (1) "to afford applicants an opportunity to correct drafting errors," (2) "that lengthy continuing applications 'wear' down Patent Office employees who initially resist awarding the patent," (3) "that applicants use the continuation to keep patents hidden in order to engage in economic hold-up after markets have developed," (4) "that the use of the continuation procedure affords patent applicants a strategic opportunity."[75] Within the pharmaceutical industry, continuations are employed to ensure that the maximum patent term is available for the drug product. This is a particularly valuable goal since pharmaceutical products generally involve copious research and development costs, long product cycles and late arriving returns.

In an attempt to recoup drug development investments, pharmaceutical companies employ continuation applications. Historically, small start-up companies with limited funding

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[74] Schreiner & Doody, *supra* note 40, at 556-557.

[75] Stuart J.H. Graham, *Secrecy in the Shadow of Patenting: Firms' Use of Continuation Patents, 1975-1994* (Oct. 2002), *available at* http://www.dklevine.com/archive/graham_submarine.pdf.

utilized continuations because they lacked "the resources to file multiple, simultaneous patent applications to claim every aspect of their inventions."[76] Over time, with the emergence of lengthy governmental drug approval processes, the pharmaceutical industries have taken the same approach as small start-up companies. Additionally, the pharmaceutical industry has compensated by "fil[ing] patent applications early in the development stage[s] to avoid the statutory bar effect of their public use in clinical trials."[77] Thus, the application for a drug patent is made quite early in the lengthy drug development process to ensure that a valuable patent is issued to protect the drug development investment. Therefore, pharmaceutical companies are most likely to use continuations in order to help them keep monopolies over their drugs. It has been noted that, from 1995 to 1999, 41% of drug patents issued were based on continuations, in contrast to mechanical engineering patent that only utilized continuations on 22% of the patents.[78] Many pharmaceutical companies' have numerous pending patent applications that request two or more continuations.[79]

According to *Tafas v. Dudas*, [80] upon the discovery of a "potential class of new drug products (a 'genus')," [81] a pharmaceutical company prosecutes a patent by "fil[ing] an initial application containing a broad disclosure that includes numerous structurally-related compounds (a 'species')."[82]

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[76] Schreiner & Doody, *supra* note 40, at 557.

[77] *Id.*

[78] Amy Coombs, *Proposed Changes to Patent Code Loom Over Biotech Industry*, 5 NATURE BIOTECHNOLOGY 12, 1333 (2007), *available at* http://www.nature.com/nbt/journal/v25/n12/full/nbt1207-1333.html.

[79] Nathan Koppel, *Glaxo Claims in Suit Its Patent Applications in U.S. Are at Risk*, WALL ST. J., Oct. 13, 2007, at A4**.** GSK claims that the new rules will damage the company's ability to obtain new patents, citing about 130 pending patent applications for which it has requested two or more continuations and/or continued examinations. Experts say that, in all, hundreds of thousands of patent applications may be similarly affected.

[80] 511 F. Supp. 2d 652 (E.D. Va. 2007).

[81] *Id.* at 658.

[82] *Id.*

"Many times, [pharmaceutical companies] have no idea which drug or biologic, if any, will ultimately succeed through the multi-year, multi-phase, drug development process."[83] Until all research and development is performed, the pharmaceutical company does not know which species will be brought to market.[84] Pharmaceutical companies "therefore file relatively broad application disclosures initially, with the intent of narrowing the scope of the claims through successive continuation and divisional application filings coincident with their drug development phase." [85] Called evergreening, pharmaceutical companies employ the continuation process to improve "their proprietary position, a process sometimes referred to as 'life cycle management'."[86] "Through evergreening, many highly profitable drugs are kept 'on patent' long past the expiration of the initial patent covering the drug itself."[87]

Because market exclusivity is essential for recouping drug development investments, pharmaceutical companies are dependent on filing early broad claims and narrowing claims through continuation applications. Additionally, continuation applications on patents that issue after being kept in secrecy are labeled submarine patents. "The archetypical example of the 'hold-up submarine' patent is one that, after having languished in the patent office for many years, is released into a marketplace in which competitors are extensively using the patented technology."[88] Through this secretive delay, the patent holder can potentially alter the scope of their patent and claim emerging technology.[89] "Experts in the pharmaceutical industry

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[83] Schreiner & Doody, *supra* note 40, at 557.

[84] 511 F. Supp. 2d. at 658.

[85] Schreiner & Doody, *supra* note 40, at 557.

[86] Holman, *supra* note 56, at 332.

[87] *Id.*

[88] Stuart J.H. Graham, *Behind the Patent's Veil: Innovators' Uses of Patent Continuation Practice*, 1975-2002 10 (Ga. Inst. of Tech., GER Working Paper Series, 2004).

[89] *Id.*

note that, by taking advantage of continuation application delay, pharmaceutical patentees maximized returns from the exclusive patent right."[90] As discussed above, continuation applications play a relatively large role in the pharmaceutical industry. Thus, it is imperative to address the impacts that these drastic proposed continuation rule changes will have on the pharmaceutical industry.

III. LIMITING CONTINUATION APPLICATIONS: THE EFFECT ON THE MARKET STRUCTURE OF GENERIC AND BRAND NAME PHARMACEUTICAL DRUGS

A. GENERICS DRUG ENTRY INTO THE MARKET

The aforementioned Hatch-Waxman Act allows generics to enter the market, which affects the market in two tremendous ways. First, "they compete with first-filing generics, lowering prices for consumers."[91] And second, "they reduce the profitability of the 180-day marketing exclusivity period, reducing the incentives for generic entry."[92] The reward for being the first generic applicant to file an ANDA application (and hence a paragraph IV certification), is market exclusivity for a 180-day period, effectively blocking other generics from market entry.[93] The Medicare Prescription Drug, Improvement, and Modernization Act of 2003[94] "may be viewed as codifying

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[90] *Id.* at 19.

[91] Authorized Generics Drugs: Gauging the Impact, http://www.researchoninnovation.org/WordPress/?p=79 (Sept. 6, 2007).

[92] *Id.*

[93] *See* Teva Pharm. Indus. v. Crawford, 410 F.3d 51, 52, 55 (D.C. Cir. 2005) (stating that the Hatch-Waxman Act "clearly does not prohibit the holder of an approved NDA from marketing, during the 180-day exclusivity period, its own 'brand-generic' version of its drug" and affirming FDA practices concerning authorized generics); *see also* Mylan Pharms., Inc. v. FDA, 454 F.3d 270 (4th Cir. 2006) (stating that the FDA does not grant the power to prohibit the marketing of authorized generics during the 180-day exclusivity period).

[94] Pub. L. No. 108-173, 117 Stat. 2066 (2003).

congressional intent that multiple generic applicants may enter the market during the 180-day marketing exclusivity period."[95] This could lead to the idea of "shared exclusivity" being that "the statute . . . makes clear that multiple first applicants – that is to say, more than one generic that filed a paragraph IV generic application on the same day – may each enjoy 'shared exclusivity'."[96] Additionally, "many prescription drugs are available in a number of different dosage forms and strengths . . . [and] each strength and [each] dosage form is considered a separate drug product for which a distinct generic applicant can qualify for 180-day exclusivity."[97] While the pure verse shared exclusivity between generics is debated, it is well established that generic manufacturers will continue to enter the market.

The Hatch-Waxman Amendments have increased generic drug entry into the markets. This is accomplished by "encourage[ing] challenges to questionable drug patents" of brand name pharmaceutical manufacturers by generic manufacturers.[98] These challenges result from "eased FDA approval for a generic firm by allowing it to file an [ANDA] that incorporates safety and efficacy data that the 'pioneer' firm has already submitted to the FDA."[99] Additionally, between 1992 and 2000, generics won 73 percent of infringement challenges against brand name pharmaceutical companies.[100] As noted, "[m]any of these successes involved blockbuster drugs [such as Prozac, Zantac, and Taxol] and allowed generic competition years before patent expiration."[101]

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[95] THOMAS, *supra* note 74, at 14.

[96] *Id.* at 7. This is due to the statute defining the term "first applicant" to mean all applicants who, on the first day on which a substantially complete generic application with paragraph IV certification is filed, did themselves file a substantially complete generic application with a paragraph IV certification.

[97] *Id.* at 14-15.

[98] Carrier, *supra* note 72, at 483.

[99] *Id.*

[100] FEDERAL TRADE COMMISSION, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY, at vi (2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[101] *Barriers to Generic Entry*, *supra* note 11, at 10.

The Hatch-Waxman Act sought to increase generic competition and to foster invention, and a number of scholars have presented statistic supporting that this has, in fact, happened. According to the FDA, "in 2007, U.S. manufacturer sales of generics reached $58.5 billion. Total 2007 U.S. pharmaceutical manufacturer sales -- for brand and generics -- were $286.5 billion".[102] This corresponds to the increase that generics play within a market, making up around 65 percent of prescription drugs.[103] The expected profits for a given product are normal and, in the long run, it is possible that generic manufacturers may earn above-normal profits from a particular therapeutic molecule.[104] Studies confirm that "once multiple generic manufacturers enter [the market], they typically price their drugs at discounts of 70 to 90 percent below the incumbent's price prior to [their] entry."[105] It was also observed "that the brand name producers did not typically cut their prices in response to generic entry and indeed that [brand name pharmaceuticals] raise their real prices post entry."[106] Furthermore, "[w]ithin a year of generic entry, market shares of the [brand name pharmaceuticals] typically fall to about twenty percent."[107] These studies can be qualified by recent reports that "[o]nce the 180 days expire, anywhere between five to ten generics companies typically enter the market with their versions of the drug, which can drive the cost of treatments

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[102] Generic Pharmaceutical Association Frequently Asked Questions for Researchers, http://www.gphaonline.org/Content/NavigationMenu/AboutGenerics/FAQs/faqs2.htm (last visited Nov. 30, 2008).

[103] *Id.*

[104] *See generally* EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE (8th ed. 1965).

[105] JAMES W. HUGHES ET. AL., "NAPSTERIZING" PHARMACEUTICALS: ACCESS, INNOVATION, AND CONSUMER WELFARE 8, http://www.ftc.gov/os/comments/intelpropertycomments/snydermoorehughes.pdf.

[106] *Id.*

[107] *Id.* at 9.

down by as much as 80%."[108] Additionally, "the industry expects a 75% increase in generic subsidiaries between [2008] and 2010."[109]

B. BRAND NAME PHARMACEUTICAL INDUSTRIES MARKET

A patent owner can use the property right of the patent to charge higher prices than one could normally obtain in a competitive market.[110] Particularly for pharmaceuticals, patents may cover the "basic chemical compound, methods of making the compound, methods of formulating the compound for effective treatment, and methods of administering the compound in the treatment of a disease."[111] Pharmaceutical firms will not know, at the time a patent is issued, whether the compound will survive lengthy and uncertain clinical trials. Pharmaceutical companies must file patent applications early in the development stage to avoid the statutory bar effect of their public use clinical trials. Many times, "these organizations have no idea which drug or biologic, if any, will ultimately succeed through the multi-year, multi-phase, drug development process."[112] By filing relatively broad application disclosures initially with the underlying intention of narrowing the scope of the claim through successive continuations coincident with their drug development phase, a pharmaceutical company can maximize their patentable material. "Those companies that succeed in obtaining FDA approval do enjoy a brief reprieve from competition by the FDA exclusion, but that brief period

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[108] Simon Frantz, *Pharma Companies Becoming More Aggressive Towards Generics Firms*, 5 NATURE REVIEWS DRUG DISCOVERY 8, 619 (2006), *available at* http://www.nature.com/nrd/journal/v5/n8/full/nrd2121.html.

[109] *50% of Pharmaceutical Companies to Enter Generics Market by 2010*, REUTERS (Feb. 14, 2008), *available at* http://www.reuters.com/article/pressRelease/idUS148876+14-Feb-2008+MW20080214.

[110] COOTER & ULEN, *supra* note 59, at 120. "[A] patent enables the inventor of something valuable to earn profits that exceed the ordinary rate of return on investment." POSNER, *supra* note 59, at 122.

[111] Cahoy, *supra* note 13, at 632.

[112] Schreiner & Doody, *supra* note 40, at 557.

(about 5 years) is wholly insufficient to compensate the drug companies' R&D expenditures to develop new drugs."[113]

> This [phenomenon address above] is reflected by examining the patent protection of eight of the most currently used cancer drugs. Only one drug, Epogen, is protected by patents having only one continuation, request for continued examination (RCE), or continuation in part (CIP) and containing ten or fewer claims. The remaining seven drugs are protected by patents that resulted from more than one continuation, RCE, or CIP and contained more than ten claims. The remaining seven, Procrit/Eprex, Eloxatin, Gleevec/Glivec, Gemzar, Lupron, Taxotere, and Herceptin, have helped countless numbers of patients and account for approximately 37% of the cancer market; while, Epogen accounts for approximately 13% of the cancer market.[114]

Pharmaceutical Research and Manufacturers of America ("PhRMA") has estimated that, "as a rule of thumb, researchers must screen 50,000-100,000 compounds in order to find [one] from which a profitable drug may be designed."[115] Many

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[113] Schreiner & Doody, *supra* note 40, at n.22.

[114] Carol M. Nielsen & Michael R. Samardzija, *Compulsory Patent Licensing: Is it a Viable Solution in the United States?*, 13 MICH. TELECOMM. & TECH. L. REV. 509, 529 (2007). "Similarly, to underscore the importance of and reliance on continuation practice to adequately protect inventions in the healthcare sector, a university pleaded its case as follows: . . . a scientist at a university may identify a class of compounds that will treat a particular cancer, and file a patent application on that class. But, years of additional research will be necessary to identify the exact compound that will provide the most effective treatment in humans while minimizing toxicity. The current continuation practice gives the university and its licensees the time to obtain appropriate patent protection of the commercially valuable compound, which given the costs of bringing the compound to market, is a necessary factor for pharmaceutical companies to invest in the technology." *Id.* at 528.

[115] Daniel M. Putterman, *Model Material Transfer Agreements for Equitable Biodiversity Prospecting*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 149, 176 (1996) (citing the Pharmaceutical Research and Manufacturers Association of America).

characterize the market for pharmaceuticals as monopolistic competition.[116] But this goes against the basic premise that patents do not equate to market power. "Until recently, Supreme Court case law had mirrored the findings of mid-twentieth century courts that the mere existence of a patent demonstrated market power."[117] The new notion expressed in a 2006 Supreme Court case was that the "mere existence of a patent [in a particular market does not] constitute the requisite 'market power'."[118] Thus, a market is competitive in that there is free entry and exit. Of course, the FDA regulates entry of generics, but it does not limit the total number of generics due to free entry, after the 180 days of shared exclusivity.

C. THE COSTS OF BRINGING A BRAND NAME AND A GENERIC PHARMACEUTICAL DRUG INTO THE MARKET

There are many different accounts of how much are the research and development costs for a brand name pharmaceutical drug company. Some say the average research and development cost for branded pharmaceuticals to gain FDA approval is $86 million and typically enrolls several thousand patients.[119] Others say the FDA approval requires fifteen years of research and development and costs over $800 million.[120] However, one underlying truth is that the research and development of a new drug, including clinical development, takes a decade or more and up to at least a million dollars.[121]

There is a drastically different cost for generic pharmaceuticals. Some say the cost for all research and regulatory approval for generic pharmaceuticals is fixed around $2 million, while others say the cost is "a couple of million

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[116] CHAMBERLIN, *supra* note 105, at 68.

[117] Carrier, *supra* note 72, at 477-78.

[118] Ill. Tool Works Inc. v. Indep. Ink, Inc. 547 U.S. 28, 42 (2006).

[119] Joseph A. Dimasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151, 162 (2003).

[120] PhRMA – Innovation, http://www.phrma.org/innovation/ (last visited Nov. 30, 2008).

[121] *Id.*

dollars."[122] In the early 1990's, the cost was merely $603,000.[123] Most generic pharmaceutical firms have large plants with multiple products. Hence fixed costs for manufacturing are already spread over a large number of established generic products and there is typically excess capacity to undertake new product offerings. This situation suggests that fixed costs of manufacturing are low for generic pharmaceutical firms. Generics play a role in decreasing the amount of financial return a name brand pharmaceutical will receive. The difference in drug prices (mainly for generic drugs) between pharmaceuticals is huge and it has noted that brand name off-patent drugs still command a noticeable premium over the generic copycats.[124] The reason for the difference in drug prices between generic and brand name, similar to other competitive industries, is that having an identifiable brand (even with identical copycat products) allows the originator to command noticeable premiums.[125]

It is seen from brand name pharmaceuticals' expenditures on research and development of a single drug that pharmaceutical companies are in need of a way to recoup their costs. The Hatch-Waxman Act is clearly advantageous for generic manufacturers, allowing them to enter into the market by only proving that generic identical drugs were safe and efficient. The dynamics that exist been brand name pharmaceuticals and generics with regard to the effect markets have on innovation, will be discussed later in this note.

D. ANALYZING THE LIMITATION OF CONTINUATION APPLICATIONS WITHIN THE MARKET

The fear of the new continuation rules is emphasized by the fact that "America's pharmaceutical research companies are concerned with any policies – including those contained in the

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[122] David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, REV. ECON. & STAT. 87, 37-49 (2005).

[123] *Id.* at 39.

[124] Sarah Rubenstein, *Why Generic Doesn't Always Mean Cheap*, WALL ST. J., Mar. 13, 2007, at D1.

[125] *Id.*

new rule – that create uncertainty about their ability to fully protect their discovery and creation of new medicines for millions of patients around the world."[126] The limitation of continuations will not allow brand name pharmaceutical companies to file broad initial patent applications with broad disclosures and claims on a class of new drug products with the intent of later pursing additional patent claims in the form of continuation applications.[127] Since continuation applications have the same disclosure as the earlier filed initial application, they claim the benefit of the filing date of the earlier application. Maintaining the earliest filing date is critical because pharmaceutical companies will not know which drug or therapeutic method will generate revenue until the end of the patent term. Thus, most patents are sought for products that never make it to market, cutting the "effective size of the patent portfolio down by another order of magnitude."[128] By utilizing continuations, the "pharmaceutical companies have the ability to take full advantage of the value that the market places on drug or treatment in question."[129] "In terms of patents that stand in the path of a generic pharmaceutical competitor seeking to market an outright copy of an innovative medicine, the effective size of the patent portfolio of most pharmaceutical companies is reduced by yet another order of magnitude."[130]

A result of limiting the continuation applications which are a way that pharmaceutical companies can capture their ultimate drug patents is that generic drugs will dominate the market. Since most pharmaceutical companies file these broad initial patent applications, the continuation applications usually result in marketable and profitable drugs. Thus, by not allowing

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[126] Katrina Megget, *Patent Changes and the Pharma Industry*, IN-PHARMA TECHNOCLOGIST, Aug. 30, 2007, http://www.in-pharmatechnologist.com/Industry-Drivers/Patent-changes-and-the-pharma-industry (quoting Ken Johnson, Senior Vice President of PhRMA).

[127] Vincent J. Napoleon, *Patent Rules Would Impede Innovation*, WASHINGTON TECHNOLOGY, Dec. 10, 2007, http://www.washingtontechnology.com/print/22_22/31907-1.html.

[128] Armitage, *supra* note 37, at 275.

[129] Cahoy, *supra* note 13, at 634.

[130] Armitage, *supra* note 37, at 275.

pharmaceutical companies to capture these potential continuation applications that benefit from the initial patents' filing date, they will lose their ability to patent these potential continuations. If the initial patent applications disclosure was overly broad, they might lose the ability of these continuations to be patented. This inability to patent drugs that would otherwise be patented as continuation applications opens the door for early generic entry into the market. Interest groups in favor of the Patent Reform Act of 2007 advocate prohibiting pharmaceutical companies from using their continuation applications due to their beliefs that pharmaceutical companies have manipulated the patent system and thwarted the entry of generics to the marketplace, and thus reducing access to affordable prescription drug treatments.[131] While affordable prescription drugs are particularly important for all Americans, brand name pharmaceutical companies would not be incentivized to produce new drugs because they cannot patent them (since continuation applications are limited in their arsenal) and recoup their research and development spending.

IV. LIMITING CONTINUATION APPLICATIONS: THE EFFECT ON INNOVATION AND OTHER OUTCOMES

After describing the mechanism of patent continuation applications before and after the Patent Reform Act of 2007, the relativity of continuations within the context of the pharmaceutical industry, the market structures for both brand name and generic drugs, it becomes increasingly apparent that, limiting the number of continuation applications will result in a decrease in pharmaceutical innovation (due to the companies inability to recoup the cost of research and development) and there will be a trend towards increased patent settlements.

The implementation of this continuation practice has been said by "Chief Judge Paul Michel of the U.S. Court of Appeals for the Federal Circuit and many others . . . that damage determinations [due to limited continuations] would be . . .

[131] Brief for Pub. Patent Found. et al. as Amici Curiae Supporting Petitioners, Tafas v. Dudas, 541 F. Supp. 2d 805 (2008) (No. 1:07cv846).

unpredictable."[132] This being said, evidence supports that there will be decreased research and development and hence innovation and then address why there will be an increase in the patent settlements for pharmaceutical companies.

A. INNOVATION WILL ULTIMATELY BE HAMPERED DUE TO THE IMPLEMENTATION POST-PATENT REFORM ACT OF 2007

"If patent protection for [pharmaceutical] drugs were not available, would pharmaceutical companies invest billions of dollars to create new drugs, especially when the only protection they can obtain is by patent?"[133] "Drug companies do not have the luxury of trade secret protection since the pharmaceutical formulations must be made public."[134]

The economic rationale for patents is that the faster companies recoup the enormous costs of innovation, the more incentive there is for companies to invent. Joseph Stiglitz, an economist, states that patents slow down pharmaceutical innovations.[135] This statement can be qualified by economists David Levine and Michele Boldrin who have found that pharmaceutical industries have done fine even in countries that do not allow drugs to be covered by patents.[136] However, "it has become increasingly clear that excessively strong or badly formulated intellectual property rights may actually impede

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[132] Paul F. Prestia, *Patent Reform is Still a Hot Legal Topic in Washington*, LEGAL INTELLIGENCER, Feb. 20, 2008, at 5, *available at* http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=900005560265#.

[133] Schreiner & Doody, *supra* note 40, at 561.

[134] *Id.* at 561, n.22.

[135] Joseph E. Stiglitz, *Prizes, Not Patents*, PROJECT SYNDICATE (2007), *available at* http://www.project-syndicate.org/commentary/stiglitz81. "There is an alternative way of financing and incentivizing research that, at least in some instances, could do a far better job than patents, both in directing innovation and ensuring that the benefits of that knowledge are enjoyed as widely as possible: a medical prize fund that would reward those who discover cures and vaccines."

[136] MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 14-15 (2008).

innovation – and not just by increasing the price of research."[137] Thus, "any rules implemented by the USPTO need to be carefully balanced against the cost and damage that the rules may have on innovative . . . pharma[ceutical] companies. If the proper balance is not reached, future development of drugs . . . will [be] hampered."[138] There is a well founded fear that innovation will be impeded with the proposed change to patent rules. This is due to the fact that the proposed Patent Reform Act of 2007 takes drastic measures to limit continuations.

With the Patent Reform Act of 2007 limiting the number of continuations, Smith Kline Beecham Corp., Glaxo-SmithKline, and others argue "that the changes will weaken the patent system to an extent that many potentially life-saving drugs will not be developed because companies will not be able to obtain sufficient patent protection to recover their costs."[139] The problem of limiting continuations can be summarized by that statement that "[w]ithout strong patent protection, a new drug would immediately be copied and sold by others who did not incur the billions of dollars in research investments borne by an innovator company."[140] In a typical case, a pharmaceutical company will utilize one drug composition from a genus only to find out many years later that the drug was not suitable for commercial administration and go back and prosecute another drug composition from that same genus. [141] If the pharmaceutical company already used several continuations with the prosecution of the first drug, the company will not be able to go back and prosecute the second compound since under the Patent Reform Act of 2007 there are limitations on the number of continuations.

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[137] Joseph E. Stiglitz, *Intellectual-Property Rights and Wrongs*, PROJECT SYNDICATE (2005), *available at* http://www.project-syndicate.org/commentary/stiglitz61.

[138] Ray K. Harris & Rodney J. Fuller, *Technology Barriers: 21st Century IP Basics*, 44 ARIZ. ATT'Y 22, 23 (2008).

[139] Mary Ann Liebert, *PTO Wants to Restrict Continuation Applications and Claim Numbers*, 26 BIOTECHNOLOGY L. REP. 600, 601 (2008).

[140] *Id.*

[141] *Id.*

It has been argued that generic drug entry into the markets "reduces returns to pharmaceutical [research and development], which in turn will lead to fewer pharmaceutical innovations."[142] This is qualified by research established by Jensen in 1987 in which the relationship between research and development expenditures and drug discoveries was examined. It was found that there was "a positive correlation between research expenditures and the probability of discovering a new drug."[143] The drug industry has been shown in surveys to be the sector in which patent protection is most valuable in appropriating returns from innovation. Importantly, it was noted by the FTC that pharmaceutical investment in innovation may decrease by approximately 60% without adequate patent protection.[144]

> Moreover, the characteristics of the industry and its products make a long patent term particularly valuable. Because the products emerge from regulatory procedures quite late, and because a large portion of industry revenues are generated from drugs that exhibit enormous sales well beyond the 20-year patent term, an extended patent term is more valuable in the drugs industry than in industries with reasonably quick invention-to-manufacture intervals and short product life cycles.[145]

Some pharmaceutical companies only have one gorilla sized patent that is successfully keeping several generic drug manufacturers off the market. The only reason for the existence of this patent is because of the use of continuations, which allow a patent owner to use the date of filing of the parent application

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[142] HUGHES, *supra* note 106, at 18.

[143] *Id.* at 12.

[144] FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, at 11 (2003), *available at* www.ftc.gov/os/2003/10/innovationrpt.pdf.

[145] Graham, *supra* note 89, at 57.

as a prior art reference point.[146] It has been stated that if pharmaceutical industry patents could never reach a large enough size or strength, generic drug companies could evade the few such patents protecting any innovative medicine, forcing companies to go out of business.[147] Thus, a "pharmaceutical industry cannot be left entirely to market forces . . . . [Companies] cannot always account for societal costs or benefits because they have an obligation to optimize returns . . . [and] profits by selecting projects with both low risk and high expected return."[148] Thus, it is important to provide pharmaceutical companies financial incentives in the form of maintaining their patents rights in order to pursued them to innovate.

"Innovative therapeutic, diagnostic or other technological advances must face regulatory approval and testing," the cost is often appropriated and offset by the potential commercial profit.[149] The "commercial profit can only be maximized if intellectual property rights are used to prevent competitors who have not incurred the development and regulatory approval costs, e.g., generic pharmaceutical companies, from offering the innovative product at a lower price."[150] Moreover, the proposed rule changes threaten to shutdown the marketing of a new innovation that could be lifesaving device.[151] "Reduction in research will lead to fewer innovations, fewer cures, and fewer hopes for many Americans who are counting on medical breakthroughs to lengthen their lives."[152] "[R]esearch and development by the pharmaceutical industry accounts for nearly

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[146] Armitage, *supra* note 37, at 275 (stating that often this is the case for smaller pharmaceutical companies).

[147] *Id.* (stating that often this is the case for smaller pharmaceutical companies).

[148] Mark D. Shtilerman, *Pharmaceutical Inventions: A Proposal for Risk-Sensitive Rewards*, 46 IDEA 337, 347 (2006).

[149] Harris, *supra* note 140, at 24.

[150] *Id.*

[151] Nielsen, *supra* note 116, at 529.

[152] HUGHES, *supra* note 106, at n.3.

a third of total research and development to improve health and nearly two-thirds of all privately funded medical research."[153] This is important for Americans primarily because the relationships between pharmaceutical innovations and future innovations have been linked to longevity. A 2002 study by Lichtenberg found "that both health expenditure and medical innovation contributed significantly to the observed increase in longevity."[154]

Therefore, by the Patent Reform Act of 2007 limiting the number of continuations allowed, pharmaceutical companies will not readily seek out new drug developments because they will be unable to recoup the cost of research and development. Without being able to make back the research and development costs, the pharmaceutical companies will be less inclined to invent and invest in drug developments. Since advances in drug development lead to increased longevity, this will ultimately have a deteriorating effect on the health of the United States.

B. THE BRAND NAME PHARMACEUTICAL DRUG INDUSTRY'S MOVES TO AN INCREASED NUMBER OF PATENT SETTLEMENTS

Over the past few years, brand name pharmaceutical companies have found ways to frustrate generics manufacturers. Some companies have taken the controversial step of licensing out their own drugs to a generic company during the period of market exclusivity. Namely, during the generic's 180-day exclusivity period there has been settlement agreement between the brand name pharmaceutical manufacture and the generic. The "purpose of the 180-day exclusivity period was to provide incentives to generic companies to . . . challenge patents listed by the . . . brand name company."[155] This means that generic manufacturers can only market a copy of a branded drug if the patents on it have expired or if they can prove in court that the

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[153] HUGHES, *supra* note 106, at n.27.

[154] HUGHES, *supra* note 106, at 15.

[155] Natalie M. Derzko, *The Impact of Recent Reforms of the Hatch-Waxman Scheme on Orange Book Strategic Behavior and Pharmaceutical Innovation*, 45 IDEA 165, 195 (2005).

patents are invalid or that their copy doesn't infringe on the patents. Thus, "[b]y entering into agreements to settle pending patent infringement litigation, both innovative and generic companies took advantage of this delaying effect of the 180-day exclusivity provision to maintain market exclusivity for a drug and prevent subsequent market entry by other generic applicants."[156] This arrangement is less lucrative for the generics company, which will only derive a share of the total profit, but it removes the risk of investing in a patent case that it could lose. Thus,

> [p]harmaceutical companies are increasingly [capitulating to the] onslaught of generic-drug makers challenging the patents to their . . . brand-name drugs. . . . Instead of defending the patents in protracted and risky court proceedings, some companies are . . . agreeing to shorten the patent life of a drug -- and to forgo hundreds of millions of dollars in potential revenue -- in return for assurance that they can market it for a few years free of the pall cast over their share prices by litigation.[157]

This intrusion into pharmaceutical ability to recoup R & D costs by limiting continuations could be qualified by "settlement agreements by which brand-name pharmaceutical firms pay generic companies to delay entering the market" [158] (often called a "reverse payment" settlement). This shift is further supported by the fact that in the fiscal year 2004 and the early part of fiscal year 2005, none of the nearly twenty agreements reported between brands and generics contained both a payment from the brand and an agreement to defer generic entry.[159] However,

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[156] *Id.* at 196.

[157] Leila Abboud, *Branded Drugs Settling More Generic Suits*, WALL ST. J., Jan. 17, 2006, at B1.

[158] Carrier, *supra* note 72, at 480.

[159] Press Release, FTC, Bureau of Competition Issues FY 2006 Summary of Pharmaceutical Company Settlement Agreements (Jan. 17, 2007), *available at* http://ftc.gov/opa/2007/01/drugsettlements.htm.

in the fiscal year 2006, fourteen of twenty-eight final settlements (including nine of eleven involving first-filers) involved such provisions. Patent settlements will likely increase proportionally to the decrease in continuation applications allowed for pharmaceutical companies to employ.

V. CONCLUSION

As previously addressed, the changes in the Patent Reform Act of 2007 are drastic, changing the number of continuation applications an initial patent may file. The focus of this Note was on the pharmaceutical industry in particular due to its unique federal regulations and the interplay that generic drugs have with the pharmaceutical drug market. Decreasing the number of continuations will change the market structure between generic and brand name pharmaceutical manufacturers because generic will be able to enter the market earlier. By allowing generics to enter the market earlier, brand name pharmaceutical companies will lose their ability to patent drugs which would have resulted from continuation applications. This will disincentivize pharmaceutical manufacturers from inventing and innovating new drugs because they will be unable to recoup the large research and development costs. Ultimately, limiting the number of continuation applications will stifle pharmaceutical innovations.

Is the decreased longevity of all Americans, a likely effect of decreased drug developments, enough to discourage the USPTO from limiting the number of continuation applications? Currently, this is unanswered. Only impending litigation will decide if the number of continuation applications will actually be decreased. But from a public policy standpoint if the number of continuation applications is limited, the harm to the health and well being of society due to a decrease in innovation will outweigh any beneficial effects.

THE PLAYBOY DEFENSE IN PHILADELPHIA: HOW PENNSYLVANIA CONTINUES TO THWART FAIR AND EFFECTIVE SEXUAL ASSAULT PROSECUTIONS BY REFUSING TO ADMIT EXPERT TESTIMONY ABOUT RAPE TRAUMA SYNDROME

Christopher Emrich[1]

I. INTRODUCTION

In June 2007, Jeffrey Marsalis was convicted of two counts of sexual assault in Philadelphia Common Pleas Court. The allegations, however, went far beyond sexual assault. Philadelphia prosecutors alleged that Marsalis had orchestrated an elaborate scheme utilizing Internet dating sites, fake identities, and drugs in order to rape women throughout the city. During the trial, all of the women who testified told remarkably similar stories. All of the alleged rapes occurred after consensual dates in popular restaurants and bars in downtown Philadelphia. All of the women were under the impression that they had met a charming, attractive, successful man looking for love. All of the women alleged that, at some point during their dates with Marsalis, he slipped a drug into their drinks, waited for them to feel its effects, and took them back to his apartment where he repeatedly raped them while they were unconscious.

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[1] B.A., American Studies, Rowan University (2006); J.D., Rutgers University School of Law–Camden (2009). The author would like to thank the outstanding attorneys in the Family Violence & Sexual Assault Unit of the Philadelphia District Attorney's Office for their insight and dedication to justice.

This was not the first time Marsalis had been on trial following allegations of date rape. In January 2006, Marsalis was accused of drugging and raping three women.[2] In total, Mr. Marsalis has faced allegations of date rape from ten women in two separate trials. Despite the similarities between the testimony of all ten women, two different Philadelphia juries, "decided that in every case, the women [had not] been raped."[3] The acquittals on the rape charges have led some to argue that Pennsylvania juries need to be allowed to hear from expert witnesses about Rape Trauma Syndrome in order to counter the centuries-old expectations about an "acceptable" reaction to being raped. The victims here, "all of them college-educated, sophisticated, successful, [and] good-looking," unfortunately exhibited some confusing and frustrating behavior following the alleged rapes.[4] Some of them met with Marsalis again. Some of them even continued pursuing a romantic relationship with him. None of them reported the incidents to the police or sought medical treatment at a hospital following the alleged rapes.

Despite decades of research into the psychological effects of rape, the same sexist rhetoric is being used by defense attorneys to urge acquittals in sexual assault cases in which the victims exhibit counterintuitive behavior. This rhetoric, in turn, is adopted by judges and juries in order to justify finding reasonable doubt in cases tied up with so many preconceived notions about the appropriate response to a rape. However, as science discovers more about the human mind, it is becoming increasingly unacceptable for courts to allow jurors to make decisions based on these outdated stereotypes and myths about the so-called "appropriate" response to a traumatic event that causes a wide variety of responses in its victims. The so-called "normal" responses to rape may be much more varied than jurors can possibly imagine.

Prosecutors throughout the country have been successfully using expert testimony regarding Rape Trauma Syndrome ("RTS") for more than two decades. RTS is defined as an "acute

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[2] Dan P. Lee, *He Said, They Said*, PHILA. MAG., Oct. 2007, at 102, 200-201.

[3] *Id.* at 200.

[4] *Id.*

phase and long term reorganization process that occurs as a result of forcible rape or attempted forcible rape."[5] More simply, RTS is recognized by psychologists as a means of explaining how and why victims respond to the trauma of rape with seemingly unexplainable behavior. Jurisdictions across the country have found a number of ways to admit such expert testimony into evidence without it being unduly prejudicial. "Pennsylvania law, however, forbids prosecutors from calling experts who could attest to [the victims' counterintuitive behavior], leaving it to jurors to determine how victims ought to react. It is the only state in the nation to expressly preclude such testimony."[6] In this respect, Pennsylvania is perpetuating old stereotypes and allowing them to stand in the way of justice. Defense attorneys are permitted to paint victims as crazy accusers or scorned ex-lovers.

As Pennsylvania continues to forbid the use of expert testimony to explain RTS to jurors, it is thwarting effective prosecutions in sexual assault cases. Perhaps surprisingly, there is often little physical evidence in sexual assault and rape cases. This problem is often compounded when victims delay seeking medical treatment. This turns many cases into little more than "he said-she said" battles, leaving the jury in the unenviable position of sorting out the mess. Faced with women who delay reporting the incident or seek further contact with the rapist, jurors often find such victims unsympathetic or assume they are lying. This, in turn, allows jurors to acquit a defendant with a clear conscience. The acquittals in both of Marsalis's cases are perfect examples of this phenomenon and thus the best examples of why the Pennsylvania Supreme Court needs to change its position on the admissibility of expert testimony regarding RTS. As other jurisdictions have developed limited approaches to the issue over the previous three decades, Pennsylvania can certainly find an acceptably reasonable formula.

This Note will first discuss how Jeffrey Marsalis perpetrated his crimes in the city of Philadelphia, becoming "not only the

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[5] Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974).

[6] Lee, *supra* note 2, at 203.

most prolific serial rapist in Pennsylvania history, but among the worst in the annals of American crime."[7] Despite the mountain of evidence that showed his fabrications about his professional life and the remarkably consistent stories the victims told in their testimony, the jury acquitted Marsalis on all but two sexual assault charges. The seemingly inconsistent verdict is a prime example of the outdated views some people have regarding the "correct" reaction to a rape. It will then be necessary to describe the historic impediments, both social and legal, that have prevented effective prosecutions in rape cases.

Next, this Note will explain the development of RTS since the phrase was first coined in 1974 as a subset of Post-Traumatic Stress Disorder. More specifically, it will look at the short-term and long-term ways in which victims deal with rape. Although victims respond in confusing ways, the responses are capable of categorization and are not all that different from normal reactions to other traumatic experiences.

This Note will then examine the case in Pennsylvania that effectively prohibited the use of expert testimony to explain RTS or even any reference to "unusual" responses some women have to rape. Then, it will be necessary to examine the different approaches other jurisdictions across the country have taken toward admitting RTS testimony, ranging from generalized references to unusual responses by rape victims to actual diagnosis of a complainant by expert witnesses. Finally, a proposal will be made for Pennsylvania that attempts to balance the important evidentiary and constitutional concerns of the defendant with the need to fairly and effectively prosecute rapists.

II. JEFFREY MARSALIS GOES TO TRIAL TWICE ON MULTIPLE CHARGES RELATING TO MULTIPLE WOMEN AND IS ACQUITTED ON ALL BUT TWO CHARGES OF SEXUAL ASSAULT

Jeffrey Marsalis is an exceedingly unremarkable man. He was born into a wealthy family on the West Coast, and later "hopscotched from one college to another during a slacker

[7] *Id.* at 200.

migration eastward, ultimately landing at Drexel University, where he earned a bachelor's degree for paramedics before immediately reenrolling, briefly, in the nursing school."[8] Unsatisfied with his real life, Marsalis used his imagination and invented an alter-ego that he would use to win favor with women romantically. He did more than just tell women that he was a CIA secret agent, an emergency room surgeon, and an astronaut. He invented a character that amazingly held all three of these professions. Through doctored photographs and outright lies, he created a profile on the popular Internet dating website Match.com that portrayed him as this character. It was through Match.com that he met untold numbers of women, including the alleged victims in both rape trials. It was with this inflated profile on Match.com that he met women that were looking for an honest and loving relationship. These women had no idea, however, that Marsalis was a liar and a rapist.

Marsalis went to great lengths to maintain this charade. He "allegedly convinc[ed] several women that he was a CIA assassin who spent time in caves in Afghanistan following September 11th."[9] After dropping out of Drexel's nursing program, "[he] routinely left his apartment at all hours of the day and night dressed in scrubs and a white coat." He even boldly took his charade to Drexel's Hahnemann Hospital, where "he breezed past security and roamed the halls freely, going in and out of labs and supply closets (using the access codes he [had] been granted as a nursing student), meeting dates in the hospital's cafeteria, [and] taking them on private tours of the fully staffed ER."[10] There were photos on his Match.com profile of him "in full scrubs and mask in the midst of surgery (they [were not] of him) as well as another, grainier image of him in an astronaut group picture (once again not of him, though he regularly told his girlfriends he was away at astronaut training in Houston)."[11]

In the first trial for the rape of three women, the prosecution's case was not solid, "two of the three victims . . .

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[8] *Id.*

[9] *Id.* at 105.

[10] *Id.* at 200.

[11] *Id.*

[had not] come forward on their own, and admitted on the stand to the complicated emotional and sexual relationships [they had] shared with Marsalis."[12] The jury acquitted Marsalis. The women appeared to be merely scorned ex-lovers.

After the acquittal, Marsalis was immediately re-arrested by sheriff's officers in the courtroom. For the next trial, prosecutors were able to pick from a larger pool of victims who had subsequently come forward with similar allegations against Marsalis after hearing about the first trial in the news. Although the relationships these women had with Marsalis were less complicated, their stories were not perfect: "only one accuser . . . came forward of her own volition, and only after hearing about Marsalis's arrest on the evening news; investigators had contacted the rest."[13] Moreover, although all the women had similar stories about blacking out and waking up while being assaulted or naked the next morning, none of them went straight to the hospital or the authorities.

These points were seized upon by Marsalis's defense attorney in his closing argument. Attacking the victims' credibility, he referred to Match.com as a "hustle" one of the women used to meet men.[14] He warned the jury that Marsalis is "not a rapist . . . [but] just a playboy."[15] Again, the victims were being portrayed as nothing more than scorned ex-lovers. In further downplaying the dispute between Marsalis and the women, Marsalis's attorney questioned whether a criminal court was the place to settle this issue: "You need to stop saying that a criminal courtroom is the forum for a woman who regrets having sex with you and who is upset because you lied about your profession."[16] After all, none of the women responded hysterically to the alleged rapes. None of them reported it immediately to the police. A few of the women remained in contact with Marsalis. The defense's tactic clearly played well

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 202.

[15] *Id.*

[16] *Id.*

with a jury that was hesitant to convict a man on several rape charges after hearing about such confusing behavior by the victims. Thus, when the stakes were so high and the city needed to convict a defendant who is perhaps the worst rapist in the city's history, its prosecutors were prevented from introducing expert testimony to explain to the jurors why the women exhibited such illogical behavior.

III. HISTORIC MISCONCEPTIONS ABOUT SEX CRIMES THAT CONTINUE TO INFLUENCE JUDGES AND JURIES IN RAPE AND SEXUAL ASSAULT PROSECUTIONS

Before discussing the relatively recent developments in psychiatry that led to the study of RTS as a specific subset of Post Traumatic Stress Disorder, it is necessary to look to the myths and stereotypes surrounding male and female sexuality that made RTS such an important breakthrough. Despite the great strides American society has made toward a more equal view of human sexuality, many misconceptions still persist, especially when considered during a criminal prosecution. These misconceptions are further complicated when the discussion is not about consensual sex, but rather rape and sexual assault. In the context of rape and sexual assault prosecutions, there are many conflicting ideas across society about who rapes, who gets raped, what constitutes rape and when and how these questions should be answered by the legal system. The case of Jeffrey Marsalis is a valuable illustration of when conventional ideas about sex and rape are just plain wrong and when expert testimony would be helpful.

The first major group of misconceptions, dealing with who rapes, paints the rapist as a sex-starved maniac lurking in the shadows and attacking without warning. While there certainly have been stories in the news that match that scenario, the more common scenario is much different and much less reported. First, rape is not purely sexual. Often, men who have raped "have said it was not out of sexual desire but for power and control over their victims."[17] Sexual desire, therefore, coupled

[17] CHARLES W. DEAN & MARY DEBRUYN-KOPS, THE CRIME AND THE CONSEQUENCES OF RAPE 33 (1982).

with power issues, often drives men to rape. Moreover, it is not the case that rapists are sex-starved sociopaths. Rather, "[a] majority of men who rape are married or have sexual relationships with girlfriends."[18]

Finally, "[m]any, if not most, victims are acquainted with their attacker."[19] Most estimates of acquaintance rape, in fact, are probably low because knowing one's rapist will probably lead fewer women to report the attack.[20] When relating this information back to the trial of Jeffrey Marsalis, that scenario makes a little bit more sense. His scheme was not merely about having sex, but was also about feeling the power of being a rich and successful doctor. By most accounts he was a handsome, charming, and charismatic date who lulled his victims into a false sense of security after communicating for weeks through telephone and email conversations. Thus, the victims' responses might be explained by their romantic and emotional feelings for him and the fact that the rapes occurred while they were on a consensual date.

The next major group of misconceptions has to do with who gets raped. The misconceptions are that women are somehow to blame for being raped, that part of them enjoyed it, and that they invite it through their actions. A common defense in rape prosecutions essentially asserts that "nice women" do not get raped.[21] This is often an easy sell when the victims are not sympathetic characters in the eyes of the jury. This misconception often rears its ugly head when prostitutes are the victims of rape. The complainants in the Marsalis case were all successful, well-spoken professionals, so how did they get painted with this myth? Mr. Marsalis met many of the women whom he allegedly assaulted on the Internet dating service Match.com. While the service has a national marketing campaign and celebrity endorsements, it has not reached a level of universal societal acceptance as a tool for dating. The image of desperate women prowling the Internet for dates with

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[18] *Id.*

[19] *Id.* at 34.

[20] *Id.*

[21] *Id.* at 36.

successful doctors fit easily into the playboy defense constructed by Marsalis's defense team.

The final misconceptions about rape are about the act itself. Many believe that a woman who was fully conscious, but did not resist, was not raped. Unfortunately, there is no way to predict what effect resistance will have on the perpetrator.[22] This is complicated when the complainants allege they were drugged, as is the case with Mr. Marsalis. Part of the delay between Mr. Marsalis's two trials was due to the effort of the Philadelphia District Attorney's Office to sort through the dozens of complaints against him to find the cases that would make for the best possible trials. Since there was some level of publicity for the first trial, the District Attorney's Office had to contend with the notion that now women were coming forward and "crying rape" but had no connection with Mr. Marsalis or were merely feeling regret or shame after having consensual sexual relations with Mr. Marsalis. Again, the defense's playboy defense played into this by painting the women as attention-driven and regretful having fallen for Mr. Marsalis's game.

IV. HISTORIC BARS TO EFFECTIVE LAW ENFORCEMENT AND CRIMINAL PROSECUTION OF SEXUAL ASSAULT AND RAPE

Societal misconceptions about rape and sexual assault have negatively shaped the way law enforcement and the courts deal with the topic. Lax enforcement of domestic violence laws as well as the sexist attitudes of judges and jurors have historically prevented many rape victims from getting the justice they deserve.

The first bar to effective handling of rape and sexual assault cases typically prevented the victims from getting into the system at all. For decades, police officers viewed reports of domestic violence as a private matter. Police officers responding to a call would settle the parties down and be on their way.[23] Even if the police officers took a statement, they

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[22] *Id.*

[23] *See* ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: VICTIMS OF CRISIS 70-71 (1975).

would often decide to pursue charges only if the victim exhibited sufficient emotional responses while relating her story and would purposely delay going forward with formal charges until the complainant made repeated requests for them to do so.[24]

Certainly, lax investigations of rape allegations were partly due to the prevailing societal views about sex and gender. Moreover, law enforcement was ineffective in dealing with rape because of the legal framework in which police officers were working. After all, police officers in any jurisdiction must make difficult decisions about whether there is reason to believe that a crime has even been committed.[25] Those decisions are of course shaped by the statutory criminal law, the judicial interpretations of those laws, evidentiary rules, and the burdens of proof. Until the major reforms at the end of the twentieth-century, rape law was rigid and unfairly burdensome on victims. This, in turn, made investigating allegations of rape unnecessarily difficult.

The legal framework for analyzing rape started by incorrectly characterizing it as something that was much more different from other crimes than it really is. The oft-repeated generalization about rape is that "[i]t is a charge easily made and difficult to defend against."[26] The same could be said about many crimes that receive much less skepticism from police and investigators. Nevertheless, the legal system used this starting point to allow investigations into the prior history of the complainant, her response during the crime, and the actions of the complainant following the alleged crime.

Investigations into the prior history of the complainant included both her "reputation for chastity" over the long-term as well as her actions immediately before the alleged crime.[27] "At

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[24] *Id*. at 70.

[25] Comment, *Police Discretion and the Judgment that a Crime Has Been Committed – Rape in Philadelphia*, 117 U. PA. L. REV. 277, 277 (1968) ("The police must make important judgments about what conduct is in fact criminal; about the allocation of scarce resources; and about the gravity of each individual incident and the proper steps that should be taken.").

[26] Stevick v. Commonwealth, 78 Pa. 460, 460 (1875).

[27] *See, e.g.*, Commonwealth v. Eberhardt, 67 A.2d 613, 619 (Pa. Super. Ct. 1949) (allowing the following jury instructions: "The Jury should be instructed that evidence of bad reputation for morality and chastity is such evidence [from] which the Jury could come to the conclusion that the carnal knowledge was with

common law, and under the statute . . . evidence of bad reputation for chastity [was] admissible on a rape charge as substantive evidence bearing on the question of the female's consent."[28] Admittedly, such investigations were rare, occurring only "when it appeared the offense would be unfounded" because of a lack of other supporting evidence.[29] Nevertheless, some interviews were conducted with the complainant's "neighbors and associates, and *occasionally the person alleged to have committed the offense*."[30] More shockingly, courts permitted police officers to analyze allegations of rape using what amounted to an application of the "assumption of the risk" theory. The argument was that a "complainant who would assume the risk of entering the residence or automobile of a stranger or casual acquaintance arguably might also be more likely to have consented to any resulting sexual relations than the complainant who would not assume this risk."[31] The factors used to evaluate the complainant's assumption of the risk, "the location of the offense and the social relationship between the complainant and the offender," were considered "objective, general indicators of the complainant's prior conduct."[32]

In addition to investigations into what happened before the alleged crime, the law encouraged police officers to respond more favorably to allegations that were promptly reported.[33] In

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the consent of the female . . . . The girl admitted that she was not a virgin on the night of April 11, 1948. The Jury should be instructed that this fact, together with evidence of bad repute for morality and chastity, could be a basis for a finding by the Jury that the carnal knowledge by them was with her consent."); Commonwealth v. Goodman, 126 A.2d 763, 766 (Pa. Super. Ct. 1956) (noting that "events leading up to allegations of rape are important in the final determination whether consent was given or force was used").

[28] Comment, *supra* note 25, at 299 (citing *Eberhardt*, 67 A.2d at 619).

[29] *Id.* at 313.

[30] *Id.* at 312 (emphasis added).

[31] *Id.* at 290.

[32] *Id.* at 291.

[33] *See, e.g.*, *Stevick*, 78 Pa. 460; Commonwealth v. Mtynarczyk, 34 Pa. Super. 256, 258 (1907); Commonwealth v. Berklowitz, 2 A.2d 516, 517 (Pa. Super. Ct. 1938) (stating that "[o]rdinarily proof of the failure of the female to

analyzing the promptness of complaints, police considered: "the promptness of the complaint (if any) to persons other than the police, and the promptness of the report to the police."[34] Complaints to persons other than the police were considered more trustworthy if they were immediately reported "to the first person [the complainant] had an opportunity to inform" or, alternatively, "to the first person one would definitely expect the complainant to inform."[35] Cases in which "the complainant failed to report the offense at first opportunity to a person one would expect her to tell" were much more likely to be viewed as unfounded.[36] Although allegations made to the police were generally considered more trustworthy, allegations made even twenty-four hours after the alleged crime received more skepticism than those that immediately followed the incident.[37]

Generally, the 1970s brought changes in the way police officers responded to reports of domestic violence and rape. As law enforcement became more sensitive to the intricacies of such incidents, more cases began to filter into the courts.[38] The quality of law enforcement tactics vastly improved as law enforcement agencies created units to deal specifically with the issue. Some of the same issues have historically prevented rape victims from having their cases tried effectively once they are handed over to a prosecutor. Prosecutors' responses to victims were obviously shaped by what the law required them to prove in court. Thus, a major institutional hurdle victims had to cross was the law itself.

American law, as it has evolved from the English common law, was initially very slow to develop a sensible framework for dealing with sex crimes. As with most areas of Anglo-American law, the concept of rape as a crime developed with property

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make an outcry and complaint tends to show that she consented to the intercourse").

[34] Comment, *supra* note 25, at 282-83.

[35] *Id*. at 283.

[36] *Id*.

[37] *Id*. at 284.

[38] *See* DEAN & DEBRUYN-KOPS, *supra* note 17, at 67.

interests in mind. Rape laws were created to protect the property interests of the victim's father and her current or future husband.[39] The word rape, in fact, "is derived from the Latin *rapere* which means to steal, seize, or carry away."[40]

At common law, rape was defined in most states as "unlawful carnal knowledge of a woman, forcibly and against her will."[41] The problem with common law rape was not that it was slow to recognize rape as a crime, but rather that its emphasis on male property interests was so misguided that it almost completely ignored the actual physical violation of the female victim. Thus, even in states like Pennsylvania that codified rape in their criminal law, the same common law prejudices were merely made statutory. For example, the legal system protected rapists from prosecution by requiring corroboration of the complainant's account, requiring a showing of utmost resistance by the complainant to prove non-consent, legally excluding spousal rape from prosecution, and allowing the defense to present evidence of the victim's prior sexual history. The source of these archaic prejudices is summarized by William Blackstone's formula for determining the truthfulness of rape victims in the eighteenth century:

> If she be of evil fame and stand unsupported by others, if she concealed the injury for any considerable time after she had the opportunity to complain, if the place where the act was alleged to be committed was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong but not

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39 CARMEN GERMAINE WARNER, RAPE AND SEXUAL ASSAULT: MANAGEMENT & INTERVENTION 2 (Carmen Germaine Warner ed., Aspen Systems Corp. 1980) ("This view of rape was based purely on the issue of economics. If a married woman was raped, her husband was the one who was wronged. If she was unmarried, the father suffered since his investment depreciated.").

40 *Id.* at 1.

41 Commonwealth v. Stephens, 17 A.2d 919, 920 (Pa. Super. Ct. 1941).

> conclusive presumption that her testimony is false or feigned.[42]

The Pennsylvania Supreme Court enshrined this view into law in 1875 when it approved the following jury instructions: "[I]n order to guard against false charges in cases of this kind," the woman's sincerity is determined by whether, during the alleged crime, "she cried aloud, struggled and complained on the first opportunity, and prosecuted the offender without delay."[43]

Pennsylvania laws on sex crimes did not evolve so much as they continually reinforced stereotypes about sex and gender. The 1860 Criminal Code was merely declaratory of the common law, stating: "If any person shall have unlawful carnal knowledge of a woman, forcibly and against her will, or who, being of the age of fourteen years and upwards, shall unlawfully and carnally know and abuse any woman child under the age of ten years, with or without her consent, such person shall be adjudged guilty of felonious rape . . . ."[44] The 1860 Criminal Code was amended in 1887 to include an important avenue for acquittal. The statutory definition of rape remained the same. The relevant amendment added: "Provided however, [t]hat upon the trial of any defendant charged with the unlawful carnal knowledge and abuse of a woman child under the age of sixteen years, if the jury shall find that such woman child was not of good repute and that the carnal knowledge was with her consent, the defendant shall be acquitted of the felonious rape and convicted of fornication only."[45] This amendment explicitly codified the bias against so-called women of ill-repute and encouraged the defense to introduce witnesses to ruin the reputation of the complainant.

The 1939 Penal Code maintained this definition of rape, including a lesser offense designed to cover a defendant who engaged in sexual intercourse with a complainant under the age

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[42] DEAN & DEBRUYN-KOPS, *supra* note 17, at 20-21.

[43] *Stevick*, 78 Pa. 460.

[44] Act of March 31, 1860, No. 374, § 91, 1860 Pa. Laws 382, 405.

[45] Act of May 19, 1887, No. 69, § 91, 1887 Pa. Laws 128, 128.

of 16 who "was not of good repute."[46] In 1966, the Penal Code mandated harsher penalties and higher fines for rape, including a sentence of 15 years to life for causing serious bodily injury, without altering the substance of the crime itself.[47] Rape and sexual assault laws were updated again in Pennsylvania in 1972. Although the Penal Code took on a more modern look, it did little to change the substance of the rape law. Fortunately, however, the Pennsylvania General Assembly created lesser-included offenses, including separate offenses for statutory rape, involuntary and voluntary deviate sexual intercourse, corruption of minors, indecent assault, and indecent exposure.[48] The addition of "deviate sexual intercourse," for example, allowed prosecutors to pursue these lesser offenses when rape was more difficult to prove or a jury was reluctant, for whatever reasons, to find a rape had occurred.[49]

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[46] Act of June 24, 1929, No. 375, § 721, 1939 Pa. Laws 872, 958.

[47] Act of May 12, 1966, No. 1, § 721, 1966 Pa. Laws 84, 84.

[48] Act of Dec. 6, 1972, No. 334, §§ 3122-3127, 1972 Pa. Laws 1482, 1530 ("§ 3122. Statutory rape. A person who is 16 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 16 years of age. § 3123. Involuntary deviate sexual intercourse. A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person . . . . § 3124. Voluntary deviate sexual intercourse. A person who engages in deviate sexual intercourse under circumstances not covered by section 3123 of this title (relating to involuntary deviate sexual intercourse) is guilty of a misdemeanor of the second degree. § 3125. Corruption of minors. (a) Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of 18 years, or who aids, abets, entices or encourages any such child in the commission of any crime, or who knowingly assists or encourages such child in violating his or her parole or any order of court, is guilty of a misdemeanor of the second degree . . . . § 3126. Indecent assault. A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree . . . . § 3127. Indecent exposure. A person commits a misdemeanor of the second degree if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.").

[49] *Id.* § 3101, at 1529 (defined as "Sexual intercourse per os or per anus" and "penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good-faith medical, hygienic or law enforcement procedures").

The addition of these lesser-included offenses was accompanied by a significant overhaul of the language of the definition of rape. The new law provided that:

> A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.[50]

Unfortunately, the same sexist assumptions remained. The definition of rape itself excluded the possibility of spousal rape by adding the phrase "another person not his spouse."[51] A newly worded exemption allowed the defense to prove by a preponderance of the evidence "that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others."[52] Another barrier to prosecution was created by requiring the victim to make a "prompt complaint."[53] Finally, the General Assembly mandated a curious jury instruction that required courts to instruct juries to look at claims of rape or sexual assault in a more skeptical light. For any prosecution of rape or sexual assault, "the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional

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[50] *Id.* § 3121, at 1530.

[51] *Id.* *See also*, *id.* § 3103, at 1529 ("Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.").

[52] *Id.* § 3104, at 1529.

[53] *Id.* § 3105, at 1530 ("No prosecution may be instituted or maintained under this chapter unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specially interested in the victim learns of the offense.").

involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."[54]

The first major change in the substance of the laws occurred in 1984 with the creation of a statute that allowed for prosecutions of spousal sexual assault. The new crime made it a second degree felony for a person to "engage[] in sexual intercourse with that person's spouse . . . by forcible compulsion."[55] This addition, however, was the result of a compromise made by those who wished to tread lightly into liberalization. In his veto message, Governor Dick Thornburgh required certain changes that would soften the impact of the new crime. He stated that he was "concerned that with this bill we would be entering the privacy of the home and the sanctity of an ongoing marriage to allow spousal prosecutions for sexual conduct."[56] As a result, the bill made spousal sexual assault a second degree felony as opposed to one of the first degree and included a prompt complaint clause, requiring the victim to report the crime within 90 days.[57]

The 1995 amendments to the Crimes Codes continued the trend of modernizing the laws on sex crimes. The changes expanded the Code's definition of "forcible compulsion" to include "[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied."[58] In addition, the 1995 amendments expanded the cover of the Crimes Code to protect children from sexual abuse and other forms of exploitation, including child pornography.[59] In 1997, the General Assembly increased the penalties for sex crimes

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[54] *Id.* § 3106, at 1530.

[55] Act of Dec. 21, 1984, No. 230, § 3128, 1984 Pa. Laws 1210, 1211.

[56] H.B. 1137, Veto No. 1984-4 (1st Sess. 1984) 1984 Pa. Laws 1563.

[57] Act of Dec. 21, 1984, No. 230, § 3128(c), 1984 Pa. Laws at 1211.

[58] Act of Mar. 31, 1995, No. 10, § 3101, 1984 Pa. Laws 985, 985. The new definition of "forcible compulsion" is codified the Pennsylvania Supreme Court's interpretation of the phrase in *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986), and *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988).

[59] Act of Mar. 31, 1995, No. 10, § 6312, 1984 Pa. Laws 985, 991.

committed "by administering or employing, without the knowledge of the complainant, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss, and any other effect of this substance."[60]

The law of rape and sexual assault went through its most significant changes in 2000, reflecting a more modern approach to the issue. First, the spousal sexual assault provision was repealed along with the requirement in the rape statute itself that the victim be someone other than the perpetrator's spouse. Next, the rape shield law made evidence of the victim's prior sexual conduct generally inadmissible. A defendant wishing to introduce such evidence may only introduce evidence "of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue."[61] Further, the prompt complaint requirement was eliminated along with the rule mandating a jury instruction encouraging skepticism of rape victims. The new rules stated: "Prompt reporting to public authority is not required in a prosecution under this chapter"[62] and "[t]he credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter."[63] Finally, the issue of resistance as it relates to consent was clarified, stating that an "alleged victim need not resist the actor in prosecutions under this chapter."[64]

Cleary, the Pennsylvania General Assembly has done much in the last decade to modernize the crime of rape and its lesser-included offenses. In addition, it has taken laudable steps to ensuring that the trial process itself is fair through reform of its evidentiary rules. Both of these statutory reforms have helped make prosecutions of sex crimes more fair and efficient. Moreover, conditions have continued to improve since the 1970s

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[60] Act of Dec. 19, 1997, No. 65, § 3121, 1984 Pa. Laws 621, 621-622

[61] 18 PA. CONS. STAT. § 3104 (1976).

[62] 18 PA. CONS. STAT. § 3105 (1995).

[63] 18 PA. CONS. STAT. § 3106 (1995).

[64] 18 PA. CONS. STAT. § 3107 (1976).

as prosecutor's offices have created units specifically designed to prosecute such crimes. The Philadelphia District Attorney's Office, for example, created the Family Violence Sexual Assault Unit and has provided an easily accessible Frequently Asked Questions section for domestic violence and sexual assault victims on its website.[65] One glaring problem with Pennsylvania's evidentiary rules, however, is its absolute ban on the use of expert testimony on Rape Trauma Syndrome.

V. RAPE-TRAUMA SYNDROME

The concept of Rape Trauma Syndrome is perhaps more comprehensible to jurors today than when it was first developed. The phrase was coined in 1974 by Ann Burgess and Lynda Holmstrom following extensive interviews with rape victims in a Boston hospital emergency room. [66] The two psychologists "conducted a year-long study of the physical, behaviorial [sic], and psychological responses typically displayed by women seeking treatment for rape or an attempted rape."[67] The study revealed that rape victims exhibit predictable patterns of behavior and "consistently described certain symptoms over and over."[68] They were found to "suffer a significant degree of physical and emotional trauma during the rape, immediately following the rape, and over a considerable time period after the rape."[69] Burgess and Holmstrom divided the typical patterns of response into two stages: the acute phase and the long-term process. The acute phase, immediately following the rape, is characterized by more intense emotional responses that lead to greater disorganization and disruption in

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[65] City of Philadelphia's District Attorney's Office, *Victims of Domestic Violence, Sexual Assault and Child Abuse,* http://www.phila.gov/districtattorney/VictimAssistance/domesticViolence.html.

[66] BURGESS & HOLSTROM, *supra* note 23, at 37 n.10.

[67] Kathryn M. Davis, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused*, 49 HASTINGS L.J. 1511, 1517 (1998).

[68] BURGESS & HOLMSTROM, *supra* note 23, at 37.

[69] *Id.*

victims' lives. In the long-term process, victims attempt to reorganize their disrupted lives and move beyond the traumatic experience. Both phases combine to explain some of the counterintuitive behavior that frustrates the legal process.[70]

The study revealed that victims in the acute phase exhibited intense emotions. However, these intense emotions did not always manifest themselves in the form of the stereotypically hysterical victim. "To the contrary, victims described and indicated . . . an extremely wide range of emotions in the immediate hours following the rape."[71] Burgess and Holmstrom characterized the two main emotional styles shown by the victims as expressed and controlled. The expressed style included more outward expressions of emotion, such as "anger, fear, and anxiety."[72] Victims expressed such feelings "by being restless during the interview, becoming tense when certain questions were asked, crying or sobbing when describing specific acts of the assailant, and smiling in an anxious manner when certain issues were stated."[73] On the other hand, victims expressing the controlled style were more likely to mask or hide their emotions and exhibit "a calm, composed, or subdued" demeanor that seem to be more consistent with intense feelings of shock or disbelief.[74]

The difference in the way the victims displayed their emotions is indicative of the fact that most victims reported that the primary feeling expressed after the incident was that of fear- "fear of physical injury, mutilation, or death."[75] This feeling of fear, according to Burgess and Holmstrom, explains the "range of symptoms" associated with RTS because fear is often accompanied by a variety of other emotions, which "range from

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[70] Kathryn M. Davis, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused*, 49 HASTINGS L.J. at 1517-1518.

[71] BURGESS & HOLMSTROM, *supra* note 23, at 38.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 39.

humiliation, degradation, guilt, shame, and embarrassment to self-blame, anger and revenge."[76] The "acute stress reaction to the threat of being killed," depends on the circumstances of each attack and is therefore unique to each victim.[77] The intensity of a victim's feelings in the period immediately after the incident is very important because of the consequences in the legal system. "The victim continually tries to block the thoughts of the assault from her mind" in an attempt to begin reorganizing her life.[78] At this point, her emotional well-being takes precedence over any desire to report the incident and subsequently relive the events.

In addition to the wide range of emotional reactions associated with the acute phase, victims also exhibited a wide range of physical reactions after a rape. Victims most often complained of disruptions in their sleep patterns and a general decrease in appetite.[79] Moreover, victims also reported "physical symptoms specific to the area of the body that has been the focus of the attack. Victims forced to have oral sex may describe irritation to the mouth and throat. Victims forced to have vaginal sex may complain of vaginal discharge, itching, a burning sensation on urination, and generalized pain."[80]

In the long-term process, victims attempt to move beyond the traumatic event by reorganizing their lives. A victim's ability to rebuild depends on a variety of factors, including "the victim's personality style, the people available to her who respond to her distress in a serious and concerned manner, and the way in which she is treated by the people with whom she comes into contact after the rape."[81] These factors will determine the severity of the disruption and the effort that it will take to reorganize the victim's life. Generally, the long-term process is

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[76] BURGESS & HOLMSTROM, *supra* note 23, at 39.

[77] *Id.*

[78] *Id.* at 40.

[79] *Id.* at 38-39.

[80] *Id.* at 39.

[81] *Id.* at 41.

characterized by changes in lifestyle in an effort to cope with the prior incident as well as prevent a future attack. The intensity of the emotions during this process will determine whether a victim will later develop phobias or other strong mental reactions.

The long-term disruptions caused by a rape may include an inability to perform above a minimum level of functioning in school or at work. Sometimes victims are affected more severely. Unfortunately, some quit work or school altogether or refuse to leave their homes without being accompanied by a friend..[82] Another common response is to get away from the area where the incident occurred. Some victims "turn for support to family members not normally seen on a daily basis. Often this mean[s] a trip to some other city and a brief stay with parents in their home."[83] Some victims request new or unlisted telephone numbers or even change their residence.[84]

Beyond the disruptions in their daily lives, victims often report common mental and emotional responses, such as an increase in nightmares during both the acute phase and the long-term process. Two types of nightmares typically occur.[85] The first type is usually closer in time to the rape and thus mirrors the actual event.[86] In this type of dream, the victim is "attempting to try and get out of the situation but fails."[87] The second type of dream develops in the long-term process. "The dream material changes" becoming less like the actual rape, and "often the victim will report mastery in the dream. However, the dream content still is of violence, and this is disturbing to the victim."[88]

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[82] BURGESS & HOLMSTROM, *supra* note 23,. at 41-42.

[83] *Id*. at 42.

[84] *Id*. at 42-43.

[85] *Id*. at 43.

[86] *Id*.

[87] *Id*.

[88] BURGESS & HOLMSTROM, *supra* note 23, at 44.

Another "common psychological defense that is seen in rape victims is the development of fears and phobias specific to the circumstances of the rape."[89] Just as the emotional responses to rape vary, so do the fears and phobias vary. Victims often report phobic reactions to large crowds or to being alone.[90] Sometimes the phobic reaction is triggered by very specific characteristics of the assailant, such as the smell of alcohol.[91] Other times phobic reactions are just as intense but much more general, resulting in "a very suspicious, paranoid feeling" or "a global fear of everything."[92] This will often cause the victim to withdraw from the outside world.

VI. ADMISSIBILITY OF EXPERT TESTIMONY REGARDING RAPE TRAUMA SYNDROME IN PENNSYLVANIA

The Pennsylvania Supreme Court prohibited the use of expert testimony to explain Rape Trauma Syndrome relatively early in the development of the syndrome as a recognized psychiatric response to that particular trauma. In the 1980s courts across the country began to grapple with the issue of how to admit such expert testimony. Pennsylvania, on the other hand, completely shut the door. In *Commonwealth v. Gallagher*, the Pennsylvania Supreme Court held that an expert's testimony regarding Rape Trauma Syndrome improperly took the issue of the victim's credibility away from jury.[93] The experts called by the prosecution were actually the two women who conducted the original study in 1974 and popularized the term Rape Trauma Syndrome, Ann Wolbert Burgess and Lynda Lytle Holmstrom.

In *Gallagher*, a man posing as a Philadelphia police officer entered the home of a woman and forcibly raped her.[94] Two

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[89] *Id.*

[90] *Id.* at 44-45.

[91] *Id.* at 45.

[92] *Id.*

[93] 547 A.2d 355 (Pa. 1988).

[94] *Id.* at 356.

weeks after the incident, the victim failed to identify the defendant, Gallagher, in a photograph and in person.[95] "More than four years later, however, the victim identified the appellant from a photographic display."[96] The defendant was then arrested and charged only with involuntary deviate sexual intercourse because the statute of limitations for rape and the other charged had expired.[97] "In order to downplay the victim's repeated failures to identify appellant within weeks of the crimes and bolster her identification after four years, the Commonwealth presented Ann Burgess as an expert witness with respect to RTS."[98] Dr. Burgess "described the symptomology of the syndrome . . . then summarized her examination of the victim, stated her diagnosis that the victim suffered from RTS, and related her opinion of how the phenomena of RTS bore upon the identification process."[99]

The theme of the majority's opinion is that expert testimony regarding RTS improperly encroached on the jury's role in determining a witnesses' credibility. In doing so, the Pennsylvania Supreme Court referred to a number of opinions that reflected this fear of letting juries hear expert testimony, stating, "[w]e have consistently rejected expert testimony which encroaches on this vital jury question [of witness credibility]."[100] The Supreme Court made its final point by referring to the recent decision in *Commonwealth v. Seese*, in which it said

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* at 356-57.

[100] *Id.* at 357. *See also* Kozak v. Struth, 531 A.2d 420, 424 (Pa. 1987) (prohibiting expert testimony on causation and due care because issues of ultimate fact, especially those of credibility, are for jury, not expert); Commonwealth v. Seese, 517 A.2d 920, 924 (Pa. 1986) (prohibiting expert medical testimony regarding the veracity of children who claim to be objects of sexual abuse); Commonwealth v. O'Searo, 352 A.2d 30, 32 (Pa. 1976) (prohibiting expert testimony of clinical psychologist to substantiate and corroborate the defendant's version of the critical events).

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness . . . [T]he question of a witness' credibility has routinely been reserved *exclusively* for the jury.[101]

In limiting what the jury can hear, however, it limits some context that an individual juror's life and common knowledge may not provide.

The two dissenting justices in *Gallagher*, on the other hand, were much more sympathetic to the emotional and psychological effects of rape. In addition, the dissents recognize that not all jurors will be familiar with the effects sex crimes have on their victims. Justice Larsen, for example, noted that expert testimony is commonly admissible to explain things that the average person does not know.[102] Expressing an understanding of the depths of the psychological trauma after a rape, Justice Larsen explained, "The average juror does not know about the psychological and behavioral impact of rape on a rape victim. Indeed, many jurors bring to the courtroom the myths about rape which had long influenced our courts as they applied 'special' rules of evidence only to rape cases."[103] Justice Papadakos went a step further, noting that other jurisdictions have successfully admitted expert testimony in rape cases by limiting the scope and purpose of the evidence. He noted, "[c]ourts have admitted such expert evidence especially in various sexual crimes where, on the one hand, it is presumed that the average layman lacks knowledge of how such victims

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[101] Commonwealth v. Gallagher, 547 A.2d 355, 358 (Pa. 1988) (citing *Seese*, 517 A.2d at 922) (emphasis added).

[102] *Id.* at 360. ("The average juror does not know about the psychological and behavioral impact of rape on a rape victim. Indeed, many jurors bring to the courtroom the myths about rape which had long influenced our courts as they applied 'special' rules of evidence only to rape cases."); *see also O'Searo*, 352 A.2d 30 (Pa. 1976).

[103] *Gallagher*, 547 A.2d at 360.

react and, on the other, where victims of sexual abuse have difficulty remembering dates and other facts."[104] Without this knowledge, jurors may make dangerously false assumptions.

The majority opinion in *Gallagher* reflects the outdated view that jurors are generally knowledgeable and experienced enough to always know when a witness is telling the truth about a rape. Unfortunately, this view does not take into account the fact that jurors only see a relatively small snapshot of a witness, when she is on the witness stand, recounting a traumatic event, and only a few feet away from the perpetrator. Moreover, most jurors cannot be well-versed enough in the ever-expanding fields of psychiatry and psychology to understand why the human mind works the way it does. The majority takes the close-minded view that strange behavior after a rape is always indicative of a dishonest witness. The reality, however, as illustrated by the scientific research, is that sometimes that counterintuitive behavior indicates that the witness is telling the truth. This greater understanding of the human mind is simply not accessible to most lay people and therefore begs for the admissibility of expert testimony in rape cases. Pennsylvania has severely thwarted prosecutions of sexual assault cases by shutting the door on such evidence.

VII. GENERALIZED RTS EXPERT TESTIMONY

The admissibility of expert testimony regarding Rape Trauma Syndrome falls into five categories: "fact-based testimony about the general behavior of rape victims," "fact-based testimony about the general diagnostic criteria of RTS," "testimony about victim's behavior or symptomatology," "opinion testimony about the consistency of the victim's behavior or symptoms with [RTS]," and "opinion testimony that the victim suffers from [RTS]."[105] The five categories of admissibility vary according to how much an expert may discuss RTS and its symptoms and whether the expert may refer to the

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[104] *Id.* at 361.

[105] Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 713-23 (1989).

complainant in relation to RTS. Thus, a state supreme court can weigh the probative value of the expert testimony against such testimony's potential to abdicate the credibility-weighing power of the jury. Then, the high court can tailor the testimony's admissibility to its own level of comfort and the general admissibility of expert testimony in that state. The first two categories represent generalized expert testimony because they permit discussion of victims' responses generally but forbid explicit references to the complainant.

The first category of admissibility is the most restrictive on expert witnesses and thus is most favored. In this category, the prosecution is permitted to admit general expert testimony regarding some of the "unusual" or counterintuitive responses exhibited by rape victims. [106] However, the expert witness is prevented from referring to any of the symptoms as part of the officially recognized condition of "Rape Trauma Syndrome."[107] Under this framework, courts have allowed experts to discuss a variety of victim responses: the victim's emotional "flatness" after the rape;[108] the victim denying a rape had even occurred;[109] the victim's memory loss of events before the rape;[110] and the victim asking the assailant that he not tell anyone about the

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[106] State v. Robinson, 431 N.W.2d 165, 169 (Wis. 1988) (expert testimony "used to rebut common misconceptions about the presumed behavior of sexual assault victims, by sharing her personal observations of other sexual assault victims she had encountered.").

[107] Fischer, *supra* note 105, at 713-15.

[108] *Robinson*, 431 N.W.2d at 172 (noting that "defense attempted to capitalize on the misconception that all sexual assault victims are emotional following the assault.").

[109] People v. Whitehead, 531 N.Y.S.2d 48 (N.Y. App. Div.1988) (noting that "defendant had the opportunity to cross-examine the witness, and County Court properly instructed the jury that it could accept or reject the expert testimony in whole or in part").

[110] State v. Staples, 415 A.2d 320, 322 (N.H. 1980) (allowing expert witness's testimony that it was not unreasonable that the complainant's memory loss was the result of trauma following a sexual assault and not the result of intoxication).

rape.[111] The witness may offer lay testimony about the complainant if, for example, she interviewed the complainant at a rape crisis center after the rape. The witness may then proceed to give expert testimony as to common rape victim responses and conditions immediately following a rape.[112] This is a wise framework because it allows the expert witness to relate the unusual responses of the particular complainant in the case with other unusual responses by victims that turn out to be quite common. Moreover, it does so without opening the door to a potential bias jurors may have against the well-established but "softer" science of psychology. Some jurors may view an officially labeled "syndrome" skeptically while being receptive to hearing that syndrome's symptoms explained by a professional. It is important to note that this testimony is often offered after the defendant has pointed out some of the victim's unusual behavior as opposed to during the prosecution's case-in-chief, which may appear to be substantive evidence of guilt rather than a scientific explanation of the victim's behavior.

In a few jurisdictions the expert witness may explicitly refer to Rape Trauma Syndrome and may explain how a victim is diagnosed as suffering from RTS but is prevented from actually diagnosing the complainant.[113] Like the first category, it is a mere explanation of common victim responses without "particularized" reference to the complainant. In Arizona, for example, the expert witness is permitted to testify about RTS only to aid the fact-finder in determining if there was consent, not in the determination of whether a rape occurred.[114] The

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[111] Lessard v. State, 719 P.2d 227, 233-34 (Wyo. 1986) (allowing expert witness's testimony "that most rape victims at some point ask their assailant not to tell" as well as the witness's "opinion of why victims usually do this." The Court noted, "In the process the expert did not say that she believed or held any opinion with respect to the victim's version of the events surrounding the assault. She did not vouch for the truth of the victim's testimony").

[112] Fischer, *supra* note 105, at 720.

[113] Fischer, *supra* note 105, at 720-21.

[114] State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985) (en banc) (noting that the court "might have some difficulty in upholding the admissibility of rape trauma syndrome to prove the existence of a rape, we believe, however, if properly presented by a person qualified by training and experience such as a psychiatrist or psychologist, that such evidence is admissible to show lack of

expert is also prevented from testifying specifically about the complainant, essentially leaving the jury to decide whether such a diagnosis is appropriate. Unfortunately, such an approach may be an ill-advised compromise that fails to fully appreciate the meaning of a diagnosis. The Arizona Supreme Court, which permits RTS expert testimony but not particularized testimony about the complainant does so because it fears that such testimony would allow experts to offer their opinions about the complainant's credibility.[115] This misinterprets a diagnosis of RTS as a statement of credibility rather than a condition that shapes the lens through which her credibility should be examined. Such a distinction could be made through a jury instruction explaining the role of the jury as the sole decider of a witness's credibility and explaining the role of the expert as an aid in evaluating the complainant's credibility. Seemingly then it would be better to admit explicit references to RTS with particularized testimony or limit the expert testimony to generalized testimony about common victim responses.

VIII. PARTICULARIZED RTS EXPERT TESTIMONY

In some jurisdictions, prosecutors are permitted not only to introduce expert testimony about RTS and its symptoms but also opinion testimony as to whether the particular complainant in the case can be diagnosed as exhibiting symptoms of RTS. This approach represents a significant liberalization of the way sexual assault cases are tried. Although it would certainly be favored by prosecutors and victims, it also presents important evidentiary and constitutional issues for the defendant's right to a fair trial. In allowing expert witnesses to make references to

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consent"); *but cf.* State v. Black, 745 P.2d 12, 18 (Wash. 1987) (finding that "the issue is *not* whether rape victims may display certain symptoms" but rather that "the issue is whether the presence of various symptoms, denominated together as 'rape trauma syndrome', is a scientifically reliable method admissible in evidence and probative of the issue of whether an alleged victim was raped. The literature on the subject demonstrates that it is not") (citation omitted) (original emphasis).

[115] *See, e.g.*, State v. Moran, 728 P.2d 248, 255 (Ariz. 1986) (finding that "particularized testimony permits the expert to indicate how he or she views the credibility of a particular witness.").

the complainant, high courts must structure rules so as not to allow experts to assume the role of determining a witness's credibility.

One careful approach to particularized expert testimony permits an expert to discuss the particular complainant's behavior or symptomatology without giving an "opinion about the meaning of those symptoms."[116] In *State v. Robinson*, for example, the Wisconsin Supreme Court allowed an expert witness to describe the complainant's condition upon entering the rape crisis center as well as the typical conditions of victims generally upon entering the crisis center.[117] The Court reasoned that as long as the expert had personally interviewed the complainant, she should be able to testify as to whether the complainant's condition was consistent with rape victims generally. Courts using this approach might consider requiring a certain level of interaction between the expert and the victim in order to ensure that the consistency determination has been scientifically reached. In allowing consistency testimony, courts also need to be careful about possibly allowing experts to voice their opinions about a complainant's credibility. Courts may allow for a wider cross-examination by the defense or require carefully worded jury instructions so as to make sure that crisis center workers used as experts do not become de facto advocates.

The final two categories can be categorized as a consistency approach and a diagnostic approach. Because these approaches allow experts to make more specific and particularized statements about complainants' condition they are predictably the least used means of admitting RTS expert testimony. In the consistency approach, the expert witness comes to the doorstep of diagnosing the complainant as suffering from RTS. Instead, "the expert gives an opinion that the victim's pattern of symptoms or behavior is consistent with . . . Rape Trauma Syndrome" but "does not impute his or her diagnosis of the victim into the testimony."[118] This framework has been

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[116] Fischer, *supra* note 105, at 719.

[117] State v. Robinson, 431 N.W.2d 165, 169 (Wis. 1988).

[118] Fischer, *supra* note 105, at 720-21.

established by four state supreme courts.[119] Each court that has allowed experts to testify that a complainant's response is consistent with RTS without diagnosing it as such has noted that such testimony is helpful to the jury in sorting out difficult factual scenarios. Each court, however, has made reference to the concern that expert testimony often has an "'aura of certainty'" that might mislead the jury.[120] Again, cross-examination and carefully worded jury instructions may be required.

It is unclear what the practical difference is between having an expert testify that a complainant has acted consistently with RTS and having an expert actually diagnose a complainant. Nevertheless, only a few jurisdictions permit an expert to make an actual diagnosis. Courts that do allow a diagnosis still restrict the manner in which the diagnosis may be offered in testimony.[121] Citing all the same concerns that have been voiced by the courts that have taken the "consistency" approach, courts that have allowed diagnostic testimony have been very careful in allowing such testimony. Obviously, these courts do not allow experts to testify as to whether the victim was actually raped.[122]

The diagnostic courts, however, take an interesting approach to RTS testimony. In *State v. Allewalt*, the Maryland Court of Appeals clarified exactly which diagnosis an expert may make.[123]

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[119] *See, e.g.*, Simmons v. State, 504 N.E.2d 575 (Ind. 1987); State v. Taylor, 663 S.W.2d 235 (Mo. 1984); State v. Jensen, 432 N.W.2d 913, 916 (Wis. 1988). *See also* State v. McCoy, 366 S.E.2d 731, 737 (W. Va. 1988) (holding that experts may testify as to whether a complainant's behavior is consistent with RTS but reversing and remanding because at the trial of the present case the expert testified that the complainant was "'still traumatized by this experience.'" The Court noted that this "was tantamount to an opinion that [the complainant] had, in fact, been raped by the defendant.").

[120] *Taylor*, 663 S.W.2d at 241 ("the most that [an expert witness] could legitimately state would be that the prosecutrix' symptoms were consistent with a traumatic experience-even a stressful sexual experience. But it goes beyond his qualifications to say that she was raped by defendant").

[121] *See* State v. McQuillen, 721 P.2d 740 (Kan. 1986); State v. Marks, 647 P.2d 1292 (Kan. 1982); State v. Allewalt, 517 A.2d 741 (Md. 1986).

[122] *McQuillen*, 721 P.2d at 742; *Allewalt*, 517 A.2d at 743.

[123] *Allewalt*, 517 A.2d 741.

The court held that a psychiatrist may testify as to whether the complainant suffers from Post-Traumatic Stress Disorder ("PTSD") but may not specifically refer to the condition as Rape Trauma Syndrome. The court noted that references to PTSD as opposed to RTS would be less likely to unfairly prejudice the jury because referring to RTS may imply that the expert believes a rape occurred. Jurors are thus able to hear expert testimony that the complainant is in fact responding to a traumatic event without hearing language that may suggest the nature of that event. Moreover, courts allowing diagnostic testimony have carefully examined the nature of the expert's testimony in response to cross-examination. The Washington Supreme Court, for example, found an expert's testimony to be inadmissible because "the expert attempted to 'scientifically prove' that the victim was suffering from RTS."[124] The court, which in a later case held PTSD testimony to be admissible in rape prosecutions,[125] seemed to have a problem with the expert's "evasive answers" on cross-examination about whether RTS can be caused by events other than rape.[126] This problem seems to be eliminated by allowing an expert to refer only to PTSD because such a disorder is caused by a seemingly infinite number of events.

IX. PROPOSAL FOR PENNSYLVANIA

It is clear that, absent a change in the evidentiary rules promulgated by the General Assembly, the Pennsylvania Supreme Court is reluctant to change its stance on Rape Trauma Syndrome. As such, the Court would probably only consider one of the more limited options. It is unlikely that it would be receptive to allowing diagnostic testimony because such testimony is an incredible encroachment on the role of the jury. Nevertheless, it may be possible for the Court to adopt a more reasonable approach with the necessary procedural and substantive safeguards that allow for effective yet fair

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[124] Fischer, *supra* note 105, at 723-24.

[125] State v. Ciskie, 751 P.2d 1165, 1174 (Wash. 1988).

[126] Fischer, *supra* note 105, at 724.

prosecutions in rape and sexual assault cases. It seems reasonable enough to allow the prosecution to use an expert witness to explain to jurors that rape victims often behave in ways that seem to be counterintuitive to what one would expect following such an awful crime. There is enough evidence, illustrated by the Jeffrey Marsalis case, that Pennsylvania's approach does not do enough to counter the juror bias against rape victims. The victims in that case, who were mostly successful, intelligent professionals, exhibited behavior that was seemingly consistent with RTS.

Allowing generalized RTS testimony or even testimony that describes common victim responses seems to be the most appropriate option. This is certainly necessary to combating some of the myths about rape that still exist. By speaking about Rape Trauma Syndrome generally, jurors would still be the ones left to connect the dots between the victim's unusual behavior and professionally recognized patterns of behavior. Even if it is not dressed up in the professional nomenclature, jurors would still benefit from hearing from a professional, such as a worker at a crisis center, that rape victims' behavior is often counterintuitive. In fact, barring such professional language and relying on the observations of professionals who have daily contact with victims might be the best option. Jurors could be more receptive to hospital employees or rape crisis center workers than academics.

Particularized testimony might be possible in Pennsylvania once its courts become comfortable with admitting generalized expert testimony. It is inconceivable at the moment, however, that Pennsylvania will rush to allow expert witnesses to reach diagnostic conclusions about victims. It would be unwise and potentially dangerous. In the meantime, however, trial judges need to be better educated about the dynamics of rape and sexual assault cases and the common psychological reactions to such a traumatic experience. Problems arise not only from juror bias but also from judges perpetuating myths and stereotypes, and thereby giving them some level of credibility.

Regardless of the approach the Pennsylvania Supreme Court eventually takes, it is important that there are safeguards to admitting such evidence. First, in a jury trial the judge must give the jury instructions regarding the limited scope and purpose of the expert's testimony. Jury instructions are more important as experts are allowed to more closely approach

diagnosing the complainant. Therefore, the instructions must inform the jury that it is their role to determine whether a victim's responses are consistent with rape victims generally or Rape Trauma Syndrome specifically. Special emphasis must be placed on the fact that jurors may disagree with experts or choose to accept one expert's testimony over another's. Allowing the prosecution to introduce expert testimony on Rape Trauma Syndrome opens the door to the defense using experts to rebut the prosecution's expert witness. As Rape Trauma Syndrome has been declared admissible in other jurisdictions, defense attorneys have developed legal strategies in using their own experts.[127] The acceptability of RTS or any scientific theory is a valuable debate to have among scientists and is directly relevant to any theory's admissibility in trials.

X. CONCLUSION

Rapid Trauma Syndrome is a scientifically studied disorder, under the umbrella of Post-Traumatic Stress Disorder, which describes the mind's attempts to cope with an incredibly traumatic event. Although the admission of expert testimony in trials always runs the risk of usurping power from juries, it can also be useful to shed light on things that lay persons have no knowledge of or experience with. Courts across the country have developed fair and effective means of admitting expert psychiatric testimony in rape and sexual assault cases over the last twenty to thirty years. While the approaches differ regarding exactly how much experts may say, they represent a sympathetic and yet also scientific approach to some of the historic problems in prosecuting rape cases. The two trials of Jeffrey Marsalis are an example of the hurdles prosecutors must cross to explain the counterintuitive responses that rape victims often exhibit. It seems reasonable to conclude that the jurors in that case were reluctant to find Marsalis guilty on all counts because they were confused about why the victims acted the way they did. Thus, some expert testimony about the psychology of how the human mind copes with traumatic events could have

[127] Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1375 (2005).

proved helpful. Pennsylvania courts are dangerously behind the times on this issue. The Pennsylvania Supreme Court should begin to develop a jurisprudence that will allow trial courts to more accurately present to juries the intricacies of rape cases, which are often bogged down by centuries-old myths and prejudices.