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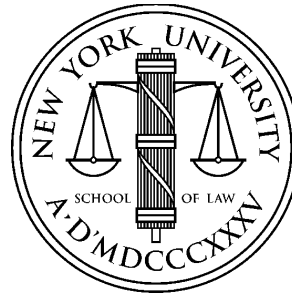

For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW

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RELIGION AND EMPLOYMENT ANTIDISCRIMINATION LAW: PAST, PRESENT, AND POST *HOSANNA-TABOR*†

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† A prior draft of this article has been accepted to appear as *Religion and Employment* in *Religion and the State*. Jennifer Ann Drobac & Jill L. Wesley, *Religion and Employment*, *in* RELIGION AND THE STATE (Boris Bittker, Scott Idelman & Frank Ravitch, eds., Cambridge Univ. Press forthcoming 2015) (reviewing employment antidiscrimination cases and statutory law as it pertains to faith-based employment discrimination in a treatise concerning law, religion, and the state).

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INTRODUCTION

At the beginning of a new millennium, employment discrimination on the basis of religious affiliation remains a problem in the United States. Even though Europeans settled here to escape religious persecution, the Equal Employment Opportunity Commission (EEOC) reported that it had received 3811 allegations of employment discrimination on the basis of religion in 2012.[1] This figure accounted for 3.8% of the agency's total caseload for the fiscal year.[2] Although this number is small in comparison to other categories, such as discrimination based on sex (30,356 allegations) or race (33,512 allegations), the allegations of religious discrimination in employment have doubled since 1997, the first year for which statistics are available on the agency's website.[3] Of special concern

1. *Charge Statistics FY1997 Through FY2012*, U.S. Equal Emp. Opportunity Commission, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 28, 2013).

2. *Id.*

3. *Id.*

is the increase in allegations of discrimination made by Muslims since the terrorist attacks of September 11, 2001.[4]

While a complete review of law regarding religion and U.S. employment would take multiple volumes, this Article summarizes the history of and recent trends for two aspects of the law in this area. Part I surveys laws and case precedent that protect working religious adherents who claim discrimination, harassment, or a failure to accommodate. Adherents now bring most of their claims under Title VII of the Civil Rights Act of 1964[5] or equivalent state fair employment practice statutes.[6] However, isolated legislation, some arguably politically as well as religiously motivated, offers additional protections. Recently passed "refusal clauses," also known as "conscience clauses," relate to the sale of contraceptives or the provision of pregnancy termination services.[7] They highlight the importance of targeted and specific statutes. *Burwell v. Hobby Lobby Stores, Inc.* addresses whether for-profit, private *corporations* enjoy the same protections afforded by the Religious Freedom Restoration Act of 1993 (RFRA)[8] that religious *persons* may claim against governmental interference.[9]

Part II covers the protections for religious institutions that also operate as employers. The Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[10] indicates that the legal debate concerning the separation of church and state remains lively—at least where religious employers operate. The future direction of court interpretation of that precedent remains obscure. Some analysts suggest that the Court limited *Hosanna-Tabor*'s reach, while others contend that its influence may be

4. In the time period between the end of 2001 and 2012, charges filed by Muslims have risen from 15.5% to 20% of the total religious discrimination in employment charges filed. *Religion-Based Charges Filed from 10/01/2000 Through 3/31/2011?Showing Percentage Filed on the Basis of Religion-Muslim*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm (last visited Nov. 16, 2014). The percentage rose dramatically in 2002 to 28% but has leveled off since then. *Id.*

5. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

6. *See, e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 125 Cal. Rptr. 2d 663 (Ct. App. 2002) (holding that plaintiff's veganism was not a religious creed as defined by California's Fair Employment and Housing Act).

7. *Pharmacist Conscience Clauses: Laws and Information*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/health/pharmacist-conscience-clauses-laws-and-information.aspx (last updated May 2012).

8. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

9. 134 S. Ct. 2751 (2014).

10. 132 S. Ct. 694 (2012).

quite extensive. Finally, this Article concludes by making several observations about the evolution of religion and employment law.

I.
CAUSES OF ACTION AVAILABLE TO EMPLOYEES

Since its passage in 1964, Title VII has served as the primary legal vehicle for employment discrimination or harassment claims by religious adherents. However, a review of early religious discrimination claims brought under the First Amendment enhances an understanding of modern Title VII jurisprudence in at least three ways.

First, many of the early religious freedom cases highlight the tension between a court's mandate to remedy instances of religious discrimination and the historic separation of church and state. The First Amendment admonishes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[11] Enforcement of these two First Amendment clauses, known respectively as the Establishment Clause and the Free Exercise Clause, often involves a balancing exercise. Courts acknowledge that in the protection of a citizen's free exercise of religion, courts risk inadvertently establishing or endorsing a religion. Endorsement of religion becomes a particular concern when two religious adherents have opposing interests.[12] Neutrality, as well as the protection of religious freedoms, surfaces as a primary goal of reviewing courts.

Second, the early cases reveal how courts strained to verify an adherent's religious beliefs in evaluating free exercise claims. Generally, courts examined what constitutes a religion and, more specifically, what constitutes a religious belief. Additionally, courts

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11. U.S. CONST. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460–61 (1958) (applying freedom of association to states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying Free Exercise and Establishment Clauses to states).

12. *See, e.g.*, N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 363 (App. Div. 1995), *aff'd as modified*, 674 N.E.2d 305 (N.Y. 1996). The court explained:

> Simply put, to find the proper balance between the Free Exercise Clause and the Establishment Clause may not always be easy. Nevertheless, it is important to recognize that true religious liberty is damaged, not only where a penalty is attached to religious observance, but also where the State acts to promote the welfare of one religious group ahead of another. The Constitution firmly condemns both courses with the same neutral hand.

Id. at 362–63 (citation omitted).

explored how firmly established an adherent's belief had to be before it triggered First Amendment free exercise protection. Courts continue to struggle with these questions. They do so within the Title VII framework, guided by more recently passed religious protections, and in reliance on early court precedent.

Third, the early employment religious discrimination cases reveal possible biases on the part of legislatures and courts against minority religious adherents, such as Jehovah's Witnesses and Muslims. The Supreme Court acknowledged the problem of disfavored religious identity in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* when it dealt with a facially neutral law.[13] The Court explained "[f]acial neutrality is not determinative. . . . Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."[14] The challenge for jurists is the identification of masked hostility.

A. First Amendment Employment Discrimination Claims

Employment law application of the First Amendment's Free Exercise and Establishment Clauses gained strength during the industrialization of the U.S. economy. As factory jobs lured more workers from the agricultural fields, conflicts concerning the accommodation of religious freedoms arose between workers and their employers. Court resolution of these disputes necessitated judicial recognition of the limitations on government involvement in religion set by the First Amendment. Without targeted legislation, however, minority groups, including religious adherents, continued to suffer discrimination in both the public and private sectors.

Beginning in the early nineteenth century, individuals began to challenge state "blue laws" that regulate some forms of commercial conduct on particular days, usually Sundays.[15] Most U.S. blue

13. 508 U.S. 520, 524 (1993) (finding that a ban on killing animals violated the free exercise rights of Santería adherents who practice animal sacrifice as a form of religious devotion).

14. *Id.* at 534. Even though the *Lukumi* Court found the challenged ordinances facially neutral, it noted that the laws specifically targeted Santería sacrifice. *See id.* at 533–40.

15. *See* Commonwealth v. Wolf, 3 Serg. & Rawle 48, 51 (Pa. 1817) (affirming a penalty imposed on Jewish plaintiff for breaking Sunday Sabbath); Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 676 (2000) (providing a full historical accounting of the challenges presented by the "blue laws").

It is not clear from where the label "blue law" derives. *Compare* SAMUEL PETERS, A GENERAL HISTORY OF CONNECTICUT: FROM ITS FIRST SETTLEMENT UNDER GEORGE

laws protect the Christian Sunday Sabbath or Christian holidays, such as Christmas.[16] For example, Indiana still bans vehicle and off-premises alcohol sales on Sundays.[17] Arguably, these laws run afoul of the Establishment Clause by promoting Christianity. However, non-religious justifications, such as the welfare and morality of the community, enable the surviving laws to withstand judicial scrutiny.[18]

Often those who challenged blue law restrictions did so because they observed a Sabbath other than Sunday and did not want to lose two days of income.[19] Some Sunday work prohibition laws

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FENWICK, TO ITS LATEST PERIOD OF AMITY WITH GREAT BRITAIN PRIOR TO THE REVOLUTION (1829), *available at* http://archive.org/details/generalhistoryof00peter (referencing "blue laws" as religious laws written in a blue bound book), *with* W.L. Kingsley, *Lying as a Fine Art: And the Claims of Rev. Samuel Peters as an Artist*, XVI SCRIBNER'S MONTHLY 275, 279–80 (1878), *available at* http://www.unz.org/Pub/Century-1878jun-00275?View=PDFPages (disputing existence of Connecticut's blue book of religious laws and referring to Peters as "lying"). For an alternative origin of the term "blue laws," see W.F. Poole, *A Popular Cyclopaedia of United States History*, THE DIAL: A MONTHLY INDEX OF CURRENT LITERATURE, Jan. 1882, at 209, 210, *available at* http://babel.hathitrust.org/cgi/pt?view=image;size=100;id=mdp.39015030985850;page=root;seq=221;num=209) ("The word 'blue,' or 'blew,'—meaning fixed, faithful, constant,—is as old as Chaucer's time; and when fixed principles went out of fashion in England on the restoration of Charles II, whatever was fixed, serious and rigid in morals and religion was termed 'blue,' or 'true blue,' and was applied as a term of reproach to Puritans and Presbyterians. . . . The Connecticut code of 1650 was milder than that of Massachusetts, Virginia, or England; and yet to New Yorkers, who had no religion at all, it seemed strict, and hence 'blue.'").

16. *See Blue Laws in the United States*, WIKIPEDIA (Sept. 4, 2014), http://en.wikipedia.org/w/index.php?title=blue_laws_in_the_United_States&oldid=624088615.

17. IND. CODE ANN. §§ 7.1-3-1-14, 24-4-6-1(b) (West 2014)

18. *See, e.g.*, Commonwealth v. Has, 122 Mass. 40, 42 (1877). In *Has*, the court explained, "the legislative authority to provide for [the work cessation's/Sabbath's] observance is derived from [the state's] general authority to regulate the business of the community and to provide for its moral and physical welfare." *Id.* In other cases, however, judicial dicta revealed additional motivations. *See State* v. Barnes, 132 N.W. 215, 216 (N.D. 1911) (protecting the Christian Sabbath for observation by explaining "that this is a Christian nation"). The *Barnes* court also suggested that Sunday is the one day of rest typically observed by "civilized peoples." *Id. See also id.* at 216–17 (documenting support for the designation of Sunday as a day of rest throughout history, dating back to AD 321).

19. *See, e.g.*, Scoles v. State, 1 S.W. 769 (Ark. 1886) (finding Seventh-day Adventist guilty of working on Sunday); Commonwealth v. Starr, 11 N.E. 533, 534 (Mass. 1887) (affirming lower court decision that statute prohibited Jewish shopkeeper from remaining open on Sunday to serve other Jews); *see also* State v. Blair, 288 P. 729 (Kan. 1930) (considering a defendant who claimed no particular religion but resisted the imposition of a religious day of rest).

remained in force through the middle of the twentieth century.[20] Only gradually did more leniency for Saturday Sabbatarians and others develop.[21]

Avoiding religionist justifications for blue laws, the Supreme Court echoed reasoning almost a century old in *Braunfeld v. Brown*:

> [W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together . . . .[22]

The Court found it within the state's general police powers to designate one day of the week as a day of rest "when the atmosphere is one of calm and relaxation rather than one of commercialism."[23] The Supreme Court, like other courts that had examined the issue before, failed to consider that the designated day was sacred to some, but not all, citizens.

While many of the old work-related blue laws have been repealed, many states still have remnant blue laws.[24] The evolution of remaining blue laws offers an important lens through which to view current legal practices that govern the expression and control of religion in the workplace. Veiled religious endorsements and possible biases warrant careful reading of judicial opinions and analysis of legislation. For example, one might argue that prohibitions on sex work (i.e., prostitution), while ostensibly passed for public health and morality reasons, reflect religious precepts against nonmarital, recreational sex.[25] As this Article moves through the

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20. Town of W. Orange v. Carr's Dep't Store, 147 A.2d 97, 101 (Essex County Ct. 1958) (finding that store owner violated local ordinance when employees were in store checking inventory on Sunday). In *Town of W. Orange*, the court allowed labor on the restricted day if work "performed [was] in [defendant's] dwelling house, work shop or on his premises, and [had] not disturbed other persons in the observance of the first day of the week as the Sabbath." *Id.*

21. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (explaining that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all").

22. 366 U.S. 599, 607 (1961).

23. *Id.* at 602.

24. *See Blue Law*, WIKIPEDIA (Sept. 4, 2014), http://en.wikipedia.org/w/index.php?title=Blue_law&oldid=625617614; *see also Blue Laws in the United States*, *supra* note 16.

25. *See, e.g.*, Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 437–38 (1998); *see also*

workplace religious rights of both employees and employers, it draws attention to alleged mixed-motive legislation and possible subtle religious endorsements or prejudices.

1. Possible Court Bias Against Minority Religious Adherents and the Tension with the Establishment Clause Implicated in Free Exercise Claims

Any government display of bias against or preference for a religion implicates First Amendment rights. This Part highlights the difficult balance courts must strike between the protection of religious freedoms, guaranteed by the Free Exercise Clause, and the maintenance of religious neutrality, mandated by the Establishment Clause.[26] One early employment case that raises questions about the application of laws of ostensibly neutral religious import is *Prince v. Massachusetts*.[27] In *Prince*, the Court upheld Massachusetts's child labor laws against a Jehovah's Witness who allowed her ordained nine-year-old niece to distribute their religious literature.[28] The Court reasoned that the state has an interest in protecting children from exploitative labor.[29] In doing so, the Court justified the infringement of free exercise and other constitutional rights by asserting public welfare, morality, and the protection of children.[30] Unlike the old blue laws, prohibitions against the exploitation of children carry no obvious religious endorsement. However, the Court's decision may be tied to a masked hostility towards Jehovah's Witnesses and other minority religious adherents, as illustrated in other cases, including, for example, child custody cases.[31] The reliance on neutral criteria allays some, but often not all, concerns.

People v. Freaney, 488 N.Y.S.2d 759, 761 (App. Div. 1985). The *Freaney* court explained:

> Interestingly, prostitution itself was not a common-law crime, unless the manner in which it was engaged constituted a public nuisance. It became a crime by statute and, despite the suggestion that prostitution should be decriminalized and treated as a licensed, regulated activity, virtually all jurisdictions continue to punish prostitution for utilitarian reasons as well as religious and moral ones.

Id. (citing 2 WHARTON'S CRIMINAL LAW § 271 (14th ed. 1996) and Model Penal Code § 251.2 cmt. (1980).

26. U.S. CONST. amend. I.

27. 321 U.S. 158 (1944).

28. *Id.*

29. *Id.* at 166.

30. *Id.* at 166–67.

31. *Compare* Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998), *with Prince*, 321 U.S. at 170. The *Prince* Court held, "Parents may be free to become martyrs them-

If judicial or government officials display hostility to minority religious adherents, such as Jehovah's Witnesses, the animus carries other constitutional ramifications. When government officials prefer one religion over another faith or religion, or over no religious affiliation, the government's religious endorsement necessarily implicates Establishment Clause concerns. In *Everson v. Board of Education*, the Court evaluated the First Amendment's Establishment Clause and held, "Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[32] The Court perfected a test to determine whether governmental action violates the Establishment Clause in *Lemon v. Kurtzman*.[33] The three-part *Lemon* test requires that governmental action: (1) "have a secular legislative purpose"; (2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) avoid "an excessive . . . entanglement with religion."[34] However, Supreme Court Justices, constitutional law scholars, and others have criticized the *Lemon* test in the decades since its formulation.[35] In *Van Orden v. Perry*, a plurality of the Court acknowledged, "Many of our recent cases simply have not applied the *Lemon* test. Others have applied it

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selves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* Arguably, this dictum suggested that a child's martyrdom exacerbated the dangers to the *Prince* child and disparaged Mrs. Prince for her religiously associated behavior.

32. 330 U.S. 1, 15 (1947). In *Everson* the Court sustained state reimbursement for the cost of transporting children to parochial schools by analogizing the reimbursement to state-paid police protection of schoolchildren regardless of whether they attend parochial schools. *Id.* at 18.

33. 403 U.S. 602, 606–07 (1971) (invalidating a 15% salary supplement to private school teachers of secular subjects).

34. *Id.* at 612–13 (internal quotation marks omitted).

35. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) (referring to criticism by Justices O'Connor and Rehnquist); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359–79 (1995) (reviewing the fractured application of *Lemon* in subsequent cases). Donald Beschle comments, "Separationists find the [*Lemon*] test too loose in its acceptance of plausible secular state purposes and too pliable in its quest for a primary secular effect. Accommodationists point to the 'Catch-22' nature of the entanglement clause as an obstacle to conscientious legislative attempts to satisfy the 'effects' test." Donald. L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 394 (1989) (footnotes omitted).

only after concluding that the challenged practice was invalid under a different Establishment Clause test."[36]

In 1984, Justice O'Connor offered the "endorsement test" as an improvement upon and replacement for the *Lemon* test.[37] Over the years, the endorsement test has received sustained interest.[38] In *Lynch v. Donnelly*, Justice O'Connor suggested that the Establishment Clause prohibits two types of government action.[39] In her concurring opinion, she explained what these two types of government action are:

> One is excessive entanglements with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[40]

The first prohibition closely resembles the third prong of the *Lemon* test, warning against "excessive entanglement." However, the second admonition—that government action must neither endorse nor disapprove of religion—is significantly different from the first two prongs of *Lemon*.

The *Lemon* "purpose" and "effects" prongs focus on the stated purpose and actual effects of governmental action or legislation.[41] In her explanation of the endorsement test, Justice O'Connor ad-

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36. 545 U.S. 677, 686 (2005) (internal citations omitted) (holding that Texas State Capitol Ten Commandments display carried a historical meaning and did not violate the Establishment Clause).

37. Lynch v. Donnelly, 465 U.S. 668, 688–94 (1984) (O'Connor, J., concurring) (finding that a city did not violate the Establishment Clause by displaying a nativity scene).

38. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 597 (1989) (adopting Justice O'Connor's endorsement test for the first time), *abrogated by* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014). Professor Greenawalt explained, however, "A majority of Justices do agree that 'endorsement' is the crucial inquiry for certain kinds of cases, but no majority agrees on the proper formulation of that test for at least some of these cases." Greenawalt, *supra* note 35, at 361.

39. 465 U.S. at 684–85.

40. *Id.* at 687–88.

41. 545 U.S. at 613.

vised, "The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."[42] In applying the endorsement test, a court asks what the government intends by its action, which is not necessarily the same as the stated purpose. Justice O'Connor also counseled:

> [T]he effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. . . . What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.[43]

This explanation emphasizes that the unconstitutionality of a message lies in its perception as government endorsement, and not in whether the government has, in reality, advanced or inhibited religion. The endorsement test, which ferrets out the appearance of inappropriate endorsement, sweeps much more broadly than one that requires actual advancement or inhibition of religion.

In *Wallace v. Jaffree*, Justice O'Connor further clarified the endorsement test.[44] She said in her concurrence, "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."[45] Justice O'Connor's intelligent objective observer is not an "average" person on the street, but one who, for example, is familiar with the legislative history of a statute.

Justice O'Connor gave more guidance concerning the objective observer in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[46] She noted that something more than historical facts determine whether the objective observer perceives a message of endorsement: "'Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious mes-

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42. *Lynch*, 465 U.S. at 691.

43. *Id.* at 691–92. Justice O'Connor added, "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 694.

44. 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

45. *Id.*; *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (citing *Wallace* and discussing the objective observer's perception of government action); Thornton v. Caldor, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (referencing the objective observer's understanding of a state endorsing one particular day as the Sabbath).

46. 483 U.S. at 348.

sage, in large part a legal question to be answered on the basis of judicial interpretation of social facts.'"[47] This elaboration leaves the qualifications of the objective observer frustratingly vague and confusing.

Justice O'Connor's objective observer is the "reasonable person" in tort law who understands complex statutes and their legislative histories. In *Capitol Square Review & Advisory Board v. Pinette*, Justice O'Connor explained, "In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'"[48] This observer can both personify community ideals and engage in sophisticated judicial interpretation of the social elements he or she personifies.[49] What remains unclear, in part, is whether (and how) the objective observer represents all communities and how she harmonizes the reasonable person's conclusions with those of the judicial historian and interpreter.

Courts continue to struggle with Establishment Clause jurisprudence that still makes reference to both the *Lemon* and endorsement tests.[50] In 2011, Justice Thomas noted the lack of guidance as he dissented from the denial of certiorari in a case involving government display of highway crosses for slain police officers.[51] He lamented, "Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases."[52] This overview of Establishment Clause jurisprudence (if it can be called that) helps one understand the tension between Free Exercise and Establishment Clause claims in the evolution of employment law cases. The tightrope that courts walk, over the abyss of religious discrimination, demonstrates that a misstep may effectuate the violation of constitutional protections.

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47. *Id.* (quoting *Lynch*, 465 U.S. at 693–94).

48. 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

49. *Id.*

50. *See, e.g.*, Salazar v. Buono, 559 U.S. 700, 707–09 (2010) (remanding a case involving the display of a Latin cross on national land and the transfer of that land).

51. Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 12 (2011) (Thomas, J., dissenting).

52. *Id.* at 14.

2. Free Exercise and Establishment Clause Issues in Unemployment Benefits Cases

Many religious discrimination employment cases involve a state's denial of unemployment benefits. Claimant workers quit or are fired from their jobs because of a religious conflict. In *Sherbert v. Verner*, a Seventh-day Adventist sought unemployment benefits after she was terminated for refusing to work on her Saturday Sabbath.[53] The U.S. Supreme Court reversed the South Carolina Supreme Court's denial of benefits.[54] The Court held, "The [South Carolina] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[55] In deciding the case, the *Sherbert* Court established a balancing test that "asks whether [the law] substantially burden[s] a religious practice and, if it [does], whether the burden [is] justified by a compelling government interest."[56] This test tracks the "strict scrutiny" analysis used in *Wisconsin v. Yoder*, another case that considered the Free Exercise Clause.[57]

Justice Harlan's dissent in *Sherbert* deserves note for a number of reasons. First, he emphasized that the South Carolina law was one that the South Carolina Supreme Court had "uniformly applied . . . in conformity with its clearly expressed purpose."[58] Second, Harlan expressed his concern that allowing an exception for Sherbert based on her religion amounted to a de facto violation of the Establishment Clause.[59] Harlan alluded to the tension between the Free Exercise and Establishment Clauses; he reasoned that South Carolina "must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assis-

53. 374 U.S. 398 (1963).

54. *Id.* at 402.

55. *Id.* at 404.

56. *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997) (restating and confirming the *Sherbert* balancing test), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

57. 406 U.S. 205, 234 (1972). *Yoder* involved a challenge by Amish parents to a Wisconsin compulsory education law. *Id.* at 208–09. The Court held that the First and Fourteenth Amendments prevented the state from compelling Amish children to remain in school past the eighth grade until they are sixteen. *Id.* at 234. The Religious Freedom Restoration Act (RFRA) traces the compelling interest test back to *Sherbert* and Yoder. 42 U.S.C. § 2000bb (2012) (citations omitted) (stating that the purpose of the legislation is "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*").

58. 374 U.S. at 419 (Harlan, J., dissenting).

59. *Id.* at 422.

tance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated."[60]

Finally, Justice Harlan referenced *Braunfeld v. Brown*.[61] Recall that *Braunfeld* was a blue law case that had upheld the right of a state to prohibit work and provide for a day of rest on Sunday, even if it imposed a cost upon an individual citizen.[62] Harlan explained:

> The secular purpose of the statute before us today is even clearer than that involved in Braunfeld. And just as in Braunfeld—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability.[63]

Harlan regarded the *Sherbert* decision as a violation of the principle that the Court should avoid involvement with remedying a situation based on an individual's religious beliefs and should instead allow the statutes to fulfill their secular duty without judicial interference.

Thus, the *Sherbert* Court supported a religious exception to a rule of otherwise neutral application. Subsequent unemployment decisions confirmed the *Sherbert* majority view that favored accommodation of religious practices and found no constitutional conflict.[64] However, Harlan's position foreshadowed the majority decision in *Employment Division, Department of Human Resources v. Smith*, which held that a neutral law of general applicability did not violate the Free Exercise Clause.[65]

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60. *Id.* at 422. *But see* Von Stauffenberg v. Dist. Unemp't Comp. Bd., 459 F.2d 1128, 1133 (D.C. Cir. 1972) (holding that the exemption of religious organizations from unemployment compensation tax payments does not violate the Establishment Clause of the First Amendment).

61. *Sherbert*, 374 U.S. at 421 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

62. 366 U.S. at 609.

63. *Sherbert*, 374 U.S. at 421.

64. *See generally* Abner S. Greene, *The Apparent Consistency of Religion Clauses Doctrine*, 21 WASH. U. J.L. & POL'Y 225, 260–61 (2006) (discussing *Thomas v. Review Board*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), as supporting the *Sherbert* majority view).

65. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

In another major decision concerning unemployment benefits, *Thomas v. Review Board*, the Supreme Court again applied the *Sherbert* test.[66] *Thomas* validated the free exercise rights of a Jehovah's Witness who had quit his job after a transfer to a position that required he build military equipment in violation of his religion's tenets.[67] The worker filed suit after a denial of unemployment benefits and later appealed from an Indiana Supreme Court decision that upheld the state's legitimate interests.[68] In overturning the Indiana Supreme Court, the U.S. Supreme Court reaffirmed that "[a] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[69]

The *Thomas* Court specifically disapproved of the Indiana Supreme Court's willingness to explore what actions Thomas should have taken on the basis of his religious beliefs.[70] The Court reasoned, "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[71] In this passage, one sees how the *Thomas* Court disapproved of unreasonable court examination or verification of the adherent's religious beliefs. The Court added that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."[72] Thus, in both *Sherbert* and *Thomas*, the Supreme Court resolved the tension between the Free Exercise and Establishment Clauses in favor of the religious adherents. The Court applied a balancing test that permitted exceptions to laws of neutral applicability for the individual religious needs of citizens.[73]

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66. 450 U.S. 707, 713 (1981).

67. *Id.* at 709–10.

68. *Id.* at 710–13.

69. *Id.* at 716; *see also* Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 146 (1987) (citing *Sherbert* and *Thomas* in concluding "that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment").

70. *Thomas*, 450 U.S. at 715.

71. *Id.*

72. *Id.* at 716.

73. *But see id.* at 720 (Rehnquist, J., dissenting). Justice Rehnquist's *Thomas* dissent revisited Justice Harlan's emphasis on *Braunfeld* in his *Sherbert* dissent:

> [I]n this case, it cannot be said that the State discriminated against Thomas on the basis of his religious beliefs or that he was denied benefits *because* he was a Jehovah's Witness. Where, as here, a State has enacted a general statute,

The Supreme Court extended the *Sherbert* and *Thomas* holdings in *Frazee v. Illinois Department of Employment Security*.[74] Frazee opposed working on Sunday because of his personal religious beliefs and was denied unemployment benefits.[75] Unlike Sherbert and Thomas, however, Frazee was not a member of an established religious sect or church, nor did he claim that his refusal to work on Sundays resulted from a "tenet, belief or teaching of an established religious body."[76] The Court held that Illinois had violated the Free Exercise Clause in denying Frazee unemployment benefits.[77] In reconciling its decision with *Sherbert* and *Thomas*, the Court explained, "Never did we suggest [in *Sherbert* and *Thomas*] that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[78] Thus, the Court affirmed that First Amendment free exercise protection mandates neither affiliation with a particular religious sect nor verification of religious zeal and sincerity. Once again, the Court held for the religious adherent.

A recent employment benefits case, *Employment Division, Department of Human Resources v. Smith,* involved two workers, Smith and Black, who were "fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church" of which they were members.[79] Smith and Black were held ineligible for em-

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> the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert v. Verner*: "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between." Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so.

Id. at 722–23 (footnote omitted) (citations omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 423 (1963)). Rehnquist stressed the neutrality of the state to justify his preferred outcome. *Id.* at 726–27. This theme later surfaced again, in *Smith*. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882–84 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

74. 489 U.S. 829 (1989).

75. *Id.* at 830–31.

76. *Id.*

77. *Id.* at 829.

78. *Id.* at 832–33.

79. 494 U.S. 872, 874 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

ployment benefits because they had been fired for misconduct.[80] The Oregon Court of Appeals overturned the decision of the Employment Division on the basis that the activities of Smith and Black were religious and, therefore, were protected by the Free Exercise Clause of the First Amendment.[81] The Supreme Court of Oregon upheld the decision of the Court of Appeals, using the reasoning of *Sherbert* and *Thomas*.[82]

In reversing the decision of Oregon's Supreme Court, the U.S. Supreme Court opined, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[83] The Court continued, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[84] Without overruling *Sherbert*, the Supreme Court followed the reasoning in the *Sherbert* and *Thomas* dissents. It left the legal community to reconcile the decisions in this line of cases.

The primary distinguishing factor between *Smith* and other similar religious freedom cases is that the Supreme Court declined to designate Smith and Black's ingestion of peyote as religiously motivated. Rather, the Court emphasized that they had violated a criminal drug use statute.[85] This reasoning echoes that in *Prince v. Massachusetts* in which the Court upheld the facially neutral child labor laws against the free exercise claims of a Jehovah's Witness.[86] One wonders, based on the Court's treatment of Jehovah's Witnesses and the conjectures of bias following *Prince*, whether the Court would have come to the same conclusion in *Smith* if the rehab center had terminated Smith and Black for ingesting Christian sacramental wine. Arguably not, since the ingestion of sacramental wine does not otherwise constitute a crime involving a

80. *Id.*

81. *Id.*

82. Smith v. Emp't Div., Dep't of Human Res., 721 P.2d 445, 449 (Or. 1986), *vacated*, 485 U.S. 660 (1988), *adhered to*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014).

83. *Smith*, 494 U.S. at 878–79.

84. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

85. *Id.* at 875–76.

86. 321 U.S. 158 (1944).

controlled substance. *Smith* and *Prince* also raise the notion that, in addition to facial neutrality, strong public policy, such as the war on drugs or protection of children from exploitative labor, trumps free exercise rights. If that is the case, however, the Court might simply have cited the compelling governmental interest and validated the challenged *Smith* statute using narrow grounds.

Smith seemingly marks the Court's retreat from the *Sherbert*, *Thomas*, and *Frazee* holdings that free exercise protection mandates neither affiliation with a particular religious sect nor verification of religious sincerity. However, the *Smith* Court justified its rejection of the strict scrutiny standard in evaluating alleged free exercise violations by reasoning, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[87]

The *Smith* Court explained that it invoked the compelling interest (strict scrutiny) test to evaluate free exercise claims only when the government had created a mechanism for individualized exemptions to generally applicable laws.[88] In *Sherbert*, the unemployment compensation administrative system allowed the state to analyze individual free exercise claims for exemption.[89] *Smith* noted that such cases "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[90] In *Smith*, no mechanism existed for the evaluation of free exercise claims against the otherwise valid and neutral Oregon criminal drug laws, and the Court refused to extend the heightened scrutiny standard to that type of case.

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[91] Congress addressed its disapproval of *Smith*, stating, "[I]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws

87. 494 U.S. at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

88. *Id.* at 884.

89. Sherbert v. Verner, 374 U.S. 398, 405–06 (1963).

90. 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

91. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)). For a more complete discussion of the RFRA and similar state statutes, see Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010).

neutral toward religion."[92] Congress then codified the *Sherbert* compelling interest test, explaining that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[93] In essence, Congress codified the strict scrutiny standard for Free Exercise Clause case evaluations.

The constitutionality of the RFRA came before the Supreme Court in *City of Boerne v. Flores*.[94] The original issue in the case concerned a dispute between the Catholic Archbishop of San Antonio and the City of Boerne regarding whether the Archbishop could invoke the RFRA to overcome the denial of a construction permit.[95] In coming to its conclusion that the RFRA was unconstitutional as applied to the states, the Court stated that as "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[96] *Boerne* references *Smith* and how it led Congress to pass the RFRA.[97] The *Boerne* majority noted that the Court had declined to apply the *Sherbert* test in *Smith*.[98] Three Justices—O'Connor, Souter, and Breyer—registered their disagreement with the majority decision in *Boerne*.[99] Justice O'Connor authored the lead dissent, arguing that the Court should take the opportunity presented by *Boerne* to revisit their

92. RFRA § 2(a)(4), 42 U.S.C. § 2000bb (citation omitted).

93. *Id.* § 3(b), 42 U.S.C. § 2000bb-1.

94. 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

95. *Id.* at 512.

96. *Id.* at 536.

97. *Id.* at 512.

98. *Id.* at 512–13.

99. *Id.* at 54465 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

Smith holding.[100] Her dissent advocated for a return to the *Sherbert* compelling interest test.[101]

More recently, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court returned to the *Sherbert* test codified in the RFRA.[102] Specifically, the Court rejected that U.S. Customs inspectors had a compelling interest in banning the respondent church's (UDV) sacramental use of hoasca, a brewed tea that contains DMT, a hallucinogen regulated under Schedule I of the Controlled Substances Act.[103] The Court explained why the *Smith* peyote case no longer controlled the outcome in *Gonzales*: "[W]e rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner,* and, in accord with earlier cases, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws."[104] However the RFRA reintroduced the requirement of a strict scrutiny analysis.[105] Addressing changes wrought by the RFRA since *Smith*, the *Gonzales* Court explained, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened. RFRA expressly adopted the compelling interest

100. 521 U.S. at 546 (O'Connor, J., dissenting). Justice O'Connor argued:

> [The Free Exercise Clause] is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

Id.

101. *Id.* at 544–65. In response to *Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), pursuant to its Spending Clause and Commerce Clause authority. Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)). The RLUIPA is limited in scope, targeting two areas of state and local action. *See id.* As its title indicates, the RLUIPA applies to land use regulation and restrictions on the free exercise of religion by institutionalized persons. *See generally* Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011) (discussing the RLUIPA and its precursor, the RFRA, with which Congress intended to re-establish the *Sherbert* compelling interest test post-*Smith*).

102. 546 U.S. 418 (2006).

103. *Id.* at 438.

104. *Id.* at 424 (citations omitted).

105. *Id.* at 430.

test 'as set forth in *Sherbert v. Verner*.'"[106] Conducting the strict scrutiny analysis mandated by the RFRA, the Court then upheld the preliminary injunction sought by UDV against U.S. Custom officials.[107]

This discussion of employment benefits cases and Supreme Court First Amendment jurisprudence indicates that free exercise claims for employment discrimination remain viable under the RFRA against federal government interference. Whether the Court will continue to analyze state action using a low-level *Smith* scrutiny or a strict scrutiny test, consistent with the RFRA and *Gonzales*, remains unclear.

3. Free Exercise and Establishment Clause Issues in Future Cases

Another question raised post-*Smith* and the RFRA is whether for-profit corporations can, on behalf of their owners or shareholders, allege free exercise violations against the federal government. The Court recently addressed this issue only with respect to the RFRA in *Burwell v. Hobby Lobby Stores, Inc.*[108] Hobby Lobby was attempting to use the RFRA to avoid providing its employees with health care coverage for certain contraceptives.[109] The Greens, owners of Hobby Lobby stores, "believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."[110] The corporation's owners alleged that provision of such coverage, mandated by the 2010 Patient Protection and Affordable Care Act (ACA), violated their free exercise rights under the RFRA.[111] The plain language of the RFRA specifies that it applies to persons, but does not specifically define person: "Government shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability."[112] Therefore, the *Hobby Lobby* Court relied on the Dictionary Act: "Under the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'"[113] Thus, the Court held that a "person"

106. *Id.* at 430–31 (citations omitted).
107. *Id.* at 439.
108. 134 S. Ct. 2751 (2014).
109. *Id.* at 2766.
110. *Id.*
111. *Id.* at 2765–66.
112. 42 U.S.C. § 2000bb-1(a) (2012) (emphasis added).
113. 134 S. Ct. at 2768 (quoting 1 U.S.C. § 1 (2012)).

covered by the RFRA includes a for-profit corporation, such as Hobby Lobby.[114]

Arguably, *Hobby Lobby* has limited relevance to the subject of employment discrimination on the basis of religion. It is not technically an employment discrimination case in that the corporate employer was not employed by the federal government. Hobby Lobby employees were not suing their corporate employer for religious accommodation nor asserting their free exercise rights. The Court noted the limits of its *Hobby Lobby* decision:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[115]

Because the RFRA applies to for-profit corporations, however, one can expect to see further suits testing the range of RFRA protections.

Included in the ripple effect of *Hobby Lobby* is the risk of Establishment Clause claims brought by non-religious employees. Hobby Lobby employees might argue, for example, that the ACA is a law of neutral application and that the Court has endorsed religious values over the rights to health care by the non-religious employees and women, thereby discriminating against non-adherents and women. Until its parameters are clearer, *Hobby Lobby* is really beyond the scope of this Article. However, the authors highlight *Hobby Lobby* as another case that may influence the future of employment-related First Amendment claims.

B. Title VII of the Civil Rights Act of 1964

In the nineteenth and early twentieth centuries, when workers faced no state action or government interference with their free exercise rights they often had no recourse. The Constitution simply did not apply in disputes between private parties. In the mid-twentieth century, however, the civil rights movement forced a national discussion concerning the Constitution's failure to secure basic civil rights, regardless of race. Congressional debate over appropriately responsive legislation widened the circle of citizens covered by the

114. *Id.* at 2767–75.

115. *Id.* at 2783 (citations omitted).

proposed laws. Legislative proposals included protections for not only racial minorities but also for women, religious adherents, and other minority groups.[116] Congress passed the Civil Rights Act of 1964, including Title VII's protection from religious discrimination in employment, which supplemented the protections originally provided by the First Amendment and by more general employment laws.[117]

Today, Title VII of the Civil Rights Act of 1964 provides a primary legal cause of action for religious discrimination in employment.[118] Title VII offers employees two main avenues for redress of grievances: a request for accommodation[119] and a claim for discrimination on the basis of religion.[120] As will become apparent in this Article's review of court application of Title VII's protections, several themes prevalent in the First Amendment cases resurface. First, Title VII cases highlight the tension between a court's mandate to remedy instances of religious discrimination and the historic separation of church and state.[121] Second, Title VII cases also reveal how courts strain to verify an adherent's religious beliefs in evaluating claims. Generally, courts broadly define religion and what con-

116. *See, e.g.*, 110 CONG. REC. 2577 (1964) (statement of Rep. Howard Smith) (suggesting an amendment to the bill that would eventually become the Civil Rights Act to prohibit sex discrimination in employment). *Compare* H.R. 3994, 77th Cong. (1941) (proposing a prohibition on federal employment discrimination based only on race, color, or creed), *with* H.R. 7142, 77th Cong. (1942) (proposing a prohibition on federal employment discrimination based on race, color, creed, religion, national origin, or citizenship).

117. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981 to 2000h-6 (2012)).

118. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

119. 29 C.F.R. § 1605.2 (2014).

120. 42 U.S.C. § 2000e-2(a) (2012).

121. *See, e.g.*, EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613 (9th Cir. 1988) (finding no Title VII exemption for a religious, for-profit corporation and that the corporation had discriminated against an atheist employee by requiring him to attend weekly devotional services on company time). In *Townley*, the court mentioned:

> We note that under the facts of this case, no construction of section 702 would avoid significant First Amendment questions. If we held that Townley was a 'religious corporation' under the meaning of section 702, and therefore exempt from Title VII's prohibition against religious discrimination, then we might be faced with a question the Supreme Court left open in *Corporation of the Presiding Bishop v. Amos*: whether exemption of a religious corporation's for-profit activities violates the Establishment Clause.

Id. at 613 n.2 (citation omitted). The issue that *Townley* decided against the employer that claimed Title VII exemption is similar to the one that the Supreme Court decided in *Hobby Lobby* regarding the for-profit corporation's appeal under RFRA. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

stitutes a religious belief.[122] Courts explore with great care how firmly established an adherent's belief must be before it triggers Title VII protection.

1. Failure to Accommodate—Section 701(j)

In an accommodation action, an employee typically alleges that an employer failed to allow the worker's religious practices, required by a religion or sect. For example, the employer might have denied the employee time off to observe his or her religion's Sabbath. Failure to accommodate religious practices accounts for a large percentage of religious discrimination in employment claims filed by workers.[123]

The original version of the 1964 Civil Rights Act did not define religion and early court decisions did not equate a lack of accommodation with discrimination.[124] Senator Jennings Randolph, a practicing Seventh-day Adventist and a Saturday Sabbatarian, believed that those early decisions would severely disadvantage worshippers like himself.[125] He succeeded in lobbying Congress to include an expanded definition when it amended the Civil Rights Act in 1972.[126] Section 701(j) now specifies, "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's re-

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122. *See infra* Part I.B.1.a.i.

123. *See Bases By Issue FY2010–FY2013*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Apr. 28, 2013).

124. *See* Pub. L. No. 88-352, § 701, 78 Stat. 241, 253–55 (1964) (current version at 42 U.S.C. § 2000e (2012)); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971), *superseded by statute*, Pub. L. No. 92-261, 86 Stat. 103, *as recognized in* Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987); Riley v. Bendix Corp., 330 F. Supp. 583, 591 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

125. *See* 118 CONG. REC. 705 (1972) (statement of Sen. Randoph) ("[T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days."); Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 584 (2000) ("The amendment [to Title VII] was introduced by Senator Jennings Randolph, a Seventh-Day Baptist, with the express purpose of protecting Sabbatarians."). See Justice Marshall's dissent in *Trans World Airlines, Inc. v. Hardison* for an overview of the possible effect of the decisions in *Dewey* and *Riley*. 432 U.S. 63, 88–89 (1977) (Marshall, J., dissenting).

126. *See Hardison*, 432 U.S. at 74–76 (majority opinion).

ligious observance or practice without undue hardship on the conduct of the employer's business."[127]

a. Prima Facie Case of Failure to Accommodate

To establish a failure to accommodate, the plaintiff must establish that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement."[128] If the plaintiff succeeds in establishing a prima facie case, the burden then shifts to the employer to demonstrate that it could not reasonably accommodate the plaintiff's religious needs without undue hardship.[129] According to the court in *EEOC v. Firestone Fibers & Textiles Co.*:

> This is a two-prong inquiry. To satisfy its burden, the employer must demonstrate *either* (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship—that is, it would have "result[ed] in 'more than a *de minimis* cost' to the employer."[130]

In the years since Title VII's passage and amendment, litigants have challenged each prong of the prima facie case and employer burden, often in an attempt to define their seemingly amorphous terms.

i. Bona Fide Religious Belief

With respect to the employee's bona fide religious belief, employers have questioned the religion itself, the sincerity of the employee's belief, and the necessity of the practices for which the employee sought accommodation. Courts examine consistency in the employee's religious practices but allow plaintiffs some latitude for occasional deviations from established practices or for individual interpretation of tenets. The early free exercise cases brought under the First Amendment arguably influence court treatment of employee religious beliefs and practices under Title VII. For example, in *Boomsma v. Greyhound Food Management, Inc.*, a Michigan dis-

127. 42 U.S.C. § 2000e(j) (2012).

128. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) (citations omitted), *aff'd*, 479 U.S. 60 (1986).

129. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019 (4th Cir. 1996); *see also* 42 U.S.C. § 2000e(j).

130. 515 F.3d 307, 312 (4th Cir. 2008) (quoting *Philbrook*, 479 U.S. at 67).

trict court expressed its concern "that plaintiff had substituted for a fellow employee for Sunday work on one occasion, and . . . had performed Sunday duty for the Air Force National Guard."[131] The plaintiff failed to explain how his religious belief against working on Sundays permitted either of these activities.[132] Relying on Second Circuit guidance, however, the court concluded that "the burden on the plaintiff to establish a bona fide religious belief 'is not a heavy one.' "[133]

The EEOC's formal definition of religion incorporates the evaluative principles that the Supreme Court espoused in *United States v. Seeger*[134] and *Welsh v. United States*.[135] The EEOC explained that "the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[136] Additionally, the employee's belief system need not be formally recognized or incorporated into an established religion.[137] The Supreme Court also later held in *Thomas v. Review Board of the Indiana Employment Security Division* that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[138]

Although the EEOC and the courts are reluctant to delve into whether a religious practice stems from a legitimate religion that qualifies for protection under Title VII, occasionally courts find such an evaluation unavoidable.[139] Courts typically examine an em-

131. 639 F. Supp. 1448, 1453 (W.D. Mich. 1986).

132. *Id.*

133. *Id.* (quoting *Philbrook*, 757 F.2d at 482).

134. 380 U.S. 163, 185 (1965) (explaining that the "task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious").

135. 398 U.S. 333, 339–40 (1970) ("[T]he central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life.").

136. 29 C.F.R. § 1605.1 (2014).

137. *Id.* ("The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.").

138. 450 U.S. 707, 714 (1981).

139. *See, e.g.*, Redmond v. GAF Corp., 574 F.2d 897, 899–900 (7th Cir. 1978) (explaining the interpretation of religion under the 1972 amendment to Title VII). The *Redmond* court held:

> The Supreme Court has never had the occasion to interpret this phrase of the 1972 amendment, but the two circuits which have considered it, the Fifth and Sixth Circuits, both have concluded that it is not to be given a narrow or limited interpretation. We conclude that conduct which is "religiously moti-

ployee's religious beliefs if they appear to constitute a philosophical attitude rather than an established religion or if a particular belief system differs dramatically from what one would consider a valid expression of faith. For example, the California Court of Appeal held that an employee's veganism reflected his personal life philosophy rather than an organized religion.[140] Therefore, Title VII's accommodation mandate did not apply.[141] However, in contrast, a Wisconsin district court held that the white supremacist belief system of "Creativity" did qualify as a religion in the employee's life and that the employee was entitled to protection under Title VII.[142]

In *Malnak v. Yogi,* the Third Circuit explored generally what constitutes a religion for interpretations of the First Amendment.[143] Referencing U.S. religious pluralism, a *Malnak* concurrence reasoned, "Under the modern view, 'religion' is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology."[144] A number of federal circuit courts have relied on Judge Adams's concurring analysis in *Malnak*.[145]

Judge Adams identified three "indicia" to consider in an evaluation of whether a set of beliefs earns protection as a religion under

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vated," i.e., "all forms and aspects of religion, however eccentric . . . ." is protected.

Id. at 900 (quoting Cooper v. Gen. Dynamics, 533 F.2d 163, 168 (5th Cir. 1976)).

140. Friedman v. S. Cal. Permanente Med. Grp,, 125 Cal. Rptr. 2d 663, 667 (Ct. App. 2002).

141. *Id.* at 685.

142. Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002). For a discussion of how white supremacist groups have sought and obtained Title VII protection, see Lawrence D. Rosenthal, *Title VII's Unintended Beneficiaries: How Some White Supremacist Groups Will Be Able to Use Title VII to Gain Protection from Discrimination in the Workplace*, 84 TEMP. L. REV. 443 (2012).

143. 592 F.2d 197 (3d Cir. 1979).

144. *Id.* at 207 (Adams, J., concurring). Judge Adams further explained:

> It seems unavoidable, from *Seeger*, *Welsh*, and *Torcaso*, that the Theistic formulation presumed to be applicable in the late nineteenth century cases is no longer sustainable. . . . Even theologians of traditionally recognized faiths have moved away from a strictly Theistic approach in explaining their own religions. Such movement, when coupled with the growth in the United States, of many Eastern and non-traditional belief systems, suggests that the older, limited definition would deny "religious" identification to faiths now adhered to by millions of Americans.

Id. (footnote omitted).

145. *See, e.g.*, DeHart v. Horn, 227 F.3d 47, 52 n.3 (3d Cir. 2000); Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000); Alvarado v. City of San Jose, 94 F.3d 1223, 1227 (9th Cir. 1996); United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996); Dettmer v. Landon, 799 F.2d 929, 931 (4th Cir. 1986); Wiggins v. Sargent, 753 F.2d 663, 666 (8th Cir. 1985); Grove v. Mead Sch. Distr. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985); Africa v. Pennsylvania, 662 F.2d 1025, 1031–32 (3d Cir. 1981).

the First Amendment. The first indicium identifies "the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion."[146] The second indicium involves a determination of whether the belief system presented is comprehensive in its approach to answering life's "'ultimate' questions."[147] For the third indicium, a court must consider how well the "formal, external, or surface signs" of the religion in question compare to other accepted religions.[148] For example, these signs might include "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[149] However, Judge Adams also highlighted that "a religion may exist without any of these signs."[150]

While courts remain reluctant to question a given religious tradition, they more readily examine a self-professed adherent's sincerity and whether the accommodation request is based on religious motivations.[151] The inquiry includes whether professed religious dedication masks secular motives.[152] If the employee strays at

146. *Malnak*, 592 F.2d at 208.

147. *Id.* at 208–09.

148. *Id.* at 209.

149. *Id.*

150. *Id.*

151. *See* EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie I*), 798 F. Supp. 2d 1272, 1284 (N.D. Okla. 2011), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). Note that the Tenth Circuit reversed because "Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and . . . that she would need an accommodation for the practice, because of a conflict between it and Abercrombie's clothing policy." EEOC v. Abercrombie & Fitch Stores, Inc. (*Abercrombie II*), 731 F.3d 1106, 1116 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). This holding helps explain the notice obligation discussed in Part. I.B.1.a.ii. Since granting certiorari, the Supreme Court has agreed to consider employer liability "under Title VII for refusing to hire an applicant or discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee." Petition for Writ of Certiorari at I, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 44 (No. 14-86), 2014 WL 3725025, at *I.

152. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 432 (2d Cir. 1981) ("Our openness is legitimately restricted only when underlying motives of deception and fraud hide behind a facade of conscience and religious belief."); EEOC v. Chemsico, Inc., 216 F. Supp. 2d 940, 948 (E.D. Mo. 2002) (noting union concern that allowing the accommodation would result in an increase in

all from the accepted tenets of his or her religious belief, an employer litigates the sincerity of the employee's belief to defeat the associated claim for workplace accommodation.[153] For example, clothing retailer Abercrombie & Fitch asserted doubts as to an employee's religious sincerity in two cases on point. In the first, an employee who had converted to the Apostolic faith after she was hired by Abercrombie requested to be allowed to wear modest clothing that did not conform to the retailer's "Look Policy."[154] In denying the plaintiff's motion for summary judgment, the court noted Abercrombie's evidence that the employee had arrived to depositions wearing clothing almost identical to garments that the retailer required that she wear in the store.[155]

In the second Abercrombie case, a female Muslim applicant who requested to wear her headscarf while working was refused employment because Abercrombie claimed the headscarf was contrary to its "Look Policy."[156] In presenting its side of the case, the retailer challenged the sincerity of the teenager's beliefs on the basis that "she did not know the street address of her mosque, does not regularly attend Friday services, and does not pray five times a day or every day."[157] In issuing a summary judgment decision in favor of the plaintiff, the district court stated:

> [Our] focus must be on the sincerity of Elauf's belief that she must wear a head scarf—not whether she observed all tenets of the Muslim faith—because it was her belief about head scarves that required accommodation. And the *purpose* of the inquiry, according to *Philbrook,* is whether this belief is held as a matter of conscience or instead, animated by motives of deception and fraud.[158]

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accommodation requests and that the representative already receives "three to four fake notes on any given Saturday").

153. *See, e.g.*, EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1011 (D. Ariz. 2006) (rejecting employer's contention that employee's willingness to remove headscarf during prior Ramadan compromised the sincerity of her belief and holding that the analysis must focus on the facts at issue and employee's sincerity at that point in time.); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *2 (W.D. Wash. Aug. 29, 2005) (finding that employee covered religious tattoos on occasion, but could articulate difference between purposeful and incidental coverage).

154. EEOC v. Abercrombie & Fitch Stores, Inc., No. 4:08CV1470 JCH, 2009 WL 3517578 (E.D. Mo. Oct. 26, 2009).

155. *Id.*, at *3.

156. *Abercrombie I*, 798 F. Supp. 2d at 1275.

157. *Id.* at 1284.

158. *Id.* at 1285 (citation omitted).

Thus, while employers suggest that any infraction constitutes evidence of insincerity, the courts require more for dismissal. Courts allow plaintiffs to grow in their religious practices and to vary the strength of their commitment over time.[159] Judges also acknowledge that plaintiffs are human and may not always meet the requirements of their faiths.[160] Finally, as evidenced above, adherents need not be experts in their faiths nor follow every rule to establish a prima facie case.[161] The Supreme Court has recently granted certiorari in the second *Abercrombie* case so jurists should check back for rulings on Abercrombie's actual knowledge.[162]

Employers also contest whether the practice or observance, for which the employee seeks accommodation, is religious in nature and covered by section 701(j). For example, a court held for an employer that setting up for a church play constituted a voluntary social obligation that merited no religious accommodation.[163] In another example, an employee failed to demonstrate that religion, rather than a personal aversion, motivated the refusal to wear a gingerbread necklace during the holiday season.[164] Court analysis of practice remains tricky because, as noted, an employee's religious beliefs need not derive from a recognized or organized religious tradition.[165] However, the employee must still demonstrate that the alleged protected activity is grounded in a faith for which the employee can establish a record of observation.[166]

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159. *See, e.g.*, EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575–76 (7th Cir. 1997) (responding to employer, who questioned sincerity of employee's Judaism because she did not observe every Jewish holiday, that such observance was not essential and strength of faith could vary over time).

160. *See, e.g.*, EEOC v. Chemsico, Inc., 216 F. Supp. 2d 940, 950 (E.D. Mo. 2002) (finding that sincere religious belief of plaintiff, who was member of Church of God, which did not allow sex before marriage, and who had delivered a child out of wedlock, did not require that adherent never fell below religious standards).

161. *See supra* notes 159–60 and accompanying text.

162. *See supra* note 151.

163. Wessling v. Kroger Co., 554 F. Supp. 548, 552 (E.D. Mich. 1982).

164. Kreilkamp v. Roundy's, Inc., 428 F. Supp. 2d 903, 908 (W.D. Wis. 2006).

165. *See supra* note 137 and accompanying text.

166. *See, e.g.*, *Abercrombie II*, 731 F.3d 1106, 1119 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014). The Tenth Circuit explained:

> First, an applicant or employee may engage in practices that are associated with a particular religion, but do so for cultural or other reasons that are not grounded in that religion. If so, an employer's discrimination against that individual for engaging in that practice . . . would not contravene Title VII's religion-discrimination provisions.

Id.

ii. Employer Notification of Belief

Courts have consistently held that an applicant or employee must notify the employer of his or her religious beliefs so that the employer is afforded an opportunity to accommodate related practices.[167] This notification must be specific enough so that the employer has a general understanding of what the employee's religious beliefs are and what accommodation of those beliefs might entail.[168] The Seventh Circuit clarified, "An employee has a duty to give fair notice of religious practices that might interfere with his employment. On the other hand, an employer cannot 'shield itself from liability by . . . intentionally remaining in the dark.' "[169]

Courts do not expect an employer to be an expert in all religions,[170] nor to monitor continually its work force for religious needs.[171] In *Reed v. Great Lakes Cos.*, the Seventh Circuit explained,

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167. *See, e.g.*, *id.* at 1116 (reversing lower court judgment for plaintiff because "[she] never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and . . . that she would need an accommodation for the practice").

168. *See, e.g.*, *id.*; Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 319–20 (3d Cir. 2008) (finding that informing employer she was a Christian was not sufficient to notify employer that school "libation ceremony" would offend employee's religion).

169. Xodus v. Wackenhut Corp., 619 F.3d 683, 686 (7th Cir. 2010) (citations omitted) (quoting EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 804 (7th Cir. 2005)).

170. *Wilkerson v. New Media Technology Charter School, Inc.* provides an example of a court's unwillingness to require that employers be familiar with every employee's nuanced faith traditions and accommodate the related practices. 522 F.3d at 319–20 ("[W]e do not impute to the employer the duty to possess knowledge of particularized beliefs of religious sects."). In that case, the Third Circuit affirmed a ruling that an employer's general knowledge of an employee's Christian beliefs was not sufficient to put the employer on notice that the employee would need an accommodation at a ceremony where alcoholic drinks were served. *Id.* at 319.

In another example, the Seventh Circuit held that an employer was not required to equate an applicant's use of the word "belief" with a particular religious tradition and that the applicant should have been more explicit regarding his need for accommodation. *Xodus*, 619 F.3d at 683. When Xodus applied for a position with Wackenhut Corporation, the hiring manager told Xodus that he would need to cut his dreadlocks to comply with the organization's grooming policy. *Id.* at 685. In affirming the lower court, the appellate court explained, "Xodus claims that his use of the word 'belief' and the dreadlocks themselves sufficed to notify McCuller of the religious nature of his hairstyle. But unlike race or sex, a person's religion is not always readily apparent." *Id.* at 686.

171. *See, e.g.*, Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978) ("We agree with defendant that accommodation is not so onerous as to charge an employer with the responsibility for continually searching for each potential religious

"Even if he wears a religious symbol, such as a cross or a yarmulke, this may not pinpoint his particular beliefs and observances; and anyway employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects."[172] Thus, courts have held that the appearance of an employee does not create a duty for an employer to understand how that employee may need to be accommodated.

Debates arise about whether an employee need directly and explicitly notify an employer of a need for religious accommodation to establish a prima facie case of a failure to accommodate.[173] For example, in the *Abercrombie* headscarf case, the district court held that the manager's past experience in hiring and the fact that the Muslim applicant wore a headscarf to her interview allowed for sufficient notice that the applicant would require an accommodation.[174] The court also noted that the hiring manager had contacted a district manager to discuss the possible need for an accommodation.[175] The Tenth Circuit reversed and remanded this case on the ground that "Ms. Elauf never informed Abercrombie *before* its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommo-

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conflict of every employee. The employee has the duty to inform his employer of his religious needs so that the employer has notice of the conflict.").

172. 330 F.3d 931, 936 (7th Cir. 2003).

173. In *Hellinger v. Eckerd Corp.*, for example, the court held that an applicant's reference to a need for accommodation served as sufficient notification. 67 F. Supp. 2d 1359, 1363–64 (S.D. Fla. 1999). In *Hellinger*, the pharmacist candidate failed to inform the employer during the interview and on his application form that his Orthodox Jewish faith precluded him from selling condoms and that, as a result, he would need an accommodation. *Id.* at 1361. The employer learned of the need when the hiring manager consulted one of Hellinger's references and decided against hiring the pharmacist based on the reference. *Id.* at 1363. In denying the employer's motion for summary judgment, the court explained that the employer was not relieved of the obligation to accommodate since the employer received notice, even if not from the plaintiff:

> It would be hyper-technical, based on the facts of this case, to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff. The notice requirement is meant in part to allow the company an opportunity to attempt to reasonably accommodate the Plaintiff's beliefs. The Defendant was not deprived of the opportunity to attempt to accommodate the Plaintiff's beliefs merely because the notice did not come from the Plaintiff.

Id. at 1363–64. The district court also cautioned that its ruling "does not place the burden of inquiry on the employer." *Id.* at 1364.

174. *Abercrombie I*, 798 F. Supp. 2d 1272, 1286 (N.D. Okla. 2011), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

175. *Id.*

dation for that practice."[176] Therefore, the court found that Abercrombie did not have notice of the need for accommodation.[177]

Case law also emphasizes that employees should seek accommodation at the management level with the human resources unit, rather than through a local manager.[178] Otherwise, employees who experience a change in management may need to renotify their employers of the need for accommodation.[179]

Finally, an employee must notify the employer in advance of the need for a religious accommodation. In *Johnson v. Angelica Uniform Group, Inc.*, an employee missed twelve days of work to observe the Holy Days established by the Worldwide Church of God and was subsequently fired.[180] The Eighth Circuit upheld the district court's ruling that the employee had failed to establish a prima facie case because she had not informed the employer in advance of her need for accommodation.[181]

iii. Discipline for Failure to Comply

In an adverse employment action, courts look for negative consequences similar to those that occur in other types of discrimination cases.[182] For example, a plaintiff might provide the court with evidence that he was "discharged or disciplined as a result of his failure to comply with an employer demand which conflicted with his religious beliefs."[183] However, a demotion that does not result in a salary reduction may legitimately accommodate the employee's

176. *Abercrombie II*, 731 F.3d 1106, 1122 (10th Cir. 2013) (emphasis added), *cert. granted*, 135 S. Ct. 44 (2014).

177. *Id.* at 1128–31.

178. *See, e.g.*, Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1129 (N.D. Ala. 2011).

179. For example, in *Miller v. Safeway, Inc.*, a native Alaskan wore his hair long because of his spiritual beliefs. 102 P.3d 282, 285 (Alaska 2004). Although long hair violated the store's grooming policy for males, Miller received an accommodation from the local store manager who had hired him. *Id.* When Safeway purchased the chain for which Miller worked, his local accommodation continued only for another eighteen months. *Id.* at 286. When Safeway slated Miller for a transfer to a different store, it informed him that he would need to cut his hair or face termination. *Id.* In this case, if Miller had sought the accommodation at the organizational level, a record of his need for accommodation would have better protected him during the transition in the store ownership. The court granted Safeway summary judgment because of Miller's failure to give notice of a need for religious accommodation during the ownership transition. *Id.* at 292–93.

180. 762 F.2d 671, 672 (8th Cir. 1985).

181. *Id.* at 673.

182. *See, e.g.*, Lake v. B.F. Goodrich Co., 837 F.2d 449, 450 (11th Cir. 1988) (finding that employee was fired for failure to report to work for a weekend shift).

183. Wilshin v. Allstate Ins. Co., 212 F. Supp. 2d 1360, 1373 (M.D. Ga. 2002).

religious practice.[184] Courts have also found an employee's requested transfer that resulted in a religious conflict as excusing the employer's need to accommodate.[185] Additionally, a "failure to promote with continued accommodation" was not sufficiently adverse to constitute a Title VII violation.[186]

b. The Employer's Response Under Section 701(j)

After the employee successfully makes the prima facie case, the burden shifts to the employer. Circuit courts require employers to show: (1) proof that the employer attempted a reasonable accommodation, or (2) a demonstration that accommodation constituted an undue hardship.[187] They split on how to assign these burdens, however. The First, Third, and Fourth Circuits treat reasonable accommodation and undue hardship as two distinct defenses to a charge of religious discrimination.[188] In contrast, most of the other circuits view the employer's burden as a two-part process, including presentation of evidence of an attempt to accommodate and evidence of an undue burden.[189] The Ninth Circuit follows this pro-

184. Mathewson v. Fla. Game & Fresh Water Fish Comm'n, 693 F. Supp. 1044, 1050 (M.D. Fla. 1988), *aff'd*, 871 F.2d 123 (11th Cir. 1989) (finding an accommodation for an employee offered a demotion without a salary reduction to enable him to avoid working on Saturdays).

185. *See, e.g.*, Irvin v. Aubrey, 92 S.W.3d 87, 90 (Ky. Ct. App. 2001).

186. Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1139 (N.D. Ala. 2011).

187. *See infra* notes 188–91.

188. *See, e.g.*, EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 312 (4th Cir. 2008) (explaining that the employer's burden "is a two-prong inquiry," and employer "must demonstrate *either* (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship"); EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 55 (1st Cir. 2002) (holding that after the plaintiff has established his prima facie case "the burden shifts to the union to show that it made a reasonable accommodation of the religious practice or show that any accommodation would result in undue hardship."); United States v. Bd. of Educ., 911 F.2d 882, 887 (3d Cir. 1990) (finding that there are two defenses, accommodation and undue hardship).

189. Harrell v. Donahue, 638 F.3d 975, 979 (8th Cir. 2011) ("Title VII requires an employer to reasonably accommodate the religious beliefs of its employees unless the employer can demonstrate that doing so would impose an undue hardship."); Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1321 (11th Cir. 2007) (stating that "the burden shifts to the defendant to 'demonstrate[ ] that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business'") (citations omitted); Virts v. Consol. Freightways Corp. of Del., 285 F.3d 508, 516 (6th Cir. 2002) ("Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant employer to

cess, but adds a condition that the employer negotiate with the employee.[190] The Ninth Circuit also permits a demonstration of good faith efforts as part of a showing of reasonable accommodation.[191]

i. Employee Responsibility for Accommodation

Some courts place the burden on the employee to suggest a reasonable accommodation to the employer. For example, in *Yott v. North American Rockwell Corp.*, a California district court stated, "The plaintiff has the burden of proving that he has offered to the employer an accommodation which is acceptable to him."[192] The Seventh Circuit specifically rejected this approach in *Redmond v. GAF Corp.*, reasoning, "While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof."[193]

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show that it could not reasonably accommodate the employee without undue hardship."); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (explaining that after an employee establishes his prima facie case, "the burden then shifts to the employer to show it could not accommodate the employees' religious beliefs without undue hardship"); Weber v. Roadway Express, Inc., 199 F.3d 270, 273 (5th Cir. 2000) (stating that the burden shifts to the employer to demonstrate that it was unable to accommodate the employee's beliefs without undue hardship); Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986) (holding that the employer's burden is "to demonstrate that he cannot accommodate the plaintiff's religious practice without undue hardship to his business"); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989) (citations omitted) ("Once a plaintiff has made out a prima facie case, 'the burden shifts to the employer to show that it was unable reasonably to accommodate the plaintiff's religious needs without undue hardship.'").

190. *See* Opuku-Boateng v. California, 95 F.3d 1461, 1467 (9th Cir. 1996) (quoting Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993)) (internal quotation marks omitted) (stating that after the employee establishes a prima facie case, "the burden shifts to the employer to show that it negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs"). The *Opuku-Boateng* court also held that if the negotiations fail to eliminate the religious conflict, "the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Id.*

191. Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978) (concluding that the burden was on the employer and the union "to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship").

192. 428 F. Supp. 763, 769 (C.D. Cal. 1977), *aff'd*, 602 F.2d 904 (9th Cir. 1979).

193. 574 F.2d 897, 901 (7th Cir. 1978).

ii. Vague Terms: Reasonable Accommodation and Undue Hardship

The employer's burden to accommodate, through an employee's proposal or otherwise, attracts additional litigation because of vague terms in the statute. When Congress amended Title VII in 1972, it mandated an employer "reasonably accommodate" the "religious observance or practice" of employees or prospective employees, as long as that effort to accommodate does not create an "undue hardship on the conduct of the employer's business."[194] The amended definitions section, however, failed to specify what Congress meant by "reasonably accommodate" and "undue hardship."[195] Courts in each circuit have interpreted and explored the terms uniquely.[196] One judge suggested that whether an accommo-

194. Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (2012)).

195. *See id.*; *see also* Beadle v. Hillsborough Cnty. Sheriff's Dep't, 29 F.3d 589, 592 (11th Cir. 1994) ("The phrases 'reasonably accommodate' and 'undue hardship' are not defined within the language of Title VII."); Am. Postal Workers Union, S.F. Local v. Postmaster Gen., 781 F.2d 772, 775 (9th Cir. 1986) ("The 'reach' of the [accommodation] obligation has simply never been spelled out by Congress or the EEOC.").

196. *See, e.g.*, *Beadle*, 29 F.3d at 592 (finding that definitions of reasonable accommodation and undue hardship are "unclear under the statute and must be determined on a case-by-case basis"); Smith v. Pyro Mining Co., 827 F.2d 1081, 1085 (6th Cir. 1987) ("The reasonableness . . . must be determined on a case-by-case basis; what may be a reasonable accommodation for one employee may not be reasonable for another."); Williams v. S. Union Gas Co., 529 F.2d 483, 489 (10th Cir. 1976) ("The phrases 'reasonably accommodate' and 'undue hardship' are relative terms and cannot be given any hard and fast meaning."); Maroko v. Werner Enters., Inc., 778 F. Supp. 2d 993, 1003 (D. Minn. 2011) (quoting Sturgill v. United Parcel Serv., Inc., 512 F.3d 1024, 1033 (8th Cir. 2008)) (noting that the "Eighth Circuit has counseled that the reasonableness of a proposed accommodation often 'is a question for the jury because it turns on fact-intensive issues such as work demands [and] the strength and nature of the employee's religious conviction' "). In *Trans World Airlines, Inc. v. Hardison*, the Court determined:

> Cases decided by the Courts of Appeals since the enactment of the 1972 amendments to Title VII similarly provide us with little guidance as to the scope of the employer's obligation. In circumstances where an employer has declined to take steps that would burden some employees in order to permit another employee or prospective employee to observe his Sabbath, the Fifth, Sixth, and Tenth Circuits have found no violation for failure to accommodate.

432 U.S. 63, 75 n.10 (1977); *see also S. Union Gas Co.*, 529 F.2d at 488–89 (finding no issue of law and no violation because employer did not normally require plaintiff to work on his Sabbath); Reid v. Memphis Publ'g Co., 521 F.2d 512, 528 (6th Cir. 1975) (finding no evidence that accommodation of employee's religious practice of not working on Saturdays would not have been an undue hardship for the employer); Johnson v. U.S. Postal Serv., 497 F.2d 128 (5th Cir. 1974) (ruling that further accommodation in a small post office would have posed an undue hardship for the Postal Service). *But see* Draper v. U.S. Pipe & Foundry Co., 527 F.2d

dation is reasonable is "difficult to boil down to a set formula. Instead, the determination of reasonableness is quintessentially a fact-bound inquiry that depends on the unique circumstances of each case."[197]

515, 520–21 (6th Cir. 1975) (finding no undue hardship where an accommodation would cause other workers to become disgruntled); Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975) (holding that mild, infrequent complaints by coworkers would not have amounted to an undue hardship in accommodation), *aff'd*, 429 U.S. 65 (1976), *vacated*, 433 U.S. 903 (1977); Riley v. Bendix Corp., 464 F.2d 1113, 1118 (5th Cir. 1972) (finding no evidence of undue hardship). One might explain these apparent intracircuit conflicts by the differing facts of each case, but neither the Fifth nor the Sixth Circuit has suggested a theory of decision to justify the differing results that they have reached.

197. Haliye v. Celestica Corp., 717 F. Supp. 2d 873, 881 (D. Minn. 2010).

A number of cases focus on whether shift swapping between employees constitutes a reasonable accommodation. Courts have expressed concern that if they force a shift swap in the spirit of accommodation for one employee, they could inadvertently create an accommodation issue for the employer and another employee. *See, e.g.*, Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing *Hardison*, 432 U.S. at 81) (finding that an employer need not deny the shift or job preferences of some employees to accommodate the religious needs of others). Additionally, some caution against requiring one employee to rely on the "goodwill" of other employees in order to satisfy a religious need. *See, e.g.*, N. Shore Univ. Hosp. v. State Human Rights Appeal Bd., 439 N.Y.S.2d 408, 409 (App. Div. 1981) (alteration in original) (quoting State Div. of Human Rights v. Genesee Hosp. 418 N.Y.S.2d 687, 694 (App. Div. 1979)) (holding that an employer has an affirmative duty to assist its employee because the employee "'should not [be] forced to rely upon the good will of her coworkers or her powers of persuasion, else be relegated to choosing between her religious beliefs and her employment").

If the employer does offer shift swapping as a potential solution, the employer must actively assist the employee in finding someone with whom to swap. *See, e.g.*, Miller v. Drennon, 59 Fair Empl. Prac. Cas. (BNA) 192 (4th Cir. 1992) (holding that the shift swapping accommodation was as reasonable as those upheld in other circuits); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982) (ruling that hospital's policy of allowing pharmacists to trade shifts was a reasonable accommodation); EEOC v. Aldi, Inc., No. CIV.A. 06-01210, 2008 WL 859249, at *11 (W.D. Pa. Mar. 28, 2008) (finding that where courts had accepted shift swapping as an appropriate accommodation, employers had taken additional action beyond the existing scheduling procedure); Kenner v. Domtar Indus., Inc., No. 04-CV-4021, 2006 WL 522468, at *4 (W.D. Ark. Mar. 3, 2006) (citing Rice v. U.S.F. Holland, Inc., 410 F. Supp. 2d 1301, 1312 (N.D. Ga. 2005)) (stating that the "employer could not rely on existence of a shift-swap policy when employer took no effort in response to employee's notification of the conflict").

The Ninth, Tenth, and Eleventh Circuits have found shift swapping to be a reasonable accommodation. *See, e.g.*, Hudson v. W. Airlines, Inc., 851 F.2d 261, 266 (9th Cir. 1988) (holding that a collective bargaining agreement provided employee with "reasonable accommodations to eliminate her religious conflicts" by allowing employee to trade shifts with coworkers); United States v. City of Albuquerque, 545 F.2d 110, 113–14 (10th Cir. 1976) (affirming the district court's holding that trading shifts was a reasonable accommodation); *Beadle*, 29 F.3d at

The Supreme Court first weighed in on the issue of what might constitute a reasonable accommodation in *Ansonia Board of Education v. Philbrook*.[198] *Ansonia* concerned a high school teacher who had decided to join the Worldwide Church of God, which required that he miss six days of school in observance of Holy Days.[199] The collective bargaining agreement (CBA) that governed the school's leave policy allowed for only three days of leave for religious observance.[200] Philbrook and the school board favored different accommodations: Philbrook requested that the school board permit him to use personal business leave for religious observance or that he pay a substitute and receive his full pay for the days off.[201] However, the board wanted Philbrook to take unpaid leave when he exhausted his religious leave allowance.[202]

The Supreme Court held that Title VII required only that the employer provide the employee with an accommodation, not that it be without cost to the employee or that it be the accommodation that the employee preferred.[203] The Court explained, "Neither the terms nor the legislative history of § 701(j) supports the Court of Appeals' conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business."[204] The Court cautioned, "The extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship."[205] While an employer might require the employee to take a day of unpaid leave for a religious obser-

593 (holding that a neutral rotating shift system and shift swaps within the system represent reasonable accommodations).

198. 479 U.S. 60, 66 (1986).

199. *Id.* at 62.

200. *Id.* at 63–64.

201. *Id.* at 64–65.

202. *Id.* at 70.

203. *Id.* (holding that it was reasonable for employee to take a day of unpaid leave). However, at least one court determined that an employer could encounter more difficulty crafting an accommodation if the employee's belief system dictated that a religious violation resulted when anyone worked on the holy day. *See* EEOC v. J.P. Stevens & Co., Inc., 740 F. Supp. 1135, 1138 (M.D.N.C. 1990) (explaining that accommodation failed because employees refused to request that someone else commit what they considered to be a sin).

204. *Ansonia*, 479 U.S. at 61 (finding that an employer meets its legal obligation under section 701(j) when it offers a reasonable accommodation. Section 701(j) does not require that the employer prove that each of the employee's alternative accommodations would result in undue hardship).

205. *Id.*

vance, commented the Court, an employer has not offered a "reasonable accommodation when paid leave is provided for all purposes *except* religious ones."[206]

Ansonia prompted two partial dissents. Justice Marshall wrote that a denial of pay constituted an adverse action rather than an accommodation.[207] For Marshall, further attempts at accommodation were required because the board's solution forced Philbrook "to choose between following his religious precepts with a partial forfeiture of salary and violating these precepts for work with full pay."[208] In stark contrast, Justice Stevens reasoned that no accommodation was necessary because Philbrook suffered an adverse consequence only because he took a day off of work, not because the school interfered with his religious practice.[209]

Ansonia provides some guidance to courts, employers, and employees regarding what constitutes a reasonable accommodation. However, accommodation cases tend to be relatively fact specific. Therefore, one should exercise caution in generalizing beyond the facts of a specific case. An Eighth Circuit district court used *Ansonia* as a signal that "it is not unreasonable to ask an employee to take unpaid leave while attempting to place him in another position."[210] However, the court noted that a mere possibility that an acceptable position might open up would not suffice as an accommodation.[211]

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206. *Id.* at 71.

207. *Id.* at 74 (Marshall, J. dissenting) ("A forced reduction in compensation based on an employee's religious beliefs can be as much a violation of Title VII as a refusal to hire or grant a promotion.").

208. *Id.*

209. *Id.* at 81 (Stevens, J. dissenting). Stevens wrote:

> Every employee who takes a day off from work for an unauthorized purpose suffers the same inconvenience as Philbrook; each loses a day of pay and must make up the work associated with that day. The obligation to perform the work carries over, not because the employee has exercised his religion in the one case or satisfied a secular business need in another, but for the generic and shared reason that the employee was not paid for a day on which he was hired to do work. Since no statutory conflict between Philbrook's religion and his work duties occurred, the duty to accommodate his religious practices never arose.

Id. This reasoning appears consistent with Harlan's discussion of *Braunfeld v. Brown* in *Sherbert* and Rehnquist's subsequent discussion of *Braunfeld* in *Thomas*. Thomas v. Review Bd., 450 U.S. 707, 722–23 (1981) (Rehnquist, J., dissenting); Sherbert v. Verner, 374, U.S. 398, 421 (1963) (Harlan, J., dissenting).

210. Maroko v. Werner Enters., Inc., 778 F. Supp. 2d 993, 1002–03 (D. Minn. 2011) (citing *Ansonia*, 479 U.S. at 70).

211. *Id.* at 1003 (disapproving that the plaintiff's employment would have been terminated if a position did not become available during the time of the leave).

Similarly, in *American Postal Workers Union, San Francisco Local v. Postmaster General*, the Ninth Circuit held that an acceptable accommodation is one that "reasonably preserves the affected employee's employment status."[212] Additionally, the employer must update and adjust accommodations as work conditions change. For example, the Sixth Circuit held in *EEOC v. Arlington Transit Mix, Inc.,* that an employer could not rely on a prior accommodation to satisfy the employer's obligations under Title VII after the employee's schedule changed.[213]

iii. Vague Terms: Union Member Employees

Litigation over the meaning of reasonable accommodation and undue hardship has forced employers to navigate between employee accommodation and the obligations to honor CBAs and to deal fairly with unions, as mandated by the National Labor Relations Act.[214] The Supreme Court established priorities between competing interests and clarified the meaning of terms in *Trans World Airlines, Inc. v. Hardison*.[215]

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212. 781 F.2d 772, 776–77 (9th Cir. 1986).

213. 957 F.2d 219, 222 (6th Cir. 1991) (finding that once the new schedule was implemented, the company should have made a reasonable attempt to accommodate the employee's sincere religious needs).

214. *See* 29 U.S.C. §§ 1511–69 (2012).

215. 432 U.S. 63, 79 (1977). *But see* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971), *superseded by statute*, Pub. L. No. 92-261, 86 Stat. 103, *as recognized in* Smith v. Pyro Mining Co., 827 F.2d 1081 (6th Cir. 1987).

In, *Dewey*, a Title VII case filed prior to the 1972 section 701(j) amendments, an equally divided Supreme Court affirmed the Sixth Circuit's holding that an employer need not disrupt the schedules of other employees to accommodate the plaintiff's religious practices. *Id.* The Sixth Circuit held, "The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees." *Id.* at 330–31. The court expressed concern that its allowing Dewey to change his schedule for a religious reason "could create chaotic personnel problems and lead to grievances and additional arbitrations." *Id.* The court continued, "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." *Id.* at 335.

Other cases that comment on *Dewey* call its currency into question. For example, in *Michigan Department of Civil Rights* ex rel. *Parks v. General Motors Corp., Fisher Body Division*, the Michigan Supreme Court found:

> *Dewey*, it must be observed, was decided before the 1972 amendment to Title VII defined "religion" to include religious observances and practices and imposed a reasonable accommodation duty on the employer. *Dewey* also pre-

Hardison, who joined the Worldwide Church of God after he began at TWA, worked in a division that operated twenty-four hours a day, seven days a week.[216] Hardison informed his supervisor of his need to observe the church's Sabbath, from sundown on Friday to sundown on Saturday.[217] His supervisor attempted to accommodate him and was initially successful in doing so.[218] However, when Hardison transferred to a different area, he lacked sufficient seniority for TWA to schedule him around his Sabbath on a regular basis.[219]

The *Hardison* decision serves a two-fold purpose. First, the Court reviewed the Sixth Circuit's position in *Dewey v. Reynolds Metals Co.* regarding the importance of collective bargaining agreements.[220] The Court stated, "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts."[221] This *Hardison* quote confirms the primacy of CBAs and union seniority.

Second, the Court established the "de minimis" standard as a way for employers to judge whether the cost of a particular accommodation constituted an undue hardship:

> To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, *to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion*.[222]

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ceded the United States Supreme Court decision in *Griggs v. Duke Power Co.*, which spoke of Title VII as proscribing "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". Further, the affirmance by an equally divided Supreme Court entitles *Dewey* to no precedential weight and its several alternative rationales, according to the Supreme Court, make its impact "inconclusive."

317 N.W.2d 16, 24 (Mich. 1982) (citation omitted).

216. 432 U.S. at 66–67.

217. *Id.* at 67–68.

218. *Id.*

219. *Id.* at 68.

220. *Id.* at 73.

221. *Id.* at 79. The Court continued, "Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances." *Id.*

222. *Hardison*, 432 U.S. at 84 (emphasis added). The Court continued:

> By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an

Here, the Court sought to put all employees on equal footing, regardless of their religious practices. Additionally, the Court's interest in preserving the integrity of the CBA and protecting union employers from additional grievances justified the de minimis standard to resolve the differences between the competing needs of employees, employers, and the union. This standard appears to present quite a hurdle, therefore, to employees.

Application of the *Hardison* de minimis analysis involves consideration of a variety of factors. Such factors may include: (1) whether the employees are union members with an applicable CBA, (2) whether the accommodation would force the employer to assume additional payroll costs, (3) whether the accommodation would affect the employer's marketing brand or employee appearance, and (4) whether the accommodation might affect employee safety.

State and federal courts consistently find that employers need not disturb a negotiated CBA to accommodate an employee's religious practices.[223] In fact, courts often point to a neutral seniority

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additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

Id. at 84–85.

Justice Marshall dissented. He expressed concern especially for the potential erosion of tolerance for minority faiths: "Particularly troublesome has been the plight of adherents to minority faiths who do not observe the holy days on which most businesses are closed—Sundays, Christmas, and Easter—but who need time off for their own days of religious observance." *Id.* at 85 (Marshall, J. dissenting). Marshall also spoke to the more general social effect:

> Today's decision deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices. . . . An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith. As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court thinks unwise.

Id. at 86–87.

223. *See, e.g.*, Stolley v. Lockheed Martin Aeronautics Co., 228 F. App'x 379, 382 (5th Cir. 2007) (holding that the employer was not required to disrupt seniority system when the union was unwilling to waive provision in the CBA); Haliye v. Celestica Corp., 717 F. Supp. 2d 873, 879 (D. Minn. 2010) ("This is not to say that there are no bright-line rules for determining whether a given accommodation is

system as itself an accommodation of employee needs.[224] This reasoning has its limitations, however. In one example, when one enterprising employer tried to use the seniority system at one of its unionized work locations to deny time off to an employee at a non-unionized site, a court declined to find evidence of an accommodation.[225]

Some judges express skepticism over a union seniority system as an accommodation because Title VII's employer obligations do not apply to unions.[226] Union representatives are therefore free to

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reasonable. For example, an employer is not required to deprive other employees of their contractual rights in order to accommodate an employee's religious needs."); *see also* Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing *Hardison*, 432 U.S. at 79 (majority opinion)) (holding that "Title VII [does not] require an employer to violate a valid labor agreement to accommodate an employee"); Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979) (deciding that the employer was not required to depart from a seniority system to accommodate a religious need); Boomsma v. Greyhound Food Mgmt., Inc., 639 F. Supp. 1449, 1454 (W.D. Mich. 1986) (noting the neutrality of a scheduling system "particularly where such system is mandated by a collective bargaining agreement and operates through a seniority system"); N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 362 (App. Div. 1995), *aff'd as modified*, 674 N.E.2d 305 (N.Y. 1996) ("The courts are not free to downgrade the importance of union seniority rights.").

224. *See, e.g.*, EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 315 (4th Cir. 2008). Relying on *Hardison*, the Fourth Circuit court reasoned:

> Firestone's use of a seniority-based bidding system for working shifts "itself represent[s] a significant accommodation to the needs, both religious and secular, of all of [its] employees." This is because a "seniority system represents a neutral way of minimizing the number of occasions when an employee must work on a day that he would prefer to have off." When Jozwiakowski first reviewed Wise's request, he examined whether Wise could change shifts or positions. Unfortunately for Wise, Jozwiakowski could not grant such a move because Wise's preferred shift (7:00 a.m. to 3:00 p.m.) was occupied by employees with more seniority. As the district court noted, however, "[t]he fact that Wise does not currently benefit from the seniority system does not negate the reasonableness of the accommodation."

Id. (citation omitted).

225. N.Y. & Mass. Motor Serv., Inc. v. Mass. Comm'n Against Discrimination, 517 N.E.2d 1270, 1275 (Mass. 1988).

226. *See, e.g.*, N.Y.C. Transit Auth. v. Exec. Dep't, Div. of Human Rights, 627 N.Y.S.2d 360, 364 (App. Div. 1995) (Rubin, J., concurring). In *New York City Transit Authority*, a concurring opinion emphasized:

> My objection to the more or less automatic exemption of union seniority systems from civil rights statutes is that current State and Federal standards impose no obligation on the employer *and union* to accommodate an employee's religious beliefs, even where, as here, the employer is a quasi-public agency that derives a substantial portion of its operating revenue from public funding. . . . By requiring no effort at accommodation on the part of the employee

insist on the implementation of the CBA without fear of statutory repercussions. The concurrence in *New York City Transit Authority v. Executive Department, Division of Human Rights* points out that the union did so insist, even though accommodation would have been fairly easy because of the sheer number of employees.[227] The law incentivizes union and employer enforcement of the seniority structure guaranteed by a CBA much more than it does a religious accommodation for a single employee.[228]

Courts routinely find that employer-borne accommodation costs, whether they result from an increase in salary or a decrease in production due to a missing worker, are not de minimis.[229] For example in *United States v. City of Albuquerque*, the court held, "Title VII does not require an employer . . . to bear the financial burden of an employee's religious convictions."[230] However, the EEOC reminds

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union, the law invites intolerable discriminatory consequences through rigid adherence to contractual provisions.

Id. (citations omitted).

227. *Id.* Concerning the organization that employed over 33,000 workers, the concurrence expressed skepticism that "the accommodation of the occasional Sabbath observer would require another employee to forego the comfort of home and the company of offspring." *Id.* The concurrence added, "It is clear from the record that the Transport Workers Union insisted on rigid adherence to the terms of its collective bargaining agreement and ultimately frustrated any attempt by the employer to permit its employee to take Saturdays off." *Id.*

228. *Id.* at 361 (majority opinion) (noting that the employer "declined" to contest issue with union).

229. *See, e.g.*, Lee v. ABF Freight Sys., Inc., 22 F.3d 1019, 1023 (10th Cir. 1994) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)) ("The cost of hiring an additional worker or the loss of production that results from not replacing a worker who is unavailable due to a religious conflict can amount to undue hardship."); Mann v. Frank, 7 F.3d 1365, 1370 (8th Cir. 1993) (quoting *Hardison*, 432 U.S. at 84) ("'Any cost in efficiency or wage expenditures that is more than de minimis constitutes undue hardship.'"); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *4 (W.D. Wash. Aug. 29, 2005) (citing Balint v. Carson City, Nev., 180 F.3d 1047, 1055 (9th Cir.1999)) (finding an undue hardship in "additional costs arising from lost efficiency or higher wages"); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1364–65 (S.D. Fla. 1999) (holding that precedent supported employer's argument that hiring additional pharmacy staff would be more than a de minimis cost); Favero v. Huntsville Indep. Sch. Dist., 939 F. Supp. 1281, 1291 (S.D. Tex. 1996) (holding that "courts have repeatedly held that paying additional wages to accomplish an accommodation is an undue burden"), *aff'd*, 110 F.3d 793 (5th Cir. 1997).

230. 423 F. Supp. 591, 601 (D.N.M. 1975), *aff'd*, 545 F.2d 110 (10th Cir. 1976).

employers that they are always free to take on the additional costs to accommodate the needs of an employee.[231]

Courts also face conflicts over how an employee expresses religious beliefs through his or her appearance.[232] In one often-cited case, *Cloutier v. Costco Wholesale Corp.*, an employee who had joined the Church of Body Modification pierced various parts of her body, including her face.[233] Local managers objected to the piercings as a violation of Costco's dress code and asked her to remove or cover them; Cloutier objected.[234] Holding in favor of Costco, the First Circuit validated the retailer's right to cultivate a "neat, clean and professional image."[235] Similarly, in *EEOC v. Sambo's of Georgia, Inc.*, a Georgia district court upheld an employer's enforcement of grooming standards, commenting in dicta that even if those standards are "nothing more than an appeal to customer preference . . . it is not the law that customer preference is an insufficient justification as a matter of law."[236]

Employers also tend to prevail when religious dress or appearance preferences conflict with safety requirements.[237] For example,

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231. *Best Practices for Eradicating Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last updated July 23, 2008) (stating that "employers may of course choose voluntarily to incur whatever additional operational or financial costs they deem appropriate to accommodate an employee's religious need for scheduling flexibility").

232. *See* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 136 (1st Cir. 2004). Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image. *E.g.*, Hussein v. The Waldorf-Astoria, 134 F. Supp. 2d 591, 599 (S.D.N.Y. 2001) ("Some courts have found that clean-shavenness is a bona fide occupational qualification in certain businesses and, in those situations, as long as the employer's grooming requirement is not directed at a religion, enforcing the policy is not an unlawful discriminatory practice."), *aff'd*, 31 F. App'x 740 (2d Cir. 2002). The majority of religious discrimination cases in this arena appear to involve policies regulating facial hair. *See, e.g.*, EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86, 90–91 (N.D. Ga. 1981) (holding that exempting a Sikh job applicant whose religious practice required that he wear a beard from a restaurant's no-facial-hair policy would constitute undue hardship); *cf.* Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 43 (E.D. Va. 1976) (upholding an employer's no-beard policy against a claim of racial discrimination, finding that it served a legitimate business interest in maintaining an image of cleanliness to attract and retain customers), *aff'd*, 579 F.2d 43 (4th Cir. 1978).

233. 390 F.3d at 128–29.

234. *Id.*

235. *Id.* at 136.

236. 530 F. Supp. at 91.

237. *See, e.g.*, EEOC v. Kelly Services, Inc., 598 F.3d 1022, 1031–32 (8th Cir. 2010) (holding that a printer's refusal to hire a Muslim wearing a hijab constituted

the Fifth Circuit held that a female applicant's request to wear skirts while working as a stocker at Sears would have constituted a safety hazard and de facto an undue hardship for the retailer.[238]

In defending an accommodation action, an employer may point to the need to maintain harmony in the workplace, especially when an accommodation would require a coworker to take a less desirable schedule or to complete a larger share of the workload. However, courts typically require that coworker complaints amount to more than a general inconvenience or constitute more than "mere grumbling."[239]

When holding that a particular circumstance constitutes an undue hardship, courts often require actual evidence of the hardship rather than speculation about negative consequences.[240] However,

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a legitimate safety concern and was not a pretext for discrimination); Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383–84 (9th Cir. 1984) (upholding the suspension of a Sikh employee who refused to shave after a new policy required employees to be clean-shaven so that respirator masks fit properly); McCarter v. Harris County, Tex., No. Civ. A. H-04-4159, 2006 WL 1281087, at *5–6 (S.D. Tex. May 5, 2006) (finding that the accommodation of allowing an employee to wear a skirt or dress when such attire increased job performance safety risks imposed an undue hardship on the employer).

238. Johnson v. Sears Roebuck & Co., 66 F. App'x 523 (5th Cir. 2003).

239. *See, e.g.*, Burns v. S. Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978) (citing Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d at 402 (9th Cir. 1978)) (holding that undue hardship requires more than grumbling or unhappiness; it requires an "imposition on co-workers or disruption of the work routine").

In *Cummins v. Parker Seal Co.*, the court explained:

> The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and § 2000e(j) such grumbling must yield to the single employee's right to practice his religion. Moreover, the fact that Saturday Sabbath observance by one employee forces other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. It is conceivable that employee morale problems could become so acute that they would constitute an undue hardship. The EEOC, in interpreting Regulation 1605, has noted the possibility of undue hardship when the employer can make a persuasive showing that employee discontent will produce "chaotic personnel problems."

516 F.2d 54, 550 (6th Cir. 1975) (citing EEOC Decision No. 72-0606, 4 Fair Empl. Prac. Cas. (BNA) 311 (1971)), *aff'd*, 429 U.S. 65 (1976) (per curiam), *vacated*, 433 U.S. 903 (1977).

240. *See, e.g.*, Smith v. Pyro Mining Co., 827 F.2d 1081, 1086 (6th Cir. 1987) (finding that "[a]n employer must . . . present evidence of undue hardship; it cannot rely merely on speculation"); *Anderson*, 589 F.2d at 402 (concluding that "[u]ndue hardship cannot be proved by assumptions nor by opinions based on

in an unpublished opinion from the Sixth Circuit, the court stated that the employer need not prove unequivocally that the accommodation will result in an undue hardship.[241] The court reasoned, "Surely Congress did not intend that an employer must actually undertake an accommodation that will inevitably cause undue hardship."[242] Affirming the district court's summary judgment for the employer, the appellate court indicated that the office was too small for the employer to allow all the plaintiff's requested leave when she had already exhausted more than her accumulated time.[243] The employer need not implement a particular accommodation in order to judge its effectiveness or cost.[244]

In *Cloutier v. Costco Wholesale Corp.*, the employee claimed that her appearance had not prompted any complaints of which she was aware.[245] The First Circuit acknowledged sister courts' similar hesitancy to rule on hypothetical hardships.[246] However, it still affirmed summary judgment for the employer.[247] The court reasoned that

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hypothetical facts"); *Abercrombie I*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011) (ruling that the employer should have attempted "to collect or analyze data to corroborate his opinion" using the data from similar accommodations that had been granted), rev'd on other grounds, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014); EEOC v. Aldi, Inc., No. CIV.A. 06-01210, 2008 WL 859249, at *15–16 (W.D. Pa. Mar. 28, 2008) (chastising employer for presenting only hypothetical generalizations of potential costs to support its claim of undue hardship); EEOC v. Alamo Rent-A-Car LLC, 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006) ("Alamo fails to support its assertion of undue burden with anything other than speculation, which is not a basis to establish a genuine material fact.").

In *Draper v. U.S. Pipe & Foundry Co.*, the court stated, "[W]e are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." 527 F.2d 515, 520 (6th Cir. 1975).

241. DePriest v. Dep't of Human Servs., No. 86-5920, 1987 WL 44454 (6th Cir. Oct. 1, 1987) (per curiam).

242. *Id.*, at *4.

243. *Id.*, at *1, *4 (citing *Draper*, 527 F.2d at 520).

244. *See id. But see* EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *5 (W.D. Wash. Aug. 29, 2005). The *Red Robin* court took issue with the employer's argument that it had presented "concrete evidence" in the form of a company profile and customer study: "Red Robin fails to present any evidence that visible tattoos are inconsistent with these goals (to present a family-oriented and kid-friendly image) generally, or that its customers specifically share this perception." *Id.* Instead, the court stated, the employer must present "evidence of 'actual imposition on co-workers or disruption of the work routine' to demonstrate undue hardship." *Id.* (citation omitted).

245. 390 F.3d 126, 135 (1st Cir. 2004).

246. *Id.*

247. *Id.* at 138.

the employee's desired accommodation "would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the 'neat, clean and professional image' that it aims to cultivate. Such a business determination is within its discretion."[248]

Annual EEOC charges by Muslims of workplace religious discrimination or failure to accommodate increased by 237% between 2001 and 2012.[249] These charges accounted for 20% of the total religion-based charges filed with the EEOC in 2012.[250] Accommodation requests by Muslims typically focus on appearance, such as clearance to wear a beard or a headscarf.[251] Anecdotal evidence in several case histories indicates that Muslims tend to be unsuccessful in pursuing religious accommodation requests.[252] This phenomenon deserves further research.

In *EEOC v. GEO Group, Inc.*, a private prison denied three Muslim employees a variation from the uniform policy to allow them to wear headscarves.[253] Ruling for the employer prison, the Third Circuit cited safety concerns presented by the headscarves: the inability to identity the wearer adequately and the possibility that prisoners would use the headscarves to choke the female employees during a riot.[254] The court wrote that "prison is not a summer camp" and that the employer was entitled to take measures designed to prevent these dangers.[255]

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248. *Id.* at 136.

249. *Religion-Based Charges Filed from 10/01/2000 Through 3/31/2011?Showing Percentage Filed on the Basis of Religion-Muslim*, *supra* note 4. In 2012 there were 784 Muslim religion-based charges filed, up from 330 in 2001. *Id.*

250. *Id.*

251. See, *e.g.*, Webb v. City of Philadelphia, 562 F.3d 256, 258 (3d Cir. 2009) (describing how a female Muslim police officer requested the right to wear a hijab or headscarf); E. Greyhound Lines Div. of Greyhound Lines, Inc. v. N.Y. State Div. of Human Rights, 311 N.Y.S.2d 465 (App. Div.) (noting that the plaintiff wanted an accommodation to wear a beard), *aff'd*, 265 N.E.2d 745 (N.Y. 1970).

252. *See, e.g.*, *Webb*, 562 F.3d at 260–61 (finding that a uniform dress code was important in establishing trust with the community as well as authority); *E. Greyhound Lines*, 311 N.Y.S.2d at 465 (ruling that the complaint should have been dismissed and leaving decisions concerning dress code policy to the employer). For a thorough discussion of related issues, see Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221 (2011).

253. 616 F.3d 265, 269 (3d Cir. 2010).

254. *Id.* at 273–74.

255. *Id.* at 274–75 ("Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that GEO is entitled to attempt to prevent.").

In his dissent, Judge Tashima focused on safety risks that might constitute more than a de minimis cost for the employer.[256] In doing so, he chastised the majority for applying the wrong legal standard.[257] He also argued that GEO Group should have demonstrated that the headscarves presented a real, not just hypothetical, safety issue.[258] He suggested, "An employer cannot evade liability for religious discrimination by merely asserting that it has a legitimate business interest, no matter how important, for refusing to accommodate an employee's religious practice."[259] *GEO Group* highlights a tension involving safety concerns. Those court decisions that require actual evidence of undue hardship allow for potential safety risks. Those that grant the employers latitude to enforce dress codes and safety protocols allow for possible employer abuse of the discretionary latitude.

2. Religious Discrimination

In addition to the mandate of religious accommodation, Title VII proscribes religious discrimination evident in an adverse employment action or in a hostile work environment.[260] The elements of a prima facie case of religious discrimination track those for other areas of discrimination law, such as racial or sexual harassment.[261]

To establish a prima facie case of religious discrimination based on an adverse employment action under Title VII, the claimant must demonstrate: (1) that she was a member of a protected class because of her religion, (2) that she experienced an adverse employment action, (3) that she was qualified for the job or performing to legitimate expectations, and (4) that she was replaced by a person outside of the protected class or that she was treated

256. *Id.* at 286–89 (Tashima, J., dissenting).

257. *Id.* at 285.

258. *Id.* at 287.

259. *GEO Grp., Inc.*, 616 F.3d at 285.

260. 42 U.S.C. § 2000e-2 (2012).

261. *Compare* EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 313–14 (4th Cir. 2008) (explaining that the prima facie case in a religious harassment case includes proof "that the harassment was (1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer"), *with* JENNIFER ANN DROBAC, SEXUAL HARASSMENT LAW: HISTORY, CASES, AND THEORY 71 (2005) (summarizing that a sexual harassment case requires that the plaintiff show "1. Membership in a protected class; 2. Unwelcome sexual harassment; 3. Based on sex; 4. That affects the terms, conditions or privileges of employment; 5. Respondeat Superior").

differently than similarly situated employees.[262] To meet the requirements of the second prong, the employee must experience a "materially adverse employment action," which courts define as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[263]

To prove a discriminatorily hostile or abusive work environment, the plaintiff must show that "the harassment was (1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer."[264] Typically, the plaintiff must prove that discriminatory statements made in the workplace were more than stray remarks and that the remarks played a part in whatever action was taken against the employee.[265]

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262. *See, e.g.*, Fischer v. Forestwood Co., Inc., 525 F.3d 972, 985 (10th Cir. 2008); Tepper v. Potter, 505 F.3d 508, 515 (6th Cir. 2007); Vetter v. Farmland Indus., Inc., 884 F. Supp. 1287, 1302 (N.D. Iowa 1995) (listing additional element that plaintiff "was performing his or her job at a level that met the employer's legitimate expectations").

263. *Tepper*, 505 F.3d at 515 (citations omitted).

264. *Sunbelt Rentals*, 521 F.3d at 313.

265. *Id.* at 316 (describing how the plaintiff was subjected to derogatory terms, such as "Taliban" and "towel head" on a regular basis, which was enough to establish an initial claim); *see also* MackMuhammad v. Cagle's, Inc., 379 F. App'x 801, 805–06 (11th Cir. 2010) (holding that Muslim employee was not subjected to religious harassment when manager referred to him as "Bin Laden" or "Muhammad-man" over company radio and intercom, and where supervisors asked him about his religion and made comments about his religious dietary restrictions, because such comments were at most insensitive and rude, and did not rise to the level of severe and pervasive harassment); Richardson v. Dougherty Cnty., Ga., 185 F. App'x 785, 790–91 (11th Cir. 2006) (rejecting Title VII hostile work environment claim where supervisor referred to plaintiff more than fifty times as "preacher man" and made comments about his religion and request for accommodation, where such conduct was not objectively severe or pervasive); Jones v. United Space Alliance, LLC, 170 F. App'x 52, 53, 56 (11th Cir. 2006) (dismissing hostile environment claim because complained-of conduct was not objectively severe or pervasive where manager made derogatory remarks based on plaintiff's religion, coworker removed flyer advertising plaintiff's church events, manager told him to remove lanyard with name "Jesus" on it, manager told him not to leave his Bible on his desk, and he was asked to turn down religious music played at work); Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1153 (N.D. Ala. 2011) ("Plaintiff's allegations are simply not enough, and courts in this circuit have consistently dismissed religious hostile work environment claims for similar infirmities of proof."); Wheeles v. Nelson's Elec. Motor Servs., 559 F. Supp. 2d 1260, 1272 (M.D. Ala. 2008) (dismissing religious harassment claim where plaintiff failed to satisfy "severe or pervasive" requirement and complained-of conduct was nothing more than "slightly insulting").

Two cases in particular highlight the procedural and substantive application of antidiscrimination law. In *Jenkins v. New York City Transit Authority*, the defendant challenged the Title VII claim, arguing an absence of actionable religious disparate impact.[266] The New York district court rejected this defense, noting that courts often dismiss disparate impact religious claims for "lack of evidence, rather than failure to state a claim."[267] In *Gadling-Cole v. West Chester University*, the plaintiff believed that homosexuality was a sin and claimed to have faced workplace harassment because of this belief.[268] A Pennsylvania district court found credence to plaintiff's religious discrimination claims and that sufficient facts supported the pleadings.[269] The court distinguished the instant case from cases involving sexual orientation harassment, not currently entitled to protection under Title VII.[270]

This distinction between religious discrimination and sexual orientation discrimination is important because Congress may soon extend Title VII to provide protection against discrimination based on sexual orientation.[271] At some point, a court might have to resolve two opposing claims of harassment or discrimination, arising out of a single set of facts. One employee might claim that she has been the victim of harassment because of religious beliefs while another might allege harassment because of sexual orientation. How a court will resolve such competing claims is difficult to predict but

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266. 646 F. Supp. 2d 464, 471 (S.D.N.Y. 2009).

267. *Id.* (citing Barrow v. Greenville Indep. Sch. Dist., 480 F.3d 377, 382–83 (5th Cir. 2007), Soria v. Ozinga Bros., Inc., 704 F.2d 990, 994–97 (7th Cir. 1983), and Tucker v. Reno, 205 F. Supp. 2d 1169, 1174–75 (D. Or. 2002)). The *Jenkins* court explained:

> [T]his court granted an employer's motion to dismiss a disparate impact claim based on religious discrimination, but did so because the plaintiff had failed to meet the elements required to state a disparate impact claim. These cases leave open the possibility that a disparate impact claim based on religious discrimination can be stated if it is properly pleaded. The defendants' argument that a disparate impact claim based on religious discrimination does not exist is therefore without merit.

Id. (citation omitted).

268. 868 F. Supp. 2d 390 (E.D. Pa. 2012).

269. *Id.*

270. *Id.* at 396.

271. The Employment Non-Discrimination Act (ENDA) would prohibit employment discrimination on the basis of sexual orientation or gender identity under federal law. *See* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). As with Title VII, ENDA would exempt private employers with fewer than fifteen employees, religious institutions, and private membership clubs. *See id.* §§ 3a(5), 6. This exemption for religious employers includes any "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1 (2012).

courts will want to avoid an Establishment Clause violation by preferring one religious adherent over another or over a non-believer.

C. "Refusal" or "Conscience" Laws

Since the Supreme Court's *Roe v. Wade* decision,[272] many states have enacted "refusal laws" that allow healthcare providers to refuse to participate in pregnancy termination or sterilization procedures that violate or are inconsistent with their religious beliefs.[273] Immediately following *Roe* in 1973, Congress passed an amendment to the Public Health Service Act (PHSA), known as the "Church Amendment."[274] The Church Amendment safeguards federally funded healthcare providers from a requirement that they participate in abortion procedures when personnel raise moral or religious objections.[275] The Church Amendment further proscribes hospitals from mandating the performance of pregnancy termination as a condition of employment.[276] Laws that followed added to protections for religious adherents and their employer organizations.[277] Originally, these laws focused on abortion but more recently have been expanded to protect pharmacists who refuse to dispense emergency contraception and to fill contraception prescriptions.[278]

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272. 410 U.S. 113 (1973).

273. *See* Rachel Benson Gold, *Conscience Makes a Comeback in the Age of Managed Care*, THE GUTTMACHER REP. ON PUB. POL'Y, Feb. 1998, 1, 1, *available at* http://www.guttmacher.org/pubs/tgr/01/1/gr010101.html; *see also* Erin Whitcomb, *A Most Fundamental Freedom of Choice: An International Review of Conscientious Objection to Elective Abortion*, 24 ST. JOHN'S J. C.R. & ECON. DEV. 771 (2010).

274. Pub. L. No. 93-45, § 401, 87 Stat. 91, 95 (1973) (codified as amended at 42 U.S.C. § 300a-7 (2012)). Frank Church was the bill's sponsor and the amendment carries his name. Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L. J. 783, 789 (2004); *see also* Whitcomb, *supra* note 273, at 784.

275. *See* 42 U.S.C. § 300a-7(b).

276. *Id.* § 300a-7(c)(1)(A) (barring hospital discrimination "in the employment, promotion or termination of employment of any physician or health care personnel" who performed or assisted or refused to perform or assist in the lawful sterilization or abortion procedures for moral or religious reasons); *see also* Whitcomb, *supra* note 273, at 785.

277. *E.g.*, Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004) (enacting the Hyde-Weldon Conscience Protection Amendment, which closed loopholes associated with the PHSA).

278. *See, e.g.*, ARK. CODE ANN. § 20-16-304(4) (West 2014) (permitting physician and pharmacist refusal to dispense contraceptives); IDAHO CODE ANN. § 18-611(2) (West 2014) ("No health care professional shall be required to provide any health care service that violates his or her conscience.").

Laws that protect religious adherents who refuse to provide medical and pharmaceutical services clearly disadvantage women and families who seek access to such services. Government involvement on either side arguably raises First Amendment Establishment Clause and Free Exercise Clause issues, in addition to Fourteenth Amendment Equal Protection and Substantive Due Process concerns that are beyond the scope of this Article. The 2010 passage of the Patient Protection and Affordable Care Act (PPACA),[279] colloquially known as Obamacare, only heightens the tension of this debate. In that legislation, Congress mandated that employers with fifty or more employees provide a minimal level of healthcare coverage for women.[280] Health Resources and Services Administration (HRSA) guidelines provided that plans must include coverage for all Food and Drug Administration approved contraceptive methods, sterilization procedures, and associated counseling.[281] A narrow exception for religious exemption resulted in more litigation[282] and leads to Part II of this Article, concerning not only not-for-profit religious employers, but also for-profit, private, corporate employers.

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279. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

280. 42 U.S.C. § 300gg-13(a) (2012). The statute provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—
>
> (1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force; . . .
>
> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

Id.; *see also* Rose Shingledecker, Note, *No Good Deed: The Impropriety of the Religious Accommodation of Contraceptive Coverage Requirements in the Patient Protection and Affordable Care Act*, 47 IND. L. REV. 301 (2014).

281. *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN. (last visited Oct. 1, 2014), http://www.hrsa.gov/womensguidelines/.

282. *See, e.g.*, Univ. of Notre Dame v. Sebelius, No. 3:12CV253, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012) (dismissing complaint by Catholic university that HRSA guidelines promulgated pursuant to the PPACA violated Establishment and Free Exercise Clauses); *see also* Shingledecker, *supra* note 280, at 307 n.51.

II.
EXCEPTIONS TO ANTIDISCRIMINATION LEGISLATION AVAILABLE TO NOT-FOR-PROFIT RELIGIOUS EMPLOYERS AND FOR-PROFIT, PRIVATE, CORPORATE EMPLOYERS

The Free Exercise and Establishment Clauses of the First Amendment limit court oversight of employees of religious institutions. Under the First Amendment, religious employers may build a workforce of co-religionists, as well as discharge ministerial employees, a term that is broadly defined, for any reason the religious employer chooses. Additionally, Title VII, and sections 702 and 703 in particular, provide exceptions from its anti-discrimination policies for religious organizations.[283]

To explain these constitutional limits and religious employer exemptions, Part II of this Article analyzes three aspects of government oversight of religious, nonprofit employers. First, Part II.A examines whether an organization qualifies as a religious employer. Second, Part II.B reviews the First Amendment's Freedom of Association Clause and a religious employer's right to hire co-religionists. Third, Part II.C considers the ministerial exception and briefly re-

283. Section 702 specifies:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a) (2012). Section 703 adds:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-2(e) (2012).

views the Supreme Court's confirmation of that exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[284]

A. Religious Employers

In order to limit government intrusion into its internal human resources processes, an organization must first prove its religious character. A number of court cases have explored whether an organization is essentially a religious institution and the associated burden of proof.[285] However, these cases have not produced a comprehensive national standard. Moreover, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[286] discussed in Part II.C.1, offers little clear guidance on the point.

In a recent case concerning employer qualification for religious exemption from Title VII, *Spencer v. World Vision, Inc.*, three Ninth Circuit judges sitting on a three-judge panel identified three different tests, none of which received a majority endorsement.[287] World Vision is a self-described Christian humanitarian organization that addresses the root causes of poverty and injustice.[288] When World Vision hired Sylvia Spencer and two other "employees," it required that they submit personal statements about their "relationship with Jesus Christ," as well as comply with the organization's "Statement of Faith, Core Values, and Mission Statement."[289] When "World Vision discovered that the Employees denied the deity of Jesus Christ and disavowed the doctrine of the Trinity," it terminated them.[290] All three filed suit in the Western District of Washington, alleging that World Vision had violated Title VII.[291] The district court granted summary judgment to World Vision, reasoning that World Vision was a religious employer under the framework set forth in *LeBoon v. Lancaster Jewish Community Center Ass'n*.[292]

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284. 132 S. Ct. 694 (2012).

285. *See, e.g.*, Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011) (per curiam); EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988).

286. 132 S. Ct. at 694.

287. 633 F.3d at 723. For further discussion of the *Spencer* decision, as well as the qualifications to be considered a religious employer, see Brandon S. Boulter, Note, *Goldilocks and the Three-Judge Panel:* Spencer v. World Vision, Inc. *and the Religious Organization Exemption of Title VII*, 2011 BYU L. Rev. 33 (2011).

288. *Spencer*, 633 F.3d at 725.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 725–26 (discussing LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3d Cir. 2007)). For a further discussion of *LeBoon*, see *infra* notes 329–45 and accompanying text.

The employees appealed and the Ninth Circuit reviewed the case de novo to determine whether World Vision was a religious organization and, therefore, entitled to an exemption from Title VII.[293]

Judge O'Scannlain's *Spencer* concurrence suggested inquiry as to whether the institution: "1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious."[294]

Judge Kleinfeld found O'Scannlain's test too inclusive.[295] Kleinfeld similarly concurred in *Spencer* to offer his own reformulation of what the test should be.[296] He first advised asking whether an entity is organized for a religious purpose.[297] Additionally, Kleinfeld proposed asking whether the entity "is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[298] Not only did Judge Kleinfeld add a fourth requirement to Judge O'Scannlain's test, he also modified Judge O'Scannlain's first requirement so as not to mandate incorporation or other formal organizational form.

Judge Berzon, who dissented in *Spencer*, relied on two earlier Ninth Circuit decisions[299]: *EEOC v. Townley Engineering & Manufacturing Co.*[300] and *EEOC v. Kamehameha Schools/Bishop Estate*.[301] These decisions provided the basis for informal EEOC discussion of the "definition of an employer that qualifies as a religious organization."[302] Moreover, their facts help to demonstrate how far jurisprudence has evolved in the twenty-five years preceding the Court's *Hobby Lobby* decision.[303]

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293. *Spencer*, 633 F.3d at 726.

294. *Id.* at 734 (O'Scannlain, J., concurring).

295. *Id.* at 742 (Kleinfeld, J., concurring).

296. *Id.* at 742–48.

297. *Id.* at 748.

298. *Id.*

299. *Spencer*, 633 F.3d at 749–50 (Berzon, J., dissenting).

300. 859 F.2d 610, 618 (9th Cir. 1988).

301. 990 F.2d 458, 460 (9th Cir. 1993).

302. Letter from Reed L. Russell, Legal Counsel, EEOC, to Kevin Cummings, Branch Chief, Bus. & Trade Servs., Dep't of Homeland Sec. (Dec. 28, 2007), *available at* http://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html.

303. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Townley Manufacturing Company was a closely held corporation founded by Jake and Helen Townley, who were born again Christians.[304] Helen Townley "made a covenant with God that their business 'would be a Christian, faith-operated business.'"[305] Therefore, the Townleys mandated employee attendance at weekly devotional services at their Florida plant.[306] In 1979, the company hired Louis Pelvas, an atheist, to work at its Arizona plant that had no devotional services until April 1984.[307] Pelvas asked to be excused from the services in June 1984 but his supervisor denied this request.[308] In October 1984, Pelvas filed a religious discrimination charge with the EEOC, and the EEOC brought suit.[309] Ultimately, the Ninth Circuit affirmed the district court's decision that found a violation of Title VII.[310] The Ninth Circuit held that Townley's requirement that an objecting employee attend the devotional services "cannot be reconciled with Title VII's prohibition against religious discrimination" and "that Congress did not intend section 702's exemption for religious corporations to shield corporations such at Townley."[311] However, the court did recognize that the Townleys, as individuals, have "rights under the Free Exercise Clause that Title VII cannot infringe."[312]

In holding that Townley Engineering was not entitled to an exception, as a religious organization, from the worker protections of Title VII, the court referenced the related legislative history.[313] The court concluded, "All [in Congress] assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm."[314] The court noted that Townley Engineering was a secular organization that produced mining equipment.[315] The court explained "that the beliefs of the owners and operators of a corpo-

304. *Townley*, 859 F.2d at 611–12.
305. *Id.* at 612.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. 859 F.2d at 613.
311. *Id.*
312. *Id.*
313. *Id.* at 617–18.
314. *Id.* at 618.
315. *Id.* at 619.

ration are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702."[316]

In *Kamehameha,* Bernice Pauahi Bishop, a member of the Hawaiian royal family, used a charitable trust to found The Kamehameha Schools.[317] The founding documents directed that all teachers be Protestants.[318] Carole Edgerton, who was not Protestant, applied for a position as a substitute French teacher and was told of the religious requirement.[319] She subsequently filed a religious discrimination charge with the EEOC.[320] The Kamehameha Schools sought an exemption to requirements of Title VII as a religious educational institution.[321] A district court held in favor of the Schools and granted the exemption.[322] On appeal, the Ninth Circuit Court overturned the decision.[323] In considering the exemption, it weighed several factors, including the purpose of the Schools and who owned them.[324] It concluded that "the Schools are essentially a secular institution operating within a historical tradition that includes Protestantism, and the Schools' purpose and character is primarily secular, not primarily religious."[325]

In his dissent in *Spencer*, Judge Berzon relied on *Townley* and *Kamehameha* to argue for a two-part analysis to determine whether

316. 859 F.2d at 619. Later in Part II.A this Article compares the *Townley* facts to the court's recent *Hobby Lobby* decision. *See infra* notes 351–52 and accompanying text. Important to that comparison is the Ninth Circuit's emphasis that Townley Engineering's articles of incorporation did not mention any religious purpose. 859 F.2d at 619.

317. EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 459 (9th Cir. 1993).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Kamehameha*, 990 F.2d at 460.

324. *Id.* at 461. The Ninth Circuit weighed the following factors in determining whether the Kamehameha Schools were entitled to the exemption for a religious institution: (1) Ownership and Affiliation. Schools were not controlled by or affiliated with any particular sect; (2) Purpose. Schools instructed students in developing their own moral code rather than following those of a particular religion; (3) Faculty. Only three out of two hundred and fifty teachers had religious duties and none were required to maintain active membership in a church; (4) Student Body. Fewer than one-third of on-campus students were Protestant; (5) Student Activities. Student activities were varied and not of an overtly religious character, but did include prayers at times; (6) Curriculum. Core courses were taught from a secular doctrine and the schools did not instruct students in a Protestant doctrine. *Id.* at 461–64.

325. *Id.* at 463–64.

the employer was a religious entity and entitled to the exemption.[326] Quoting *Townley*, he reasoned, "First, '[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious.'"[327] Quoting *Kamehameha*, he noted, "Second, '[w]e construe the statutory exemption[ ] narrowly,' with the understanding that 'only those institutions with extremely close ties to organized religion [are] covered.'"[328] Thus, the per curiam *Spencer* opinion arguably undermined *Townley* and *Kamehameha* without clearly establishing a new test.

LeBoon v. Lancaster Jewish Community Center Ass'n,[329] a case noted in Judge O'Scannlain's *Spencer* concurrence,[330] was also mentioned in the EEOC informal definition of a religious organization.[331] The Lancaster Jewish Community Center Association (LJCC) was a non-profit organization charged with the mission to "enhance and promote Jewish life, identity, and continuity."[332] To fulfill its mission, the LJCC undertook a variety of activities, including the operation of a summer camp and preschool, the publication of a newspaper, and the promotion of events to celebrate Jewish holidays.[333] The main sources of its income included the Lancaster Jewish Federation, the United Way, membership dues (membership was open to adherents of other religions), program fees, rents, and donations.[334] Linda LeBoon, an evangelical Christian, worked for nearly four years as a bookkeeper for the LJCC until she was terminated in 2002.[335] Two other employees had been terminated shortly before LeBoon for what she believed to be discriminatory reasons.[336] At the time LeBoon was terminated, the organization was in financial distress and the interim Executive Director believed that another employee could assume LeBoon's duties.[337]

326. Spencer v. World Vision, Inc., 633 F.3d 723, 749–55 (9th Cir. 2011) (Berzon, J., dissenting).

327. *Id.* at 750 (alteration in original) (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

328. *Id.* (alterations in original) (quoting EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993)).

329. 503 F.3d 217 (3d Cir. 2007).

330. 633 F.3d at 727, 730, 734 (O'Scannlain, J., concurring).

331. Letter from Reed L. Russell to Kevin Cummings, *supra* note 302, at n.3.

332. *LeBoon*, 503 F.3d at 221.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 221–22.

337. *Id.* at 222.

After her termination, LeBoon "filed suit in federal court alleging religious discrimination, retaliation, and wrongful discharge in violation of Pennsylvania's public policy."[338] LeBoon believed that she was fired either because she was a Christian or in retaliation for complaining about the firings of other employees.[339] A magistrate judge granted LJCC's motion for summary judgment, finding that LJCC was a religious employer and exempt from Title VII's prohibition against religious discrimination in employment.[340] LeBoon filed a motion for reconsideration based on a "manifest error of fact regarding the percentage of the LJCC's funding that came from the Lancaster Jewish Federation Campaign."[341] The LJCC conceded the error and the original order was vacated.[342] On rehearing the magistrate judge again held that the LJCC was a "religious organization exempted from the religious discrimination provisions of Title VII."[343]

Ultimately, the Third Circuit relied on nine factors in determining whether an organization was sufficiently religious to qualify for exemption:

> (1) [W]hether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[344]

The Third Circuit affirmed the lower court decisions and held that LJCC was a religious organization entitled to the exemption.[345]

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338. 503 F.3d at 222.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*
344. *LeBoon*, 503 F.3d at 226 (citing Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997), EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458 (9th Cir. 1993); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988), and EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980)).
345. *Id.* at 226–31.

Two other decisions, *Fike v. United Methodist Children's Home of Virginia, Inc.*[346] and *Silo v. CHW Medical Foundation*,[347] arrived at seemingly contradictory determinations regarding the extent to which an entity must reflect the principles of its founding organization in order to be considered a religious organization. In *Fike*, the court held that the United Methodist Children's Home, operating as a Christian home for orphans, demonstrated too little religious affiliation in its day-to-day activities for the court to consider it a religious employer, exempt from Title VII.[348] However, in *Silo*, a Catholic hospital's operation was consistent with the church's founding mission of "healing and providing services to the sick and poor in the Catholic moral tradition."[349] The court exempted the hospital employer, even though the hospital "does not have a chaplaincy or chapel, does not sponsor or conduct religious services, prayer groups or Bible studies on its premises and does not publicly place or display Bibles, crucifixes or any other religious symbols."[350]

Although *Burwell v. Hobby Lobby Stores, Inc.* dealt with whether a private, for-profit *corporation* qualified as a *person* for the application of the RFRA,[351] it seemingly raises the question of whether such a corporation might also qualify as a religious employer. *Hobby Lobby* arguably strengthens the autonomy of religious, for-profit, corporate employers in relation to their employees against governmental interference. Therefore, one might wonder if cases such as *Townley* shed light on *Hobby Lobby*'s broader implications. Are "secular" employers that incorporate religion into the activities of the workplace more likely to qualify for the exemption post *Hobby Lobby*?

Hobby Lobby does not mention *Townley*, *Kamehameha*, or *LeBoon*. Because Hobby Lobby's owners asserted *their own* RFRA rights via the corporate entity against the government and the PPACA, the Court did not address whether Hobby Lobby *stores* were a religious employer.[352] Therefore, *Hobby Lobby* should have little influence on the application of Title VII to private, for-profit corporations. However, wonders never cease.

This collection of cases concerning qualification for exemption on the basis of religious character highlights the fractured and varied approaches to claims by religious adherents. Litigants antici-

346. 709 F.2d 284 (4th Cir. 1983).
347. 45 P.3d 1162 (Cal. 2002).
348. 709 F.2d at 290.
349. 45 P.3d at 1164.
350. *Id.*
351. 134 S. Ct. 2751 (2014).
352. *Id.* at 2765–66.

pating such an issue in the future need to pay close attention to the continuing evolution of the law on this matter in their respective jurisdictions.

B. The Right to Hire Co-Religionists/Freedom of Association

Once an organization establishes itself as a religious one, it may use shared religious values as the basis for hiring decisions.[353] In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, Mayson worked as a building engineer at the Deseret Gymnasium for sixteen years.[354] The gymnasium was a "nonprofit facility, open to the public" and operated by The Church of Jesus Christ of Latter-day Saints.[355] The Church fired Mayson because he "failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples."[356] Mayson and a group of similarly situated employees filed suit, alleging the violation Title VII and other protections.[357]

The Supreme Court held that a religious employer may select only those applicants who share its religious philosophy, even for non-religious purposes, to advance its overall religious mission.[358] The Court also evaluated whether its ruling regarding the Title VII claim might work to promote the establishment of religion, in violation of the First Amendment.[359] Using the *Lemon* test, the Court concluded, "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say the

353. *See* 42 U.S.C. § 2000e-2(e)(2) (2012) (allowing for the hire of coreligionists when a bona fide occupational requirement exists); *supra* note 324 (analyzing the Kamehameha Schools and whether they could hire Protestant teachers); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). Although not a case that focused on paid employment, *Dale* held that religious organizations are free to affiliate with only those persons who share similar philosophical viewpoints. *Dale*, 530 U.S. at 656. The Court also rejected the argument that state public accommodation laws require groups to accept undesired members. *Id.* at 659. The Court noted that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648.

354. 483 U.S. 327, 330 (1987).

355. *Id.*

356. *Id.*

357. *Id.* at 331.

358. *Id.* at 339 (holding that religious exemption to Title VII's prohibition against religious discrimination in employment for secular nonprofit activities of a religious organization did not violate Establishment Clause).

359. *Id.* at 335.

government itself must have advanced religion through its own activities and influence."[360] Arguably, *Amos* gives employers qualifying under the religious exception of Title VII great latitude in their personnel decisions.

In *Little v. Wuerl*, the Third Circuit directly endorsed a religious institution's right to hire only coreligionists.[361] The *Wuerl* court upheld the dismissal of a Protestant teacher after she remarried, an act that the St. Mary Magdalene Parish alleged violated Catholic doctrine.[362] The court explained that the Title VII exemption applied "whether or not every individual plays a direct role in the organization's 'religious activities.'"[363] The court "conclude[d] that the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."[364] The court held that "it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles."[365]

C. The Ministerial Exception

In 1972, before section 702 of Title VII created an exemption for employees of religious entities,[366] the Fifth Circuit considered Title VII's application to these workers.[367] With *McClure,* that court established a ministerial exception.[368] The court clarified that religious institutions had a right to govern themselves through their chosen ministers.[369] Mrs. Billie McClure qualified as such a minister.[370]

McClure had entered the Salvation Army's training program in 1965 and had served the Salvation Army in a number of roles, including her final role as a secretary in the Public Relations Depart-

360. *Amos*, 483 U.S. at 337 (emphasis in original) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

361. 929 F.2d 944 (3d Cir. 1991).

362. *Id.* at 946.

363. *Id.* at 951.

364. *Id.*

365. *Id.*

366. 42 U.S.C. § 2000e-1(a) (2012).

367. *See* McClure v. Salvation Army (*McClure II*), 460 F.2d 553 (5th Cir. 1972).

368. *Id.*

369. *Id.*

370. McClure v. Salvation Army (*McClure I*), 323 F. Supp. 1100, 1106–07 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972).

ment.[371] She had considered her role with the Salvation Army to be religious in nature, even when she was not performing religious duties.[372] After the Salvation Army terminated her employment, McClure filed discrimination charges with the EEOC alleging that she had "received less salary and fewer benefits than that accorded similarly situated male officers, [and] that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices."[373]

In deciding *McClure*, the Fifth Circuit stressed the primacy of the relationship between ministers and churches; it explained that ministers are the "lifeblood" and "chief instrument" of the church.[374] The court's decision also referenced past Supreme Court decisions that recognized a "wall of separation" between church and State and that churches had the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[375]

In addressing the facts before it, the Fifth Circuit explained that application of Title VII would (without an implied free exercise exception) "cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern."[376] The court concluded that "Congress did not intend, through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" and, therefore, that it lacked jurisdiction to decide McClure's claim.[377] The Fifth Circuit's 1972 *McClure* reasoning foreshadowed that of the Supreme Court nearly forty years later.

1. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*

Since the Fifth Circuit's *McClure* decision, each of the federal circuits has similarly found a ministerial exception.[378] However, the

371. *Id.* at 1103.
372. *Id.* at 1104.
373. *McClure II*, 460 F.2d at 555.
374. *Id.* at 558–59.
375. *Id.* at 558, 560.
376. *Id.* at 560.
377. *Id.* at 560–61.
378. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d

Supreme Court did not confirm any such exception until 2011 when it decided *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.[379] *Hosanna-Tabor* involved a retaliation suit by a "called" teacher, Cheryl Perich, against a Lutheran school.[380] Hosanna-Tabor hired Perich as a lay teacher in 1999.[381] After Perich completed the necessary training, Hosanna-Tabor asked Perich to become a "called" teacher or a commissioned minister and she accepted.[382] During her employment with the school, Perich taught both secular and religious topics.[383]

Following a narcolepsy diagnosis, Perich took a disability leave at the beginning of the 2004–05 school year.[384] She received medical clearance to return to work on February 22, 2005 and went to the school, fully aware that it had already hired a lay teacher to replace her.[385] The church congregation had already voted to release Perich from her calling.[386] It offered to pay a portion of her health insurance premiums if she agreed to resign, which she refused to do.[387] The school's principal asked her to leave, but Perich refused until she was given written documentation that she had reported to work.[388] The school later terminated Perich for "insubordination and disruptive behavior" as well as for damaging her relationship with the school by threatening to take legal action.[389]

In *Hosanna-Tabor*, the Court held that the ministerial exception prevented court intervention in a ministerial employment decision.[390] The Court so ruled even though the termination and related discrimination claim were ostensibly unrelated to matters of

1299, 1302 (11th Cir. 2000); Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577 (1st Cir. 1989); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985).

379. 132 S. Ct. 694 (2012). For a more in-depth analysis of *Hosanna-Tabor*, see *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176 (2012).

380. 132 S. Ct. at 699–701.

381. *Id.* at 700.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Hosanna-Tabor*, 132 S. Ct. at 700.

387. *Id.*

388. *Id.*

389. *Id.* Perich initially filed a charge with the EEOC under the Americans with Disabilities Act (ADA). *Id.* at 701 (citing Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012))).

390. *Id.* at 710.

church religious doctrine.[391] Having confirmed the viability of a ministerial exception, the *Hosanna-Tabor* Court determined that a "called" teacher, such as Perich, was a minister for Hosanna-Tabor.[392] The Court explained, "Perich [had] accepted the call and received a 'diploma of vocation' designating her a commissioned minister."[393] The EEOC and Perich claimed, "Hosanna-Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual."[394] The Court responded that the "purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[395]

In reaching its conclusion, the *Hosanna-Tabor* Court had to distinguish *Smith*, the 1990 peyote-unemployment benefits case.[396] Recall that in *Smith*, the Court had held, "The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[397] Arguably, the ADA is a law of neutral application.[398] Therefore, the right of free exercise would not have relieved Hosanna-Tabor of the obligation to comply with the ADA's dictates, including its non-retaliation provisions. The *Hosanna-Tabor* Court found *Smith* inapposite.[399] Writing for a unanimous Court, Justice Roberts explained:

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391. *Id.* at 710.

392. 132 S. Ct. at 707–08.

393. *Id.* at 700. Other factors influenced the Court's determination that Perich functioned as a minister. For example, she satisfied specific academic requirements, including eight theology courses, in order to "pass an oral examination by a faculty committee." *Id.* at 699. Perich "also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school wide chapel service. Perich led the chapel service herself about twice a year." *Id.* at 700.

394. *Id.* at 709.

395. *Id.*

396. *Id.* at 707–08 (distinguishing Smith v. Emp't Div., Dep't of Human Res., 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014)).

397. 494 U.S. at 879.

398. *See* Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101–12213 (2012)).

399. 132 S. Ct. at 707.

> It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an *individual's* ingestion of peyote. *Smith* involved government regulation of only *outward physical acts*. The present case, in contrast, concerns government interference with an *internal church decision that affects the faith and mission of the church itself*. The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.[400]

The Court provided no guidance on how to distinguish "outward physical acts" from the act of employment termination that it considered "an internal church decision."[401] One might speculate that the difference is one of practical significance for the independence of viable institutional churches. More particularly, institutional churches may vary dramatically as to whom they recognize as a "minister"; some churches favor hierarchy and formal role differentiation, while others may count all of their adult members as "ministers."[402]

Commentators take a variety of perspectives on *Hosanna-Tabor*'s treatment of *Smith*. Professor Michael McConnell suggests that *Hosanna-Tabor* marks "a shift in Religion Clauses jurisprudence from a focus on individual believers to a focus on the autonomy of organized religious institutions."[403] Another review of the decision

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400. *Id.* (emphasis added).

401. *See id.*

402. *Compare, e.g.*, *id.* at 707 ("[T]o be eligible to become a commissioned [Evangelical Lutheran] minister, [candidate] had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher."), *with* THE BOOK OF COMMON PRAYER 855 (Church Publ'g Inc., N.Y. 2007) (1549) (defining "ministers of the [Episcopal] Church" to include "lay persons, bishops, priests, and deacons").

403. Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821, 835–36 (2012). Professor McConnell added:

> [With *Hosanna-Tabor*,] the Free Exercise Clause provides far greater protection to the "faith and mission" of religious institutions than to individual acts of religious exercise . . . . Perhaps it is a coincidence, but this shift in emphasis corresponds very roughly to the old divide between individualistic Protestantism and institutional Catholicism and might be the first evident fruit of the new Catholic majority on the Court.

Id. at 836. Other observers might not attribute the shift in emphasis to the new Catholic majority. However Justice Brennan, a Catholic, displayed great interest in protecting individual religious conscience. *See generally*, KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993).

notes "an untenable distinction between the facts of *Hosanna-Tabor* and *Smith*—a distinction that may have the unfortunate side effect of implying a new and ambiguous exception to *Smith*'s free exercise holding."[404] A third view, taken by Professor Douglas Laycock, emphasizes *Smith*'s refusal to "'lend [the Court's] power to one or the other side in controversies over religious authority'" or dogma.[405] He explains that the Court's cursory handling of *Smith* is consistent with *Smith*'s holding that it offered no precedential value in cases regarding religious authority.[406] In another review, Elliot Williams contrasted *Hosanna-Tabor* with the Court's holding in *Christian Legal Society v. Martinez*.[407] The *Martinez* Court had held that the First Amendment did not shield a religious student organization from compliance with a law school's nondiscrimination policy.[408] Therefore, the Christian Legal Society had to extend voting rights and positions of authority to all comers or lose monetary and advertising benefits made available to student organizations.[409] Williams concludes that *Hosanna-Tabor* "significantly alters contemporary Free Exercise doctrine."[410] He proposed that "*Hosanna-Tabor* limited *Smith* and revitalized a category of behavior protected under the Free Exercise Clause of the First Amendment—'decision[s] that affect[ ] the faith and mission of the church itself.'"[411] No doubt, the lower courts will use a variety of perspectives regarding the relevance of *Smith* to interpret *Hosanna-Tabor*.

Concerning which employees qualify for the ministerial exception, Chief Justice Roberts noted that the Court's *Hosanna-Tabor*

404. *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 182 (2012).

405. Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 854 (2012) (quoting Smith v. Emp't Div., Dep't of Human Res., 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014)) (discussing the application of *Smith* to the Court's ministerial exception arguments in *Hosanna-Tabor*).

406. *Id.* at 854–55.

407. Elliott Williams, *Resurrecting Free Exercise in* Hosanna-Tabor Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012)*, 36 HARV. J.L. & PUB. POL'Y 391, 401 (2013) (citing Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010)) (finding no constitutional violation when the law school mandated that that the school's officially recognized, religiously affiliated student group follow the school's "all-comers" nondiscrimination policy).

408. 561 U.S. at 667.

409. Williams, *supra* note 407.

410. *Id.* at 402.

411. *Id.* (quoting Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012)).

opinion was limited to its facts.[412] The Court explained, "We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude . . . that the exception covers Perich, given all the circumstances of her employment."[413] The Court then reviewed those circumstances, including her training, titles, promotion within the church, perceptions concerning her status (both hers and the church's), and her religiously focused duties.[414] The Court considered both formal and functional factors.[415]

In concluding that the ministerial exception, an affirmative defense, barred Perich's retaliation action, the Court further limited its holding.[416] The Court stated, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[417]

2. Qualifying Ministers

The *Hosanna-Tabor* concurrences emphasized that the Court did not adopt a bright line rule for when the ministerial exception applies nor did it provide a guiding definition of "minister." Justice Thomas wrote, "Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some."[418]

Justice Alito, joined by Justice Kagan, cautioned against using formal title and ordination status as triggers for the exception's application.[419] He emphasized a functional approach, suggesting, "These [qualifying employees] include those who serve in positions of leadership, those who perform important functions in worship

412. 132 S. Ct. at 710 ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit.").

413. *Id.* at 707.

414. *Id.* at 707–08.

415. *Id.*

416. *Id.* at 709 n.4, 710.

417. *Id.* at 710.

418. *Hosanna-Tabor*, 132 S. Ct. at 711 (Thomas, J., concurring). Justice Thomas reasoned that because "Hosanna-Tabor sincerely considered Perich [to be] a minister," her suit was "properly barred by the ministerial exception." *Id.*

419. *Id.* at 714 (Alito, J., concurring).

services, and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation."[420] He distinguished "a purely secular teacher [who] would not qualify for the 'ministerial' exception."[421] He explained, "[T]he constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones."[422] He concluded that Perich's qualification as a minister "rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."[423]

Because the *Hosanna-Tabor* majority offered no definition for minister, lower courts will continue to operate as they have done historically on this matter. Numerous state and federal circuit courts agree that a religious organization need not have designated the employee as a "minister" in order for the employee to qualify under the ministerial exception; the employee need only be distinctively involved in the religious mission of the organization.[424] Thus, the lower courts have historically taken a more functional approach, similar to the one described by Justice Alito.[425] These lower courts have found that positions ranging from choir director to press secretary qualify under the ministerial exception.[426]

A few circuit courts have established tests to help determine if an employee qualifies under the ministerial exception.[427] In the

420. *Id.* at 712.

421. *Id.* at 715.

422. *Id.*

423. *Id.* at 716.

424. *See, e.g.*, Coulee Catholic Sch. v. Labor and Indus. Review Comm'n, 768 N.W.2d 868, 892 (Wis. 2009) (holding that the role of teacher was closely linked to a religious organization's mission and qualified for a religious exception to the state's employment discrimination statutes).

425. *See, e.g.*, *id.*

426. *See* Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (finding that plaintiff in her role as press secretary served as a liaison between the Church and the community to which it directed its message and for which she served an integral role in shaping); Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999) (holding that religious music plays a highly important role in the spiritual mission of the church and that job specifications required choir director to be educated in religion and serve as a spiritual leader).

427. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1291 (9th Cir. 2010) (discussing tests adopted by other circuits and stating that the Ninth Circuit had declined to adopt one).

The circuit courts have not adopted a uniform general test for making the determination that an employee qualifies under the ministerial exception. Some

Fifth Circuit, where the exception originated before statutory codification, the court recommends three factors.[428] The first factor focuses on whether an employer made employment decisions related to the position at issue using primarily religious criteria.[429] The second factor involves whether "the plaintiff was qualified and authorized to perform the ceremonies of the Church."[430] In the third factor, the court considers whether the plaintiff " 'engaged in activities traditionally considered ecclesiastical or religious,' . . . including whether the plaintiff 'attends to the religious needs of the faithful.' "[431]

Other courts use different criteria. The Fourth Circuit adopted a primary duties test, which centers on whether the primary duties of the aggrieved employee advanced the mission of the religious institution.[432] Building on the primary duties test, a Wisconsin state court developed a test based on mission functionality.[433] This test analyzes "how important or closely linked the employee's work is to the fundamental mission of that organization."[434]

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courts utilize the "primary duties" test, which asks whether the employee's primary duties are religious in nature. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243–44 (10th Cir. 2010); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985). Others appear to use a version of the "primary duties" test, though without expressly adopting it. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 304 n.6, 307 n.10 (3d Cir. 2006); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991). At least one court has opted for a multi-factored consideration. *Starkman*, 198 F.3d at 175–77; *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1039–41 (7th Cir. 2006) (discussing several issues relevant to a multi-factored analysis).

428. *See Starkman*, 198 F.3d at 176. *But see Hosanna-Tabor*, 132 S. Ct. at 714 (Alito, J., concurring) ("The Fourth Circuit was the first to use the term 'ministerial exception' . . . .").

429. *Starkman*, 198 F.3d at 176.

430. *Id.*

431. *Id.* (quoting EEOC v. Sw. Baptist Theological Seminary, 651 F.2d 277, 284 (5th Cir. 1981) and EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980)).

432. *See Rayburn*, 772 F.2d at 1169 (citing Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUMBIA L. REV. 1514, 1545 (1979)). The *Rayburn* court held, "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.' " *Id.*

433. Coulee Catholic Sch. v. Labor and Indus. Review Comm'n, 768 N.W.2d 868 (Wis. 2009).

434. *Id.* at 882–83.

3. Limits on the Ministerial Exception

While numerous religious organizations have used the ministerial exception to defend themselves against discrimination suits brought by current and former employees, the defense is not absolute.[435] In *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, the Fourth Circuit concluded, "The ministerial exception does not insulate wholesale the religious employer from the operation of federal antidiscrimination statutes."[436] In *Petruska v. Gannon University*, the Third Circuit "agree[d] with the implied findings of [its] sister circuits that Congress would prefer a tailored exception to Title VII than a complete invalidation of the statute."[437]

4. Sexual Harassment, Tort, and Breach of Contract Claims Against Religious Employers

Investigations of sexual harassment claims made against ministers remain the one Title VII issue from which lower courts routinely decline to shield churches. In *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit held that a novice priest could pursue a sexual harassment charge against the church.[438] The *Bollard* court reasoned that free exercise rationales offered no support for an exception to Title VII.[439] The court stated, "The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs."[440] Given that determination, the court foresaw no danger that a sexual harassment action would permit the secular court to interfere in judgments "on questions of religious faith or doctrine."[441] Additionally, the court concluded, "The Jesuits' disavowal

435. *See, e.g.*, *Starkman*, 198 F.3d 173 (deciding a case involving an ADA claim); Combs v. Cent. Tex. Annual Conference of United Methodist Church, 173 F.3d 343, 345 (5th Cir. 1999) (ruling in a Title VII action); DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993) (resolving a defense against an ADEA claim); Ogugua v. Archdiocese of Omaha, No. 8:07CV471, 2008 WL 4717121, at *5 (D. Neb. Oct. 22, 2008) (footnotes omitted) ("This Court recognizes that religious employers, such as [the defendants], are free to discriminate on the basis of race, color, religion, sex, national origin, age, physical disability, and any other basis, with respect to the terms and conditions of employment of spiritual employees performing spiritual duties. A court cannot interfere in such decisions without becoming entangled in matters of religion in violation of the First Amendment's Establishment Clause.").

436. 213 F.3d 795, 801 (4th Cir. 2000).

437. 462 F.3d 294, 305–06 n.8 (3d Cir. 2006).

438. 196 F.3d 940, 950 (9th Cir. 1999).

439. *Id.* at 947.

440. *Id.*

441. *Id.*

of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines."[442] Instead of applying the ministerial exception, however, the court applied the *Sherbert* balancing test to evaluate whether Title VII's application would constitute an impermissible violation of the Free Exercise Clause.[443]

In a more recent sexual harassment case, *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit allowed a plaintiff to proceed with her claims.[444] The court reasoned that because Elvig had "stated narrower and thus viable sexual harassment and retaliation claims that do not implicate protected employment decisions" she could proceed with her claims without implicating the ministerial exception.[445]

This limitation on the exception is not exclusive to the Ninth Circuit. Another 2004 case, *Dolquist v. Heartland Presbytery*, relied on *Bollard* and the Ninth Circuit's reasoning to find that "the First Amendment does not preclude plaintiff from stating a claim for sexual harassment."[446] In *Dolquist*, the Kansas federal district court confirmed that "two state courts [New Jersey and Minnesota] have held that the First Amendment does not preclude ministers from suing for sexual harassment."[447]

Various circuits have also held churches accountable for breach of contract claims arising between the church and its ministerial staff. In *Rayburn v. General Conference of Seventh-day Adventists*, the Fourth Circuit reminded the parties that "churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts."[448] The court added, "Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."[449] Similarly, the D.C. Circuit in *Minker v. Baltimore Annual Conference of United Methodist Church* held that the plaintiff could proceed with a claim of breach of contract based on oral promises related to his employment opportunities within the church.[450]

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442. *Id.*
443. *Id.* at 948.
444. 375 F.3d 951, 953 (9th Cir. 2004).
445. *Id.*
446. 342 F. Supp. 2d 996, 1007 (D. Kan. 2004).
447. *Id.* at 1006 (citing McKelvey v. Pierce, 800 A.2d 840 (N.J. 2002) and Black v. Snyder, 471 N.W.2d 715 (Minn. Ct. App. 1991)).
448. 772 F.2d 1164, 1171 (4th Cir. 1985).
449. *Id.*
450. 894 F.2d 1354, 1359 (D.C. Cir. 1990).

The *Hosanna-Tabor* Court's disinclination to address the application of the ministerial exception in circumstances such as these only invites future appeals for the Court's resolution.[451] The *Hosanna-Tabor* Court admonished that the purpose of the ministerial exception is not only to protect terminations justified exclusively for religious reasons.[452] Therefore, one can imagine a breach of contract case that could implicate a "minister."[453] One may wonder whether even Title VII sexual harassment claims will survive in future cases against religious institutions.

5. The Future of the Ministerial Exception

Supreme Court approval of the ministerial exception leaves many open questions. Included among those questions are how courts will further apply the ministerial exception to Title VII and other antidiscrimination claims and which religious employees will be covered by the exception. Current interpretations of the exception give qualifying religious organizations a wide berth in making employment decisions. Any constriction of this latitude is more likely to come from congressional amendments to Title VII or other similar legislation than from courts.

CONCLUSION

Fewer Americans proclaim themselves affiliated with a particular religious organization today than they did historically.[454] According to a 2012 Pew poll, "One-fifth of the U.S. public—and a third of adults under 30—are religiously unaffiliated today, the highest percentages ever in Pew Research Center polling."[455] A 2012 Gallup poll confirmed, "In particular, the percentage of Americans who do not have a specific religious identity has increased, while the percentage who identify as Protestant or some

451. *See supra* Part II.C.2.

452. Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 (2012).

453. *See supra* notes 448–50 and accompanying text.

454. *See "Nones" on the Rise: One in Five Adults Have No Religious Affiliation*, Pew Research Ctr. (Oct. 9, 2012), http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx.

455. *Id.* For more information about religious affiliations in the United States, see the recently launched Digital Atlas of Am. Religion, http://religionatlas.org (last visited Oct. 8, 2014). A chart on this site indicates that at least 46% of Americans affiliate with some type of religion. *Largest Denominational Family per State: Rank Order, 2010*, Digital Atlas of Am. Religion, http://religionatlas.org/?page_id=44 (last visited Oct. 8, 2014).

other non-Catholic Christian religion has decreased."[456] However, the Gallup poll also noted, "Sixty-nine percent of American adults are very or moderately religious, based on self-reports of the importance of religion in their daily lives and attendance at religious services."[457] Thus, legal protection for religious workers, whether specifically affiliated or not, continues to serve a valuable function.

Protections for religious adherents and employers appear to remain strong in the United States. For example Stanford Law School just launched its Religious Liberty Clinic.[458] The *Hosanna-Tabor* case reconfirms the Court's commitment to the free exercise of religion, including that of religious organizations.[459] *Hobby Lobby* heralds the advent of religious protections from governmental interference for private, for-profit corporations as *persons* under the RFRA.[460] However, when compared to other recent Supreme Court decisions, the *Hosanna-Tabor* and *Hobby Lobby* cases may also suggest more jurisprudential respect for corporate, organizational mission and independence than for religious free exercise.[461] How the balance of rights between individual religious adherents, between religious corporations and the government, and between religious institutions and employees, will evolve in the future remains unclear. Recent cases suggest, however, that courts remain committed to the separation of church and state in the context of employment.

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456. Frank Newport, *Seven in 10 Americans Are Very or Moderately Religious*, GALLUP (Dec. 4, 2012), http://www.gallup.com/poll/159050/seven-americans-moderately-religious.aspx.

457. *Id.* For a more general and fascinating discussion of modern trends, see ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 132 (2012).

458. Leslie A. Gordon, *Does a Prisoner Have a Right to a Mohel? Stanford's New Clinic Takes on Religious Liberties Cases*, A.B.A. J., May 2013, at 12, 12.

459. Hosanna-Tabor Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

460. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

461. *Compare* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (finding that corporate political spending is a form of speech protected under the First Amendment), *with Hosanna-Tabor*, 132 S. Ct. 694 (finding that how religious groups select (or dismiss) their own members is protected by the Free Exercise Clause of the First Amendment). One analyst recently noted:

> In the eight years since Chief Justice Roberts joined the court, it has allowed corporations to spend freely in elections in the Citizens United case, has shielded them from class actions and human rights suits, and has made arbitration the favored way to resolve many disputes. Business groups say the Roberts court's decisions have helped combat frivolous lawsuits, while plaintiffs' lawyers say the rulings have destroyed legitimate claims for harm from faulty products, discriminatory practices and fraud.

Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 5, 2013, at B1.

A FEDERAL SOLUTION TO FOSTER CARE'S PSYCHOTROPIC DRUG CRISIS

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INTRODUCTION

Psychotropic drugs are a type of medication designed to influence mood and behavior by altering chemical levels in the brain.[1] The Food and Drug Administration (FDA) typically approves these drugs for use in adults, but doctors are free to prescribe them in whichever way their medical judgment directs.[2] When doctors prescribe an approved drug for an unapproved use, they are engaging in "off-label" prescribing.[3] It is estimated that up to 75% of psychotropic medication use in children is off-label.[4] Off-label use exposes children to a drug's side effects without assurance that the drug will effectively treat the condition for which it has been prescribed.[5] In fact, it has been observed that children "just don't get the robust benefit that many adults get" from treatment with psychotropic medication.[6] Little is known about how psychotropic drugs affect children in the short or long term, as liability issues often prevent funding of clinical trials involving children,[7] and the results of adult

1. Enjoli Francis, *Psychotropic Drugs: What Are They?*, ABC NEWS MED. UNIT (Dec. 2, 2011, 5:04 PM), http://abcnews.go.com/blogs/health/2011/12/02/what-you-need-to-know-about-psychotropic-drugs/.

2. C. Lindsay Devane, *Off-Label Prescribing of Drugs in Child and Adolescent Psychiatry*, *in* PHARMACOTHERAPY OF CHILD AND ADOLESCENT PSYCHIATRIC DISORDERS 25, 25–26 (David R. Rosenberg & Samuel Gershon eds., 3d ed. 2012).

3. *Id.*

4. Rick Nauert, *Psychotropic Medications Overused Among Foster Children*, PSYCHCENTRAL (Aug. 4, 2008), http://psychcentral.com/news/2008/08/04/psychotropic-medications-overused-among-foster-children/2688.html#.UrzBK7R5jCc.

5. *See* David Rubin et al., *Interstate Variation in Trends of Psychotropic Medication Use Among Medicaid-Enrolled Children in Foster Care*, 34 CHILD. & YOUTH SERVS. REV. 1492, 1493 (2012) (describing the controversy surrounding the use of atypical antipsychotics in children, given limited evidence of efficacy and emerging concerns about side effects).

6. Virginia Merritt, *View from the "Other Side": Why Child Psychiatrists Hate the* Rogers *Decision*, MASS. OFFICE OF THE CHILD ADVOCATE 14 (Aug. 8, 2000), http://www.mass.gov/childadvocate/docs/mcle-rogers-paper-dr-virginia-merritt.doc.

7. JOANNE SOLCHANY, PSYCHOTROPIC MEDICATION AND CHILDREN IN FOSTER CARE: TIPS FOR ADVOCATES AND JUDGES 1, 14 (2011), *available at* http://

studies cannot be extrapolated to children.[8] Best medical practice requires limiting the prescription of psychotropic medication to children to avoid interference with development.[9]

Psychotropic drugs are grouped into five classes: antidepressants, antianxiety drugs, mood stabilizers, antipsychotics, and stimulants.[10] Of most concern are antipsychotics, which are further divided into typical and atypical subtypes. Atypical antipsychotics, which the FDA has approved to treat severe illnesses like schizophrenia, are increasingly prescribed to address disruptive behaviors in children.[11] They have several dangerous side effects, including

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www.americanbar.org/content/dam/aba/administrative/child_law/PsychMed.authcheckdam.pdf; M. Lynn Crismon & Tami Argo, *The Use of Psychotropic Medication for Children in Foster Care*, 88 CHILD WELFARE 71, 73 (2009); Merritt, *supra* note 6, at 16.

8. MEDICAID MED. DIRS. LEARNING NETWORK & RUTGERS CTR. FOR EDUC. & RESEARCH ON MENTAL HEALTH THERAPEUTICS, ANTIPSYCHOTIC MEDICATION USE IN MEDICAID CHILDREN AND ADOLESCENTS: REPORT AND RESOURCE GUIDE FROM A 16-STATE STUDY 12 (2010) [hereinafter RUTGERS STUDY], *available at* http://rci.rutgers.edu/~cseap/MMDLNAPKIDS/Antipsychotic_Use_in_Medicaid_Children_Report_and_Resource_Guide_Final.pdf; *see also* MELISSA D. CARTER, GEORGIA PSYCHOTROPIC MEDICATION MONITORING PROJECT 19 (2012), *available at* http://bartoncenter.net/uploads/PsychMedsProject/GAPsychotropicMedMonitoProjReport_FINAL.pdf ("[C]hildren have adverse reactions [to psychotropic drugs] that differ from adult reactions, depending on the maturity of their organ and metabolic systems."); Christopher Bellonci & Tricia Henwood, *Use of Psychotropic Medications in Child Welfare*, NAT'L RESOURCE CENTER FOR PERMANENCY & FAMILY CONNECTIONS 10, http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/ppt/Psychotropic-Medications.ppt (last visited Nov. 2, 2014) (listing "[m]edications that were safe for use in adults that had unanticipated side-effects for children").

9. Angela Olivia Burton, *"They Use It Like Candy": How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT'L L. 453, 467 (2010); Mary Margaret Gleason et al., *Psychopharmacological Treatment for Very Young Children: Contexts and Guidelines*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1532, 1535 (2007); *see also* CAROLE KEETON STRAYHORN, TEXAS HEALTH CARE CLAIMS STUDY—SPECIAL REPORT ON FOSTER CHILDREN 76 (2006) [hereinafter STRAYHORN, TEXAS HEALTH CARE CLAIMS STUDY], *available at* http://psychrights.org/states/Texas/hccfoster06.pdf (noting that caution is recommended because the effects of psychotropic drugs on "learning, cognition, growth, and development" are unknown); Mark Abdelmalek et al., *New Study Shows U.S. Government Fails to Oversee Treatment of Foster Children with Mind-Altering Drugs*, ABC NEWS (Nov. 30, 2011), http://abcnews.go.com/US/study-shows-foster-children-high-rates-prescription-psychiatric/story?id=15058380&singlePage=true ("The general consensus is that when you're treating young children, you always try behavioral intervention before you go to medication.").

10. *Categories of Psychiatric Medications*, STANFORD SCH. OF MED., http://whatmeds.stanford.edu/medications/categories.html (last visited Jan. 13, 2014).

11. SHEILA A. PIRES ET AL., FACES OF MEDICAID: EXAMINING CHILDREN'S BEHAVIORAL HEALTH SERVICE UTILIZATION AND EXPENDITURES 61 (2013) (claiming that

rapid weight gain, type 2 diabetes, menstrual irregularities, pituitary tumors, liver function abnormalities, and irreversible facial tics.[12] Consequently, atypical antipsychotics are generally considered a last resort, to be used only after non-pharmaceutical interventions like therapy have been tried and found inadequate.[13]

Recent years have seen a general increase in the number of children treated with psychotropic drugs, but children in foster care have been particularly vulnerable to this trend.[14] This Note will begin by exploring the roots and extent of foster care's psychotropic medication crisis. It will then endorse a system of child welfare agency consent with "red flag" preconsent review as the best possible solution. It concludes by proposing that the federal government address this crisis by conditioning state access to federal funds on the use of red flag preconsent review.

I.
PRESSURES TO MEDICATE

Foster care's overreliance on psychotropic drugs can be traced to the fact that there are more pressures to medicate foster children than there are pressures against medicating them. Among the pressures to medicate are the foster child's behavior, the lack of a consistent interested party in the foster child's life, the growing number of primary care doctors prescribing psychotropic medication, the influence of drug manufacturers, a lack of patience or funds for alternative treatments, and the attitudes of foster parents and school personnel.

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atypical antipsychotics are "often used off-label for their sedating side effects"); Sandra G. Boodman, *Off-Label Use of Risky Antipsychotic Drugs Raises Concerns*, KAISER HEALTH NEWS (Mar. 12, 2012), http://www.kaiserhealthnews.org/stories/2012/march/13/off-label-use-of-risky-antipsychotic-drugs.aspx (interviewing a pediatrician who observed that antipsychotics "were typically prescribed to children to control disruptive behavior"); Rosanne Spector, *Evidence Lacking for Widespread Use of Costly Antipsychotic Drugs, Says Researcher*, INSIDE STANFORD MED. (Jan. 6, 2011), http://med.stanford.edu/ism/2011/january/antipsychotics.html (noting that atypical antipsychotics were originally approved to treat schizophrenia).

12. STRAYHORN, TEXAS HEALTH CARE CLAIMS STUDY, *supra* note 9, at vii; Spector, *supra* note 11.

13. Crismon & Argo, *supra* note 7, at 77.

14. *See* PIRES ET AL., *supra* note 11 ("Overall psychotropic medication use has increased two- to three-fold in the past 10 years, including among the very young and among privately insured children.").

A. The Foster Child's Behavior

Several factors converge to increase the likelihood that children in foster care will exhibit challenging behaviors. They may have suffered neglect or abuse at the hands of their biological parents, causing them lasting emotional damage.[15] They may also have family histories of mental illness, raising the risk that they themselves will suffer from mental illness.[16] Most significantly, many have been separated from their families of origin and placed with strangers. The trauma associated with separation can create feelings of sadness, rage, or fear that lead foster children to suffer from behavioral disturbances.[17]

Trouble arises when doctors try to affix a diagnostic label to these feelings and behaviors. Doctors observing foster children may mistake normal emotional reactions to neglect, abuse, or separation for signs of a psychiatric disorder.[18] Lack of access to a foster child's family or medical history exacerbates this problem. One child and adolescent psychiatrist, remarking on the difficulties of evaluating foster children, noted that doctors must often make de-

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15. *See* ADVISORY COMM. ON PSYCHOTROPIC MEDICATIONS, TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., THE USE OF PSYCHOTROPIC MEDICATIONS FOR CHILDREN AND YOUTH IN THE TEXAS FOSTER CARE SYSTEM 25 (2004), *available at* http://www.dfps.state.tx.us/documents/Child_Protection/pdf/Advisory_Committe_Report_on_Psych_Meds_Sept_2004.pdf (expressing concern that "there will be an over-reliance upon medications to control the child's behaviors that stem from . . . abuse or neglect").

16. *See* N.Y. OFFICE OF CHILDREN & FAMILY SERVS., INFORMATIONAL LETTER NO. 08-OCFS-INF-02, THE USE OF PSYCHIATRIC MEDICATIONS FOR CHILDREN AND YOUTH IN PLACEMENT—AUTHORITY TO CONSENT TO MEDICAL CARE (Feb. 13, 2008), *available at* http://ocfs.ny.gov/main/policies/external/OCFS_2008/INFs/08-OCFS-INF-02%20The%20Use%20of%20Psychiatric%20Medications%20for%20Children%20and%20Youth%20in%20Placement%20-%20Authority%20to%20Consent%20to%20Medical%20Care.pdf ("Children in care often have biological . . . risk factors that predispose them to emotional and behavioral disturbances.").

17. Editorial, *The Drugging of Foster Youth*, SFGATE (June 11, 2006), http://www.sfgate.com/opinion/editorials/article/The-drugging-of-foster-youth-2494981.php.

18. *See* PHARMACY & THERAPEUTICS COMM., TENN. DEP'T OF CHILDREN'S SERVS., PSYCHOTROPIC MEDICATION UTILIZATION PARAMETERS FOR CHILDREN IN STATE CUSTODY 2, *available at* http://www.tn.gov/youth/dcsguide/policies/chap20/PsychoMedUtilGuide.pdf (noting that foster children often exhibit symptoms "reflective of past traumatic and reactive attachment difficulties" that "mimic many overlapping psychiatric disorders"); ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., IM-12-03, PROMOTING THE SAFE, APPROPRIATE, AND EFFECTIVE USE OF PSYCHOTROPIC MEDICATION FOR CHILDREN IN FOSTER CARE 4 (Apr. 11, 2012), *available at* https://www.acf.hhs.gov/sites/default/files/cb/im1203.pdf ("Children in foster care are more likely to have a mental health diagnosis than other children.").

cisions as to diagnosis and treatment based on behavioral symptoms alone.[19] The end result is the unnecessary medication of many "fundamentally normal children" who are simply reacting to extraordinary events in their lives.[20]

B. Lack of a Consistent Interested Party

Overuse of psychotropic drugs can also be attributed to the lack of a consistent interested party in the lives of most foster children. The presence of an adult who could observe the child's behavior, accompany the child to medical appointments, provide or withhold consent to treatment with psychotropic drugs, and monitor the effects of such drugs would go a long way toward stemming the crisis.[21] Unfortunately, most foster children "have no natural advocates or allies."[22] Their biological parents are frequently uninvolved in their lives, either by choice or otherwise; their caseworkers are overburdened and unable to invest significant resources in any one child; and many foster children are unable to establish meaningful relationships with substitute caretakers due to frequent placement changes.[23] The risk of overmedication is at its highest when none of the adults involved in a foster child's care takes full responsibility for the child's welfare.[24]

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19. *The Watch List: The Medication of Foster Children* (PBS television broadcast Jan. 7, 2011) (interviewing Dr. Fernando Siles, Child & Adolescent Psychiatrist), *available at* http://www.pbs.org/wnet/need-to-know/health/video-the-watch-list-the-medication-of-foster-children/6232/.

20. CAROLE KEETON STRAYHORN, FORGOTTEN CHILDREN 199 (2004) [hereinafter STRAYHORN, FORGOTTEN CHILDREN]; *see also* Burton, *supra* note 9, at 495 (claiming that children in foster care are likely to be prescribed psychotropic medication to control "feelings that are not excessive or out of proportion to the child's real life experiences"); David Crary, *A Dilemma: Medications for Foster Kids*, BOSTON.COM (Mar. 13, 2007), http://www.boston.com/news/nation/articles/2007/03/13/a_dilemma_medications_for_foster_kids/ ("Children who are having normal reactions to the trauma of being separated from their families are often misdiagnosed or overdiagnosed as suffering from psychiatric problems.").

21. Tracy Weber, *Caretakers Routinely Drug Foster Children*, L.A. TIMES, May 17, 1998, http://articles.latimes.com/1998/may/17/news/mn-50808 ("The only real solution is to have social workers with caseloads of 10 kids. The thing that's missing is to have someone in the parental role. Someone who shares the child's destiny.").

22. Michelle L. Mello, Note, *Psychotropic Medication and Foster Care Children: A Prescription for State Oversight*, 85 S. CAL. L. REV. 395, 398 (2012).

23. Maggie Brandow, Note, *A Spoonful of Sugar Won't Help This Medicine Go Down: Psychotropic Drugs for Abused and Neglected Children*, 72 S. CAL. L. REV. 1151, 1158 (1999).

24. *See The Financial and Societal Costs of Medicating America's Foster Children: Hearing Before the Subcomm. on Fed. Fin. Mgmt., Gov't Info., Fed. Servs. & Int'l Sec. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 64 (2011) [hereinaf-

C. Primary Care Physicians

Over the last decade, there has been an increase in the number of primary care physicians writing psychotropic prescriptions for foster children.[25] This phenomenon, partly attributable to a nationwide shortage of child and adolescent psychiatrists,[26] is worrisome because the typical primary care physician has little training in psychiatry.[27] Even if primary care physicians understand the risks associated with psychotropic drugs, they may be unfamiliar with the Practice Parameters issued by the American Academy of Child and Adolescent Psychiatry (AACAP).[28] The AACAP Practice Parameters are designed to guide physicians writing prescriptions for psychotropic medications. In particular, they advise on the use of multiple psychotropic drugs in one patient, or polypharmacy,[29] and give detailed recommendations on how best to monitor side effects.[30] Because primary care physicians are unlikely to understand the complex considerations that should go into prescribing a psychotropic drug, they are not only more likely to prescribe in the first

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ter *2011 Hearing*] (statement of Gregory D. Kutz, Director of Forensic Audits & Investigative Services) (observing that foster children lack "a consistent caretaker to plan treatment, offer consent, and provide oversight"); Laurel K. Leslie et al., *States' Perspectives on Medication Use for Emotional and Behavioral Problems among Children in Foster Care*, NAT'L RESOURCE CENTER FOR PERMANENCY & FAMILY CONNECTIONS 4 (Feb. 2010), http://nrcpfc.org/teleconferences/2-10-10/L%20Leslie%20medication%20powerpoint.ppt (claiming that the psychotropic drug problem is exacerbated by the "lack of a designated, consistent individual . . . to monitor [the foster child's] care").

25. *See Are Too Many Kids Taking Antipsychotic Drugs?*, CONSUMER REPORTS (Dec. 2013), http://www.consumerreports.org/cro/2013/12/are-too-many-kids-taking-antipsychotic-drugs/index.htm ("The number of prescriptions for [antipsychotic] drugs written by pediatricians has increased steadily over the last several years and is up nearly 25 percent since 2006.").

26. Crary, *supra* note 20.

27. Brandow, *supra* note 23, at 1175; Weber, *supra* note 21.

28. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, PRACTICE PARAMETERS FOR THE USE OF ATYPICAL ANTIPSYCHOTIC MEDICATIONS IN CHILDREN AND ADOLESCENTS (2011) [hereinafter AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, PRACTICE PARAMETERS], *available at* http://www.aacap.org/App_Themes/AACAP/docs/practice_parameters/Atypical_Antipsychotic_Medications_Web.pdf; *see also* Brandow, *supra* note 23, at 1175 (emphasizing that "general practitioners . . . may not have sufficient specialized training" in psychiatry).

29. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, PRACTICE PARAMETERS, *supra* note 28, at 12.

30. *Id.* at 12–14.

place, but also more likely to prescribe combinations of medications and less likely to properly monitor side effects.[31]

D. Drug Manufacturers

The problem of improper use of psychotropics does not disappear even when a child and adolescent psychiatrist writes the prescription. Pharmaceutical companies' marketing techniques pressure doctors of all kinds into writing unnecessary prescriptions.[32] The influence of manufacturers can be seen in the studies evaluating the efficacy of new drugs. By funding these studies themselves or training sales representatives to spin study results in the most positive light, pharmaceutical companies routinely mislead doctors into believing that drugs are less dangerous and more effective than the available evidence warrants.[33] In the most severe cases, drug manufacturers give kickbacks to doctors who prescribe their products.[34]

Psychotropic drugs, especially antipsychotics, have become particularly important moneymakers for pharmaceutical companies. Annual U.S. sales of antipsychotics rose from $2.8 billion in 2003 to $18.2 billion in 2011.[35] The growing popularity of these drugs is

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31. Mark Olfson et al., *National Trends in the Office-Based Treatment of Children, Adolescents, and Adults with Antipsychotics*, 69 ARCH. GEN. PSYCHIATRY 1247, 1254 (2012) (linking an increase in antipsychotic use among children and adolescents to prescriptions by "nonpsychiatrist physicians"); Boodman, *supra* note 11 (attributing the misuse of antipsychotics to "the growing number of non-psychiatrists prescribing them"); *see also* KAREN WORTHINGTON, PSYCHOTROPIC MEDS FOR GEORGIA YOUTH IN FOSTER CARE: WHO DECIDES? 3 (2011), *available at* http://www.ct.gov/dcf/lib/dcf/behavorial_health_medicine/pdf/georgia_article_foster_care.pdf (arguing that the dearth of evidence on the long-term effects of psychotropic medication "dictate[s] . . . specialized expertise when it comes to giving medications to children").

32. Ellen L. Blank & D. Micah Hester, *Industry Representatives, Gift-Giving, and Conflicts of Interest*, *in* CLINICAL ETHICS IN PEDIATRICS 215, 216 (Douglas S. Diekema et al. eds., 2011) (reporting that "multiple studies have shown that the prescribing practices of both residents and veteran practitioners are affected by [the marketing] practices of the medical industry").

33. *See* Michael Sernyak & Robert Rosenheck, *Experience of VA Psychiatrists with Pharmaceutical Detailing of Antipsychotic Medications*, 58 PSYCHIATRIC SERVICES 1292, 1295–96 (2007) (concluding that some assertions made by sales representatives were inconsistent with FDA-approved package inserts); Boodman, *supra* note 11 (describing how marketing campaigns "affect the whole information stream" available to prescribing physicians).

34. Jessica Setless, Note, *The Crisis of Over-Medicating Children in Foster Care: Legal Reform Recommendations for New York*, 19 CARDOZO J.L. & GENDER 609, 618–20 (2013).

35. *Are Too Many Kids Taking Antipsychotic Drugs?*, *supra* note 25.

largely attributable to a surge in the number of doctors prescribing antipsychotics for off-label use.[36] One study discovered an increase from 4.4 million off-label antipsychotic prescriptions in 1995 to 9 million such prescriptions in 2008.[37] It is estimated that, for atypical antipsychotics, off-label use now accounts for the majority of prescriptions.[38]

The growth in off-label use stems from the marketing tactics of pharmaceutical companies. Proponents of off-label prescribing argue that it is necessary to the practice of child and adolescent psychiatry, given the reliability with which psychiatric disorders can be diagnosed in children and the obstacles standing in the way of conducting pediatric clinical trials.[39] It is undeniable, however, that drug manufacturers have pushed the practice of off-label prescribing past its justifiable limits. Even though the FDA prohibits manufacturers from advertising possible off-label uses of their products,[40] this rule is routinely violated; several of the major players in the atypical antipsychotics market have come under investigation for questionable marketing practices.[41]

The dangerous influence exercised by drug manufacturers is a widely recognized, but difficult to eradicate, problem. Investigations in Texas, Minnesota, and Vermont have found numerous financial ties between psychiatrists treating foster children and pharmaceutical companies.[42] Efforts to address the problem, like the Texas Medication Algorithm Project (TMAP), may become coopted by the pharmaceutical industry. TMAP, designed to aid Texas doctors through the development of a list of recommended psychotropic medications, was plagued by accusations of favoritism toward

36. *See id.* (attributing the increased popularity of antipsychotic drugs in part to pharmaceutical companies' "aggressive promotion of off-label uses in children"); *see also* Boodman, *supra* note 11 (claiming that antipsychotic drugs are often prescribed to treat "problems of living" because "doctors have gotten it into their heads that this is an acceptable use").

37. G. C. Alexander et al., *Increasing Off-Label Use of Antipsychotic Medications in the United States, 1995–2008*, 20 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 177, 177 (2011).

38. Stephen Crystal et al., *Broadened Use of Atypical Antipsychotics: Safety, Effectiveness, and Policy Challenges*, 28 HEATH AFF. 770, 771 (2009).

39. Devane, *supra* note 2, at 27, 31.

40. *Id.* at 34.

41. Sernyak & Rosenheck, *supra* note 33; Spector, *supra* note 11.

42. Emily Ramshaw, *Some Texas Foster Kids' Doctors Have Ties to Drug Firms*, DALLAS MORNING NEWS, Aug. 17, 2008, http://www.mindfreedom.org/kb/youth-mental-health/foster-care-psychiatric-drugs/dallas-morning-news-texas.

companies that had supported the project and has been discontinued.[43]

E. Appeal and Availability of Alternative Treatments

Absent the influence of drug manufacturers, foster children would still face the risk of overmedication. Even assuming every participant in the sequence of events leading up to the administration of psychotropic drugs to a foster child had pure intentions, human nature as well as financial and time constraints would remain obstacles to appropriate mental health treatment.

It is human nature to choose a seemingly quick, simple solution over a slower, more difficult one. Non-pharmaceutical interventions, though demonstrated to be effective,[44] are perceived to be too time-consuming.[45] A foster child's caretakers want to see immediate changes in problematic behaviors.[46] Though a pill may carry the risk of side effects, it appears to promise instant improvement. Therapy, on the other hand, only creates gradual change.[47]

This is assuming that there is even a choice between medication and therapy. Too often, medication is the only option for adults seeking to address a foster child's mental health issues. There is a nationwide shortage of professionals qualified to administer therapy to children and adolescents: it is estimated that the United States needs 30,000 child and adolescent psychiatrists but only has 7000.[48] Even if a child and adolescent psychiatrist can be located, the doctor may refuse to accept the foster child as a pa-

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43. *The Watch List: The Medication of Foster Children*, *supra* note 19.

44. Jacqueline A. Sparks & Barry L. Duncan, *The Ethics and Science of Medicating Children*, 6 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 25, 31 (2004).

45. Weber, *supra* note 21 ("The doctors don't have time to make an assessment. The fastest thing is to use chemical straitjackets on the kids . . . .").

46. *See Prescription Psychotropic Drug Use among Children in Foster Care: Hearing Before the Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means*, 110th Cong. 51 (2008) [hereinafter *2008 Hearing*] (statement of Misty Stenslie, Deputy Director, Foster Care Alumni of America) (arguing that "medication is used as a chemical restraint for children whose behavior get[s] out of control"); Kimber E. Strawbridge, *The Children Are Crying: The Need for Change in Florida's Management of Psychotropic Medication to Foster Children*, 15 U.C. DAVIS J. JUV. L. & POL'Y 247, 270 (2011) (lamenting that "therapy is often a secondary recommendation after prescribing a quick-fix medication to control mood and problematic behavior").

47. *See Are Too Many Kids Taking Antipsychotic Drugs?*, *supra* note 25 ("There's a societal trend to look for the quick fix, the magic bullet that will correct disruptive behaviors.").

48. *2011 Hearing*, *supra* note 24, at 160 (statement of the National Alliance on Mental Illness).

tient. Most children in foster care are insured through Medicaid,[49] and low Medicaid reimbursement rates discourage psychiatrists from treating foster children.[50] Finally, even if a foster child's caretakers succeed in finding a child and adolescent psychiatrist who accepts Medicaid, it is unlikely the doctor will provide effective nonpharmaceutical intervention. Some doctors with high caseloads will resort to drugs instead of time-consuming therapy out of necessity.[51] Others will choose the same strategy out of self-interest, recognizing that they can take on more patients by writing prescriptions than they can by offering therapy.[52] Whatever the reason, the result is the same: it is unlikely caretakers interested in therapy as an alternative to medication will be able to access that type of treatment.[53]

F. Foster Parents

Unfortunately, much of the pressure to medicate foster children comes from the adults charged with their daily care. Foster parents often bear the brunt of the child's behavioral problems and pursue psychotropic drugs as a possible solution.[54] Though some foster parents manage to forge loving bonds with their foster children, many lack the true parental concern a biological parent would possess.[55] Consequently, they are more likely to turn to psychotropic drugs to control situations that a biological parent would tolerate without pharmaceutical help.[56] They may use medi-

49. KAMALA D. ALLEN & TAYLOR HENDRICKS, MEDICAID AND CHILDREN IN FOSTER CARE 1 (2013), *available at* http://www.childwelfaresparc.files.wordpress.com/2013/03/medicaid-and-children-in-foster-care.pdf.

50. Strawbridge, *supra* note 46, at 271.

51. *See* Ramshaw, *supra* note 42.

52. *The Watch List: The Medication of Foster Children*, *supra* note 19; *see also* Crary, *supra* note 20 (claiming that psychiatrists have financial incentives to prescribe medication).

53. *See* STRAYHORN, TEXAS HEALTH CARE CLAIMS STUDY, *supra* note 9, at xiii (revealing that foster children who would benefit from therapy typically receive it inconsistently or not at all).

54. Brandow, *supra* note 23.

55. *See id.* ("While some substitute caretakers may form close emotional bonds with their foster children, many have little emotional bond with them but significant financial interest in them.").

56. *See* Strawbridge, *supra* note 46, at 267 (arguing that "foster parents . . . often do not understand the child's behavior as a parent would"); April Hunt, *Georgia Foster Kids Medicated at High Rates*, ATLANTA JOURNAL-CONSTITUTION, Feb. 23, 2011, http://www.ajc.com/news/news/local/georgia-foster-kids-medicated-at-high-rates/nQqqp/ (claiming that psychotropic drugs are often used "to make the child more docile for caregivers").

cation to sedate the child or to reduce outbursts rather than to treat a true mental illness.[57]

There are also financial incentives for foster parents to administer psychotropic drugs. Federal law requires state child welfare systems to make reimbursement payments to individuals caring for a foster child.[58] Some states make larger payments to foster parents caring for children who are taking psychotropic medications or who have been diagnosed with a mental illness.[59] Unfortunately, this has led some foster parents to needlessly medicate children in order to receive larger reimbursement payments.[60] Whether foster parents are motivated by financial concerns or are just trying to manage a child with problematic behaviors, they are likely to turn to psychotropic drugs for help.

G. School Personnel

Foster parents are not the only adults in a foster child's life who are likely to urge the use of psychotropic medication. Teachers and school officials, struggling to control a disruptive foster child, may come to view psychotropic drugs as a classroom management

57. *See* LAUREL K. LESLIE ET AL., MULTI-STATE STUDY ON PSYCHOTROPIC MEDICATION OVERSIGHT IN FOSTER CARE 4 (2010) [hereinafter LESLIE ET AL., MULTI-STATE STUDY], *available at* http://tuftsctsi.org/~/media/Files/CTSI/Library%20Files/Psychotropic%20Medications%20Study%20Report.ashx (reporting that there is "pressure from foster parents to decrease behavioral issues in order to keep children in foster homes"); STRAYHORN, FORGOTTEN CHILDREN, *supra* note 20, at 206 (presenting anecdotal evidence that foster parents seek out psychotropic medication to "make [foster children] more submissive").

58. DIANE DEPANFILIS ET AL., HITTING THE M.A.R.C. 1 (2007), *available at* http://www.childrensrights.org/wp-content/uploads/2008/06/hitting_the_marc_summary_october_2007.pdf.

59. *See, e.g.*, STRAYHORN, FORGOTTEN CHILDREN, *supra* note 20, at 206 (noting that Texas's Department of Protective and Regulatory Services provides more funding for children with greater needs).

60. *See id.* (presenting anecdotal evidence that foster parents seek out psychotropic medication to "draw down more financial reimbursement for the [foster child's] care"); A. Rachel Camp, *A Mistreated Epidemic: State and Federal Failure to Adequately Regulate Psychotropic Medications Prescribed to Children in Foster Care*, 83 TEMP. L. REV. 369, 386–87 (2011) (noting that "[p]sychotropic medications appear to be one way of qualifying for an enhanced rate of payment"); Setless, *supra* note 34, at 615 (pointing out that foster parents have a financial incentive to place the child on psychotropic medication). *But see* TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., EXAMINING THE FOSTER CARE REIMBURSEMENT SYSTEM AND THE IMPACT ON THE PRESCRIBING OF PSYCHOTROPIC MEDICATION 8 (2006), *available at* http://www.dfps.state.tx.us/Documents/about/pdf/2006-10-02_Psychotropic.pdf (concluding that service level determinations are not based on the number of psychotropic drugs the foster child is taking).

tool.[61] They may even refuse to let a foster child attend school unless he or she begins taking medication for behavioral issues.[62] This problem became so pervasive that Congress addressed it in the 2004 Individuals with Disabilities Education Act Reauthorization (IDEA Reauthorization 2004). IDEA Reauthorization 2004 prohibits public school officials from "requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school."[63] Covered substances include stimulants like Ritalin or Adderall.[64] However, teachers are not prohibited from "consulting or sharing classroom-based observations with parents or guardians regarding a student's . . . behavior in the classroom or school,"[65] leaving school personnel opportunities to pressure caretakers to administer psychotropic medication.

H. Conclusion

The fundamental challenge facing foster children is that the parties charged with making medical decisions for them are not always emotionally invested in them. Children entering foster care are more likely than other children to suffer from emotional and behavioral issues, whether because of neglect, abuse, or the trauma associated with removal from home. Foster parents, not paying as much attention to the dangers associated with psychotropic drugs as a biological parent would, look to doctors for help. Doctors, probably undertrained in child and adolescent psychiatry and influenced by the marketing techniques of the pharmaceutical industry, write prescriptions, sometimes for dangerous combinations of drugs. Dr. Euthymia Hibbs, chief of psychosocial treatment research for children and adolescents at the National Institutes of Health, neatly summarized the situation: "Putting kids on medication is easier for the people who care for them . . . . It is more convenient for everyone around—[except for] the kids."[66]

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61. *See* GABRIEL MYERS WORK GROUP, REPORT OF GABRIEL MYERS WORK GROUP 11 (2009), *available at* http://www.dcf.state.fl.us/initiatives/gmworkgroup/docs/GabrielMyersWorkGroupReport082009Final.pdf; Connie Lenz, *Prescribing a Legislative Response: Educators, Physicians, and Psychotropic Medication for Children*, 22 J. CONTEMP. HEALTH L. & POL'Y 72, 84 (2005).

62. LESLIE ET AL., MULTI-STATE STUDY, *supra* note 57.

63. 20 U.S.C. § 1412(a)(25)(A) (2006).

64. BOB JACOBS, LEGAL STRATEGIES TO CHALLENGE CHEMICAL RESTRAINT OF CHILDREN IN FOSTER CARE 7 (2006), *available at* http://www.guardianadlitem.org/documents/LegalStrategiestoChallengeChemicalRestraintofChildreninFosterCare.pdf.

65. 20 U.S.C. § 1412(a)(25)(B).

66. Weber, *supra* note 21.

II.
PRESSURES AGAINST MEDICATING

There are pressures against the overmedication of foster children, including negative media attention and class actions. Critics of a national legislative solution to foster care's psychotropics problem might argue that the media and class actions can adequately address the issue on the state level: where abusive prescription practices are particularly egregious, the local media will draw attention to the problem and child advocacy groups will file lawsuits, spurring the necessary reforms. However, negative media attention and class actions are not capable of producing permanent changes everywhere they are required, suggesting a need for federal legislative action.

A. Negative Media Attention

The ill-advised use of psychotropic drugs in foster care occasionally comes to the attention of the media. The death of Gabriel Myers, for example, touched off a media firestorm in Florida in 2009.[67] Myers was a seven-year-old foster child who hanged himself while taking several psychotropic drugs whose side effects included increased risk of suicide.[68] The uproar led to the formation of a task force to study what went wrong in Myers' case and to make recommendations for statewide reform.[69] A bill was introduced in the Florida Senate that would have tightened restrictions on the psychotropic drugs administered to foster children age ten or younger.[70] The bill survived committee review in the Senate but failed to garner enough support to make it through Florida's House of Representatives.[71]

Incidents like Myers' suicide illustrate why the media cannot be an effective agent of change on the psychotropic drug issue. First, the media only pays attention after a terrible tragedy occurs.[72] My-

67. Edecio Martinez, *After 7-Year-Old Gabriel Myers' Suicide, Fla. Bill Looks to Tighten Access to Psychiatric Drugs*, CBS NEWS (Mar. 17, 2010, 6:17 AM), http://www.cbsnews.com/news/after-7-year-old-gabriel-myers-suicide-fla-bill-looks-to-tighten-access-to-psychiatric-drugs/.

68. GABRIEL MYERS WORK GROUP, *supra* note 61, at 3.

69. Martinez, *supra* note 67.

70. *Id.*

71. Dara Kam, *House Won't Make It Harder for State to Put Foster Kids on Psych Drugs*, PALM BEACH POST ON POLITICS BLOG (Feb. 9, 2012, 6:30 PM), http://postonpolitics.blog.palmbeachpost.com/2012/02/09/house-wont-make-it-harder-for-state-to-put-foster-kids-on-psych-drugs/.

72. *See* Camp, *supra* note 60, at 374 (arguing that "growing media coverage of high profile cases involving children in foster care receiving psychotropic medica-

ers' caretakers were inappropriately administering psychotropic medication for years before he took his own life, but this was not deemed worthy of media coverage.[73] Second, media attention can prompt policymakers to begin thinking about reform, but it cannot ensure that they will follow through after the spotlight is gone. In Myers' case, the initial burst of media coverage caused Florida politicians to introduce a bill addressing the medication problem, but it was not enough to secure the bill's passage in the legislature.[74] While the media can be a good resource for drawing attention to the psychotropic drug problem, it is not capable of solving the problem.

B. Class Actions

Class actions have shown some potential as a tool to address the psychotropic drug crisis. If a state's foster care system has deep structural flaws that are hurting the children in its custody, an advocacy group may file a lawsuit on the children's behalf seeking reform. For example, the national advocacy group Children's Rights filed suit against Tennessee in 2000.[75] The complaint alleged, among other things, that the state was inappropriately medicating foster children with psychotropic drugs.[76] The settlement that was eventually reached mandated the appointment of a medical director to oversee the administration of psychotropic medication to children in state custody.[77] In the years since the settlement, Tennessee has developed a stringent review system that has produced measurable reductions in the number of foster children taking psychotropic drugs.[78] Individuals involved in the system's creation

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tions at extremely young ages, at extremely high rates, or with devastating results" has prompted reform); Crary, *supra* note 20 (observing that states take action on psychotropic drugs in response to "overdose tragedies" or "damning investigations").

73. GABRIEL MYERS WORK GROUP, *supra* note 61, at 4.

74. Kam, *supra* note 71.

75. Complaint, Brian A. *ex rel.* Brooks v. Sundquist, 149 F. Supp. 2d 941 (M.D. Tenn. 2000) (No. 300-0445), *available at* http://www.childrensrights.org/wp-content/uploads/2008/06/2000-05-10_tn_briana_complaint.pdf; *Tennessee (Brian A. v. Haslam)*, CHILDREN'S RIGHTS, http://www.childrensrights.org/reform-campaigns/legal-cases/tennessee/ (last visited Jan. 14, 2014).

76. Complaint, *supra* note 75, at 35.

77. CHILDREN'S RIGHTS, INC., TENNESSEE FACT SHEET 7 (2009), *available at* http://www.childrensrights.org/wp-content/uploads//2010/02/2009-11-13_tn_brian_a_fact_sheet_final.pdf.

78. *See infra* Part IV.C.

have credited the Children's Rights lawsuit with spurring the needed reforms.[79]

Nevertheless, class actions are limited in their ability to produce change. Advocacy groups typically only show interest in bringing suits where problems are particularly egregious. In Tennessee, for instance, Children's Rights was moved to pursue the psychotropic drug issue in part because of an incident in which a foster child almost threw himself off a roof during a medication-induced hallucination.[80] Addressing only the extremely shocking incidents of psychotropic drug misuse leaves unprotected those foster children experiencing more routine, but no less real, abuses.

III.
EXTENT OF THE CURRENT CRISIS

Consistent with the previous analysis, the available evidence suggests that the pressure to medicate foster children vastly outweighs the pressure against medicating. The statistics are sufficiently alarming that they have inspired both private and public attempts to remedy the situation.

A. Statistics

Several states have commissioned studies to better understand the extent of the psychotropic medication crisis. Florida,[81] Tennessee,[82] and North Carolina[83] all found that about a quarter of children in foster care were taking at least one psychotropic drug. In Georgia, 32.5% of foster children had a prescription for a psychotropic,[84] as did 35% of children in Utah.[85] Texas discovered that 37.9% of its foster children were on psychotropic medication,[86]

79. *2008 Hearing*, *supra* note 46, at 22 (statement of Tricia Lea, Director of Medical & Behavioral Services, Tennessee Department of Children's Services).

80. Complaint, *supra* note 75, at 35.

81. Carol Marbin Miller, *1 in 4 Foster Kids on Risky Mind Medication*, MIAMI HERALD, Jan. 15, 2005, at 1A.

82. Bellonci & Henwood, *supra* note 8, at 33.

83. Kevin Kelley et al., *Monitoring and Oversight of Psychotropic Medications for Children in Foster Care in North Carolina*, FAMILY & CHILDREN'S RESOURCE PROGRAM 14 (Jan. 29, 2013), http://fcrp.unc.edu/pdfs/psychotropicmeds_webinar.pdf.

84. CARTER, *supra* note 8, at 12.

85. Julie S. Steele & Karen F. Buchi, *Medical and Mental Health of Children Entering the Utah Foster Care System*, 122 PEDIATRICS 703, 703 (2008).

86. Julie M. Zito et al., *Psychotropic Medication Patterns Among Youth in Foster Care*, 121 PEDIATRICS 157, 158 (2008).

while the figure in Iowa was 42%.[87] Maryland, Delaware, California, and Pennsylvania have also reported high rates of psychotropic drug use in their foster care populations.[88]

The numbers also revealed that many foster children were concurrently prescribed more than one medication. More than 6% of North Carolina foster children were prescribed two psychotropics and almost 9% were prescribed three or more.[89] One in ten Florida foster children were taking three drugs simultaneously.[90] Among Texas foster children receiving psychotropic medication, 41% received three or more different classes of drugs and almost 16% received four or more different classes.[91] Among Utah foster children prescribed a psychotropic, 42% were prescribed more than two medications.[92] Almost 5% of Georgia foster children taking psychotropics received at least four different drugs.[93]

The statistics are dramatically worse when compared to the numbers for children outside the foster care system. Most studies identify the rates of psychotropic medication use in state foster care populations at between 13% and 37%, as compared to 4% for children in the general population.[94] One study estimated that children in foster care are sixteen times more likely to receive a prescription for a psychotropic drug than are non-foster children.[95]

Skeptics question the value of comparing children in foster care to children in the general population, theorizing that the higher medication rates can be explained through the greater prevalence of mental illness and behavioral problems in the foster care population.[96] However, studies comparing children enrolled in

87. PUB. POLICY CTR., UNIV. OF IOWA, HEALTH POLICY BRIEF: A STUDY OF IOWA'S CHILDREN IN FOSTER CARE 3 (2004), *available at* http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1003&context=ppc_health.

88. *2008 Hearing*, *supra* note 46, at 9 (statement of Julie M. Zito, Professor of Pharmacy & Psychiatry, Pharmaceutical Health Services Research, University of Maryland).

89. Kelley et al., *supra* note 83.

90. Miller, *supra* note 81.

91. Zito et al., *supra* note 86, at 157.

92. Chris Chytraus & Navina Forsythe, *Psychotherapeutic Medication Report on Utah's Foster Care Clients*, 15 UTAH'S HEALTH: AN ANN. REV. 21, 21 (2010).

93. CARTER, *supra* note 8, at 12.

94. Lisa Hunter Romanelli et al., *Best Practices for Mental Health in Child Welfare: Screening, Assessment, and Treatment Guidelines*, 88 CHILD WELFARE 163, 184 (2009).

95. Sparks & Duncan, *supra* note 44, at 25.

96. *See, e.g.*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 18, at 5 ("Although numerous studies have demonstrated that the rates of psychotropic medication prescriptions are high among children in foster care, these rates, at least in part, may reflect increased levels of

Medicaid show there is still cause for concern. There are three categories of children eligible for Medicaid: those who receive Temporary Assistance for Needy Families (TANF), those who receive Supplemental Security Income because of physical or mental disabilities (SSI/disability), and those who are in foster care.[97] A study working with 2005 Medicaid data from all fifty states concluded that foster children constituted about 3% of the Medicaid child population but almost 13% of the children taking psychotropic drugs.[98] Twenty-three percent of foster children, compared to 27% of SSI/disability children and 4% of TANF children, were on psychotropic medication.[99] Of those foster children being treated with psychotropic drugs, 42% were prescribed antipsychotics, compared to 42% of SSI/disability children and 18% of TANF children.[100] Almost half (48.7%) of foster children taking psychotropic drugs received two or more concurrent prescriptions, compared to 46.4% of SSI/disability children and 25.8% of TANF children.[101]

A Government Accountability Office study using 2008 Medicaid data from Florida, Massachusetts, Michigan, Oregon, and Texas found similar patterns. Foster children were 2.7 to 4.5 times more likely to be prescribed a psychotropic drug than their non-foster counterparts.[102] Foster children were also nine times more likely than other Medicaid-eligible children to be prescribed psychotropic drugs on an off-label basis.[103] In addition, foster children were at greater risk of taking multiple psychotropic drugs at one time.[104] The state with the greatest disparity was Texas, where children in care were fifty-three times more likely than non-foster children to be taking five or more psychotropic drugs simultaneously, followed by Massachusetts (nineteen times), Michigan (fifteen times), Oregon (thirteen times), and Florida (four times).[105]

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emotional and behavioral distress."); CTR. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., TRI-AGENCY LETTER ON APPROPRIATE USE OF PSYCHOTROPIC MEDICATIONS AMONG CHILDREN IN FOSTER CARE (Nov. 23, 2011), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SMD-11-23-11.pdf ("Research has clearly demonstrated that children known to the child welfare system are diagnosed with mental health disorders at a much higher rate than the general population.").

97. PIRES ET AL., *supra* note 11, at 8.
98. *Id.* at 62–63.
99. *Id.* at 61.
100. *Id.* at 67.
101. *Id.* at 66.
102. *2011 Hearing*, *supra* note 24, at 60.
103. Abdelmalek et al., *supra* note 9.
104. *Id.*
105. *Id.*

Taken together, these studies indicate that foster children are uniquely vulnerable to overmedication with psychotropic drugs. Children in foster care are medicated at roughly the same rate as disabled children, many of whom have disorders for which psychotropic drugs are an FDA-approved treatment.[106] They are as likely as disabled children to receive antipsychotics, one of the most dangerous classes of psychotropic medications.[107] And they are the most likely of all Medicaid-eligible children to be prescribed potentially risky combinations of drugs.

B. National Responses

Professional associations have participated in initiatives designed to help prescribing physicians understand the dangers posed by psychotropics. In 2013, the American Psychiatric Association (APA), the largest professional organization of psychiatrists in the United States, joined the Choosing Wisely campaign.[108] The Choosing Wisely campaign aims to reduce the number of psychotropic prescriptions written for children by issuing guidelines on appropriate use.[109] Its recommendations include avoiding the use of antipsychotics as a first-line treatment for conditions other than psychotic disorders, and, if antipsychotics must be prescribed, not prescribing two or more concurrently.[110]

Several states have attempted to address the underlying causes of the psychotropic drug crisis. The Colorado and Texas Boards of

106. For example, the FDA approved Risperdal, an atypical antipsychotic, to treat the irritability associated with autism in children and adolescents. Press Release, FDA, FDA Approves the First Drug to Treat Irritability Associated with Autism, Risperdal (Oct. 6, 2006), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108759.htm; *see also Atypical Antipsychotic Drugs Information*, U.S. Food & Drug Admin., http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm094303.htm (last visited Oct. 6, 2014) (describing Risperdal as an atypical antipsychotic).

107. *See supra* notes 11–12 and accompanying text.

108. Kim Painter, *Doctors: Anti-Psychotic Meds Overused for Dementia, Kids*, USA Today (Sept. 23, 2013), http://www.usatoday.com/story/news/nation/2013/09/21/antipsychotic-dementia-children/2844419/; *About APA & Psychiatry*, Am. Psychiatric Ass'n, http://www.psychiatry.org/about-apa—psychiatry (last visited Oct. 6, 2014) (describing the APA as "the world's largest psychiatric organization").

109. *About Us*, Choosing Wisely, http://www.choosingwisely.org/doctor-patient-lists/american-psychiatric-association/ (last visited Oct. 29, 2014); *see also* Painter, *supra* note 108.

110. *Five Things Physicians and Patients Should Question: American Psychiatric Association*, Choosing Wisely, http://www.choosingwisely.org/doctor-patient-lists/american-psychiatric-association/ (last visited Jan. 14, 2014).

Education both passed resolutions calling on school personnel to use traditional classroom management techniques in lieu of psychotropic medication to control disruptive behaviors.[111] A Virginia law prohibits school officials from recommending that students begin taking psychotropic drugs.[112] The Hawaii legislature passed a resolution instructing the state to consider nonpharmaceutical alternatives for children in foster care taking psychotropic drugs.[113] Washington and North Carolina enacted laws requiring the state to monitor the number of children in foster care being treated with a psychotropic.[114] California authorized state agencies to adopt regulations governing the administration of psychotropic medication to children in care.[115] A recent Oregon law requires a mental health assessment prior to the prescription of an antipsychotic as well as annual case reviews for children taking more than two psychotropic drugs concurrently.[116]

The federal government has also turned its attention to the issue. The House Ways and Means Committee held one hearing on Health Care for Children in Foster Care in 2007 and another on Prescription Psychotropic Drug Use among Children in Foster Care in 2008, while the Senate's Committee on Homeland Security and Governmental Affairs held a hearing on the Financial and Societal Costs of Medicating America's Foster Children in 2011.[117] At all three hearings, expert witnesses testified to the seriousness of the psychotropic drug crisis, described how different states were handling the problem, and proposed their own solutions.[118] Several members of Congress expressed willingness to pursue a federal response to the issue.[119]

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111. DARCY E. GRUTTADARO & JOEL E. MILLER, CHILDREN AND PSYCHOTROPIC MEDICATIONS 8–9 (2004), *available at* http://www.nami.org/Template.cfm?Section=other&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15860.

112. *Id.* at 9.

113. *Id.*

114. *Id.*

115. *Id.*

116. RUTGERS STUDY, *supra* note 8, at 44–45.

117. *2011 Hearing*, *supra* note 24; *2008 Hearing*, *supra* note 46; *Health Care for Children in Foster Care: Hearing Before the Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means*, 110th Cong. (2007) [hereinafter *2007 Hearing*].

118. *2011 Hearing*, *supra* note 24, at 18, 20, 22, 24, 28–29, 100–01, 129, 137, 142, 148–50, 154, 156, 182; *2008 Hearing*, *supra* note 46, at 8–10, 16–17, 20–25, 58–59, 61–63, 71, 87; *2007 Hearing*, *supra* note 117, at 26–30.

119. *See 2011 Hearing*, *supra* note 24, at 31 (statement of Sen. Brown, Member, S. Comm. on Homeland Security & Governmental Affairs) ("[H]ow does this happen and who is responsible and how do we fix it?"); *2008 Hearing*, *supra* note

The solution Congress devised was embedded in the Child and Family Services Improvement and Innovation Act of 2011. The Act requires states to establish "protocols for the appropriate use and monitoring of psychotropic medications" before they may receive federal child welfare funds.[120] State protocols are evaluated on five criteria: (1) screening, assessment, and treatment planning for foster children's unique mental health needs; (2) mechanisms for obtaining informed consent before medication use; (3) systems for monitoring medication use at both child and population levels; (4) availability of a board-certified or board-eligible child and adolescent psychiatrist to consult on both consent and monitoring issues; and (5) access to and dissemination of the latest information on mental health and trauma-related interventions.[121]

The Child and Family Services Improvement and Innovation Act is an admirable first step toward reform, as it at least acknowledges that there is a serious psychotropic drug problem in the nation's foster care system. But it does not go far enough to protect foster children from the risk of overmedication. Because the law merely establishes criteria on which state protocols are evaluated and does not mandate the adoption of specific protocols, there is room for significant variation among states.[122] In addition, because states can fail to meet one or more of the criteria without losing federal funding, no state has established protocols satisfying all five standards.[123]

The second half of this Note will argue for a stronger federal role in addressing foster care's psychotropic drug problem. Part IV will analyze the psychotropic medication protocols in place in five states: Illinois, Florida, Tennessee, Massachusetts, and Connecticut. Parts V and VI will advocate for the nationwide implementation of a system of child welfare agency consent and red flag preconsent re-

46, at 3 (statement of Rep. McDermott, Member, H. Comm. on Ways & Means) (arguing that the federal government has "a special obligation . . . to protect and care for [foster children]").

120. Child and Family Services Improvement and Innovation Act, Pub. L. No. 112-34, § 101(b)(2), 125 Stat. 369, 369 (2011) (codified as amended in scattered sections of 42 U.S.C.).

121. Office of Planning, Research & Evaluation, U.S. Dep't of Health & Human Servs., Rep. No. 2012-33, Psychotropic Medication Use by Children in Child Welfare 7 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/opre/psych_med.pdf; Eva J. Klain, *Improving Oversight of Psychotropic Medication Use with Children in Foster Care*, 31 Child. L. Prac. 109 (2012).

122. *2011 Hearing*, *supra* note 24, at 7 (statement of Sen. Collins, Member, S. Comm. on Homeland Security & Governmental Affairs).

123. *Id.*

view. The final Part will recommend that the federal government encourage reform by tying the availability of federal funds to state use of red flag preconsent reviews.

IV.
STATE APPROACHES TO THE CRISIS

A handful of states have taken the lead in confronting the psychotropic drug crisis. Illinois, Florida, Tennessee, Massachusetts, and Connecticut have all adopted different approaches to the problem. The following sections will explore each state's system in depth and offer an evaluation of their respective efficacies.

A. Illinois

Illinois's Department of Children and Family Services (ILDCFS) was under attack throughout the 1990s. A 1991 class action alleged that the state's child welfare system was violating foster children's constitutional rights[124] and a 1995 series of pieces in the Chicago Tribune harshly criticized the agency's failures.[125] The enhanced scrutiny prompted the state to attempt reform, particularly of the ways medication is administered to the foster care population.[126]

ILDCFS promulgated a rule mandating that prescribing physicians obtain consent from ILDCFS prior to starting a foster child on a psychotropic medication.[127] The prescribing physician sends the ILDCFS Centralized Consent Unit (CCU) a request to start medication.[128] ILDCFS then forwards the request to the Clinical Services in Psychopharmacology Program at the University of Illinois at Chicago.[129] A board-certified child and adolescent psychiatrist evalu-

124. *See* Michael W. Naylor, *Psychiatric Consultation in a Psychotropic Medication Oversight Program for Foster Children: The Illinois Model*, PALTECH 3, http://www.paltech.com/web/psychotropic/documents/Workshop%206%20-%20Naylor.pptx (last visited Nov. 2, 2014).

125. R. Bruce Dold, Op-Ed., *Kids Suffer Under DCFS Reform Efforts*, CHI. TRIB., Sept. 22, 1995, http://articles.chicagotribune.com/1995-09-22/news/9509220377_1_consent-decree-child-welfare-aclu; Editorial, *A Vote for Jess McDonald*, CHI. TRIB., Oct. 20, 1995, http://articles.chicagotribune.com/1995-10-20/news/9510200016_1_child-welfare-system-child-abuse-problem-kids-in-state-care (labeling ILDCFS "the poster child for government indifference and inefficiency").

126. *See* Naylor, *supra* note 124, at 6–10.

127. ILL. ADMIN. CODE tit. 89, § 325.10 (2012).

128. *2007 Hearing*, *supra* note 117, at 30 (statement of Michael W. Naylor, Director, Division of Child & Adolescent Psychiatry, Program Institute for Juvenile Research, University of Illinois-Chicago).

129. *Id.*

ates the request in light of the clinical and demographic data provided and recommends approval, denial, or modification.[130] The psychiatrist's recommendation goes to the CCU, where an authorized agent makes a decision and notifies the prescribing physician.[131] The expected turnaround time is twenty-four hours for inpatient requests and forty-eight hours for all other requests.[132] A physician may prescribe medication without ILDCFS consent in an emergency, but the University of Illinois-Chicago, which maintains the consent database for ILDCFS, will subsequently review all such prescriptions.[133]

Each psychotropic medication request receives some scrutiny. Certain requests, however, will get a closer review, including those for four or more psychotropic medications prescribed concomitantly; for any psychotropic medication other than stimulants for children under age four; for two or more antidepressants, two or more antipsychotics, two or more stimulants, or three or more mood stabilizers prescribed concomitantly; for frequent changes of medications without a clear rationale; for prescriptions inconsistent with the patient's diagnosis; for multiple psychotropic drugs before one drug alone has been tried; for dosages exceeding those usually recommended; for psychostimulants for an actively psychotic child; and for emergency medications more than twice a day for three or more consecutive days.[134]

Physicians who violate ILDCFS rules face professional consequences. Each psychotropic medication started without ILDCFS consent generates notifications to the physician that he or she is in violation of ILDCFS Rule 325.[135] A physician who receives five such notifications gets a first warning letter informing him or her that ILDCFS may file a complaint with the Illinois Department of Financial and Professional Regulation upon further violations.[136] A second warning letter is sent after five additional violations, with the

130. *Id.*

131. *Id.*

132. ILL. ADMIN. CODE tit. 89, § 325.40(a).

133. Michael W. Naylor et al., *Psychotropic Medication Management for Youth in State Care: Consent, Oversight, and Policy Considerations*, 86 CHILD WELFARE 175, 186 (2007).

134. ILL. DEP'T OF CHILDREN & FAMILY SERVS., GUIDELINES FOR THE UTILIZATION OF PSYCHOTROPIC MEDICATIONS FOR CHILDREN IN FOSTER CARE 6–7 (2008), *available at* http://www.state.il.us/dcfs/docs/ocfp/rules/rules_325.pdf. The Illinois guidelines use "concomitantly" to mean "concurrently."

135. ILL. ADMIN. CODE tit. 89, § 325.80(a)(1).

136. *Id.* § 325.80(a)(2).

eleventh violation prompting the lodging of the threatened complaint.[137]

Illinois has used this system to detect dangerous prescription patterns and educate physicians on how to avoid them.[138] The state has also been able to identify and take corrective action against physicians who repeatedly prescribe outside the guidelines.[139] Experts in the field of child and adolescent psychiatry have praised the Illinois model for providing "patient-specific, individualized review[s]" that improve the safety of the psychotropic prescriptions written for children in care.[140]

B. Florida

Florida gives authority to consent to treatment with psychotropic medication to the foster child's birth parents.[141] If the parents cannot be located, refuse to consent, or have had their legal rights terminated, authorization to treat must be sought through court order.[142] An agent of the Department of Children and Families (FLDCF) must file a motion with the court supported by a medical report containing: the name and dosage of the psychotropic drug; the diagnosis the drug was prescribed to treat; the recognized side effects of the drug; a plan for monitoring the treatment; the amount of time the child is expected to be on the drug; and a statement confirming that the information in the report was explained to the child and the child's caretaker.[143]

Under certain circumstances, a child and adolescent psychiatrist must review the proposed treatment before a parent or judge can consent: preconsent review is necessary before the prescription of two or more psychotropic drugs to any foster child under age

137. *Id.* § 325.80(a)(3)–(4).

138. *2007 Hearing*, *supra* note 117, at 27 (statement of Michael W. Naylor, Director, Division of Child & Adolescent Psychiatry, Program Institute for Juvenile Research, University of Illinois-Chicago).

139. *Id.*

140. *2008 Hearing*, *supra* note 46, at 10 (statement of Julie M. Zito, Professor of Pharmacy & Psychiatry, Pharmaceutical Health Services Research, University of Maryland); *see also* LAUREL K. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS FOR YOUTH IN THE CUSTODY OF THE MASSACHUSETTS DEPARTMENT OF CHILDREN AND FAMILIES 18 (2011) [hereinafter LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS], *available at* http://www.tuftsctsi.org/About-Us/News/Archive/~/media/522D7F0CCEAB4115B5D1365B70B0D96D.ashx (quoting a child and adolescent psychiatrist as stating that the Illinois model "works really well").

141. FLA. ADMIN. CODE ANN. r. 65C-35.007(1) (2010).

142. *Id.* r. 65C-35.007(2).

143. FLA. STAT. § 39.407(3)(c)(1)–(5) (2013).

eleven[144] unless a parent whose rights have not been terminated waives this requirement.[145] Under the preconsent review system, the child's caseworker and prescribing physician complete a Psychotropic Medication Report, which is then submitted to the Department of Psychiatry within the University of Florida College of Medicine.[146] A psychiatrist reviews the report for conformity with accepted medical practice, records his or her recommendations, and returns the report within one business day.[147] If the psychiatrist disagrees with the proposed course of treatment, he or she contacts the prescribing physician to discuss the child's case.[148] FLDCF sends the psychiatrist's recommendation to the party with legal authority to consent, who uses it to inform his or her final decision.[149] Medication may be prescribed without preconsent review when the prescribing physician certifies that delay would more likely than not cause significant harm to the child.[150]

In the wake of the Gabriel Myers tragedy,[151] the Florida Supreme Court's Steering Committee on Families and Children appointed a subcommittee charged with improving judicial oversight of the administration of psychotropic medication in the foster care system.[152] The subcommittee produced a Psychotropic Medications Judicial Reference Guide, explaining the purposes and side effects of popular psychotropic drugs, as well as a Psychotropic Medications Bench Card, clarifying the substantive and procedural implications of a psychotropic medication request.[153] The subcommittee's efforts are expected to better prepare judges to

144. *Pre-Consent Review for Psychotropic Medication*, COMMUNITY PARTNERSHIP FOR CHILDREN 2 (Feb. 4, 2011), http://www.communitypartnershipforchildren.org/zupload/user/policies/bhs585pre-consentreviewforpsychotropicmedicationtreatmentplans.pdf.

145. Memorandum from Alan Abramowitz, State Dir., Office of Family Safety, to Community-Based Care CEOs et al. (Dec. 2, 2010), *available at* http://centerforchildwelfare2.fmhi.usf.edu/kb/policymemos/New%20requirements%20for%20pre_consent%20review%20of%20PsyMeds%20for%20children%20in%20OHC_final%20signed.pdf.

146. *Pre-Consent Review for Psychotropic Medication*, *supra* note 144, at 3.

147. *Id.*

148. *Id.*

149. *Id.*

150. FLA. ADMIN. CODE ANN. r. 65C-35.010(1)(a) (2010).

151. Martinez, *supra* note 67.

152. FLA. DEP'T OF CHILDREN & FAMILIES, PSYCHOTROPIC MEDICATION: A REVIEW OF ACTIONS TAKEN TO IMPLEMENT RECOMMENDATIONS FROM THE GABRIEL MYERS WORKGROUP 10–11 (2010), *available at* http://www.dcf.state.fl.us/initiatives/childsafety/meetings/Task%20force%20on%20Fostering%20Success%20.pdf.

153. *Id.* at 12.

handle their role as medical consenters for some children in foster care.[154]

It is unclear whether Florida's approach has reduced the number of unnecessary or dangerous psychotropic prescriptions issued to foster children (the efficacy of systems that rely on judicial oversight is discussed in more general terms in Part V.C). Florida has, however, reduced the number of prescriptions issued without proper authorization. At the time of Gabriel Myers's suicide, 35% of Florida foster children were taking psychotropic medication without consent.[155] In the immediate aftermath of the tragedy, the state reduced that number to 6.45%.[156] By mid-2013, only 0.5% of foster children were being medicated without consent.[157]

C. Tennessee

After the advocacy group Children's Rights filed a class action alleging inappropriate use of psychotropics in its foster care system, Tennessee turned its attention to psychotropic drug use in the foster care population.[158] In consultation with expert consultants from the Child Welfare League of America (CWLA), the state revised its psychotropic medication policies.[159] State law gives authority to consent to psychotropic drug treatment to a foster child's birth parents unless the child is sixteen years of age or older or parental rights have been terminated.[160] If the child is sixteen or older, he or she is empowered to give or withhold consent to treatment.[161] If the child is younger than sixteen and his or her biological parents' rights have been terminated, authority to consent goes to one of the twelve Department of Children's Services (DCS) Regional Nurses.[162]

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154. *See id.* at 13.

155. *Id.* at 14.

156. *Id.*

157. *Id.*

158. *See supra* Part II.B; *see also 2008 Hearing*, *supra* note 46, at 22 (statement of Tricia Lea, Director of Medical & Behavioral Services, Tennessee Department of Children's Services); Bellonci & Henwood, *supra* note 8, at 30.

159. Bellonci & Henwood, *supra* note 8, at 32.

160. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.24 (Aug. 2011), *available at* http://www.tn.gov/youth/dcsguide/policies/chap20/20.24.pdf.

161. *Id.* at 3.

162. *Id.* at 5–6.

DCS gives particular scrutiny to requests for pro re nata (PRN), or "use as needed," prescriptions.[163] PRN prescriptions for anxiolytic-hypnotic drugs (used to treat insomnia and anxiety disorders) and PRN antipsychotic prescriptions require prior approval from DCS.[164] The prescribing physician must submit a form to a DCS Regional Nurse describing the condition or symptoms the PRN psychotropic medication is supposed to treat; any other behavioral interventions being used; all other medications the child is taking; the time period for which the medication will be used; and the anticipated frequency of use.[165] The DCS Regional Nurse reviews the form then sends it to the DCS Central Office for approval by the DCS Chief Medical Officer.[166]

For all other types of psychotropic prescriptions, DCS uses a dual system of review. When consent is obtained from a youth age sixteen or older or from the youth's birth parents, no DCS action is required before the prescription can be filled.[167] The DCS Regional Nurse is notified of such a prescription and enters the information into the DCS electronic record.[168] Any prescription that falls outside the state's psychotropic medication utilization parameters generates an alert to the DCS Chief Medical Officer,[169] who may order a review of the child's case.[170]

When consent must be obtained from the DCS Regional Nurse, preconsent review is required for certain types of prescriptions. Prescriptions to children age five and under must be approved by a child and adolescent psychiatrist in the DCS Central Office.[171] Prescriptions to children between ages six and ten must be approved by both a nurse practitioner and a psychologist or psy-

163. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.18 (Aug. 2011), *available at* http://www.tn.gov/youth/dcsguide/policies/chap20/20.18.pdf.

164. *Id.* at 4.

165. *Id.* at 4–5.

166. *Id.* at 5.

167. WORTHINGTON, *supra* note 31, at 27.

168. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.18, *supra* note 163.

169. *See* TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.18, *supra* note 163 (stating that cases falling outside the parameters "are assessed by DCS Regional Nurses, the DCS Chief Medical Officer, or designee"); WORTHINGTON, *supra* note 31, at 30 ("When a prescription falls outside the psychotropic medication utilization parameters, automatic alerts are sent to the agency medical directors.").

170. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.18, *supra* note 163.

171. Naylor et al., *supra* note 133, at 182–83.

chiatrist in the central office.[172] In deciding whether to grant approval, DCS can seek advice from any of the Centers of Excellence housed at universities across the state.[173] The Centers of Excellence evaluate particularly complicated cases, as where a child has multiple diagnoses or a history of disrupted placements.[174] There is no emergency exception to the preconsent review requirement unless the child is in a hospital or a Psychiatric Residential Treatment Facility.[175]

Tennessee's approach has been lauded as a creative effort to discourage dangerous prescription practices.[176] The state has also been able to report specific instances of improvement. One fourteen-year-old child was living in a residential treatment facility and receiving six psychotropic drugs concurrently.[177] The medication combination fell outside the utilization parameters, prompting a referral to one of the Centers of Excellence.[178] The child was subsequently taken off several medications and transitioned to a family foster home.[179] The reforms are also credited with producing a drop in the percentage of foster children taking a psychotropic drug, from 25% in 2004 to 21% in 2006.[180]

D. Massachusetts

The Massachusetts model dates back to a 1983 Supreme Judicial Court decision. In *Rogers v. Commissioner of the Department of Mental Health*,[181] the court was asked to determine whether the administration of antipsychotic medications to an individual who is incompetent to give informed consent requires prior judicial approval. Noting that antipsychotics may be abused "by those claiming to act in an incompetent's best interests," the court concluded that judicial approval must be sought before all nonemergency adminis-

172. *Id.* at 183.

173. *Id.*

174. Bellonci & Henwood, *supra* note 8, at 41.

175. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.18, *supra* note 163.

176. *2008 Hearing*, *supra* note 46, at 10 (statement of Julie M. Zito, Professor of Pharmacy & Psychiatry, Pharmaceutical Health Services Research, University of Maryland).

177. *Id.* at 21 (statement of Tricia Lea, Director of Medical & Behavioral Services, Tennessee Department of Children's Services).

178. *Id.*

179. *Id.*

180. *Id.* at 24.

181. 458 N.E.2d 308, 310 (Mass. 1983).

trations of antipsychotics to incompetent patients.[182] The decision was subsequently incorporated into Department of Children and Families (MADCF) regulations.[183]

Current MADCF regulations distinguish between routine and extraordinary medical care.[184] For routine medical care, including treatment with non-antipsychotic psychotropic medication,[185] MADCF social workers are authorized to consent on the foster child's behalf.[186] For extraordinary medical care, including the use of antipsychotic drugs, MADCF must seek court approval.[187] Court approval is unnecessary in an emergency, when a physician determines that medication is required to prevent "the immediate, substantial, and irreversible deterioration of a serious mental illness."[188]

Once MADCF learns that a physician plans to prescribe an antipsychotic for a foster child, the agency submits a *Rogers* Petition asking the court to appoint a guardian ad litem (GAL).[189] The GAL conducts an investigation into the appropriateness of the proposed medication regimen, gathering information from medical records, the prescribing physician, the child, the child's caseworker and caregivers, and other interested parties.[190] The GAL then submits a report containing his or her recommendations to the court.[191] The prescribing physician must also submit an affidavit disclosing the risks and benefits of the proposed treatment, the child's prognosis with and without treatment, and the child's expressed preferences.[192] The judge then holds a hearing to consider the GAL's

182. *Id.* at 320–22 (quoting *In re* Guardianship of Roe, 421 N.E.2d 40, 53 n.11 (Mass. 1981)).

183. *Revisiting the* Rogers *Process for Children in State Custody: Is It Working?*, MASS. OFFICE OF THE CHILD ADVOCATE, http://www.mass.gov/childadvocate/examination-of-the-rogers-process.html (last visited Apr. 21, 2014).

184. 110 MASS. CODE REGS. 11.01 (2008).

185. *Id.* 11.04(1)(r).

186. *Id.* 11.04(2).

187. *Id.* 11.14(2).

188. *Id.* 11.14(6)(a)–(b).

189. Soc. Justice Program, Ne. Univ. Sch. of Law, *Court-Ordered Consent: Revisiting the Rogers Process for Children in State Custody*, MASS. OFFICE OF THE CHILD ADVOCATE 4 (Apr. 7, 2011), http://www.mass.gov/childadvocate/docs/nusl-full-report.pdf.

190. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 4.

191. *Id.*

192. *Clinician's Affidavit and Report for Extension and/or Amendment of Substituted Judgment Treatment Plan*, THE MASSACHUSETTS COURT SYSTEM, http://www.mass.gov/courts/docs/forms/probate-and-family/mpc823-clinicians-affidavit-sub-judgment-fill.pdf (last visited Jan. 14, 2014).

report and the prescriber's affidavit as well as statements from the child or biological parents.[193] If the request is approved, the judge issues a *Rogers* Order authorizing administration of the antipsychotic.[194]

In 2010, Massachusetts funded a study that used interviews with key stakeholders to evaluate the *Rogers* process.[195] Reviews of the system were decidedly mixed. Some stakeholders appreciated the role of the GAL, claiming that GALs could access information unavailable to other participants in the child welfare system and thereby make sound recommendations.[196] However, the GALs themselves—typically attorneys—sometimes reported that their lack of medical training made them "feel [un]comfortable questioning a good psychiatrist," casting doubt on their effectiveness as independent advocates for children's best interests.[197] There were also disagreements over whether the process reduced unnecessary prescriptions or denied access to needed medication. Child welfare professionals reported dealing with psychiatrists who initially insisted an antipsychotic was necessary then "suddenly change[d] their minds . . . when they learn[ed] that a *Rogers* Order [was] required."[198] Legal professionals argued that this means doctors are "really think[ing] about [the] medication[s] they're giving kids,"[199] while medical professionals viewed this as proof that the system is a "barrier to treatment."[200] One thing that all major stakeholders could agree on was that the *Rogers* process can take a long time: most respondents reported waiting weeks or months for *Rogers* Orders.[201]

Critics also questioned the need to single out antipsychotic drugs for special scrutiny.[202] The *Rogers* decision came before the introduction of atypical antipsychotics, which are considered less dangerous than the earlier generation of typical antipsychotics.[203]

193. Soc. Justice Program, Ne. Univ. Sch. of Law, *supra* note 189.

194. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 3.

195. *Revisiting the* Rogers *Process for Children in State Custody: Is It Working?*, *supra* note 183.

196. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 8.

197. *Id.*, app. at 16, *available at* http://www.tuftsctsi.org/About-Us/News/Archive/~/media/DCE8D6512EE44CF5B03B039A6AF95884.ashx.

198. *Id.* at 6.

199. *Id.* at 14.

200. *Id.* at 11.

201. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 9.

202. Merritt, *supra* note 6, at 18.

203. *Id.* at 14–15.

While antipsychotic use in foster care is an issue of concern,[204] system participants also identified a need to extend oversight to cover additional classes of psychotropic medications, use in young children, off-label use, and polypharmacy.[205]

E. Connecticut

Inspired by the Illinois model, Connecticut began overhauling its psychotropic drug policies in 1999.[206] After the state legislature mandated that the Department of Children and Families (CTDCF) establish a "state-of-the-art medication management system for children and youth in [CTDCF] care and custody,"[207] CTDCF formed a Centralized Medication Consent Unit (CMCU).[208] The CMCU, headed by a Chief of Psychiatry and staffed by child psychiatrists, advanced practice registered nurses (APRN), and support personnel, is empowered to consent to all psychotropic medication requests for children who are in foster care due to abuse or neglect.[209]

Under this system, the prescribing physician completes a request form and sends it to the CMCU.[210] Either a child psychiatrist or an APRN approves, denies, or modifies the request.[211] The child psychiatrist must be the one to make the decision when the child is under five years of age, is taking more than five medications, has been prescribed a drug that is not on the CTDCF Approved Drug List, or has been prescribed a dosage exceeding CTDCF's Maxi-

204. *See supra* notes 11–12.

205. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 15.

206. Lesley Siegel, *Consent for Psychotropic Medication: Connecticut's Model for Children and Youth in Foster Care*, PALTECH 4, http://www.pal-tech.com/web/psychotropic/documents/Workshop%203%20-%20Siegel.pptx (last visited Nov. 2, 2014).

207. CONN. DEP'T OF CHILDREN & FAMILIES, GUIDELINES FOR PSYCHOTROPIC MEDICATION USE IN CHILDREN AND ADOLESCENTS 8 (2010) [hereinafter CONN. DEP'T OF CHILDREN & FAMILIES, GUIDELINES], *available at* http://www.ct.gov/dcf/lib/dcf/behavorial_health_medicine/pdf/guidelines_psychotropic_medication.pdf.

208. Margaret Rudin & Lesley Siegel, *Psychotropic Medications and Foster Children*, PALTECH 26–28, https://www.pal-tech.com/intranet/OCAN/3393_Rudin,_M.-Psychotropic_Medication_Use_with_Children.pdf (last visited Nov. 2, 2014).

209. Children who have been voluntarily placed in foster care require consent from a biological parent to begin treatment. CONN. DEP'T OF CHILDREN & FAMILIES, POLICY 44-5-2.1, STANDARDS REGARDING THE DELIVERY OF HEALTH CARE (2011) [hereinafter CONN. DEP'T OF CHILDREN & FAMILIES, POLICY 44-5-2.1], *available at* http://www.ct.gov/dcf/cwp/view.asp?a=2639&Q=480666&PM=1.

210. *Id.*

211. *Id.*

mum Dosing Guidelines.[212] A request is more likely to be approved if the request form is "relatively complete," the medication fits the diagnosis, the child is not already on multiple psychotropic drugs, and the child has not been prescribed more than one antipsychotic.[213] Other factors that influence the decision include the child's setting, his or her history with the prescribing physician, other ongoing treatment, and the ultimate goal of the drug regimen.[214]

The CMCU processes urgent requests within twelve hours and routine requests within twenty-four hours.[215] The prescribing physician may appeal a CMCU denial to the Agency Medical Director, whose decision is final.[216] Medication may be administered without CMCU consent when the prescribing physician believes treatment is immediately necessary to prevent serious harm to the child, but the CMCU must be informed of emergency uses within three days.[217]

Outright denials of medication requests are rare,[218] but the CMCU has not operated as a mere rubber stamp. The number of approved requests declined from 84% in the first quarter of 2010 to 58% in the second quarter of 2012.[219] The difference is attributable to an increase in the number of requests modified by the CMCU, from 3% in the first quarter of 2010 to 29% in the second quarter of 2012.[220] Child and adolescent psychiatrists have praised Connecticut's system for its simple and efficient approach to protecting foster children.[221]

F. Conclusion

Each state's approach has strengths and weaknesses that make it more or less suitable for nationwide imposition. Illinois is to be commended for having a psychiatrist review every psychotropic prescription, but its relationship with the Clinical Services in

212. Rudin & Siegel, *supra* note 208, at 43.

213. Siegel, *supra* note 206, at 12–13.

214. *Id.* at 14.

215. Conn. Dep't of Children & Families, Guidelines, *supra* note 207, at 13.

216. Conn. Dep't of Children & Families, Policy 44-5-2.1, *supra* note 209.

217. Conn. Dep't of Children & Families, Form DCF-465, Psychotropic Medication Consent Request (2014), *available at* www.ct.gov/dcf/lib/dcf/policy/forms/dcf_465-ipr.doc.

218. 3% of requests are denied. Siegel, *supra* note 206, at 16.

219. *Id.*

220. *Id.*

221. *See, e.g.*, Leslie et al., Examination of the *Rogers* Process, *supra* note 140, at 17.

Psychopharmacology Program at the University of Illinois at Chicago may not be replicable across the country. Florida focuses its reviews on prescriptions perceived to be especially dangerous, but leaves consent in the hands of parties unsuited to resist pressures to medicate.[222] Tennessee protects children ages ten and under whose biological parents' rights have been terminated, but leaves other foster children vulnerable. Massachusetts forces doctors to carefully consider whether or not to prescribe an antipsychotic, but fails to curb the excessive use of other psychotropic classes. Connecticut, by centralizing authority to consent in its child welfare agency and mandating preconsent review by a psychiatrist of particularly risky prescriptions, comes closest to the most efficient mechanism for protecting foster children from the improper use of psychotropic drugs.

V.
CENTRALIZING AUTHORITY TO CONSENT IN THE CHILD WELFARE AGENCY

There are several parties who could act as medical consenters for children in foster care. The child him- or herself, biological parents with intact rights, judges, and the state child welfare agency are the most frequently discussed candidates.

A. The Child

Some commentators argue that children above a certain age should have absolute authority to give or withhold consent to treatment with psychotropic drugs.[223] Proponents of this policy claim that children age fourteen and older are cognitively capable of understanding the risks and benefits associated with psychotropic medication.[224] They also make a moral argument, claiming that the child should have the legal right to consent because the child will be the one to bear the consequences of taking the drug.[225] Finally, some commentators point to a practical benefit of allowing the

222. *See* discussion *infra* Parts V.B–C.

223. Brandow, *supra* note 23, at 1163.

224. *Id.* at 1168; *see also* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 12 ("I think as kids get older, they will have more say in what's going on in their lives. There is certainly a developmental trajectory of increasing capacity approaching the age of maturity. You absolutely want to hear what the kid's preferences are.").

225. Brandow, *supra* note 23, at 1173; *see also* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 6 ("Kids are not puppets—they need to know what they are taking and why.").

child to consent: patients who consent are more likely to comply with their medication regimens, increasing the chance of treatment success.[226]

While the desire to give a foster child a voice in his or her own medical affairs is commendable, granting the child authority to consent will not advance this goal. In states that give legal effect to a child's lack of consent, observers report that children are unlikely to know that they have the right to refuse treatment.[227] Those children who do exercise this right may be subject to retaliation from caregivers who want medication to control disruptive behaviors.[228] Furthermore, states have a variety of mechanisms to circumvent a child's lack of consent.[229] In Tennessee, where children sixteen and older can consent,[230] the state may seek judicial intervention when a child refuses a medication that the state has concluded is "necessary to protect the child from harm."[231] Similar procedural tools exist in Pennsylvania[232] and California.[233] The result of a policy locating power to consent in the child is likely to be the administration of the psychotropic drug, whether or not the child truly consents.

B. The Biological Parents

Some states allow a biological parent whose parental rights are still intact to consent to a foster child's medical treatment.[234] Proponents of this policy argue that it is constitutionally mandated, pointing to the Supreme Court's observation in *Santosky v. Kramer* that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate

226. Brandow, *supra* note 23, at 1177; *see also* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 25 ("[Youth] need to be well informed or they won't take the medication, and then nobody wins.").

227. *See* Strawbridge, *supra* note 46, at 277 (noting that foster children are probably unaware that they can object to treatment); *The Drugging of Foster Youth*, *supra* note 17 (claiming that most California foster youth are unaware they have the right to refuse treatment with psychotropic medication).

228. *See The Drugging of Foster Youth*, *supra* note 17 (reporting that foster children who refuse to take psychotropic drugs are punished by group home workers).

229. WORTHINGTON, *supra* note 31, at 25.

230. *See supra* notes 160–61 and accompanying text.

231. TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES 20.24, *supra* note 160.

232. *See* 55 PA. CODE § 3680.52(6) (1987).

233. *See* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 38.

234. Such states include Alabama, Arizona, Kansas, Kentucky, and New Jersey. Naylor et al., *supra* note 133, at 181.

simply because they . . . have lost temporary custody of their child to the State."[235] Proponents also note that most children ultimately return to their families of origin after a stay in foster care.[236] As such, biological parents should be as involved as possible in a foster child's medical treatment in order to ensure continuity of care.

However, parents who have lost their children to foster care are unlikely to be able to effectively assert their right to withhold consent. Some parents have reported that they signed consent forms despite being unconvinced of the necessity of medication because they hoped to regain custody of their children.[237] One parent asked, "What can I say about it? If I protest, they'll say I don't care about the kids."[238] Moreover, states frequently have recourse to the judiciary when a parent makes a decision with which the state disagrees. For example, North Carolina's Division of Social Services can seek a court order when it strongly disagrees with a biological parent's choice to withhold consent.[239] Similar rules exist in Pennsylvania[240] and West Virginia.[241] Just as policies giving foster children power to consent will not reduce the likelihood of overmedication, policies empowering the biological parents of foster children are not suited to address the psychotropic medication crisis.

C. Judges

Several states require court authorization prior to the administration of at least certain classes of psychotropic medications to foster children.[242] Proponents of this policy believe that a judge should make medical decisions for foster children because he or she is most likely to have the children's best interests at heart.[243] The judge is thought to be a neutral player in the system surround-

235. 455 U.S. 745, 753 (1982).

236. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 25 ("[W]hat we see, is kids go back to their biological family when they turn 18. What sense does it make to cut [the biological parents] out when that is what is happening[?]").

237. Weber, *supra* note 21.

238. *Id.*

239. Kelley et al., *supra* note 83, at 39.

240. *See In re* W.H., 25 A.3d 330, 337 (Pa. Super. Ct. 2011) (noting that the juvenile court could override a biological mother's objection to the administration of psychotropic medication "if [the child's] psychiatrist believed that [the child's] condition required prompt medical treatment").

241. WORTHINGTON, *supra* note 31, at 22–23.

242. Naylor et al., *supra* note 133, at 182.

243. *2008 Hearing*, *supra* note 46, at 87 (statement of Jody Leibman Green, Policy Director, Children's Law Center of Los Angeles).

ing foster children, someone who does not approach the request with a bias for or against medicating.[244] Furthermore, unlike the child or the child's biological parents, a judge has enough independence to resist the myriad pressures to medicate.[245]

Nevertheless, judges are ineffective advocates for foster children's best interests. Most judges lack both a medical background and familiarity with any given foster child, making them overly reliant on state-commissioned psychiatrist's reports and caseworker-generated observations of the child's behavior.[246] As a result, judges typically follow the prescribing physician's recommendations, turning court authorization into a rubber stamp.[247] In addition, the judicial approval process generates ill will among the people involved in the foster child's care. Prescribing physicians resent having to testify before the court and often feel that their professional judgment is under attack.[248] Judges sometimes do not understand why they are charged with making the final decision and would prefer to wash their hands of the matter.[249] Court authorization creates more problems than it solves, costing time, money, and aggravation

244. *See* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 20 ("I think the judicial oversight is a critical piece. This ensures that there is neutral oversight in the administration process, to make sure these medications are not used for other than a medical need . . . .").

245. *See id.* at 8, 12 (discussing the importance of judicial immunity).

246. *See In re* J.C., No. CO46722, 2004 WL 2944669, at *4 (Cal. Ct. App. Dec. 21, 2004) (observing that "the only evidence before the juvenile court was the informed professional opinion of a qualified child psychiatrist"); GABRIEL MYERS WORK GROUP, *supra* note 61, at 25 (claiming that judges "lack . . . 'the intimacy of daily association' with the affected foster children" required to make medical decisions); *The Drugging of Foster Youth*, *supra* note 17 (noting that the judges "can only go by the reports handed to [them] by . . . social worker[s] and group home staff").

247. Strawbridge, *supra* note 46, at 281; *see also* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 21 (reporting that one judge "emphasized that he 'never feels comfortable' rejecting a proposed treatment plan because of the potential consequences of his denial"). *But see* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 5 (claiming that some judges "operate with a 'rubber stamp,' while others carefully review every case").

248. Merritt, *supra* note 6, at 4.

249. *See* Miller, *supra* note 81 (noting that Florida judges reported that they were "confused about their role"); Weber, *supra* note 21 (quoting Terry Friedman, former Presiding Judge of the Los Angeles Juvenile Court, as stating that "[w]e all have enormous fears that our decisions, one way or another, are going to cause serious harm to these children").

and producing the same results as would have obtained absent judicial involvement.[250]

D. The Child Welfare Agency

More than ten states place authority to consent in their child welfare agencies.[251] Of these states, most allow representatives of the agency, such as caseworkers, to make the decision.[252] Others have special departments within the agency tasked with consenting to treatment.[253] Either approach, when paired with preconsent review by medical professionals trained in child and adolescent psychiatry, is preferable to consent by the child, biological parents, or judges.

Authorizing the agency to consent vastly simplifies what would otherwise be a complicated, lengthy process. In systems that give the child or biological parents the power to consent, either consent is granted or else authorization to treat is obtained in some other, more time-consuming, fashion.[254] In systems that use court authorization, filing the appropriate paperwork, scheduling and conducting a hearing, and waiting for the judge to issue an order can take months.[255] Submitting a medication request to the child welfare agency has the advantage of being relatively quick and painless for the parties involved.[256] In addition, agency consent forces the child welfare bureaucracy to take ownership of prescription patterns in the foster care population. When the agency, rather than the children or their biological parents, is the medical consenter, it cannot shirk responsibility for adverse outcomes.

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250. *See* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 16 ("A collaborative approach is a great idea, but doctors, lawyers, and judges speak in two different languages and anyone resents having someone encroach on their expertise. . . . [W]ould judges want doctors telling them how to make judicial decisions?").

251. Such states include Alaska, Arkansas, Georgia, Maryland, Nebraska, Texas, Vermont, and Washington. Naylor et al., *supra* note 133, at 181.

252. Alaska, Arkansas, Georgia, Maryland, Nebraska, Vermont, and Washington allow caseworkers to consent. *Id.*

253. *See, e.g.*, discussion *supra* Part IV.A (describing such a department in Illinois).

254. *See supra* Parts V.A–B.

255. *See supra* text accompanying note 201.

256. Siegel, *supra* note 206, at 19; *see also* Soc. Justice Program, Ne. Univ. Sch. of Law, *supra* note 189, at 25 ("I like [the] idea of having some kind of quick, accessible panel that's available. . . . I think they should have the ability to review medical histories, authorize administration, and then start having some kind of monitoring system . . . .").

To be sure, there are drawbacks to designating the agency as the medical consenter. Much like judges, child welfare officials do not really know any given foster child very well.[257] Social workers handling high caseloads and special consent departments processing several medication requests each day cannot be expected to have in-depth knowledge of a specific child's circumstances.[258] Unfortunately, however, the foster children who most need protection from overmedication are often the ones who have no one in their lives who really knows them: their biological parents are unable or unwilling to be involved, their caseworkers are overburdened, and they change placements too frequently to form strong bonds with caretakers.[259] For these children, the decision whether or how to medicate is inevitably going to be made by a party who is less than fully acquainted with the details of their lives.

The more pressing concern is that the agency, faced with the demands of foster parents and other caregivers, will be too willing to medicate.[260] This criticism is valid, as child welfare personnel have reported feeling compelled to seek psychotropic drugs in order to maintain children in their placements.[261] Nevertheless, this should not disqualify the agency from acting as the medical consenter for children in foster care. When agency consent is combined with a preconsent review process, it both retains its advantages relative to other consent schemes and guards against overmedication of the foster population.

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257. Brandow, *supra* note 23, at 1162.

258. *Id.*

259. *See* AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, AACAP POSITION STATEMENT ON OVERSIGHT OF PSYCHOTROPIC MEDICATION USE FOR CHILDREN IN STATE CUSTODY: A BEST PRINCIPLES GUIDELINE 1 (2005) [hereinafter AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, AACAP POSITION STATEMENT], *available at* https://www.aacap.org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/FosterCare_BestPrinciples_FINAL.pdf ("Unlike mentally ill children from intact families, [foster] children often have no consistent interested party to provide informed consent for their treatment, to coordinate treatment planning and clinical care, or to provide longitudinal oversight of their treatment."); Camp, *supra* note 60, at 380 (worrying that "an involved, committed, and informed adult will not be available (or willing) to make an informed decision" about the treatment of a foster child with psychotropic medication); Setless, *supra* note 34, at 615 (claiming that "a stable and devoted adult is almost always absent" from the life of a foster child).

260. Brandow, *supra* note 23, at 1162.

261. *See supra* note 57.

VI.
PRECONSENT REVIEW BY MEDICAL PROFESSIONALS TRAINED IN CHILD AND ADOLESCENT PSYCHIATRY

Preconsent review requires a medical professional trained in child and adolescent psychiatry to assess the appropriateness of a prescription before the agency can give consent. Different approaches to preconsent review are possible. States can create positions within their child welfare agencies for child and adolescent psychiatrists[262] or establish partnerships with local universities.[263] States can mandate that every review be conducted by psychiatrists or allow other medical professionals, like APRNs, to handle more routine cases.[264] Finally, states can require review of every psychotropic drug request or just those that raise red flags.[265] The ultimate goal is to get a neutral third party with expertise in child and adolescent psychiatry to identify dangerous prescriptions, initiate conversations with prescribing physicians, and gradually eliminate the worst abuses from the system.

For states struggling with budgetary constraints, red flag review is more feasible than a system requiring scrutiny of every prescription.[266] Red flags are "[p]atterns that may signal that factors other than clinical need are impacting the prescription of psychotropic

262. As Connecticut did. Siegel, *supra* note 206, at 3. There are drawbacks to this approach, however. *See* Patricia K. Leebens, *Mental Health Consultation within State Child Agency*, PALTECH 19, http://www.pal-tech.com/web/psychotropic/documents/Workshop%206%20-%20Leebens.pptx (last visited Nov. 2, 2014) (noting that a psychiatrist employed by a state agency "[c]an be co-opted by political forces which demand . . . sole allegiance to the state agency rather than to children and families" and observing that the position may come with "budgetary limitations which compromise . . . effectiveness and/or . . . professional standards").

263. As Illinois did. Siegel, *supra* note 206, at 4.

264. *See supra* notes 210–11 and accompanying text.

265. *Compare 2007 Hearing*, *supra* note 117, at 30 (statement of Michael W. Naylor, Director, Division of Child & Adolescent Psychiatry, Program Institute for Juvenile Research, University of Illinois-Chicago) (describing the Illinois system, which requires review of every prescription), *with* Naylor et al., *supra* note 133, at 182–83 (describing the Tennessee system, which confines reviews to riskier prescriptions).

266. *See 2011 Hearing*, *supra* note 24, at 182 (statement of the Bazelon Center for Mental Health Law) (endorsing reviews of prescriptions "for . . . 5 or more medications or 2 or more medications from the same class"); N.Y. OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 16, at 13 (recommending that New York districts implement a red flag system); CARTER, *supra* note 8, at 39 (describing efforts in Georgia to "create procedures for independent clinical reviews to be triggered when a prescription falls outside of the medication guidelines").

medications."[267] Texas was the first state to develop a list of red flags[268] and other states with red flag policies have tended to follow its lead.[269] The Texas parameters, revised in 2013, recommend review of a child's medication regimen under the following circumstances:

1. Absence of a thorough assessment for the DSM-5 diagnosis(es) in the child's medical record[.]
2. Four (4) or more psychotropic medications prescribed concomitantly (side effect medications are not included in this count)[.]
3. Prescribing of:
   Two (2) or more concomitant stimulants[;]
   Two (2) or more concomitant alpha agonists[;]
   Two (2) or more concomitant antidepressants[;]
   Two (2) or more concomitant antipsychotics[; or]
   Three (3) or more concomitant mood stabilizers[.]
4. The prescribed psychotropic medication is not consistent with appropriate care for the patient's diagnosed mental disorder . . . .
5. Psychotropic polypharmacy . . . for a given mental disorder is prescribed before utilizing psychotropic mono-therapy.
6. The psychotropic medication dose exceeds usual recommended doses (FDA and/or literature based maximum dosages).
7. Psychotropic medications are prescribed for children of very young age, including children receiving the following medications with an age of:
   Stimulants: Less than three (3) years of age[;]
   Alpha Agonists[:] Less than four (4) years of age[;]
   Antidepressants: Less than four (4) years of age[;]
   Antipsychotics[:] Less than four (4) years of age[; or]

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267. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 18, at 8.

268. PSYCHOTROPIC MEDICATION ROUNDTABLE, SUP. CT. OF TEX. PERMANENT JUDICIAL COMM'N FOR CHILDREN, YOUTH & FAMILIES, PSYCHOTROPIC MEDICATION AND TEXAS FOSTER CARE 12 (2012), *available at* http://texaschildrenscommission.gov/media/15003/Final%20Psych%20Meds%20Report%20PRINT_01-10-13.pdf.

269. *See, e.g.*, *Tennessee Begins Tracking Medications for Children in State Custody*, CHILDREN'S VOICE (Nov.–Dec. 2008), http://www.cwla.org/voice/0811national.htm (reporting that Tennessee's psychotropic medication guidelines were based on the Texas parameters); Admin. on Children, Youth, & Families, *"Too Many, Too Much, Too Young": Red Flags on Medications and Troubled Children*, 21 RECLAIMING CHILDREN & YOUTH, Summer 2012, at 59, 61 (2012) (listing red flags that resemble the Texas parameters).

Mood Stabilizers: Less than four (4) years of age[.]

8. Prescribing by a primary care provider who has [no] documented previous specialty training for a diagnosis other than the following (unless recommended by a psychiatrist consultant):

Attention Deficit Hyperactive Disorder (ADHD)[;]

Uncomplicated anxiety disorders[; or]

Uncomplicated depression[.]

9. Antipsychotic medication(s) prescribed continuously without appropriate monitoring of glucose and lipids at least every 6 months.[270]

Red flag preconsent review can counteract some of the pressures to medicate emanating from drug manufacturers, foster parents, and school personnel.[271] States that have experimented with such reviews have reported promising results. Texas saw a 31% drop in the concurrent use of five or more psychotropic classes per child in its foster care population.[272] Washington has also reduced the number of high-risk prescriptions issued to foster children using a red flag approach.[273] Other states have noted lower proposed dosages and a decrease in requests for antipsychotics for young children.[274] Despite a record of success, there are obstacles standing in the way of nationwide implementation of red flag preconsent review systems. These include intellectual objections to the scheme, such as concerns about protecting the sanctity of the doctor/patient relationship and maintaining unrestricted access to mental health treatment, as well as political realities, such as the power of the pharmaceutical industry and the cost of conducting preconsent reviews.

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270. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS. & UNIV. OF TEX. AT AUSTIN COLL. OF PHARMACY, PSYCHOTROPIC MEDICATION UTILIZATION PARAMETERS FOR CHILDREN AND YOUTH IN FOSTER CARE 8 (2013), *available at* http://www.dfps.state.tx.us/documents/Child_Protection/pdf/TxFosterCareParameters-September2013.pdf.

271. *See* Camp, *supra* note 60, at 400 (noting that preconsent review enhances the "neutrality and legitimacy of recommended treatment").

272. *2008 Hearing*, *supra* note 46, at 10 (statement of Julie M. Zito, Professor of Pharmacy & Psychiatry, Pharmaceutical Health Services Research, University of Maryland).

273. *2011 Hearing*, *supra* note 24, at 123 (statement of Dr. Jon McClellan, Child Psychiatrist, Seattle Children's Hospital).

274. Mello, *supra* note 22, at 426.

A. The Sanctity of the Doctor/Patient Relationship

Opponents of red flag preconsent review argue that a preconsent review process infringes on the doctor/patient relationship. They view with suspicion any effort to insert the state into a clinical encounter.[275] They also question the value of giving oversight power to psychiatrists who only know the patient on paper, claiming that these professionals could not possibly be better equipped than the child's own doctor to make treatment decisions.[276] Doctors are especially worried that the state will use preconsent review to dictate the decisions of treatment providers, and they have been able to use their political influence to block reform in some states.[277]

These objections, however, are ill founded. When the patient is a minor, the relationship at issue is really between the doctor and the parent or guardian. In most cases, minors are considered legally incompetent[278] and cannot provide or withhold consent to medical treatment.[279] Responsibility to consent, therefore, falls to the minor's parent or guardian.[280] Parents and guardians are given the power to consent because it is assumed that they love their children and will act in their children's best interests.[281]

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275. *2011 Hearing*, *supra* note 24, at 22 (statement of Matt Salo, Executive Director, National Association of State Medicaid Directors).

276. *See* LESLIE ET AL., MULTI-STATE STUDY, *supra* note 57, at 14 (noting that some states locate authority to consent at the clinical encounter to address concerns about personalization of care).

277. *See, e.g.*, *The Drugging of Foster Youth*, *supra* note 17 (noting that a California bill that would have required the Department of Social Services to study the administration of psychotropic drugs to foster children was killed due to opposition from the California Psychiatric Association).

278. Stephen A. Talmadge, *Who Should Determine What Is Best for Children in State Custody Who Object to Psychotropic Medication?*, 15 ANNALS HEALTH L. 183, 201 (2006).

279. Christine M. Hanisco, Note, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 899 (2000).

280. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, CODE OF ETHICS 5 (2009), *available at* http://www.aacap.org/App_Themes/AACAP/docs/about_us/transparency_portal/aacap_code_of_ethics_2012.pdf; COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CEJA REPORT 8-I-07, PEDIATRIC DECISION-MAKING 1 (2007), *available at* http://www.ama-assn.org/resources/doc/code-medical-ethics/10016a.pdf.

281. RICHARD B. MILLER, CHILDREN, ETHICS, AND MODERN MEDICINE 39–40 (David H. Smith & Robert M. Veatch eds., 2003); Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 697 (1993); Matthew S. Feigenbaum, Comment, *Minors, Medical Treat-*

In the foster care context, the state assumes the role of parent[282] and has the same duty to pursue the best interests of the children in its care.[283] Even though the state's responsibilities to the children in its care are well understood,[284] it is extremely difficult for the state to meet its obligations. The state agent who most resembles a parent to a foster child is probably the caseworker. Many caseworkers, however, are already struggling to manage caseloads that far exceed CWLA recommendations, and thus cannot form close bonds with any given child.[285] Consequently, it is highly unlikely that they will act with the same caution a prudent parent would exhibit in deciding whether to put a child on psychotropic medication.[286] Even if caseworkers did wish to take a cautious approach to medication, they lack the medical training necessary to identify inappropriate prescriptions and persuade the prescribing physician to alter the treatment plan.[287]

While obviously not a perfect substitute for the concern of a loving parent, red flag preconsent review can help the state better approximate the role of a caring guardian. It puts experts in child and adolescent psychiatry between a prescribing physician and the state agent authorized to consent, allowing the experts to supply some of the caution that is inevitably missing from the state's approach to the question of whether or how to medicate a foster

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ment, and Interspousal Disagreement: Should Solomon Split the Child?, 41 DEPAUL L. REV. 841, 853 (1992).

282. Brandow, *supra* note 23, at 1152 (noting that foster children are under the parens patriae power of the state).

283. *See* Mindy S. Rosenberg & Robert D. Hunt, *Child Maltreatment: Legal and Mental Health Issues*, *in* CHILDREN, MENTAL HEALTH, AND THE LAW 79, 85 (N. Dickon Reppucci et al. eds., 1984) (arguing that the parens patriae power must be exercised to promote the child's best interests); Mello, *supra* note 22 ("[T]he state must care for and treat [foster] children as a prudent parent would.").

284. *See 2008 Hearing*, *supra* note 46, at 3 (statement of Rep. McDermott, Member, H. Comm. on Ways & Means) ("When at-risk children are taken into custody for their own safety, they become foster children and we become their parents."); LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 21 (arguing that the state must "mimic the role of a responsive parent or caretaker" when making decisions on psychotropic medications).

285. *See* Talmadge, *supra* note 278, at 183.

286. CHILD WELFARE INFORMATION GATEWAY, CASELOAD AND WORKLOAD MANAGEMENT 3 (2010), *available at* https://www.childwelfare.gov/pubs/case_work_management/case_work_management.pdf; Strawbridge, *supra* note 46, at 268–69.

287. Camp, *supra* note 60, at 403; Christopher Bellonci & Thomas I. Mackie, Oversight of Psychotropic Medication Use among Youth in Custody of State Child Welfare Systems 46 (Oct. 2011) (unpublished PowerPoint presentation) (on file with author).

child.[288] Even doctors concerned about infringements on their prescribing freedoms are capable of acknowledging that some oversight is needed to protect children in foster care,[289] and many doctors have indicated a preference for oversight by fellow physicians, rather than by social workers or lawyers.[290] Red flag preconsent review has the dual advantages of being politically palatable and capable of protecting foster children from abusive prescription practices.[291]

B. Preconsent Review as an Obstacle to Treatment

Critics also worry that the preconsent review process will delay or impede access to psychiatric treatment in the foster care system.[292] Opponents of preconsent review prioritize quick responses to behavioral and mental health issues over protracted assessments of proposed treatments, arguing that it is cruel to allow foster children to suffer while the bureaucracy processes their medication requests.[293] They urge the importance of early intervention, claiming that childhood mental illnesses left untreated can interfere with school performance and the acquisition of social skills.[294] More

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288. *See* Strawbridge, *supra* note 46, at 285 (arguing that Tennessee's system "allows [the state] to make up for the lack of parental concern by applying the cautiousness of a medical professional").

289. LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, app. at 9 (quoting a healthcare professional as stating that "[i]f those kids don't have parents to look out for them because they're in state custody, there should be a process for someone to provide oversight").

290. *See* CONN. DEP'T OF CHILDREN & FAMILIES, GUIDELINES, *supra* note 207, at 11 (noting that prescribing physicians respond better to oversight when allowed to interact directly with fellow medical professionals); Merritt, *supra* note 6, at 12, 19, 21 (arguing that because psychiatrists and lawyers understand medication and its side effects differently, psychiatrists would prefer submitting medication requests to an agency consent panel staffed by physicians).

291. *See* CONN. DEP'T OF CHILDREN & FAMILIES, POLICY 44-5-2.1, *supra* note 209 ("[T]he standard of care in most states is for mental health professionals to provide assistance to the state's child welfare agency regarding the informed consent process for the use of psychotropic medications.").

292. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, AACAP POSITION STATEMENT, *supra* note 259; BECCI AKIN ET AL., MEDICAID CHILDREN'S FOCUSED STUDY: PRESCRIBING PATTERNS OF PSYCHOTROPIC DRUGS AMONG CHILD MEDICAID BENEFICIARIES IN THE STATE OF KANSAS 13 (2009), *available at* http://www.keys.org/kureports/finalreportdrugs.pdf.

293. *See* GRUTTADARO & MILLER, *supra* note 111, at 12 (stressing the importance of avoiding "prolonged delays in receiving appropriate treatment").

294. *See* LESLIE ET AL., EXAMINATION OF THE *ROGERS* PROCESS, *supra* note 140, at 16 ("[H]ealth care providers emphasized the notion that the best interest of the child requires a process that assures clinical services are provided as quickly as

generally, critics argue that psychotropics are not the evils they are often made out to be, as recent years have seen the development of drugs that are safer and more effective than ever before.[295] Foster children do not need to be protected from these drugs; on the contrary, too many foster children go without appropriate medications and a preconsent review process will only exacerbate this problem.[296]

Claims that foster children are undermedicated are dubious in light of the data available on the subject.[297] Even assuming that foster children are at risk of being denied needed drugs, a red flag preconsent review system would only target an especially risky subset of psychotropic prescriptions. Prescriptions that appear safe, such as those for a low dose of a single drug for an older child, would not raise a red flag and would not require preconsent review.[298] Prescriptions that seem more dangerous, such as those for very young children or written by a physician with no training in psychiatry, would be the only ones singled out for further inspection.[299] All a red flag preconsent review system proposes is giving some extra scrutiny to "non-standard, unusual, and/or experimental psychiatric interventions" before administering them to foster children.[300] Furthermore, the review process does not have to be inflexible or lengthy. As multiple states have demonstrated, it is possible to implement review systems featuring short turnaround times and exceptions for emergencies.[301]

C. The Influence of Drug Manufacturers

The pharmaceutical industry disfavors legal restrictions on prescribing practices and has not hesitated to use its political clout to block reform efforts.[302] Nevertheless, the experience of Washing-

possible in order to meet the pressing mental health needs of youth in [state] custody.").

295. *See* GRUTTADARO & MILLER, *supra* note 111, at 8 (worrying that "[a]nti-psychiatry groups" have advanced "unfounded assertions" about the dangers of psychotropic drugs).

296. *See id.* at 14 (claiming that 80% of mentally ill youth receive no mental health treatment).

297. *See supra* Part III.A.

298. *See* TEX. DEP'T OF FAMILY & PROTECTIVE SERVS. & UNIV. OF TEX. AT AUSTIN COLL. OF PHARMACY, *supra* note 270.

299. *Id.*

300. *2008 Hearing*, *supra* note 46, at 50 (statement of Christopher Bellonci, Medical Director, the Walker School).

301. *See supra* Parts IV.A–B, IV.E.

302. *2011 Hearing*, *supra* note 24, at 22 (statement of Matt Salo, Executive Director, National Association of State Medicaid Directors).

ton state indicates that pharmaceutical lobbying is not an insurmountable obstacle. Washington faced opposition from drug manufacturers when it began the process of implementing a red flag review system, but was able to neutralize much of the resistance by publicizing alarming data on the high-risk prescriptions that were being issued to foster children.[303] In the end, the pharmaceutical industry's lobbying did not result in any substantive changes to the proposed monitoring system.[304] Shocking statistics and anecdotes from across the country should provide similar support for nationwide reform.[305]

D. The Cost Burden of Preconsent Review

Opponents of preconsent review may also cite cost as a concern, worrying that the expenses associated with the reviews will strain state budgets. While it is true that hiring medical professionals to conduct reviews will require an expenditure of state funds, preconsent review actually has the potential to create cost savings in the short and long term. In the short term, preconsent review can reduce the number of psychotropic medications the state must purchase for the children in its care.[306] This is an especially important advantage given the increasing popularity of expensive atypical antipsychotics as a treatment option for foster children.[307] In the long term, preconsent review can give children in foster care the opportunity to become productive members of society. By ensuring proper treatment of mental health issues in the foster population, these reviews can help foster children avoid events like hospitalization, institutionalization, and interruptions in schooling that might otherwise disrupt their development.[308]

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303. *Id.* at 156 (statement of Dr. Jon McClellan, Child Psychiatrist, Seattle Children's Hospital).

304. *Id.*

305. *See supra* Parts III.A, IV.B.

306. *See supra* notes 272–74 and accompanying text; *see also 2011 Hearing*, *supra* note 24, at 24 (statement of Dr. Jon McClellan, Child Psychiatrist, Seattle Children's Hospital) (claiming that Washington's red flag system saved the state $1.2 million over two years).

307. *See* Crystal et al., *supra* note 38 (observing that antipsychotics are "the most costly drug class for Medicaid programs, exceeding the runner-up (antidepressants) by a wide margin").

308. *See 2011 Hearing*, *supra* note 24, at 161 (statement of the National Alliance on Mental Illness) (arguing that the provision of effective psychosocial interventions to foster children generates long-term savings).

VII.
A FEDERAL SOLUTION

The federal government is uniquely positioned to spur reform across the country. By tying access to federal funds to implementation of red flag preconsent review systems that use the Texas criteria, the federal government can pressure every state to confront the psychotropic medication crisis.

A. State Dependence on Federal Funds

The federal government has shared the cost of foster care with the states since 1961.[309] Under Title IV-E of the Social Security Act, states may claim reimbursement for costs associated with the daily care and supervision of foster children; the administration of a foster care program; the training of staff and foster care providers; and the design, implementation, and operation of a statewide data collection system.[310] In 2011, the federal government spent more than $6 billion through Title IV-E, covering over half of the states' Title IV-E spending.[311] The Department of Health and Human Services is authorized to withhold reimbursement from states that do not comply with federal law.[312] Incorporating a red flag preconsent review requirement into federal law should produce real reform in the states that have not adequately addressed the psychotropic drug crisis, as the threat of losing federal funding would induce state lawmakers to pay serious attention to the issue.

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309. Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs., ASPE Issue Brief: Federal Foster Care Financing 3 (2005), *available at* http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf.

310. *Title IV-E Foster Care*, Children's Bureau (May 17, 2012), http://www.acf.hhs.gov/programs/cb/resource/title-ive-foster-care.

311. Emilie Stoltzfus, Cong. Research Serv., R42792, Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance and Kinship Guardianship Assistance under Title IV-E of the Social Security Act 1 (2012), *available at* http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R42792_gb_2.pdf.

312. *See* 45 C.F.R. § 1355.33 (2012) (describing Child & Family Services Reviews, which the federal government uses to monitor state compliance with federal law); Children's Bureau, U.S. Dep't of Health & Human Servs., Child and Family Services Reviews Procedures Manual 5 (2006), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cfsr_procedures_manual.pdf (explaining that federal funds may be withheld for nonconformity with federal law).

B. Fears of Federalization

Critics of further federal involvement in foster care express skepticism that a uniform solution to the psychotropics issue can be applied to all states.[313] Opponents argue that each state differs in its foster care population, its resource base, and the severity of its psychotropic drug problem, making federal legislation an inappropriate approach to the crisis.[314] They are also concerned about the effect federal intervention could have on state experimentation. They view states as the laboratories of democracy, constantly testing new policy approaches to discover what does and does not work.[315] A federal law mandating that each state adopt a red flag preconsent review system would put an end to this beneficial experimentation, perhaps preventing states from discovering an even better solution.[316]

Nevertheless, many observers deem a national approach to foster care's psychotropics problem both appropriate and necessary.[317] Without federal involvement, states will not make much progress unless prompted by a tragedy or a lawsuit.[318] The benefits of allowing states to continue experimenting with new policies must be balanced against the dangers psychotropic drugs pose to the wellbeing of children in foster care. At a certain point, experimen-

313. *See, e.g.*, *2008 Hearing*, *supra* note 46, at 62 (statement of Christopher Bellonci, Medical Director, the Walker School & Laurel K. Leslie, Developmental-Behavioral Pediatrician, Center on Child & Family Outcomes, Tufts-New England Medical Center Institute for Clinical Research & Health Policy Studies).

314. *See* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 18, at 13 (observing that each state's "service delivery array is unique").

315. *2011 Hearing*, *supra* note 24, at 3 (statement of Sen. Carper, Member, S. Comm. on Homeland Sec. & Governmental Affairs).

316. *See id.* at 150 (statement of Matt Salo, Executive Director, National Association of State Medicaid Directors) (expressing a desire to "maintain flexibility while bringing much needed awareness to this problem").

317. *See, e.g.*, *2007 Hearing*, *supra* note 117, at 61–62 (statement of Michael W. Naylor, Director, Division of Child & Adolescent Psychiatry, Program Institute for Juvenile Research, University of Illinois-Chicago) (recommending standardization of consent procedures across states); GABRIEL MYERS WORK GROUP, *supra* note 61, at 13 (endorsing the development of "a comprehensive nationwide approach" to the psychotropics problem); Leslie et al., *supra* note 24, at 17 (arguing that the psychotropic drug problem requires a national response).

318. *See* Matthew M. Cummings, Note, *Sedating Forgotten Children: How Unnecessary Psychotropic Medication Endangers Foster Children's Rights and Health*, 32 B.C. J.L. & SOC. JUST. 357, 388 (2012) (claiming that the overmedication of foster children with psychotropic drugs "needs prioritization on a national level"); Bellonci & Mackie, *supra* note 287 (naming "lack of national approach" as a complicating factor in the psychotropic drug crisis).

tation must cease and states must be prompted to adopt the practices that have worked best in other states.[319] Red flag preconsent reviews have produced results in several states, making them an ideal candidate for replication across the country.[320]

Furthermore, conditioning receipt of federal funds on implementation of a red flag preconsent review process does not have to completely stifle policy experimentation. Those states that wish to go beyond the Texas criteria by adopting a stricter set of red flags would be free to do so. Tennessee's medication utilization parameters, for example, flag for review the prescription of any psychotropic drug to a child under five years of age.[321] Nevada and Colorado are also more cautious than Texas, with Nevada targeting all off-label prescribing for extra scrutiny[322] and Colorado treating three or more concurrent prescriptions as a red flag.[323] Federal law can set a baseline, pushing reluctant states to provide some degree of protection while allowing ambitious states to implement more rigorous review mechanisms.[324]

CONCLUSION

Foster children face a perfect storm that ensures that large numbers of them will be inappropriately medicated with psychotropic drugs. They come into state custody burdened with histories of neglect or abuse and suffering from the effects of being sepa-

319. *See 2011 Hearing*, *supra* note 24, at 3 (statement of Sen. Carper, Member, S. Comm. on Homeland Sec. & Governmental Affairs) (describing the states as "laboratories of democracy" but arguing that "[e]very State should be adopting those practices" that have been shown to be effective elsewhere).

320. *See supra* notes 272–74 and accompanying text. Red flag preconsent review systems are also an ideal candidate for nationwide replication because private funding may be readily available for such programs. *See* Hunt, *supra* note 56 (reporting that "private foundations have expressed interest in funding the [red flag system] idea as a national pilot program").

321. PHARMACY & THERAPEUTICS COMM., TENN. DEP'T OF CHILDREN'S SERVS., *supra* note 18, at 6. New Mexico has the same policy. George Davis, *The Use of Psychotropic Medication in Children and Adolescents*, N.M. LEGISLATURE 7 (Sept. 2, 2013), http://www.nmlegis.gov/lcs/handouts/LHHS%20090413%20Item%207%20%20Davis%20MD%20Psychiatrist%20CYFD%20%20The%20Use%20of%20Psychotropic%20Medication%20in%20Children%20and%20Adolescents.pdf.

322. Nev. Rev. Stat. Ann. § 432B.197(1) (West 2009).

323. COLO. DEP'T OF HEALTH CARE POLICY & FIN. & COLO. DEP'T OF HUMAN SERVS., PSYCHOTROPIC MEDICATION GUIDELINES FOR CHILDREN AND ADOLESCENTS IN COLORADO'S CHILD WELFARE SYSTEM 6 (2013), *available at* http://www.colorado.gov/cs/Satellite/CDHS-ChildYouthFam/CBON/1251644597356.

324. *Cf.* WORTHINGTON, *supra* note 31, at 18 (explaining the virtues of "[f]ramework-setting legislation").

rated from their families of origin. Their responses to the traumas they have endured lead caretakers and doctors to turn to pharmaceutical solutions, either out of genuine concern for the child's mental health or simply out of a desire to control disruptive behavior. While a child from an intact family would enjoy the protection that comes from parental love, foster children too often have no one to advocate on their behalf. Consequently, they are medicated more frequently, and with more dangerous classes and combinations of drugs, than are children in the general population. While tragedies or class actions have pushed some states to confront the issue, the majority still have confused or nonexistent policies that leave many foster children unprotected.

The solution that holds the most promise entails locating authority to consent to medical treatment in the state child welfare agency and requiring preconsent review of riskier prescriptions by medical professionals trained in child and adolescent psychiatry. Designating the agency as the medical consenter simplifies the process while forcing the state to take responsibility for psychotropic drug use in the foster care population. Requiring red flag preconsent review reduces the number of risky prescriptions issued to foster children by facilitating dialogue between prescribing physicians and experts in child and adolescent psychiatry. Finally, federal involvement in promoting more widespread implementation of red flag preconsent review provides greater protection for foster children while leaving room for states to exceed the federally mandated minimum. With the causes and consequences of the psychotropics crisis clearer than ever, and an effective and politically plausible solution on the table, the time is right for the federal government to take action.

SECTION 21(A) REPORTS: FORMALIZING A FUNCTIONAL RELEASE VALVE AT THE SECURITIES EXCHANGE COMMISSION

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INTRODUCTION

The Securities and Exchange Commission (SEC or the Commission) is the primary regulator of financial entities, and as such, possesses an institutional expertise in sorting out corporate malfeasance unmatched by any other agency.[1] To ensure a stable and well-functioning financial marketplace, Congress has delegated to the SEC authority to promulgate securities rules and enforce them, either through internal administrative proceedings or in federal court.[2] The enforcement of the securities laws and regulations takes on many forms, but a theme pervasive in the regulatory approach of the Commission is the "assumption that more information is bet-

1. Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL CONDUCT TO REGULATE CORPORATE CONDUCT 177, 192–93 (Anthony S. Barkow & Rachel E. Barkow eds., 2011). This knowledge is often leveraged by prosecutors and state attorneys general seeking to convict white collar criminals for complex financial wrongdoing. *Id.*

2. ROBERTA S. KARMEL, REGULATION BY PROSECUTION 92 (1982).

ter than less."[3] By requiring the publication of material facts relevant to a company's wellbeing, the Commission allows a member of the public to review its financial state and make investment decisions based on this knowledge at her own peril. With this approach, the Commission straddles the fine line between protection and paternalism.

A fully informed investor can presumably make prudent allocations of her capital, and if she does not, only she is to blame for any ensuing loss.[4] While this market-based tack may seem uncontroversial today, preceding the enactment of the federal securities laws, so-called state "blue sky" securities laws often required regulators to examine the soundness of a financial offering.[5] Louis Brandeis, writing twenty years prior to the establishment of the Commission, best explained the theory underlining this more laissez-faire approach: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[6] In other words, the rigor of the market will drive capital away from bad actors if they are properly identified.

A requirement that financial entities disclose information or otherwise comply with securities regulations would not be effective without a complementary enforcement mechanism. Since its creation in 1934, the SEC's Division of Enforcement (Enforcement Division) has spearheaded the prosecution of financial wrongdoing with an increasingly diverse range of weaponry.[7] The SEC began with only the authority to pursue civil injunctions in federal court,[8] which later expanded with the addition of cease-and-desist authority in 1990[9] and the authority to impose fines, among other re-

3. Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 418 (2003).

4. *But see id.* at 419 (discussing the diminishing usefulness of increasingly large amounts of information as a guide for investor decisionmaking).

5. KARMEL, *supra* note 2, at 41. The origin of the term "blue sky" is uncertain, though see Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 359 & n.59 (1991), for some colorful possibilities.

6. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

7. *See generally* Daniel M. Hawke, *A Brief History of the SEC's Enforcement Program 1934–1981*, SEC. & EXCHANGE COMMISSION HISTORICAL SOCIETY (Sept. 25, 2002), http://www.sechistorical.org/collection/papers/2000/2002_0925_enforcement History.pdf.

8. Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer As Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 34 (Winter 1998).

9. Andrew M. Smith, *SEC Cease-and-Desist Orders*, 51 ADMIN. L. REV. 1197, 1198 (1999).

forms.[10] The SEC can also censure and disbar broker-dealers and other associated individuals.[11] These actions, often in combination, are the most common result after the Enforcement Division decides that a regulated entity's conduct has violated the securities laws.

This Note will focus on Reports of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 (Section 21(a) Reports),[12] a much less common action, in which the SEC decides to publish the information gathered during the course of an investigation. Resolving a matter with the publication of a report is generally restricted to times when the Commission believes that the public would benefit from the information gathered in an investigation, but does not (or cannot) follow the formal enforcement process. These reports are not a formal enforcement action, but rather are emblematic of Brandeis's conception of a market-oriented campaign of publicity[13]: they represent the notion that the publication of facts gathered from an investigation constitutes a sufficient resolution to a given issue.

As a matter of administrative law, it is hard to classify Section 21(a) Reports under the typical dichotomy of rulemaking versus adjudicatory proceedings. The reports are often simultaneously described as having both a prospective character—that is, providing guidance—and a retrospective one—providing a remedy.[14] They are employed sporadically and for reasons that differ based on the SEC's need in a particular case.[15] In form, they disclaim any adjudicatory or punitive nature,[16] though practitioners often see things

10. 6 THOMAS LEE HAZEN, LAW OF SECURITIES REGULATION § 16.2 (6th ed. 2009).

11. *Id.*

12. Fourteen Section 21(a) Reports published since 1996 are available on the SEC's website. *Reports of Investigations*, SEC. & EXCHANGE COMMISSION, http://www.sec.gov/litigation/investreports.shtml (modified Jan. 24, 2014). Additionally, the author found several Section 21(a) Reports published prior to 1996 through searches in Westlaw and LexisNexis, using varied search parameters meant to capture the language used in the reports. This search tactic allowed the author to find Section 21(a) Reports published prior to 1996 that were otherwise unidentifiable as such by title alone.

13. *See infra* Part I.A.

14. *See* 25 MARC I. STEINBERG & RALPH C. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT § 4:16 (2d ed. 2001).

15. *See, e.g.*, Eurex Deutschland, Exchange Act Release No. 70148, 106 SEC Docket, no. 18 (Aug. 8, 2013) [hereinafter Eurex Deutschland Report], http://www.sec.gov/litigation/investreport/34-70148.pdf (dealing with swaps rules); Motorola, Inc., Exchange Act Release No. 46898, 78 SEC Docket 2855, 2856 (Nov. 25, 2002) [hereinafter Motorola Report] (dealing with Regulation FD).

16. *See, e.g.*, Eurex Deutschland Report, *supra* note 15; Motorola Report, *supra* note 15.

differently.[17] In many respects, they most resemble a settlement, a product of executive action.

This Note will seek to bring the tension between the functional, investigatory purpose of the reports and formal administrative law principles to the fore, first by exploring the various circumstances that give rise to the publication of a report and then by turning to how these reports can fit into the established administrative law paradigm. Part I will bifurcate the reports into: (1) those that provide an investor-related benefit, and (2) those that provide an industry-related public benefit. This Part will also explain how the function of the reports issued prior to the "renaissance" of the SEC in the 1960s foreshadowed their use today. Part II further divides the reports into five categories based on the various rationales for issuing a report in lieu of more substantive remedial action: (1) jurisdictional issues; (2) local and state government involvement; (3) good faith; (4) derivative liability; and (5) legal ambiguity. A secondary goal of Part II is to provide a complete catalogue of all published reports.

Part III will examine the reports through the lens of administrative law, ultimately concluding that each public benefit tracks a different type of administrative action, sometimes with deleterious consequences. Part III will then attempt to explain from a normative perspective the SEC's decision to use the reports historically and today. This Part will also examine other critiques of the SEC to understand the reports within their particular regulatory milieu and offer a way to maintain the functional use of the reports while adhering to the principles of administrative law. The reports are an excellent way of clarifying the legal position of the SEC and warning investors of malfeasance; they are less useful as a remedial or quasi-legislative measure.

I.
THE FUNCTIONAL ORIGINS OF SECTION 21(A) REPORTS

A. The Statutory Basis

Section 21(a) Reports originate in a provision of the Securities Exchange Act that authorizes the SEC to "publish information concerning any such violations . . . [1] which it may deem necessary or proper to aid in the enforcement of [the securities laws], [2] in the prescribing of rules and regulations under this title, or [3] in securing information to serve as a basis for recommending further legis-

17. Dennis L. Block & Nancy E. Barton, *Securities Litigation: Section 21(a): A New Enforcement Tool*, 7 SEC. REG. L.J. 265, 266 (1979).

lation concerning the matters to which this title relates" upon completion of an investigation.[18] The second and third prongs of this tripartite framework allow the SEC to use the reports as a fact-finding mechanism to guide the agency or Congress in crafting new rules in a dynamic area of law. The bulk of the reports issue under the first prong—to aid in enforcement—a much broader and less defined mandate.[19] The clearest textual reading of this first provision is to allow the reports to function as a kind of guide for regulated parties, explaining how the SEC will react to new areas of law and warning investors that a financial transgression occurred.

This statutory authority is part of section 21(a) of the Securities Exchange Act, which allows the SEC to "make such investigations as it deems necessary to determine whether any person has violated" a securities law.[20] After the Enforcement Division decides a matter merits a formal investigation, the SEC staffers begin an inquiry that is wide-ranging in scope and can include subpoenas of witnesses and documents, frequently containing information that the entity would rather remain private.[21] An informal investigation is equally serious, though it does not involve the power to subpoena.[22] After an investigation, the Enforcement Division refers the matter to the Commission with a recommendation on whether or not to pursue a public, formal enforcement proceeding.[23] In cases where the Enforcement Division believes the best resolution to be the publication of a Section 21(a) Report, the Commission generally goes along with the staff's recommendation.[24] Investigations are private,[25] meaning the decision to publish a report detailing the facts of the wrongdoing can create significant negative publicity for a company, which is particularly problematic for financial entities dependent on client trust.[26]

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18. Securities Exchange Act of 1934, 15 U.S.C. § 78u(a)(1) (2012).

19. *See* discussion of specific 21(A) Reports, *infra* Part II.

20. § 78u(a)(1) (2012).

21. Richard M. Philips et al., *SEC Investigations: The Heart of SEC Enforcement Practice*, *in* RICHARD M. PHILIPS, THE SECURITIES AND ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 29, 30 (1997).

22. William R. McLucas et. al., *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53, 56 (1997).

23. *Id.* at 57.

24. Telephone Interview with Stanley Sporkin, former Director of Enforcement, SEC (Oct. 23, 2013).

25. Philips, *supra* note 21, at 30.

26. Richard M. Philips, *Settlements: Minimizing the Adverse Effects of an SEC Enforcement Action*, *in* RICHARD M. PHILIPS, THE SECURITIES AND ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 193 (1997).

However, the vast majority of investigations do not end in a recommendation for a Section 21(a) Report.[27] An investigation is much more likely to result in administrative proceedings or a civil injunction. Prior to the enactment of the Remedies Act in 1990,[28] the SEC had to choose between its right to seek a civil injunction from the federal courts and very limited administrative proceedings before an administrative law judge.[29] The Remedies Act not only expanded the jurisdiction of the SEC with regard to administrative proceedings, but granted it the authority to seek monetary damages as part of a civil injunctive action.[30] Administrative cease-and-desist orders are generally seen as a milder alternative to an injunctive action, primarily because of the lesser collateral consequences and lack of scienter requirements.[31]

Given this formidable arsenal of enforcement options, it is not immediately evident under what circumstances the SEC would choose to resolve a matter through the publication of a Section 21(a) Report. The difficulty arises in part because the decision arises out of negotiations with the regulated entity, which may seek to avoid the formal enforcement process through the publication of a report, knowing that it does not include admission of guilt or collateral consequences.[32]

For many entities, the issuance of a Section 21(a) Report is the best possible resolution to an SEC investigation. The SEC is also incentivized to publish a report in certain circumstances where the formal enforcement process is unlikely to yield a desired result. The reports issue where an investigation has turned up information that

27. *Id.* (explaining that the SEC only settles matters with a report in "rare instances").

28. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. 101-429, 104 Stat. 931 (1990).

29. Jeffrey B. Maletta & Neil S. Lang, *Sanctions and Collateral Consequences: The Stakes in SEC Enforcement Actions*, *in* RICHARD M. PHILIPS, THE SECURITIES AND ENFORCEMENT MANUAL: TACTICS AND STRATEGIES 137 (1997) ("[T]he Commission's authority to obtain administrative relief was generally limited to broker-dealers, investment advisors, other regulated entities, and their associated persons.").

30. *Id.* at 142–43.

31. *Id.* at 141.

32. Philips, *supra* note 21 ("[A] Section 21(a) report may be the best possible resolution of an enforcement investigation, short of no enforcement action at all."). For example, the report issued following the SEC investigation of the Retirement Systems of Alabama resulted from the negotiations by a state pension fund that sought to resolve an issue by publicizing the facts of an investigation with a report. The Retirement Systems of Alabama, Exchange Act Release No. 57446, 92 SEC Docket 2267 (Mar. 6, 2008) [hereinafter Alabama Report]; Interview with Stanley Sporkin, *supra* note 24.

the public should know, even if the facts do not constitute the basis for legal liability. The following Part will give an overview of the development of Section 21(a) Reports.

B. The Early Years: 1934–48

The SEC's early usage of Section 21(a) Reports is enigmatic but also foreshadowed their use today. As is often the case with the creation of complex administration schemes, the initial implementation phase of the financial regulation occasionally deviated from the ultimate result.[33] The anomalies that emerged along the way are a combination of historical artifacts with little precedential value and worthwhile attempts at a regulatory scheme whose abandonment may be a valuable lesson for future reform.

1. The Initial Use of Section 21(a) Reports

The period from the enactment of the securities laws to the start of the Second World War was a heyday of the securities enforcement actions at the SEC.[34] In a report issued in in the matter of White, Weld & Co. (White Report), the SEC attempted to explain the role of the reports in the newly-created regulatory agency.[35] In a legal argument portentous of disputes four decades later, the SEC maintained that the reports were merely a "preliminary inquiry" and did not amount to legal conclusions, despite the extent of the investigatory inquiries needed to issue the report.[36]

During the pre-war era, trial examiners would issue reports to the Commission along with reports from the regulated entity's counsel.[37] The issue at hand in the White Report was that while the trial examiner appeared to have exonerated the company, the

33. *See, e.g.*, Marc Winerman, *A Brief History of the FTC*, *in* FTC 90TH ANNIVERSARY SYMPOSIUM 6, 6 (describing how in its initial years the FTC ventured beyond antitrust), *available at* http://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf; *History*, FEDERAL MARITIME COMMISSION, http://www.fmc.gov/about/history.aspx (last visited Apr. 2, 2014) (explaining that the early iteration of the agency contained both promotional and regulatory powers).

34. Hawke, *supra* note 7.

35. Harold T. White, 1 S.E.C. 574 (1936) [hereinafter White Report]. While referred to in later reports as paradigmatic of the scope and intent of the Section 21(a) investigations, it is not clear whether the White Report is truly a Section 21(a) Report. *See* Alleghany Corp., 6 S.E.C. 960 (1940).

36. White Report, *supra* note 35, at 574.

37. Edward Johnson, SEC Trial Examiner, Work of a Trial Examiner, Address before the SEC Local #5 United Federal Workers of America (May 16, 1939), *available at* http://www.sec.gov/news/speech/1939/051639johnson.pdf.

Commission found facts indicating wrongdoing.[38] In doing so, the SEC established that reports do not represent any kind of adjudication,[39] a principle now explicit in most reports today. Despite the significance of the White Report in establishing that reports did not have the force of a judgment, the context of the decision also highlights some disanalogies between prewar practice and the modern era of 21(a) Reports. The White Report seems to have been issued privately without any attempt at guidance and the SEC only distributed it when the regulated entity litigated the report's purpose.[40] That is to say, the report was not issued for any particular public benefit other than to clarify the matter for the press.

Two years later, the SEC issued a report in in the matter of Richard Whitney (Whitney Report).[41] Again, there are several ways in which the context and substance of this report differ from any others subsequently published. While this Note will emphasize the marginal nature of the securities violations alleged in most 21(a) Reports, the Whitney Report atypically dealt with a major crime.[42] Richard Whitney was the former president of the New York Stock Exchange, imprisoned for embezzlement.[43] The SEC successfully requested delay of his sentence in order to carry out its investigation.[44] After examining Whitney's books, the SEC decided to hold a public hearing.[45] Two things are striking about this procedure. The first is that investigatory hearings today are private, though certain commentators have advocated for publicly held hearings.[46] The second is that the report's primary objective seemed to be to furnish information for future rulemaking or legislation,[47] perhaps the only report to explicitly do so.

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38. *White, Weld & Co. Cite 'Exoneration,'* N.Y. TIMES, July 8, 1936, at 27, *available at* http://nyti.ms/1CBT3Xk.

39. White Report, *supra* note 35, at 574.

40. *White, Weld & Co. Cite 'Exoneration,' supra* note 38.

41. U.S. SEC. EXCH. COMM'N, REPORT ON INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 IN THE MATTER OF RICHARD WHITNEY ET AL. (1938) [hereinafter WHITNEY REPORT], *available at* http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1938_07_USA_004.pdf.

42. *See id.*

43. *New Guilty Plea by Whitney*, N.Y. TIMES, Mar. 17, 1938, at 22, *available at* http://nyti.ms/1wb50CI.

44. *Whitney to Appear Before SEC Today*, N.Y. TIMES, Apr. 8, 1938, at 3, *available at* http://nyti.ms/1E2GPLo.

45. Richard Whitney et al., Exchange Act Release No. 1640 (Apr. 16, 1938).

46. Stanley Sporkin is one. *See* Interview with Stanley Sporkin, *supra* note 24.

47. *See* WHITNEY REPORT, *supra* note 41, at 4.

2. The Emergence of the Public Benefit Rationale

The public benefit rationale began to assume a more prominent role as the SEC continued issuing Section 21(a) Reports. In an untitled report, the SEC explained that a regulated entity, Consolidated Film Industries, had provided misleading information to its investors.[48] Because the SEC was either unwilling or unable to force Consolidated Film to comply with its regulations on proxy solicitations,[49] it released a Section 21(a) Report to correct the errors from a supplemental filing.[50] Interestingly, the report here seems to have acted as a kind of substantive remedy: when Consolidated Film refused to clarify information in its own filing, the SEC decided that issuing the report would serve to meet the public interest in achieving material disclosure.[51] The report was used as a direct substitute for the regulated entity's incomplete filings. This sort of usage was repeated a decade later, with a report again used to correct misleading filings, this time for a public offering.[52] Rather than allowing the facts of the investigation and legal conclusions of the report to drive investor behavior, in the early days the SEC used Section 21(a) Reports to directly cure the underlying violation.

Issuing Section 21(a) Reports in the early days allowed the SEC to avoid enforcement because the information contained within the reports only supplemented the filing information from the entities to render them compliant with disclosure obligations and no longer in breach of securities laws. The reports were effectively a substantive addition to the SEC toolbox; they could be used to fill in the gaps where the regulated entities had failed, and in so doing, help the SEC avoid the onerous enforcement process. In a yet another example, in the Alleghany Corporation report,[53] the SEC decided that due to changes in management and correction of the

48. Consolidated Film Industries, Inc., Exchange Act Release No. 903 (Oct. 22, 1936) [hereinafter Consolidated Films Report].

49. Issues about adequate disclosure in proxy solicitation "had been raised from time to time with about 150 other companies and [ ] in each an amicable agreement was reached," so non-acquiescence represented a new twist for the SEC. *SEC Gives Details of Row on Proxies*, N.Y. TIMES, Oct. 22, 1936, at 35, *available at* http://nyti.ms/1J97mXq.

50. Consolidated Films Report, *supra* note 48.

51. *See id.*

52. Drayson-Hanson, Inc., 27 S.E.C. 838, 839 (1948). ("Since the essential purpose of the Securities Act, to insure disclosure of information adequate to inform investors of their rights, would appear in this case to be accomplished by the distribution of the report, we have determined not to employ the more usual remedy . . . .").

53. Alleghany Report, *supra* note 35.

previous errors, no enforcement was needed.[54] Rather, the harm to the public would be remedied by the publicity from the report.[55]

The three Section 21(a) Reports discussed above all exemplify a kind of public benefit, but one that differs in a significant way from the later reports. The rationale for their issuance was that the publication of the facts contained therein would resolve the underlying matter.[56] If a company failed to disclose certain information, the SEC could simply publish a report to make the public aware of the material information. If information was otherwise misleading, a report could rectify the issue by providing investors with a corrected version. The early reports actively benefitted investors. While many later reports also sought to provide investors with information about wrongdoing, they did so with much more circumlocution.

3. Potential for Misuse

Although these early reports seem to have been focused primarily on resolving the issue at hand, former Commissioner Roberta Karmel believes they also anticipated future Commission abuse of the reports.[57] During her time on the Commission, Karmel gained something of a reputation as pro-industry and wary of SEC overreach generally.[58] She has been perhaps the most vocal critic of the reports, both during her time as a Commissioner[59] and afterwards,[60] believing them to be an exercise of power beyond the statutory authority of the SEC.[61] She particularly focuses her critique on an early report issued in the matter of Ward La France Truck Corporation, which described the non-disclosure of a significant tax

54. *Id.* at 5.

55. *Id.* ("[S]ince this report will serve to inform the investing public of past deficiencies, we do not feel that it will be necessary to institute any further proceedings.").

56. *See, e.g.*, *id.*

57. KARMEL, *supra* note 2, at 50.

58. Judith Miller, *Mrs. Karmel, S.E.C.'s Voice of Dissension*, N.Y. TIMES, Feb. 20, 1979, at D1. ("Mrs. Karmel's outspoken opposition to some of the agency's actions have won her plaudits on Wall Street.").

59. *E.g.*, Spartek, Inc., Exchange Act Release No. 15567, 16 SEC Docket 1094 (Feb. 14, 1979) [hereinafter Spartek Report] (Karmel, Comm'r, dissenting); The Commission's Practice Relating to Reports of Investigations and Statements Submitted to the Commission Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 15664, 17 SEC Docket 18 (Mar. 21, 1979) [hereinafter SEC Guidelines].

60. *E.g.*, Karmel, *supra* note 8, at 42 & n.40; KARMEL, *supra* note 2, at 219–22.

61. KARMEL, *supra* note 2, at 220.

benefit that would accrue to the company during a stock buyback.[62] Because of cooperation by the corporation and restitution to the shareholders after commencement of the SEC investigation, the SEC did not file further enforcement actions.[63] Karmel alleges that this report issued because the SEC had no administrative jurisdiction, and moreover, because the rule in question was not in place when the fraudulent actions took place.[64] While there is some doubt that this was the case in the Ward La France report,[65] both of these issues—a lack of demonstrable SEC jurisdiction and the use of reports to punish behavior not forbidden by SEC regulations—have arisen in latter-day reports.[66]

A harbinger of reports with similar jurisdictional issues was released in McKesson and Roberts, which condemned the audit procedures of a fraudulent entity's external auditor, Price, Waterhouse.[67] As it would in subsequent reports, it appears here that the SEC used the report to censure entities whose conduct was not yet against the law. As a collateral consequence of issuance, another subsidiary of the fraudulent entity sued Price, Waterhouse as a result of its accounting practices.[68] The possibility of a lawsuit as a result of the reports may explain the "no admit or deny clause" appended to later reports to ward off any hint of issue preclusion and to prevent their admission as evidence in subsequent litigation.[69]

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62. Ward La France Truck Corp, Exchange Act Release No. 3445 (May 20, 1943).

63. Note, *SEC Action Against Fraudulent Purchasers of Securities*, 59 HARV. L. REV. 769, 769–70 (1946).

64. KARMEL, *supra* note 2, at 50.

65. It appears that the SEC did have jurisdiction over issuers at the time. *SEC Action Against Fraudulent Purchasers of Securities*, *supra* note 63, at 778 & n.52. Ward La France's actions also appear to have occurred on October 21, 1942, after the SEC's implementation of Rule X-10-B5 on May 21, 1942. *Id.* at 769–70.

66. The Moody's Report, is an example of a report where the wrongdoing was not yet illicit. Moody's Investor Service, Inc., Exchange Act Release No. 62802, 99 SEC Docket 765 (Aug. 31, 2010) [hereinafter Moody's Report].The Spartek Report is an example of a report where there was only partial jurisdiction. *See* Spartek Report, *supra* note 59.

67. McKesson & Robbins, Inc., Exchange Act Release No. 2707 (Dec. 5, 1940) [hereinafter McKesson Report].

68. *M'Kesson Auditors Sued*, N.Y. TIMES, Jan. 30, 1941, at 23, *available at* http://nyti.ms/1tGrf3F.

69. "Hint," because for there to be issue preclusion there needs to be a judgment of "issues actually litigated and determined," which a Section 21(a) Report is not. Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 326 (1955). For a discussion of the admissibility of SEC settlements without a no admit or deny clause as evidence, see Mary P. Hansen, *"Neither Admit nor Deny" Settlements at the SEC*, NAT. L.

4. Gaining Focus: Section 21(a) Reports Adopt a Public Benefit Rationale

The early Section 21(a) Reports are scattered and individualized, more so even than the reports that have issued since the 1970s. The marked differences among them, however, allow the similarities to stand in starker contrast: early reports issued where the public would benefit from knowing the facts of an investigation. This "public benefit" criterion for the issuance of a 21(a) Report has persisted to the present day. The public benefit of modern reports is much more prominent than it was in the initial reports.

Although the salience of the "public benefit" has increased in the modern era, precisely what constitutes a public benefit has remained an ill-defined concept. The following Part defines the public benefit rationale and how it can assume a different meaning depending on the context and intended audience.

C. Introduction to the Public Benefit Dichotomy: Reports for Investors and Reports for Industry

In the context of Section 21(a) Reports, "public benefit" can assume two meanings: one focused on the needs of investors and the other on the practices of regulated industries. However, this duality is not immediately obvious from the statute or pronouncements of the SEC. The Commission states that the reports are published where substantial issues of public concern, widespread investor impact, or other matters of significance relating to the federal securities laws were involved.[70] This pronouncement is both over- and under-inclusive: nearly all enforcement actions are of public concern or are, at the very least, matters of significance; and, not all reports appear to issue for this rationale exclusively. These criteria are inherently imprecise because the decision to publish a report emerges out of the give-and-take negotiations that occur as part of the investigatory process that precedes every enforcement action. In other words, a public benefit is a necessary, but not sufficient requirement for the publication of a report.[71] The public benefit rationale provides an overarching structure that roughly divides the reports into two categories, both of which deal with a certain portion of the public and provide a certain kind of benefit.

The first type of public benefit arises in those reports used to warn companies that transacted with the entity mentioned in the

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REV., Apr. 3, 2014, *available at* http://www.natlawreview.com/article/neither-admit-nor-deny-settlements-sec-securities-and-exchange-commission.

70. SEC Guidelines, *supra* note 59.

71. *Id.*

report that the entity engaged in misconduct that either was or bordered on a securities violation. The public with a potential interest in learning about this kind of behavior can run the gamut from employees of the company to future business partners, but these reports are most likely to affect the decisionmaking of current and potential investors. Publication of the details of an investigation empowers investors because, turning again to Brandeis, "the investor's servility is due . . . to his ignorance of the facts."[72] In its analysis of individual reports this Note will use the term "investor-related" to refer to this kind of public benefit.

The second type of public benefit arises in those reports that warn regulated entities that the SEC has begun to focus its enforcement on certain practices or to clarify its rules in emerging areas of law. These reports are intended as a warning against future wrongdoing. They often recommend changes or highlight specific areas to which financial entities should pay attention. For example, the Feuerstein Report discussed in Part II.D.3, detailed the misconduct of a legal corporate officer to explain that lawyers would be considered supervisors for certain provisions of the securities regulations.[73] In this sense, the publication of a report serves to publicly benefit certain kinds of financial actors by detailing particular SEC enforcement goals. This Note will use the term "industry-related" to refer to this kind of public benefit.

Most of the reports provide a benefit to both investors and industrial actors. However, in many reports the benefit to one sector of the public predominates over the other. In a minority of reports, there does not seem to be a substantial public benefit at all. These differences can be partially explained by policymaking priorities at the Commission, but they are also indicative of an overpressured agency seeking to resolve issues quickly. Part II explains how adherence to administrative law principles can help cabin the publication of reports to matters where there is an actual public benefit.

II.
SECTION 21(A) REPORTS IN ACTION

Modern Section 21(a) Reports are a functional stopgap, used by a heavily pressured agency to resolve marginal issues quickly. This Part seeks to roughly group the reports by broad rationales, each of which details an area where the SEC would find it difficult or imprudent to pursue a formal enforcement action: (A) ex-

72. BRANDEIS, *supra* note 6, at 99.

73. John H. Gutfreund, 51 S.E.C. 93 (1992) [hereinafter Feuerstein Report].

trajurisdictional reports, (B) reports issued in politically fraught situations, (C) reports issued for the sake of leniency, (D) reports issued in matters of derivative liability, and (E) reports issued in the face of legal ambiguity. The focus of this Part is to explore the variance among the reports and to flesh out the dichotomy of public benefit that this Note posits guides their publication.

A. Extrajurisdictional Reports

1. Reports Issued to Highlight Misconduct Outside SEC Jurisdiction

After conducting an investigation, the SEC may conclude that a regulated entity committed acts that seem to run counter to the spirit of the securities laws, but do not constitute an actual violation. The SEC does not have a statutory grant of jurisdiction to bring an enforcement action against these legally permissible, yet undesirable, acts. In these circumstances, the SEC may choose to issue a Section 21(a) Report. Indeed, a common characterization of the reports in the practitioner literature is that when the SEC disapproves of certain actions that lie beyond its geographic or statutorily-granted jurisdiction, it will resort to publishing a report.[74] The SEC often admits as much: in one recent report on the rating agency Moody's (Moody's Report), the Commission stated that "[b]ecause of uncertainty regarding a jurisdictional nexus to the United States in this matter" it would not pursue an enforcement action.[75] It is worth noting the Moody's Report described conduct that was unlawful at the time of publication, though not at the time of the conduct described in the report; Congress had recently expanded the SEC's jurisdiction to cover international events.[76]

As SEC investigations can take up large amounts of staff time and agency resources, there may be internal and external pressure to arrive at some kind of closure even in the face of jurisdictional obstacles.[77] This was particularly true in the case of Moody's, as it was one of the credit rating agencies that came under fire following the financial crisis of 2008.[78] While under the gun to punish these

74. *E.g.*, STEINBERG, *supra* note 14 ("Moreover, through the Section 21(a) report procedure, the Commission can avoid the usual requirement of having to find an actual violation . . . ."); Block & Barton, *supra* note 17 ("Particularly when it has discovered a technical, marginal, or isolated violation that is beyond its administrative jurisdiction, the Commission may be tempted to use Section 21(a) . . . .").

75. Moody's Report, *supra* note 66.

76. Edward Wyatt, *No Charges for Moody's in Ratings Violation*, N.Y. TIMES, Sept. 1, 2010, at B3.

77. Block & Barton, *supra* note 17, at 271.

78. Wyatt, *supra* note 76.

agencies for rubberstamping risky securities with an AAA rating, the SEC was hampered by legislatively enacted hurdles making it difficult to prove wrongdoing.[79] Given the charged regulatory climate in which the Moody's Report was issued, it seems highly likely the SEC would have instituted a formal enforcement action if there had not been jurisdictional barriers in its way. By publicizing the report, the SEC demonstrated that it took its regulatory responsibilities towards ratings agencies seriously.

Another example of an extrajurisdictional Section 21(a) Report, the Spartek Report resulted in former Commissioner Karmel's first dissent to the publication of a report.[80] The Spartek Report detailed the company's failure to disclose material information in a preliminary proxy statement, specifically that the management had a material conflict of interest with the minority shareholders.[81] Karmel condemned the report for its publication of facts concerning obstructionist actions by the chief executive officer of Spartek, whose actions were outside of the SEC's jurisdiction, as well as what she perceived to be a general lack of jurisdiction over the alleged wrongdoing by Spartek.[82] She readily admits that there may have been strong policy reasons for regulatory intervention, but objected because she thought that the SEC should have funneled its actions through statutorily established jurisdictional and procedural channels.[83]

2. The Public Benefit Rationale

The Moody's and Spartek Reports had similar goals. In each, the SEC sought to highlight certain behavior that was beyond its jurisdictional grasp: in the Moody's report, the statute conferring extraterritorial jurisdiction was not yet in force,[84] and in the Spartek report, the CEO lied to the American Stock Exchange,

79. *See, e.g.*, Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327 (codified as amended in scattered sections of 15 U.S.C.); Wyatt, *SEC Pursuing More Cases Tied to Financial Crisis*, N.Y. TIMES, July 20, 2010, at B2 ("[T]he Credit Rating Agency Reform Act of 2006 prohibits the S.E.C. from regulating the substance, criteria or methodologies used in credit rating models . . . .").

80. Spartek Report, *supra* note 59.

81. *Id.* at 6. The management was also the controlling shareholder, which had a variety of reasons to not disclose the pending sale of the company to another investment firm. *Id.* at 4.

82. *Id.* at 9 (Karmel, Comm'r, dissenting).

83. *Id.* at 10.

84. Moody's Report, *supra* note 66.

which violated SEC rules for entities, not persons.[85] The Moody's Report served to warn Moody's and other credit ratings agencies that the SEC planned to scrutinize their role in the worldwide financial system.[86] In this sense, the report served an industry-related public benefit, meant to warn credit ratings agencies that the jurisdictional bounds of American securities laws had expanded to include overseas infractions. This report demonstrates how the public benefit rationale differs from the way that guidance is normally conceived in administrative law because it does not modify or clarify existing rules governing the conduct of credit rating agencies. Instead, the Moody's Report serves as a shot across the bow, warning credit rating agencies that the SEC is monitoring their overseas conduct.[87]

The Spartek Report is more complex than the Moody's report. Through publication of the facts of the Spartek matter, the SEC sought to warn investors of the CEO's behavior and generally about the kind of "going private" technique used by Spartek to avoid the requirements of state and federal management-led buyout rules.[88] This is an investor-related public benefit, where the SEC believes that entities that transact with the company subject to the report would prefer to know about the conduct uncovered during the course of investigation. The SEC published the information in the report because it believed it to be a kind of wrongdoing that Spartek's investors and business partners would find relevant when deciding whether to commit to future dealings with the company.[89] Additionally, the report warned other publicly held companies that similarly wanted to skirt federal and state securities laws when going private to beware. The Spartek report had two central areas of public benefit: the warning to investors and the business associates of Spartek that the CEO lied to the New York Stock Exchange and the warning to the industry that the SEC was aware of the novel and fishy technique for going private.

85. Spartek Report, *supra* note 59, at 9 & n.5 ("Cable has been included in this proceeding in order for the majority to comment adversely on certain conversations Cable had with certain American Stock Exchange officials. While I do not condone Cable's conduct in dealing with exchange officials, I do not believe the Commission has the authority to sanction his lack of candor in an administrative proceeding instituted under Section 15(c)(4) or Section 21(a).").

86. Moody's Report, *supra* note 66.

87. Brendan Sheehan, *SEC Warns Moody's and Other Rating Agencies*, CORPORATE SECRETARY (Sep. 7, 2010), http://www.corporatesecretary.com/articles/regulation-and-legal/11360/sec-warns-moodys-and-other-ratings-agencies/.

88. Spartek Report, *supra* note 59, at 1104 (Loomis, Comm'r, concurring).

89. *Id.*

The matters underlying the Spartek and Moody's Reports were outside of the statutory jurisdiction of the SEC to prosecute. Both reports served to benefit the public by providing information that would be relevant to the investing public and industry actors. The extrajurisdictional aspect of the reports is most salient here because it is mentioned directly in the reports themselves, but many other reports issue in areas where the SEC's statutorily-granted jurisdictional authority to regulate and prosecute is hazy. The following discussion of reports involving governmental entities is one such area.

B. Politically Fraught Situations

1. Reports Issued in Political Situations with Tension Between the Commission and Local and State Government Entities

The SEC must confront unique statutory and constitutional questions when it attempts to enforce its regulations on local and state financial entities.[90] Under the Eleventh Amendment, the SEC is not allowed to regulate the behavior of state-level financial actors,[91] though this restriction does not extend to municipal and other local government entities.[92] The questionable constitutionality of these reports is one of the reasons that former Commissioner Karmel claims that SEC actions in matters involving state or local entities are often yet another example of extrajurisdictional encroachment.[93] In addition to the constitutional issue, Karmel disparages statutory "loopholes" that place certain state-issued bonds, such as industrial revenue bonds, outside of what would otherwise be clear SEC jurisdictional authority.[94] Construed in this light, reports publicizing malfeasance by state and local entities would appear to be similar to the Spartek and Moody's Reports: a condemnation of behavior that lies beyond the SEC's jurisdiction to

90. Stephen Bradford Lyons, *SEC Registration Requirements for Taxable Municipal Securities*, 21 URB. LAW. 223, 242 (1989) (explaining the difficulties of regulating municipal bonds, which can be applied more generally to all regulations of municipal and state government action).

91. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); Christine Sgarlata Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455, 1534 & n.356 (2013).

92. Jinks v. Richland Cnty., S.C., 538 U.S. 456, 457 (2003) ("[M]unicipalities . . . do not enjoy a constitutionally protected immunity from suit.").

93. KARMEL, *supra* note 2, at 211–16.

94. *Id.* at 213.

formally enforce. Indeed, the SEC used a Section 21(a) Report to publicize the misleading statements by the beneficiary of an industrial revenue bond, conduct that would be illegal if there were no statutory roadblocks to the contrary.[95]

However, when dealing with state and local governments, the political ramifications of an SEC enforcement action often will weigh more heavily than other considerations.[96] For example, in a staff report that acted as a Section 21(a) Report in all but name (New York Report), the SEC published the findings of an investigation into the misleading financial statements made by the mayor, comptroller and other high officials of the City of New York.[97] The report was published in the middle of a mayoral primary, making its contents so highly anticipated that a federal district judge ruled that the report should be turned over to him to determine whether it should be published before the SEC deemed it ready.[98] Beyond the immediate political impact of the report, there were also questions about the propriety of analogizing the role of the mayor and local government to that of a CEO in the context of enforcement of securities laws.[99] Though politicians may benefit from misleading statements about their city's finances, it does not make sense to sanction the cities themselves because the financial impact will be borne by constituents (and often new political leaders), who have little control over the financial impropriety. Avoidance of this political thicket, to appropriate a metaphor, guides the SEC in these situations.

The political nature of SEC decisionmaking in this arena is compounded by officials who are unaware of the regulatory consequences of their statements or the financial rules generally. Though the officials of the City of New York were quite deliberate in their

95. Marine Protein Corp., Exchange Act Release No. 15719, 17 SEC Docket 257 (April 11, 1979) [hereinafter Marine Protein Report].

96. Interview with Stanley Sporkin, *supra* note 24.

97. Subcomm. on Econ. Stabilization of the H. Comm. on Banking, Finance & Urban Affairs , 95th Cong., S.E.C. Staff Rep. on Transactions in Securities of the City of New York (Comm. Print 1977) [hereinafter New York Report]. Stanley Sporkin called this Report a Section 21(a) Report. Interview with Stanley Sporkin, *supra* note 24.

98. Michael C. Jensen, *S.E.C. Seeking to Salvage Report, Called Inadequate, on City's Crisis*, N.Y. Times, Aug. 17, 1977, at D3.

99. June Rose, Note, *Federal Securities Fraud Liability and Municipal Issuers*: *Implications of* National League of Cities v. Usery, 77 Colum. L. Rev. 1064, 1072 (1977) (explaining that mayors and other elected officials often make exaggerated statements due to the nature of the job).

efforts to deceive the investing public,[100] often the financial irregularities mentioned in a report describe a government entity unprepared for the regulatory and compliance requirements necessary to act in the sophisticated financial marketplace. For example, the report issued in the Matter of the Retirement Systems of Alabama (Alabama Report) dealt with trading based upon material nonpublic information by a public pension fund.[101] The fund did not have any compliance checks in place to prevent this kind of trading from occurring, which would have been required if the fund were run by an external, potentially more sophisticated, money manager.[102] Again, while this was a serious offense, the SEC chose not to pursue an enforcement proceeding because it knew that any money levied against the fund would come out of the pockets of current and future pensioners.[103] Perhaps even more importantly, the pension fund disgorged the gains from the insider trading and instituted compliance reforms recommended by the SEC.[104]

2. The Public Benefit Rationale

The Alabama Report contains two central areas of public benefit. The first is investor-related: those counterparties who traded with the pension fund were made aware of the fund's ill-gotten gains from trading on material non-public information.[105] More generally, potential counterparties were made aware that public entities often did not have adequate safeguards in place to avoid insider trading and other violations of the securities laws. This relates to the second, industry-related public benefit: other similarly situated public entities were reminded that while they were exempt from many of the requirements of other money managers, they were still liable for insider trading violations arising out of Rule 10b-

100. *See* NEW YORK REPORT, *supra* note 97, at ch. 3, 135 ("The Mayor controlled the budgetary process, and was fully aware of the gamut of unsound budgetary, accounting and financial reporting practices utilized by the City.").

101. Alabama Report, *supra* note 32, at 2268 ("At the time of the events described in this report, RSA had no policies, procedures, training or compliance officer to ensure its compliance with the federal securities laws.").

102. *Id.*

103. Michael K. Lowman, Larry P. Ellsworth & Jennifer M. Lawson, *Insider Trading Compliance Programs in SEC Crosshairs*, BUS. L. TODAY, July/August 2008, at 64; Interview with Stanley Sporkin, *supra* note 24.

104. Press Release, U.S. Secs. & Exch. Comm'n, SEC Warns Public Pension Funds about Inadequate Compliance Procedures (Mar. 6, 2008) [hereinafter Alabama Press Release], *available at* http://www.sec.gov/news/press/2008/2008-35.htm.

105. Alabama Report, *supra* note 32.

5.[106] The New York Report purported to have similar public benefits.[107]

A third report dealing with a municipality making false and misleading statements drives home how the public benefit dichotomy manifests in the local and state regulatory context.[108] The report detailed the omissions and misrepresentations of public officials about the finances of the City of Harrisburg, which constituted material nondisclosures to the investing public.[109] In an accompanying cease-and-desist proceeding, the SEC for the first time charged a municipality with a Rule 10b violation outside of a primary securities offering.[110] The separate cease-and-desist proceeding provided the investor-related public benefit, warning traders in municipal bonds that the Harrisburg finances were not as robust as advertised. The Section 21(a) Report was meant as the industry-related benefit; it served to warn public officials that their comments, if inaccurate, could result in Rule 10b liability for releasing false and misleading statements about the financial state of their municipality.

An important takeaway of the Harrisburg Report is that the SEC does not necessarily provide both kinds of public benefit through a report. As in the Harrisburg matter, it may choose to use a formal enforcement proceeding to provide the investor-related public benefit, accompanied by the industry-related benefit from the report. In these situations, still published for the public benefit, a Section 21(a) Report is not simply an alternative to enforcement, it also supplements enforcement. For now, this distinction should serve as a reminder that the reports are, above all, a way for the SEC to send a message. The next Part, which explores reports involving

106. *Id.* at 2270.

107. New York Report, *supra* note 97.

108. City of Harrisburg, Pennsylvania, Exchange Act Release No. 69516 (May 6, 2013) [hereinafter Harrisburg Report]. A report with a very similar factual background and in which identical legal conclusions were reached was issued sixteen years earlier about the conduct of county-level officials in Orange County, California. County of Orange, California, Exchange Act Release No. 36761 (Jan. 24, 1996).

109. Harrisburg Report, *supra* note 108.

110. City of Harrisburg, Pa., Exchange Act Release No. 69515, 106 SEC Docket 1198 (May 6, 2013); *see also* Cate Long, *Free Speech or Securities Fraud?*, Muni-Land Blog (June 25, 2013), http://blogs.reuters.com/muniland/2013/06/25/free-speech-or-securities-fraud/. Section 10(b) of the Exchange Act, and Rule 10b thereunder, prohibit companies from using "manipulative and deceptive devices" in connection with the purchase or sale of securities. Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (2012); 17 C.F.R. § 10b-5 (2014).

cooperation and good faith, illustrates another variant of this justification.

C. Leniency

1. Reports Issued to Grant Leniency for Good Faith or Cooperation

When the SEC does not have a solid case because of political, jurisdictional, or constitutional issues, but still believes the public would benefit from knowing the facts of the investigation, it may choose to resolve a matter with a Section 21(a) Report.[111] However, the SEC may still issue a report in lieu of enforcement proceedings even where there are none of these roadblocks, when it deems the violation too minor to merit further expenditure of SEC resources. This most often occurs when the entity targeted in an investigation cooperates fully with the SEC. In fact, the most well-known Section 21(a) Report was issued in this context.

In 2001, the SEC issued what is usually referred to as the Seaboard Report, though this name does not appear in the report itself.[112] Similar to the Harrisburg Report, the Seaboard Report was linked to a related enforcement action: a cease-and-desist proceeding against a former corporate controller.[113] Upon learning of the transgression, the parent company (Seaboard) self-reported to the SEC, which decided not to pursue an enforcement action due to Seaboard's cooperation and implementation of new compliance controls.[114] The wrongdoing was clear and there were no jurisdictional, statutory, or political doubts as to the SEC's ability to prosecute. The Commission chose to publish a report because Seaboard had fully cooperated; the report provided thirteen guidelines for future entities wishing to receive credit for cooperation with the SEC.[115] These guidelines give grounds for leniency based on how quickly a regulated entity self-reports malfeasance, at what level the transgression occurred, and what new safeguards were put into place, among other criteria.[116] The Department of Justice later fol-

111. *See supra* Part II.A–B.

112. Gisela de Leon-Meredith, Exchange Act Release No. 44969, 76 S.E.C. Docket 220 (Oct. 23, 2001) [hereinafter Seaboard Report].

113. Gisela de Leon-Meredith, Exchange Act Release No. 44970, 76 S.E.C. Docket 223 (Oct. 23, 2001); Floyd Norris, *S.E.C. Sets Rule on Misconduct Reporting*, N.Y. Times (Oct. 24, 2001), http://www.nytimes.com/2001/10/24/business/sec-sets-rule-on-misconduct-reporting.html?smid=PL-share.

114. Seaboard Report, *supra* note 112.

115. *Id.*

116. *Id.*

lowed suit in the Thompson Memo, issuing similar guidelines to potential corporate defendants in criminal actions.[117]

Notably, the vast majority of matters in which cooperation was a mitigating factor have not resulted in the publication of a Section 21(a) Report, but rather in leniency in choosing whom to prosecute and which enforcement action to use.[118] That said, in one example, the SEC chose to publish a Section 21(a) Report in lieu of formal enforcement proceedings: the SEC seemed to follow the Seaboard guidelines when electing to publish a report that dealt with the acts of a foreign derivatives exchange, Eurex Deutschland.[119] The exchange failed to register one of its futures offerings, the EURO STOXX bank index, after a shift in the composition of the index placed it within the SEC's jurisdictional ambit.[120] Just like the circumstances that gave rise to the Seaboard report, this seems like a run-of-the-mill transgression. The report does not hedge, stating that Eurex Deutschland "did not comply" with various provisions from the Securities Exchange Act and the Securities Act that prohibit the trade of unregistered securities in U.S. markets.[121] However, the Commission chose to publish a Section 21(a) Report rather than a more serious enforcement action because of the extensive cooperation by Eurex Deutschland.[122] The exchange not only immediately self-reported when it discovered the issue, it also ceased sale of the index and increased other compliance measures.[123]

2. The Public Benefit Rationale

The public benefit of the Seaboard Report was clearly industry-related. It does not even mention the name of the company,[124] a necessary step to warn any potential investors or business associates. The guidelines mentioned in the Seaboard Report have since been

117. LARRY D. THOMPSON, U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2003), *available at* http://federalevidence.com/pdf/Corp_Prosec/Thompson_Memo_1-20-03.pdf; Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1109 (2006).

118. For several examples, see Barry W. Rashkover, *Reforming Corporations through Prosecution: Perspectives from an SEC Enforcement Lawyer*, 89 CORNELL L. REV. 535, 541 n.38 (2004).

119. Eurex Deutschland Report, *supra* note 15, at 1–2.

120. *Id.* at 3.

121. *Id.* at 4–6.

122. *Id.*

123. *Id.* at 7–8.

124. *See* Seaboard Report, *supra* note 112.

augmented through more formal guidance and rules,[125] but their general principles have been followed in numerous actions. The broad scope of the Seaboard Report also differentiates it from other reports, which normally deal with very specific areas of securities law. In fact, the report does not actually mention or explain any securities regulation at all; instead, it delineates the conditions under which the SEC is likely to invoke prosecutorial discretion.[126] In a sense, this demonstrates the functional nature of the reports: the SEC was able to piggyback on the cease-and-desist proceedings against Seaboard's controller to explain why it chose not to prosecute the company for the wrongdoing of its employee.

In the Eurex Deutschland Report, the public benefit is twofold. First, there is an investor-related benefit in alerting those U.S. entities transacting on the exchange that Eurex Deutschland is now in compliance with U.S. securities laws. This issue is very narrow and likely only to matter to a select few investors. The second is to warn other industry actors that would enter into similar futures swaps about the exact contours of the relevant newly enacted provisions of the securities laws.[127] While also a narrowly bounded issue, swaps were at the heart of the financial reforms following the crisis in 2008 and their regulation remains highly contested.[128] The publication of a Section 21(a) Report in this area could serve to remind financial entities that the SEC has partial jurisdiction over the contracts.[129]

There is still one central factor that distinguishes the Eurex Deutschland Report from the extrajurisdictional and local government reports. In the previously mentioned reports, it was questionable whether the SEC would choose to pursue a formal enforcement action, for the jurisdictional and political reasons mentioned above. In the Eurex Deutschland Report, the wrongdoing was clear, but it did not seem very egregious; because the composition of the index had changed, it shifted from being solely regulated by the Commodities Futures Trade Commission (CFTC) to being jointly regulated with the SEC, meaning Eurex Deutschland's only wrongdoing

125. Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L. BUS. & FIN. 1, 16 (2007).

126. Seaboard Report, *supra* note 112, at 221–22.

127. Eurex Deutschland Report, *supra* note 15, at 8.

128. *See* Landon Thomas, Jr., *Wall Street Challenges Overseas Swaps Rules*, N.Y. TIMES DEALBOOK (Dec. 4, 2013, 4:30 PM), http://dealbook.nytimes.com/2013/12/04/wall-street-trade-groups-challenge-overseas-swaps-rules/.

129. For a breakdown of the jurisdictional split between the SEC and the CFTC, see Derivatives, SEC. & EXCHANGE COMMISSION, https://www.sec.gov/spotlight/dodd-frank/derivatives.shtml (last visited Jan. 16, 2014).

was its failure to register with the SEC and, consequently, creating swaps as an unregistered party.[130] The shift was unintentional, likely the product of negligence rather than a nefarious scheme to avoid SEC registration. The SEC may have decided that such a minor issue did not merit spending the resources and time needed to undertake an enforcement proceeding, especially given Eurex Deutschland's cooperative measures. In this sense, the Eurex Deutschland Report reiterates the principles put forth in the Seaboard Report by providing the same industry-related public benefit, warning other entities that they should cooperate to remain in the good graces of the SEC. However, the public benefit rationale seems weak; more likely, the SEC wanted to reward Eurex Deutschland for prompt and full cooperation by forgoing a formal enforcement action and publishing a report.

3. Reports Issued in the Face of Good Faith Reliance

In addition to Eurex Deutschland's cooperation and the minor nature of its infraction, the report mentioned Eurex Deutschland's good-faith claim that they were in compliance with the securities regulations due to a no-action letter from the CFTC.[131] The exchange should have monitored its indices to make sure they remained compliant with the securities rules, but it was operating under the assumption that it was acting legally.[132] While this was a secondary argument in the Eurex Deutschland matter, a starker example of a report issued solely because of good-faith reliance was the Motorola Report.[133] Motorola, along with three other major corporations, was accused of violating Regulation Fair Disclosure (Regulation FD).[134] The SEC promulgated Regulation FD to prevent selective disclosure of material information to analysts and not to the general public.[135] Motorola violated the regulation by clarifying to certain preferred securities analysts that the "significant weakness" mentioned in a press release meant a 25% decline in sales and orders.[136] While the SEC instituted and settled cease-and-desist proceedings against the other three corporations,[137] it chose

130. Eurex Deutschland Report, *supra* note 15, at 3.

131. *Id.* at 2–3.

132. *Id.*

133. Motorola Report, *supra* note 15.

134. Jon Jordan, *Corporate Issuers Beware:* Schering-Plough *and Recent SEC Enforcement Actions Signal Vigorous Enforcement of Regulation FD*, 58 U. MIAMI L. REV. 751, 781 (2004).

135. *Id.* at 751–52.

136. Motorola Report, *supra* note 15.

137. Jordan, *supra* note 134, at 781–88.

to issue a Section 21(a) Report in regards to Motorola's actions.[138] Similarly to the Eurex Deutschland matter, there was a clear violation, but because Motorola had relied on the erroneous advice of its counsel, the SEC decided to do no more than publish a report.[139] Aware of the implications of allowing reliance on in-house counsel to limit liability, the report warned of the limits of this defense.[140]

The Motorola Report is emblematic of both types of public benefit. It provided an important investor-related public benefit, as the public learned that Motorola had differed in its explanation of its earnings results depending on its audience. More interesting is the industry-related public benefit, which was presumably not intended to warn other companies about the SEC position on disclosure, given that the other three proceedings sent a clear message about the SEC's view on the subject. Indeed, Regulation FD was controversial at the time of passage and this "sweep" was meant to show that the SEC planned to prosecute violations fully.[141] Instead, the report contained five guidelines clarifying how an entity should act to ensure compliance with Regulation FD, in effect serving as a specialized Seaboard Report in the realm of fair disclosure.[142] Where the actions taken against the other three companies implicated in the sweep demonstrated the Commission's resolve, the report showed the path to avoid running afoul of the Regulation FD mandate.

When the gravity of the infraction decreases, or there is good-faith reliance, the public benefit required to issue a report seems to correspondingly lessen. The Compass Report described a dissident shareholder who sought to gain a place on the company's board and failed to amend his proxy solicitation after making relatively minor changes to his proposals.[143] Commissioner Karmel dissented

138. *See* Motorola Report, *supra* note 15.

139. *Id.*

140. *Id.*, at 2859; *see also* Jordan, *supra* note 134, at 796.

141. Jordan, *supra* note 134, at 781 (This "sweep . . . made a strong statement to the public that Regulation FD would be enforced and that violations would not be tolerated."). "'[S]weep' [is] a term commonly used by the Enforcement Division for a large number of simultaneously filed enforcement actions related to similar violations." *Id.* at 781 n.151.

142. Motorola Report, *supra* note 15, at 2858–59.

143. Compass Investment Group, Exchange Act Release No. 16343, 18 SEC Docket 927, 927–29 (Nov. 15, 1979) [hereinafter Compass Report]. A similar report issued in the matter of Bull & Bear Management Corporation, which reminded entities of their duty to disclose situations that could potentially lead to self dealing, though there did not appear to be any in this specific case. Bull & Bear Management Corp., Exchange Act Release No. 18107 (Aug. 7, 1981).

from the publication of the report, stating that there was no cognizable public benefit from publishing the facts of the matter.[144] There did not appear to be any industry-related public benefit, as the rules had long been in place and were clear. There did not appear to be any investor-related public benefit either; the election was finished and the dissident shareholders had already remedied their erroneous proxy solicitations, and, similarly to the Motorola report, had relied on the recommendation of counsel when crafting the solicitations in the first place.[145] Yet there did not appear to be any detriment to investors, either. Perhaps Motorola's good-faith reliance on its lawyers, the minor nature of its infraction, or its cooperative efforts led to the publication of the report. In any case, the report's intent and effect was not to provide a public benefit.

The Seaboard, Motorola, Compass, and Eurex Deutschland Reports are examples of reports that are issued with little to no investor-related public benefit. To the extent that there is an industry-related benefit, it is to guide the regulated entities' compliance with regulations, not to warn them of new enforcement priorities. Instead of sending a shot across the bow, the SEC uses these reports to provide something similar to procedural guidance or to simply dispose of a minor matter. Reports on derivative liability—discussed in the next section—riff on this functional, though not formally condoned, use, though the public benefit is more prominent than the reports in this section.

D. Derivative Liability

1. Reports Issued in Matters of Derivative Liability

The bulk of modern Section 21(a) reports are published in matters of derivative liability:[146] where a corporation or person commits a securities violation and either the employer or another official holding statutory or common law fiduciary duties failed to adequately monitor for illegal conduct. The most common derivative liability reports are those issued in matters of corporate governance:[147] where a board member fails to adequately monitor the behavior of the management. A variation of this kind of report is often issued in cases where a professional, such as a lawyer or auditor, fails to prevent or report illegal conduct. In many of these mat-

144. Compass Report, *supra* note 143, at 932 (Karmel, Comm'r, dissenting) ("I see no public purpose being served by the publication of the facts and staff conclusions about this particular matter.").

145. *Id.*

146. *See supra* note 12.

147. *See supra* note 12.

ters, the SEC brings an enforcement action against the company or specific wrongdoers and uses a report to highlight what it views as the requirements of the monitoring supervisors. Former Commissioner Karmel has criticized these reports as incursions into the state law realm of corporate governance, in addition to her more general critiques that the reports constitute overstepping SEC authority.[148] This is a valid criticism: state law generally governs the relationship between the board of a company, the management, and the stockholders unless there is an express designation by federal statute.[149]

By choosing to issue reports in matters that dealt with corporate governance, the SEC recognized that "new ground . . . was broken," meaning the legal conclusions contained therein represented novel applications of the securities rules.[150] Often, the board's wrongdoing was failing to monitor the activities of the management appropriately.[151] While this kind of omission can often have state level ramifications,[152] it is more difficult to prove that a failure to monitor violates federal securities laws because of their scienter requirements.[153] Because of this high burden of proof, in these matters the SEC generally chooses to be "conservative" and release a Section 21(a) Report instead of a formal enforcement action, a rationale reminiscent of the extrajurisdictional reports.[154] The corporate governance reports are also related to the good faith reports because each deals with behavior that does not rise to the level of intentional malfeasance.

The paradigmatic corporate governance Section 21(a) Reports were issued in a series in the late 1970s and dealt with the monitoring responsibilities of either outside directors or the entire board. The first matter resulted in the publication of a report regarding the issuance of new securities by a bankrupt entity, the Penn Cen-

148. KARMEL, *supra* note 2, at 198 & n.17.

149. Cort v. Ash, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.").

150. Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. REG. 149, 195 (1990).

151. Stanley Sporkin, *SEC Enforcement and the Corporate Board Room*, 61 N.C. L. REV. 455, 457 (1983).

152. *E.g.*, Smith v. Van Gorkom, 488 A.2d 858, 875 (Del. 1985) ("[T]he directors were duty bound to make reasonable inquiry of [management] . . . .").

153. Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1397 (2006).

154. Sporkin, *supra* note 151, at 456.

tral Company.[155] The report chastised the board for its failure to monitor management and suggested the imposition of an audit committee.[156] Another matter resulted in the Gould report, which dealt with the lack of inquiry by a company's board before approval of a self-dealing transaction by the company's management.[157] The report reminded directors to perform their own due diligence in the face of self-interested management decision-making.[158] A third matter resulted in the Sterling Drug Report, which dealt with board access to insider information and the applicability of insider trading rules to the board.[159] In yet another report, the SEC chastised directors for their failure to ensure proper disclosure in light of known financial distress.[160] Several other reports issued in the same era, largely on the same topic: the responsibilities of directors in monitoring the behavior of management or ensuring proper disclosure.[161]

2. The Public Benefit Rationale

The Section 21(a) Reports published to explain the scope of director responsibility almost exclusively provided an industry-related public benefit. The reports sought to alter the manner in

155. SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE H. COMM. ON INTERSTATE AND FOREIGN COMMERCE , 92ND CONG., S.E.C. STAFF REP. ON THE FINANCIAL COLLAPSE OF THE PENN CENTRAL COMPANY (Subcomm. Print 1972) [hereinafter PENN CENTRAL REPORT], *available at* http://fraser.stlouisfed.org/docs/historical/house/1972house_fincolpenncentral.pdf; Robert E. Bedingfield, *S.E.C.'s Study of Pennsy: Broad New Powers Seen as Agency's Real Objective*, N.Y. TIMES, Aug. 8, 1972, at 41.While this report is not technically called a Section 21(a) Report, it marked the beginning of the publication of Section 21(a) Reports in other corporate governance cases. *See* Sporkin, *supra* note 151, at 455.

156. PENN CENTRAL REPORT, *supra* note 155, at xii.

157. Gould Inc., Exchange Act Release No. 13612, 12 S.E.C. Docket 773 (June 9, 1977) [hereinafter Gould Report].

158. *Id.* at 775.

159. Sterling Drug, Inc., Exchange Act Release No. 14675 (Apr. 18, 1978).

160. National Telephone, Co., Exchange Act Release No. 14380, 13 SEC Docket 1393 (Jan. 16, 1978) [hereinafter National Telephone Report].

161. *E.g.*, Sharon Steel Corp., Exchange Act Release No. 18271, 23 SEC Docket 1519 (Nov. 19, 1981) (dealing with inadequate disclosure); Greater Washington Investors, Inc., Exchange Act Release No. 15673, 17 SEC Docket 40 (Mar. 22, 1979) [hereinafter Greater Washington Report] (same); Stirling Homex Corp., Exchange Act Release No. 11516, 7 SEC Docket 298 (July 2, 1975) (dealing with the failure of the board to ensure disclosure). Additionally, two similarly reasoned reports issued on a failure to monitor two decades later. W.R. Grace. & Co., Exchange Act Release No. 39157, 65 SEC Docket 1240 (Sept. 30, 1997) [hereinafter Grace Report]; Cooper Companies, Inc., Exchange Act Release No. 35082, 58 SEC Docket 591 (Dec. 12, 1994) [hereinafter Cooper Report].

which directors and others viewed their fiduciary duty to monitor, which often suggested structural changes to conform to federal securities laws and enhance the role of the directors in corporate governance.[162] For example, the National Telephone report echoed the Penn Central Staff Report in proposing the creation of a board audit committee.[163] These suggested changes can have ramifications beyond their stated purpose: the Cooper Report, by requiring that the board disclose when management was under criminal investigation, could significantly curtail the ability of the executive office of a company to plead the Fifth Amendment right to avoid self incrimination in a criminal investigation.[164] The investor-related public benefit of the reports was only a general warning that outside directors and boards as a whole were not properly serving shareholder interests to ensure that the management was acting appropriately, a broad and not altogether constructive form of criticism.[165] As in the Harrisburg report, a greater investor-related public benefit resulted from the judicial or administrative proceedings against management or the entity for the primary wrongdoing, which clearly warned investors that there was something amiss at the regulated companies.

3. Further Examples of Derivative Liability Reports: Brokers and Lawyers

Using reasoning similar to the corporate governance reports, the SEC decided to publish a Section 21(a) Report about the fiduciary duties of broker-dealers in the face of fraudulent schemes.[166] The report detailed the interaction between Laser Arms, a fraudulent corporation established by Marshall Zolp that claimed that it had created a "self-chilling beverage can," and its broker-dealers.[167] Zolp was sentenced to twelve years in prison for fraud because his misconduct was clear: he promoted the stock of a corporation involved in what would be admittedly a very lucrative venture, if it

162. Sporkin, *supra* note 151, at 456.

163. National Telephone Report, *supra* note 160, at 1396.

164. David S. Nalven & Thomas A. Bockhorst, *Taking the Fifth with the SEC: No Longer an Easy Option*, 144 Bos. B.J. 12 (1996).

165. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833, 856 (2005) ("[S]hareholders seeking to exercise their theoretical power to replace directors face substantial impediments.").

166. Laser Arms Corp., Exchange Act Release No. 28878, 48 SEC Docket 305 (Feb. 14, 1991) [hereinafter Laser Arms Report].

167. *5 Guilty in Fraud Involving Self-Chilling Can*, N.Y. Times (July 2, 1987), http://www.nytimes.com/1987/07/02/business/5-guilty-in-fraud-involving-self-chilling-can.html.

were not completely fictional.[168] The SEC chose to publish a report in the matter because Zolp's fraud was unintentionally facilitated by the broker-dealers that acted as intermediaries between him and his investors.[169] Rule 15c2-11 requires broker-dealers to issue quotes only with proper documentation from the issuer.[170] Zolp provided the broker-dealers with this documentation, but it was completely falsified.[171] The Laser Arms report served to warn broker-dealers that the burden fell on them to ensure the documentation came from a reliable source.[172]

Just as in the reports on board members' duties, the broker-dealers in the Laser Arms Report appeared to have engaged in a kind of willful myopia, declining to take steps to ensure proper conduct beyond that which was required statutorily. The report warned future broker-dealers that if they did not verify unfamiliar sources, they could be subject to penalties for the violation of Rule 15c2-11.[173] Unlike the reports on the duties of the board, there were no suggestions for appropriate measures to shelter the broker-dealers from allegations of failure to perform due diligence, which likely had the effect of making the broker-dealers err on the side of caution when dealing with dubious issuers. The benefit to investors, on the other hand, was negligible: Zolp was already imprisoned on securities fraud and his scheme was shut down (though investors perhaps should have taken note of his name: this was not the first or last time he would be convicted of violating the securities laws).[174] The public benefit was prospective and meant to show regulated broker-dealers the path required to safely navigate terrain populated by Zolp and his ilk.

Another corporate governance Section 21(a) Report issued in the matter of Gutfreund, better known as the Feuerstein Report after its subject, Salomon Brothers chief legal officer Donald Feuerstein. This report dealt with the expansion of the supervisory liability of compliance officers to certain legal officers.[175] Under Section 15(b)(4)(E) of the Securities Exchange Act, supervisors have the responsibility to monitor the behavior of their employees for any

168. Laser Arms Report, *supra* note 166, at 306–08.

169. *Id.* at 315–16.

170. 17 C.F.R. § 240.15c2-11 (2014).

171. Laser Arms Report, *supra* note 166, at 306.

172. *Id.* at 312.

173. *Id.* at 316.

174. Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN ST. L. REV. 189, 192 & n.5 (2008).

175. Feuerstein Report, *supra* note 73.

irregularities or "red flags."[176] The report sought to "amplify" the SEC's position on what constituted a supervisor, employing a more expansive fact-based inquiry that would encompass certain legal and compliance officers in an effort to make internal compliance controls more robust.[177] The Feuerstein Report has been cited as conclusive on the subject and as an expansion of SEC jurisdiction.[178] Other industrial actors changed the duties of the high-ranking legal officers as a result.[179] Moreso than the director-focused reports, the Feuerstein Report served to warn of a new area of possible liability for entities regulated by the SEC.[180]

The conduct of the board, broker-dealers, and legal officers are some of the targets for which the SEC has released Section 21(a) Reports in matters of derivative liability.[181] The derivative liability reports go a step beyond the Seaboard Report and others like it. Instead of recommending the appropriate course of action upon discovery of wrongdoing, the reports modify the legal responsibilities of board members or corporate officials. This is a distinction of kind rather than degree: the goal of the Seaboard Report was to shape corporate behavior after the discovery of wrongdoing, while the corporate governance reports redefine what constitutes wrongdoing. This categorical difference will be further explored in Part III. The next Part details reports whose modification of the legal responsibilities of regulated entities takes another step in the direction of a brand of rulemaking.

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176. *Id.* at 108.

177. *Id.* at 112; *see also* James R. Doty, *Regulatory Expectations Regarding the Conduct of Attorneys in the Enforcement of the Federal Securities Laws: Recent Development and Lessons for the Future*, 48 BUS. LAW. 1543, 1559 (1993). The report appeared to clarify the ambiguity from the Commission's decision in the matter of Huff about who could constitute a supervisor from. Huff, 50 S.E.C. 524, 525–26 (1991).

178. *See, e.g.*, Robert S. DeLeon, *The SEC's Deputization of Non-Line Managers and Compliance Personnel*, 23 SEC. REG. L. J. 271, 282 (1995); Note, *Lawyers' Responsibilities to the Public: Regulating Lawyers in the Regulatory State*, 107 HARV. L. REV. 1605, 1620 (1994).

179. *Lawyers' Responsibilities to the Public: Regulating Lawyers in the Regulatory State*, *supra* note 178, at 1620 & n.117.

180. A report that similarly sought to clarify the scope of the securities laws was issued on what constituted a supervisor in the context of pay to play regulations. JP Morgan Securities, Inc., Exchange Act Release No. 61734, 98 SEC Docket 125 (Mar. 18, 2010).

181. Others focus on the responsibility of a self-regulatory organization in monitoring its members. Nasdaq Stock Market, Inc., Exchange Act Release No. 51163, 84 SEC Docket 2840 (Feb. 9, 2005); NASD, Exchange Act Release No. 37542, 62 SEC Docket 1385 (Aug. 8, 1996) (decrying the lack of independence between the SRO and its market makers).

E. Legal Ambiguity

1. Reports Issued in the Face of Legal Ambiguity

The Feuerstein Report bridges the gulf between reports issued in matters of derivative liability and the extrajurisdictional reports by demonstrating how the SEC can extend its jurisdiction through clarification of an ambiguous statutory term. The extrajurisdictional reports are very similar to the reports examined in this subpart, but instead of seeking to expand the reach of the SEC jurisdictionally, the reports now under discussion try to extend the role of the SEC through novel legal theories or applications of securities regulations. In these reports, the tug-of-war behind the text is most visible, as the SEC is confronted with difficult legal matters that very possibly would have been resolved in the favor of the regulated entity had the agency proceeded with an administrative or judicial action.

As with many of the previously mentioned reports, the extralegal reports often accompany an administrative cease-and-desist order or judicial injunction against a regulated entity. In these reports, the SEC highlights areas of law in which it could try to bring a claim under a novel reading of the regulation or statute. For example, in 2005, the Titan Corporation pled guilty to criminal violations of the Foreign Corrupt Practices Act ("FCPA") for funding the election of the President of Benin.[182] While under investigation, Titan was in the process of merging with a competitor, Lockheed Martin, but failed to disclose the FCPA investigation in its merger agreement, which had the potential to be viewed as a material non-disclosure.[183] Practitioners criticized the report as having a poor legal foundation, because the merger agreement was not meant as a disclosure document and there was ambiguity as to the legality of requiring disclosure of a pending criminal investigation.[184] The underlying FCPA violation was not at issue, only the novel interpretation of a merger agreement as a kind of disclosure.[185]

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182. Titan Corp., Exchange Act Release No. 51283, 84 SEC Docket 3327, 3327 (Mar. 1, 2005) [hereinafter Titan Report].

183. *Id.*

184. William W. Horton, *SEC's "Titan Report" Raises the Stakes for Disclosure of Government Investigations*, ABA HEALTH ESOURCE (Apr. 2005), https://www.americanbar.org/newsletter/publications/aba_health_esource_home/horton.html; *see also* Stanley Keller, *The Meaning of the Titan 21(a) Report*, EDWARDS WILDMAN (Apr. 7, 2005), http://www.edwardswildman.com/insights/PublicationDetail.aspx?publication=3565.

185. *See* sources cited *supra* note 184.

The most recent Section 21(a) Report[186] was also issued in an ambiguous area of legal doctrine. KPMG settled an administrative proceeding that resulted from an SEC investigation into the provision of non-audit services to its audit clients, a breach of auditor independence rules promulgated to simulate an arms-length transaction between the auditor and the client company.[187] The accompanying report detailed the practice at KPMG of loaning tax professionals to work directly under the roof of their audit clients.[188] Normally, securities regulations prohibit the loan of staff by an auditor,[189] but it appears that KPMG may have believed that it was acting appropriately due to a rule issued in 2003, which clarified that "an accounting firm can provide tax services to its audit clients without impairing the firm's independence."[190] The report in this matter stated that while tax services were exempt from the rules prohibiting the provision of non-audit services, an auditor still could not loan its employees to the client company.[191] In light of the ambiguity caused by these conflicting statements, it is not clear that the SEC would have prevailed on this interpretation in a formal enforcement action.

At a functional level, this means publication of these reports allowed the SEC to skirt the possibility of losing in court while still achieving whatever precedential value is ascribed to the reports. If this newly created legal interpretation is used in subsequent matters, the report would have an industry-related public benefit as it warns companies in merger negotiations of their disclosure requirements.[192] While this may seem similar to the public benefit provided by previous reports, these reports differ because they are novel definitions of the securities laws. In effect, the Titan report created a new legal application of the FCPA which Titan violated;

186. As of the date of publication of this Note.

187. Press Release, U.S. Secs. & Exch. Comm'n, SEC Charges KPMG with Violating Auditor Independence Rules, SEC (Jan. 24, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540667080?utm_source=feedburner&utm_medium=feed&utm_campaign=feed%253A§ec%252FlgHO+(SEC.gov+Updates%253A+Press+Releases)#.UuQSKWQo568.

188. KPMG, LLP, Exchange Act Release No. 71390,108 SEC Docket, no. 2 (Jan. 24, 2014) [hereinafter KPMG Report], http://www.sec.gov/litigation/investreport/34-71390.pdf.

189. 17 C.F.R. § 2-01(c)(4)(vi) (2014).

190. KPMG Report, *supra* note 188 (quoting Strengthening the Commission's Requirements Regarding Auditor Independence, 68 Fed. Reg. 6006, 6017 (Feb. 5, 2003)).

191. *Id.*

192. *But see* Horton, *supra* note 184 (describing the ambiguity of the report's message).

the KPMG report created a novel interpretation of the auditing rules which KPMG violated. The quasilegislative nature of these reports will be important in the discussion of the formalistic administrative law principles in Part III. Just as in the derivative liability reports, the investor-related public benefit of these "interpretive" reports is limited because the underlying malfeasance is described at length in the separate accompanying formal enforcement proceeding that dealt with other, more evident, violations of the SEC regulations.

Both the Titan and KPMG reports issued in areas where statutory ambiguity led to what were arguably novel applications of the securities regulations. For the misconduct described in a report published in the Netflix matter, the ambiguity was created by rapidly changing circumstances.[193] Reed Hastings, the CEO of Netflix, wrote on his personal Facebook page that Netflix had reached a benchmark indicative of a high level of success: one billion hours of content streamed in a month.[194] Preliminarily, the Division of Enforcement notified Netflix that this Facebook post constituted a material disclosure, whose dissemination needed to be over an established channel.[195] Again via Facebook, Hastings responded, asserting that his post was not material and, moreover, was public.[196] Academics and practitioners agreed with these points and further pointed out that the SEC generally allowed for a good-faith exemption to violations of Regulation FD.[197] The SEC chose not to file an enforcement action, instead issuing a Section 21(a) Report.[198]

The Netflix report warned the industry that disclosures over social media without prior notification would likely violate Regulation FD, irrespective of the number of followers the entity might have.[199] Just as with the Titan and KPMG reports, the Netflix report was somewhere between a clarification and an amplification of the

193. Netflix, Inc., Exchange Act Release No. 69279 [hereinafter Netflix Report], *available at* http://www.sec.gov/litigation/investreport/34-69279.htm.

194. *Id.*

195. Brian L. Rubin & Caroline A. Crenshaw, *The Social Network Unhinged: #topsocialmediaenforcementissuesinthesecuritiesindustry*, 32 BANKING & FIN. SERVICES POL'Y REP. 1, 4 (June 2013).

196. Netflix Report, *supra* note 193.

197. *See, e.g.*, Sesi Garimella, *Regulation FD and Social Media*, 32 REV. BANKING & FIN. L. 234, 242 (2013); Joseph Grundfest, *Regulation FD in the Age of Facebook and Twitter: Should the SEC Sue Netflix?* (Rock Ctr. For Corporate Governance at Stanford Univ., Working Paper No. 131, 2013), *available at* http://ssrn.com/abstract=2209525.

198. Rubin & Crenshaw, *supra* note 195.

199. Netflix Report, *supra* note 193, at 7.

pertinent securities law. Again, the investor-related benefit was fairly limited in the Netflix report. After its publication, investors needed to be aware that Netflix's use of social media was not permissible under Regulation FD because it should have notified investors that it planned to use the CEO's Facebook page as a channel of disclosure. Given the public defense by Hastings, the SEC would have faced a resource-intensive legal battle in an ambiguous area had it pursued an enforcement proceeding. By issuing the report, it sought to both resolve the issue at hand and to clarify the law. The Netflix report pushes the boundaries more than any of the other extralegal reports: it was not the product of negotiations and was not published with the consent of Netflix, so it serves as a stark contrast with the reports meant to reward cooperation or pardon good faith mistakes.

2. The Public Benefit Rationale

Section 21(a) Reports enlist what Brandeis called "the potent force" of publicity as a "remedial measure."[200] Stanley Sporkin explained the same concept a century later: "the critical thing is you get transparency and say what took place."[201] The public benefit is paramount. The five groupings in this part—Extrajurisdictional Reports, State and Local Government Reports, Good Faith Reports, Derivative Liability Reports, and Extralegal Reports—show instances where the SEC chooses to publish a report when it believes that the public should know the results of its staff investigation, but either cannot or chooses not to proceed with a formal enforcement action. Above all, the goal of this part was to demonstrate that the reports fill a necessary niche in the securities enforcement arsenal. As the next part attempts to fit this kaleidoscopic tool into the primary color world of administrative law, the public benefit rationale will become increasingly important as an adhesive between the functional and the formalistic.

III.
THE FORMALISTIC PERSPECTIVE: SECTION 21(A) REPORTS IN ADMINISTRATIVE LAW

The utilitarian end of the reports is clear: Parts I and II showed that they are intended to provide a public benefit to investors, industrial actors, or both. However, the legal means through which the SEC achieves this goal are murkier: it is unclear whether the

200. BRANDEIS, *supra* note 6, at 92.

201. Interview with Stanley Sporkin, *supra* note 24.

decision to publish a report arises out of the agency's adjudicative, legislative, or executive powers.

Section 21(a) Reports provide the SEC with a way to quickly and efficiently furnish regulated entities and their investors with the information necessary to transact in the dynamic and fast-paced financial marketplace. The reports are the result of a functional approach that makes sense for a regulator seeking to stay abreast of new violations in an environment of scarce resources and heightened public scrutiny. They provide the resource- and time-constrained SEC with a release valve to address an array of issues when it lacks the statutory mandate or financial wherewithal to do so.[202]

Former Commissioner Karmel, whose short tenure coincided with the zenith of the reports' use in the late 1970s,[203] believes that Section 21(a) Reports represent a failure to remain within the bounds of separation of powers principles.[204] Because Section 21(a) Reports are a hybrid action, Karmel believes that usage of reports represents a kind of prosecutorial law-making power, which is problematic because the decision to resolve a matter with a report avoids the adversarial process.[205] She further believes that the implementation of the administrative cease-and-desist orders created a formal mechanism to take over the role played by Section 21(a) Reports, rendering them obsolete today.[206] Her view contrasts with that of her contemporary, former Director of Enforcement Stanley Sporkin, who believes the reports to be a powerful way to resolve difficult issues to the satisfaction of all affected parties.[207] A third view comes from the securities enforcement literature written by practitioners, where Section 21(a) Reports are usually referred to strategically as a kind of "alternative disposition" to a

202. Ralph C. Ferrara et al., *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33, 95 (1991).

203. In 1979 alone, it appears that at least four reports were issued. Compass Report, *supra* note 143; Marine Protein Report, *supra* note 95; Greater Washington Report, *supra* note 161; Spartek Report, *supra* note 59. It is often difficult to distinguish the Section 21(a) Reports from other SEC staff reports. An additional related issue arises in the SEC's ability to seek statements from regulated entities under Section 21(a), a power not addressed in this Note. Richard M. Philips & Michael J. King, *Overview*, *in* RICHARD M. PHILIPS, THE SECURITIES AND ENFORCEMENT MANUAL: TACTICS AND STRATEGIES, 87 (1997).

204. KARMEL, *supra* note 2, at 220.

205. Karmel, *supra* note 8, at 43 ("[T]he Enforcement Division is often in the position to create new law when it is the Commissioners who should be doing so.").

206. *Id.* at 42 & n.40.

207. Interview with Stanley Sporkin, *supra* note 24.

matter, because they avoid the formal enforcement process.[208] All of these interpretations are partially correct: Section 21(a) Reports do embody a kind of prosecutorial rule-making, an efficient resolution to legal conundrums and often are the best result for regulated entities under investigation. That said, it is clear that there is no consensus on what the role of the reports is within the established administrative law scheme.

Examination of the ad-hoc decision-making process leading to the publication of a report does not lend itself easily to a formalistic abstraction that would explain the reports' use as a tool in a manner consistent with administrative law principles. Given the efficient and functional nature of the reports, it may seem unclear why formal categorization is necessary. However, this inquiry has merit beyond mere formalism for formalism's sake.

The categorization of agency actions into previously established administrative channels can provide certain benefits and safeguards to ensure a consistent and equitable usage of the reports. This formalization of agency action has an obvious historical precedent. After the rapid expansion of the administrative state during the New Deal, it quickly became apparent that constraints for agency action were needed, leading to the enactment of the Administrative Procedure Act (APA).[209] The APA and its subsequent judicial interpretation constitute in part an attempt to transfer the tripartite separation of powers present in the Constitution to the bureaucracy.[210] The procedure of the SEC, like that of other federal agencies, is governed by the APA.[211] By funneling agency actions and processes into separate and differentiated categories, regulated entities and reviewing courts are able to ascertain whether the agency acted appropriately and challenge misconduct through corresponding statutory safeguards.

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208. *E.g.*, ALAN R. BROMBERG, LEWIS D. LOWENFELS, & MICHAEL J. SULLIVAN, *Public Report of Investigation (SEA § 21(a))—Advantages*, *in* 6 BROMBERG & LOWENFELS ON SECURITIES FRAUD § 12:50 ("mild sanction"); STEINBERG, *supra* note 14 ("a substitute for administrative or civil injunctive suits"); Arthur F. Mathews, *Litigation and Settlement of SEC Administrative Enforcement Proceedings*, 29 CATH. L. REV. 215, 229 (1979) ("important enforcement alternative"). *But see* Justin P. Klein & Gerald J. Guarcini, *Director Response to Management Misconduct*, 28 REV. SEC. & COMM. REG. 7, 71 (1995), ("to warn public companies . . . of its views on certain practices or conduct").

209. Administrative Procedure Act of 1946, Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500, 551–559, 701–706 (1988)); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452 (1986).

210. Shapiro, *supra* note 209, at 453.

211. Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts-Except When They're Not*, 59 ADMIN. L. REV. 79, 82 (2007).

If Section 21(a) Reports are not so constrained, the SEC has nearly unfettered discretion to publish a report because there is no procedure that would allow a regulated entity to appeal for judicial review.[212] Moreover, the reports do not easily fit within any of the processes mentioned within the APA; certainly, they do not require any of the built-in checks like the notice and comment prerequisite to rulemaking or the hearing concomitant to an adjudication. Until recently, potential misuse of the reports has been prevented by informal SEC policy. For example, the SEC has routinely sought the consent of the regulated entity to publish a report[213] and would even occasionally allow the opposing counsel to proofread a report.[214] However, this consent was more to ensure that the opposing counsel felt that they were "treated fairly" than to adhere to the principles of administrative law.[215] In a break from this practice, the SEC issued the Moody's and Netflix reports without consent from either regulated company. As the SEC plans to ramp up usage of the reports,[216] the requirement of formal procedures like consent will be necessary to prevent improper use of the reports to resolve an expanding array of difficult matters.

This part will show that Section 21(a) Reports are an anomaly in administrative law, whose benefits should not be excessively curtailed but whose use should be confined within the appropriate sectors carved out by the APA. This part will begin by explaining how each type of public benefit dovetails with a specific administrative action. The investor-related public benefit most closely maps onto the concept of a judicially-enforced consent decree; the industry-related public benefit corresponds closely to general statements of policy. When the reports are viewed through this formal lens, the built-in safeguards from administrative law will work to limit misuse of the reports. This part will ultimately conclude that the twin pub-

212. Only once has the publication of information under Section 21(a) been challenged in court. Kukatush Min. Corp. (N.P.L.) v. SEC, 309 F.2d 647 (D.C. Cir. 1962). Moreover, in *Kukatush*, the information published was not part of a Report, but was merely statutorily defensible under Section 21(a). *Id.* at 650–51 ("We agree with the view of Judge Holtzoff that [Section 21(a)], authorizing the Commission in its discretion to publish information concerning violations of the Securities Exchange Act of 1934, constitutes ample statutory authority . . . .").

213. Interview with Stanley Sporkin, *supra* note 24 ("You don't need consent, [getting consent] was like a belt and suspenders for me.").

214. *Id.*

215. Interview with Stanley Sporkin, *supra* note 24.

216. *SEC Enforcement Update*, KING & SPAULDING (Mar. 4, 2013), http://www.kslaw.com/imageserver/KSPublic/library/publication/ca030413b.pdf ("[T]he Commission might make greater use of so-called Section 21(a) reports . . . .").

lic benefit rationales should bookend the spectrum of possible uses for the reports to prevent their misuse.

A. The Section 21(a) Report as an Administrative Consent Decree

A report usually represents a negotiated evaluation of the situation between the SEC and the regulated entity.[217] As demonstrated in Part II, the choice to forgo a formal action and publish a Section 21(a) Report may be driven by jurisdictional, legal, or political issues; it may also be a reward for cooperation. No matter the rationale, the decision to publish a report has not traditionally been unilateral. With the recognition that a report constitutes a settlement between a regulated entity and the SEC, Karmel's apprehension of circumventing the adversarial process is mitigated, but a new set of issues arises. The SEC must ensure that the reports issue not simply to resolve a matter, but also to provide a public benefit.[218] While the reports constitute a settlement between the SEC and a corporate wrongdoer, they are not the only parties interested at the figurative negotiating table; the investing public also has a stake. The SEC is obligated to simultaneously negotiate an agreement with the regulated entity and to ensure that the report will adequately provide the investing public with the facts necessary for informed decision-making. In other words, if the SEC settles with a regulated entity and decides to publish a report instead of pursuing a formal enforcement action, it must ensure that there is a sufficiently robust investor-related public benefit.

The best way to ensure that a Section 21(a) Report can both resolve a thorny issue and provide an investor-related public benefit is by analogizing report issuance to the process leading up to the judicial order of a consent decree. Consent decrees, or consent judgments, are a settlement mechanism with the enhanced protections of judicial enforcement, often used by agencies to resolve a matter with a regulated entity.[219] After the agency and the regulated entity agree to certain actions by either one or both parties, the judge enters the settlement as a consent decree.[220] In addition

217. Interview with Stanley Sporkin, *supra* note 24.

218. *See* SEC Guidelines, *supra* note 59.

219. Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988). For many agencies dealing with corporations, including the SEC, a settlement can often mean entering a consent decree in federal court. Dorothy Shapiro, *Lessons from* SEC v. Citigroup*: The Optimal Scope for Judicial Review of Agency Consent Decrees*, John M. Olin Fellows Discussion Paper Series, Paper No. 50, 12 (March 1, 2013).

220. Kramer, *supra* note 219.

to avoiding a burdensome trial, there are many procedural advantages to consent decrees, such as docket priority and enforcement through the equitable power of contempt.[221] The procedure for the publication of a report is very similar to the process leading up to issuance of a consent decree, but instead of an agency seeking judicial approval of a settlement, the Enforcement staff members go to the Commission to seek permission to publish a report to settle a matter. In effect, the Commission acts as an adjudicator; the staff as the executive enforcer. The key similarities between a report and a consent decree are that both must have a public benefit and should be issued with the consent of all affected parties. Both of these safeguards from the consent decree context can prevent misuse of the publication process and restrict the reports to areas within the bounds of administrative law.

1. The Safeguard of a Public Benefit to Mitigate SEC Self-Interest

The decision to publish the Alabama Report, *supra* Part II.C, is illustrative of how the dynamic negotiation process functions in the Section 21(a) Report context. The press release that accompanied the report explained that the Commission chose to issue it instead of beginning a formal enforcement proceeding because of voluntary, remedial action by the pension fund, its cooperation with the investigation, and the lack of personal profit.[222] As the subpart on good faith reports described, *supra* Part IIE, if a regulated entity is cooperative and takes remedial actions, it may be able to persuade the SEC to limit its enforcement actions to the issuance of a Section 21(a) Report. Sporkin, after joining private practice, successfully used this approach as counsel to the Alabama pension fund,[223] and the municipality of South Miami unsuccessfully attempted this very tactic at the conclusion of a recent SEC investigation.[224] In these cases, the decision to publish a Section 21(a) Report resembles a negotiated agreement.

The decision to end an investigation with the publication of a Section 21(a) Report was not simply an act of leniency by the SEC. Because of the constitutional issues, as well as the unclear jurisdictional authority over public pension funds, the SEC also may have

221. *Id.* at 325–28.

222. Alabama Press Release, *supra* note 104.

223. Interview with Stanley Sporkin, *supra* note 24.

224. Kyle Glazier, *SEC Charges South Miami with Securities Fraud*, BOND BUYER (May 22, 2013), *available at* http://www.bondbuyer.com/issues/122_99/sec-charges-south-miami-with-securities-fraud-1051896-1.html. The SEC chose instead to file a complaint in the Southern District of Florida.

preferred to simply issue a report rather than risk losing an unpopular effort against what was ultimately the retirement savings of the public employees of Alabama. While the specifics may vary in each matter, the rationale remains the same: when the SEC and the regulated entity agree to avoid a more formal enforcement proceeding, they may agree to publish a Section 21(a) Report. Importantly, the Alabama report also benefited the investing public by detailing the misconduct by the pension fund directors as well as outlining the risk of investing with similar financially-unsophisticated funds. The Commission approved the staff recommendation to publish the report, which contained the corresponding investor-related public benefit. This is analogous to an agency proposing a consent decree to a federal judge for approval, but the executive decision to invoke prosecutorial discretion and the judicial power to approve the settlement are combined internally in the SEC.

However, some Section 21(a) Reports fail to take this second step and subsequently lack an investor-related public benefit. In its role as an adjudicator, the Commissioners act as gate-keepers to ensure that the reports issue for the benefit of the public. This function has proved problematic in analogous federal court setting with consent decrees. Judge Jed Rakoff of the Southern District of New York has criticized the role of the adjudicator in these proceedings as nothing more than a "rubber stamp,"[225] problematic because the agency can say "publicly that it had taken action in a very high visibility situation" while not truly acting for the benefit of the public.[226] Judge Rakoff argued that the role of the judge in consent judgments is to ensure that the primary purpose of settlement is the public interest.[227] While the Second Circuit later reversed Judge Rakoff and clarified the role of the judge in the consent decree process,[228] his rulings in the post–financial crisis era have shaped the way the SEC pursues consent decrees.[229]

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225. Terry Carter, *The Judge Who Said No: Rakoff's Stance on the SEC Deals Draws Fire, Praise-and Change*, A.B.A. J., Oct. 2013, at 50, 52.

226. Jed S. Rakoff, *Are Settlements Sacrosanct?*, 37 LITIGATION 17, 17 (Summer 2010).

227. *Id.*

228. S.E.C. v. Citigroup Global Markets, Inc., 752 F.3d 285, 295 (2d Cir. 2014) ("The primary focus of the [judicial] inquiry, however, should be on ensuring the consent decree is procedurally proper, . . . taking care not to infringe on the S.E.C.'s discretionary authority to settle on a particular set of terms.").

229. Ben Protess & Matthew Goldstein, *Overruled, a Judge Still Left a Mark on the S.E.C. Agenda*, N.Y. TIMES DEALBOOK (June 4, 2014), http://dealbook.nytimes.com/2014/06/04/appeals-court-overturns-decision-to-reject-s-e-c-citigroup-settlement/?_php=true&_type=blogs&_r=0.

The Commission must ensure that it is acting in its adjudicative role when approving the Enforcement Division's decision to publish a report to resolve a matter. Indeed, Judge Rakoff's critique can also apply to the decision to publish a Section 21(a) Report. The mission-oriented SEC staff attorneys may attempt to justify the publication of a report as a way of promoting cooperation and efficiency,[230] which in turn will provide a "public benefit," as the SEC will be enabled to weigh in on more issues as they arise. However, expediency for its own sake is not a tenable rationale. Equating agency efficiency with the public good presumes that what helps the agency helps the investor. Yet because of external pressure, the SEC may be motivated to resolve matters quickly, even when the public would benefit from a more lengthy explanation of an issue. There is nothing inherently wrong with the decision to resolve a matter with a report, so long as the investor's interest is fully represented at the bargaining table. This means, however, that a report cannot *only* be a slap on the wrist; it must also explain to the investor the nature of the misconduct. Just as with a consent decree, the Commissioners should ensure that the publication of a report has a true investor-related benefit, beyond efficient use of agency resources.

2. The Safeguard of Consent to Prevent Inappropriate Reputational Harm

Consent decrees have a second built-in safeguard that the reports should adopt by analogy. By definition, consent decrees require approval by both the parties to the suit. The SEC should not use a report to chastise behavior without obtaining consent because it means that the SEC has unilaterally declared that the regulated entity has committed some kind of wrongdoing. The Netflix report is a telling example. As previously discussed,[231] the CEO of Netflix publicly opposed any enforcement action. The SEC chose to publish the report without the consent of Netflix. The facts of the report were *not* the result of an investigation, but rather constituted a summary of the publicly available information about Netflix.[232] While there was an industry-related public benefit from warning other publicly-traded companies about the SEC's plan to scrutinize social media under Regulation FD, it did not represent an agreement between the SEC and the regulated entity. The unilateral de-

230. Block & Barton, *supra* note 17, at 271.

231. *Supra* Part II.E.1.

232. Netflix Report, *supra* note 193, at 1 n.1.

cision to publish a report is a divergence from the consent judgment model, which requires consent from all parties.

Using a report to condemn the behavior of a regulated entity is problematic because the affected company has no administrative recourse and is not likely to succeed on a claim that a unilateral allegation of malfeasance violates due process principles. Procedural due process is implicated when an agency action impinges upon an entity's liberty or property interests; reputational harm is insufficient by itself.[233] In the corporate setting, this means that an agency action that causes a depression in the stock price or "goodwill" of a company does not invoke procedural due process.[234] In cases of mere reputational harm, agencies need not hold a hearing in the absence of a statutory mandate.[235] The irony here is that for many of the entities regulated by the SEC, reputation is of the highest importance.[236] If the SEC is allowed to publish a report of the facts of its investigations without the consent of the mentioned party—even if it simply republishes already public information, as with the Netflix report—it will hold tremendous leverage over any party under investigation. When the reports are properly viewed as a kind of administrative consent decree, the decision to publish information is driven by the needs of both parties and so mitigates some of the complications that arise from regulating the particularly sensitive financial markets.

The SEC, overburdened and lacking resources, needs to be able to prioritize matters that do not merit the full-court press that accompanies a formal enforcement action. The Section 21(a) Report provides a way to settle marginal issues quickly and move onto the next matter. The Commission must parallel its judicial counterparts in the consent decree context and determine that there is investor-related public benefit as a preliminary requirement before the approval of the report as a settlement; in doing so, agency self-

233. Paul v. Davis, 424 U.S. 693, 712 (1976) ("[W]e hold that the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law.").

234. Gen. Elec. Co. v. Jackson, 610 F.3d 110, 121 (D.C. Cir. 2010) (explaining that a reduction in stock price as the result of reputational harm needs to be accompanied by an additional deprivation in order to violate procedural due process).

235. Morrison, *supra* note 211, at 114–15.

236. Philips, *supra* note 21, at 67. However, the Freedom of Information Act may preclude the SEC from publication of a Report containing confidential information. Kathleen Vermazen Radez, Note, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 COLUM. BUS. L. REV. 632, 657 (2010).

interest should take a secondary role in the decision-making process preceding the publication of a report. Similarly, just as a judge should not approve a consent decree without the approval of all parties, the Commissioners must ensure that a report only issues where both the regulated entity and the staff have agreed on the facts and legal conclusions in the report.

B. The Industry-Related Public Benefit: The General Statement of Policy

A Section 21(a) Report can function as a kind of settlement, but this is only part of the story. Often, reports issue in tandem with a cease-and-desist order. These reports supplement, rather than replace, the formal enforcement action, and therefore are not primarily settlements. Even without an accompanying enforcement action, there are several reports that seem to have a limited focus on informing the investor of past wrongdoing. Instead, these reports seem much more forward-looking, functioning as the "proverbial warning shot across the bow."[237] In these reports, the SEC seems much less focused on settling a matter and more concerned about shaping future behavior; often, the industry-related public benefit predominates.

The provision of an industry-related public benefit is analogous to an agency using a general statement of policy to warn regulated entities of enforcement priorities. General statements of policy are an exception to the rule-making requirements of the APA and are not final or binding, but merely indicate how an agency plans to apply the law in future rule-makings or adjudications or are a tentative indication of future goals.[238] And just as adhering to the consent decree model provides safeguards and procedures that can prevent abuse of the Section 21(a) publication process, analogizing predominantly industry-benefitting reports to general statements of policy can channel them along lines that would conform with administrative law and equitable principles. Similar to a general statement of policy, these Section 21(a) Reports serve to explain how the agency will react towards future conduct similar to the behavior detailed in the report. They explore the corporate malfeasance, explain potential legal conclusions, and highlight areas where regulated entities should tread carefully.

For example, after the publication of the Harrisburg report, which explained that municipal officers should be cognizant that

237. Michael K. Lowman, *Recent Enforcement Trends Underscoring the Need for Corporate Compliance*, *in* SEC COMPLIANCE BEST PRACTICES (2010).

238. 2 FEDERAL PROCEDURE, LAWYERS EDITION § 2:79.

any public statement needed to accurately describe city finances,[239] made mayors, and elected officials in other locales aware of their potential liability. The Moody's report warned credit ratings agencies that their extraterritorial behavior would soon come within the SEC's jurisdictional ambit.[240] Because the SEC can easily issue a report at the end of an investigation, financial entities are quickly apprised of their regulator's take on novel issues in a rapidly moving marketplace.

Importantly, as a matter of *formal* administrative law, general statements of policy cannot substitute for rulemaking or alter preexisting regulations.[241] However, Section 21(a) Reports can seem to cross the fine line between a clarification of the law, as with a general statement of policy and an expansion of the law, as with the promulgation of a new regulation. For example, the Feuerstein report reclassified legal officers as supervisors[242] and the Netflix report expanded the scope of Regulation FD to social media.[243] A press release accompanying the Netflix report quoted not only the Director of Enforcement, but also the Director of Corporate Finance, who suggested how to apply previous guidance on Regulation FD to social media.[244] The collaboration between the various divisions at the SEC seems to imply that there is a collective approach to the creation of norms that are to be applied prospectively. This use of the reports is problematic because it does not give regulated entities a chance to respond to the new rules. While the majority of reports do not cross the line between clarification of existing rules and legislative action, formalizing them as a kind of general statement of policy—which by definition cannot create new law—would safeguard against excessive deviation from the previously established administrative scheme.

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239. Harrisburg Report, *supra* note 108, at 3 ("[P]ublic officials who make public statements concerning the municipal issuer should consider taking steps to reduce the risk of misleading investors.").

240. Moody's Report, *supra* note 66, at 1 ("Recent legislative provisions expressly provide that federal district courts have jurisdiction over Commission enforcement actions alleging antifraud violations when conduct includes significant steps within the United States or has a foreseeable substantial effect within the United States.").

241. Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969) ("We agree with petitioner that a 'general statement of policy' is one that does not impose any rights and obligations on a [regulated party].").

242. Feuerstein Report, *supra* note 73.

243. Netflix Report, *supra* note 193, at 1.

244. Press Release, U.S. Secs. & Exch. Comm'n, SEC Says Social Media OK for Company Announcements If Investors Are Alerted (Apr. 2, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513574#.UvUX70JdUv4.

When viewed as a variation on the general statement of policy, a Section 21(a) Report providing an industry-related benefit warns regulated entities about how the SEC plans to apply the securities laws in novel situations or to highlight a change in priorities. Because the reports are fact-specific and often issue in situations where the law is unclear, they may be an unwieldy tool to accomplish this task.[245] However, the timeline of an enforcement action plays an important role in demonstrating why a report is an effective tool to guide regulated entities. As explained previously, the reports issue after the conclusion of an investigation.[246] Other companies wishing to avoid a similar investigation have a strong incentive to understand why the SEC chose not to pursue a formal action. If the SEC were to simply dismiss many of these cases instead of publishing a Section 21(a) Report, many of these regulated entities would be kept in the dark. For example, though the SEC did not have the jurisdictional authority to bring an action against Moody's at the time of its misconduct, the other ratings agencies likely preferred to be put on alert, which the SEC was able to easily accomplish through the publication of a report. A report gives regulated entities a rough guide in a quick and efficient manner to SEC enforcement priorities and legal interpretations.

As guidance, however, it is not obvious why the SEC might not choose a more effective form of interpretive release to communicate its policy, such as a formal guidance document, because the facts of a particular investigation can easily confuse the underlying legal doctrine.[247] That said, using specific factual scenarios to demarcate the law is the bedrock of the common law system and the decision by the Commission to use the reports to explain the future course of action is reasonable. However, to balance the interests of the parties and the public, there must be an industry-related public benefit to justify the publication of a report. It makes sense to use the reports as a general statement of policy, which serves to clarify the priorities at the agency. It makes much less sense to use the reports as a form of rulemaking because the effect of any amplifica-

245. *See* Winterbottom v. Wright, 10 Meeson & Welsby 109, 116 (1842) ("Hard cases, it has been frequently observed, are apt to introduce bad law.").

246. David M. Stuart & David A. Wilson, *Disclosure Obligations Under the Federal Securities Laws in Government Investigations*, 64 BUS. LAW. 973, 974 (2009).

247. Compass Report, *supra* note 143, at 932 (Karmel, Comm'r, dissenting) ("If the Commission has reason to believe that persons need reminding of this duty, a general interpretative release could have been issued . . . ."); Block & Barton, *supra* note 17, at 272–73 (giving the example of a Section 21(a) Report in which the majority of the facts dealt with the "vicissitudes of breeding fish," rather than the topic at hand, the disclosure requirements for industrial revenue bonds).

tion of the underlying legal doctrine in the text of a Report is unclear. Industry actors will be unsure of the repercussions from a report, which in turn could possibly chill legal behavior.

C. The Chimeric Section 21(a) Reports

The previous two subparts established that a Section 21(a) Report can resemble a consent judgment or a general statement of policy, depending on whether the report is meant to provide an investor- or industry-related public benefit, respectively. This Note established the public rationale duality not only to help understand past reports, but to also provide a guide for future SEC actions. When the SEC decides that a formal enforcement action is unwarranted or unlikely to succeed, but still believes that the public would benefit from the information arising out of its investigation, it should still turn to the reports as a functional method to inform the public.

However, as a preliminary matter, the Commission should decide whether the report is meant to provide information to investors, the industry, or both. If the benefit is industry-related, the SEC should treat the report as a kind of general statement of policy and ensure that it does not cross over into a kind of informal rulemaking. If the benefit is investor-related, the SEC should make sure that there is agreement between all parties and that investors will truly benefit from the publication of a report. By bookending the possible uses of the report with the safeguards from other administrative schemes, the SEC will avoid executive encroachment into what should be exclusively legislative and judicial actions.

There still remains the question about reports that contain both a strong investor- and industry-related public benefit. For example, the Motorola report, *supra* IIE, both provided guidelines for cooperation and warned investors that Motorola had violated Regulation FD. For reports that provide both kinds of benefit, the SEC must ensure that *all* of the safeguards from the analogous administrative legal actions are in place. There must be consent and the investing public must have sufficient facts to benefit from the decision to publish a report. Any legal conclusions must remain within established law in order to ensure that the report serves as a warning that benefits industrial actors, rather than an ambiguous expansion that would confuse and potentially harm them.

Because most reports arise out of a settlement process, anything approaching rule-making rather than a clarification of the existing law is particularly dangerous because it means that the regulated entity and the SEC have agreed on terms that will bind

future financial actors. This fear drove a dissent to the publication of the Grace report, in which former Commissioner Steven Wallman pointed out that with a report there "is no appeal and no court ruling on the law," so the legal interpretations should "be limited to the very specific facts of this very specific case, and go no further."[248] The Commissioner's point is valid and is most applicable to those reports that would expand substantive legal liability in a substitute for legislative action. In the Grace report, this was the expansion of the liability of the directors to include double-checking legal counsel's advice.[249] In contrast, the Seaboard and Motorola reports sought to shape the conduct of regulated entities by explaining how the SEC would reward cooperation. This kind of discussion of prosecutorial discretion is an inherently executive function and does not trigger the same structural issues that the amplification of the definition of a legal term does.

D. A Proposal for Reform: Bifurcation of the Reports by Public Benefit

A further safeguard against rule-making by settlement might be an actual bifurcation of the reports: those that are intended to provide an investor-related public benefit and settle a matter could be published under a separate name from those reports published as a warning to industry actors. This would allow for greater precision in the reports themselves as well as their reception by regulated entities and the business press. For example, the Motorola report could have been split into two: one report directed towards investors that warned them of the selective disclosure and another directed towards other publicly traded companies interested in avoiding liability under Regulation FD. While both of these benefits relied on the same facts from the same investigation, each would have a different intended audience. These two separate reports could each explicitly state that their intent is to either provide an industry- or investor-related public benefit, each formulated within its respective administrative law paradigm.

The benefit from publishing separate reports would be enhanced in situations where one benefit predominated over the other. For example, many of the derivative liability reports were predominantly industry-related attempts to guide the behavior of the regulated entities. The investor-related public benefit was often negligible. Because there was only an industry-related benefit, the

248. Grace Report, *supra* note 161, at 1244–47 (Wallman, Comm'r, dissenting).

249. *Id.* at 1242.

SEC would only be able to publish one report, which would take the form of a general statement of policy. Any confusion as to the meaning of the report would be eliminated. Moreover, the drafters of the report would not feel obligated to try to force both kinds of benefit into one report, which can lead to forced rationalizations and further ambiguity. Through the bifurcation of the reports according to their public benefit, the Commission can be sure that the publication of the facts of an investigation abides by the principles of administrative law and provide a clear message to their intended audience.

CONCLUSION

The Securities and Exchange Commission acts in judicial, executive, and legislative capacities to promote the public interest in maintaining a fair and open securities marketplace. Because the Commission can often change roles within a given proceeding,[250] it must take care to remember in which capacity it is making a decision. The publication of a Section 21(a) Report is particularly problematic because it can meet both legislative and enforcement goals. Despite its incongruities with administrative law, the Section 21(a) Report remains a useful tool for the SEC.

The public benefit dichotomy established in the overview of the reports can serve as a guide for the SEC going forward. Each type of public benefit provides a safeguard against the specific problems that can arise from a corresponding administrative action. To the extent that the SEC decides to publish a report to settle a matter, it must ensure it has the consent of the regulated entity, that there is an investor-related public benefit, and it does not do so for expediency's sake. When the SEC publishes a report to serve as a general statement of policy, it must do so to provide a clear and tangible industry-related public benefit without any amplification of the legal doctrine. The best way to both recognize the functional necessities of the report while safeguarding against abuse would be to bifurcate the reports to ensure that each one corresponds to its particular type of public benefit, with a specific nomenclature to designate its role as either an administrative consent judgment or as a general statement of policy.

250. *See* Karmel, *supra* note 8, at 42 ("On rare occasions, the Commission, when acting in its judicial role, will reject theories that it put forth in its prosecutorial role.").