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THE REVIEW OF LITIGATION

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LBJ v. Coke Stevenson: Lawyering for Control of the Disputed Texas Democratic Party Senatorial Primary Election of 1948

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I. HISTORICAL LAWYERING AS A NEW VIEWPOINT ON *LBJ V. STEVENSON*

A. Historical Lawyering

This Article explores the history, from the lawyers' perspectives, of a high-profile litigation sixty years ago, the whirlwind of state and federal litigation that attended the 1948 run-off election battle between Congressman Lyndon B. Johnson and former Texas governor Coke Stevenson for the Texas Democratic Party nomination for United States Senator. Johnson famously won this election by eighty-seven votes out of almost one million cast ("Landslide Lyndon," he immediately called himself), based on very tardy vote tallies reported from Precinct 13 in politically corrupt Jim Wells County in the Rio Grande Valley of Texas. This result was ultimately sustained by an "unusual stay" issued by a United States Supreme Court Justice in favor of Johnson—in an unnumbered proceeding styled *Lyndon B. Johnson v. Coke Stevenson*[1]—at the end of three weeks of litigation between the two candidates. The litigation is interesting as a key moment in Johnson's rise to power and perhaps even as a precursor to *Bush v. Gore*.[2] However, after working through the biographers' accounts of the episode, I surmised that a legal historian or a lawyer might be able to obtain from a thorough study of the legal papers and the court proceedings, and from seeking to understand the work of the

1. In an oral history interview, Joseph Rauh, one member of Johnson's Washington legal corps, later recalled the "the unusual stay which ended the whole case and which made possible Lyndon Johnson's future career." Interview by Paige Mulhollan with Joseph L. Rauh, Jr., in Washington, D.C. (July 30, 1969), at 4, transcript *available at* http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/rauh_joseph_1969_0730.pdf [hereinafter Rauh Interview].

2. In 2000, The New York Times noted:

> [A]s lawyers continue to wage the legal battles across Florida that will determine whether Gov. George W. Bush of Texas or Vice President Al Gore goes to the White House, the famous 1948 election has cropped up once again, as historians, reporters and Texas politicians here have traced some intriguing parallels between the two elections.

Sam Verhovek, *Florida Vote Evokes Texas Squeaker*, N.Y. TIMES, Nov. 19, 2000, at A43.

candidates' lawyers, new, or perhaps more nuanced, understandings about the junction of politics and law that occurs when very close election tallies are challenged and the dispute is presented to courts for resolution.

Indeed, as I examined the biographers' footnotes, I came to the conclusion that the biographers failed to understand or to fully appreciate some very interesting primary sources, namely the records of the multiple courts in which the Stevenson–Johnson legal battles were waged. Such records and related materials are well familiar to lawyers and legal historians and are generally open and accessible, if not in clerks' offices in courthouses, then in archives. These sources include attorneys' pleadings, motions, briefs, court orders, hearing transcripts, docket sheets, other clerk and court records,[3] and, in the instance of significant trials or notable figures such as Johnson, oral history interviews of participating attorneys. Such research materials exist for the *LBJ v. Coke Stevenson* litigation and present a useful opportunity to investigate the lawyering of this particular election dispute.

Over the past sixty years, use of the term *lawyering* has skyrocketed in law practice, court decisions, and legal studies. A survey of the contemporary legal literature shows that the term is commonplace and is generally assumed to not need defining.[4] For instance, the legal lexicographer Bryan A. Garner defines the term *lawyering* blandly and quite briefly as "a neutral term to describe

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3. Access to the lawyers' client files would be additionally informative, but here, as usual, such records are not generally available. The Lyndon Baines Johnson Library in Austin maintains records of interviews with many of Johnson's lawyers and two of Stevenson's attorneys involved in the 1948 litigation. All the lawyers who worked on these cases have died.

4. For examples of authors freely using the term but neglecting to define it, see generally CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY (Austin Serrat & Stuart Scheingold, eds., 1998) (using the term *cause lawyering* without further explanation); JAMES C. FREUND, LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE 1 (1979) ("[H]ere's how you do it."); STUART SCHEINGOLD, CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA (2001) (analyzing one type of lawyering—cause lawyering—without defining the term *lawyering*); HELENE E. SCHWARTZ, LAWYERING ix (1976) ("[This book] is also about the art of lawyering."); Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 UMKC L. REV. 23, 26 (1992) (stating as part of an introduction to business lawyering that "rendering legal opinions is quintessential lawyering").

what [lawyers] do, and even as a laudatory term."[5] But what is it that lawyers really "do"? An American Bar Association task force identified the "fundamental lawyering skills essential for competent representation" as "problem solving[,] legal analysis[,] legal research[,] factual investigation[,] communication[,] counseling[,] negotiation[, and] litigation . . . ."[6] Certainly lawyers do all of those things, but that laundry list of discrete skill sets does not capture the essence of lawyering. More usefully, in their law school text, Professors Stefan H. Krieger and Richard K. Neumann, Jr. describe the "craft" of lawyering: "A lawyer's job is to *find a way*—to the extent possible—*for the client to gain control over a situation*."[7]

Not having found a truly useful definition of the word *lawyering*, I have elsewhere attempted to formulate a definition that, taking a cue from Krieger and Neumann, is functional and result-oriented:

> "Lawyering" is the work of a specially skilled, knowledgeable, or experienced person who, serving by mutual agreement as another person's agent, invokes and manipulates, or advises about, the dispute-resolving or transaction-effectuating processes of the legal system for the purpose of solving a problem or causing a desired change in, or preserving, the status quo for his or her principal.[8]

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5. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 508 (3d ed. 2011) (emphasis added).

6. AM. BAR ASS'N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 3 (1992).

7. STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 7 (2d ed. 2003). For an inferior formulation, see Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 25–26 (2005) ("Traditional lawyering . . . focuses on courtroom and client advocacy in an adversary system. . . ."; "Where a lawyer advocates for a client, the lawyer's duty is *to help the client win by creatively arguing that the client has complied with law or has a stronger case than the opposing party*.") (emphasis added).

8. Josiah M. Daniel, III, *A Proposed Definition of the Term "Lawyering,"* 101 LAW LIBR. J. 207, 215 (2009).

The lawyering of a dispute or transaction in an earlier time may therefore be referred to as historical lawyering. Historical lawyering is a nascent topic within the broad field of legal history.[9]

This Article proceeds from that perspective and seeks to contribute to that study by reviewing the fundamental legal papers and the efforts of the attorneys working for the opposing candidates in this significant post-election litigation during the mid-twentieth century. Utilizing both the Krieger–Neumann generalization and my definition of lawyering, this Article seeks to assess the "job" each of the opposing teams of lawyers "did" in attempting to "caus[e] a desired change in, or preserv[e] the status quo of"[10] the post-election situation for its candidate-client, during three hectic weeks in September and October, 1948. This Article tells the story chronologically,[11] investigating how the attorneys engaged by both sides, preeminent practitioners of their day in Texas and Washington, moved along the civil litigation path. These lawyers cobbled together ad hoc strategies and tactics under pressure and in a highly compressed time frame; formulated legal theories and drafted pleadings to advance their objectives; selected fora and judges (both state and federal); invoked—and often ignored—applicable procedural rules; developed evidence; and dealt with problems of proof or eschewed evidence altogether. They sought and obtained from trial-court judges injunctive relief of various types, sometimes very late at night or very early in the morning and, finally, maneuvered through appellate processes toward the desired "control of the situation" for the client.

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9. *See generally* BRIAN DIRCK, LINCOLN THE LAWYER ix (2007) (noting that there are few modern book-length examinations of the practice of law in Lincoln's day); WILLIAM G. THOMAS, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH xii–xiii (1999) (noting that studies of how lawyers shaped earlier political economics are recent phenomenon); Felice Batlan, *The Ladies Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, 41 AKRON L. REV. 701, 704–05 (2008) (noting that legal historians have not studied law's role in the development of women's organizations in the late nineteenth century).

10. Daniel, *supra* note 8, at 215.

11. The form of my inquiry was inspired in part by a lecture I heard in 1975, in which Irving Younger recounted the story of the lawyering that began with an accident and led to the filing of a personal injury lawsuit that resulted in the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011, 1012 (1978).

Correcting and improving the biographers' account of these three weeks of litigation between Johnson and Stevenson, this Article shows how the candidates' lawyers actually worked to preserve or to achieve electoral victory in the face of the fraud that tainted the last votes. In the end, it was the superior lawyering by the Johnson team that preserved his eighty-seven-vote electoral victory.

B. The Incomplete Accounts of Caro and Other Biographers

The 1948 Texas Democratic senatorial primary run-off election battle between Lyndon B. Johnson and Coke Stevenson was a significant political event that has been extensively chronicled. All of the major biographies of Johnson tell the story, and some of the participants, such as Johnson's campaign manager, John B. Connally, have published reminiscences about it,[12] while many others, particularly Johnson supporters, gave oral history interviews after Johnson left the White House.[13] The most important biographies have been published in the past twenty years. The first is Robert Caro's critical biography, *The Years Of Lyndon Johnson: Means Of Ascent*,[14] which is the second volume in his projected quartet and specifically focuses on the 1948 primary election and resulting litigation as emblematic of Johnson's character. The second is Robert J. Dallek's *Lone Star Rising*,[15] the first of his two-volume biography. Two other biographies are helpful for understanding the story of the election and the subsequent litigation: Ronnie Dugger's 1982 biography of

12. JOHN CONNALLY WITH MICKEY HERKOWITZ, IN HISTORY'S SHADOW: AN AMERICAN ODYSSEY (1993) .

13. *See, e.g.*, *supra* note 1 (citing oral history interview of Joseph L. Rauh, Jr. given on July 30, 1969).

14. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT (1990).

15. ROBERT J. DALLEK, LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES, 1908–1960 (1991).

Johnson[16] and James Reston, Jr.'s 1989 biography of John Connally.[17]

That Johnson won the election by eighty-seven votes as a result of very late ballots reported from the counties of Jim Wells, Duval, and Zapata—counties dominated by political bosses in the Rio Grande Valley—and cast by persons absent, ineligible, or deceased is well-known, even the stuff of folklore.[18] Caro argues that Johnson's campaign and his resulting election victory was a watershed event, not only for Johnson, who catapulted to political power in America as a result,[19] but also for "the transformation of American politics in the middle of the twentieth century."[20] Caro describes this transformation as the triumph of the "new politics" that utilized electronics, technology, and the media over the "old politics" of a lone campaigner lacking modern electioneering tools.[21] All the biographers and political historians tend to concur.

What was less well known, until Caro first described it, is the detailed story of the litigation between the two candidates over the certification of Johnson's nomination at the State Democratic Convention in Fort Worth on September 13, 1948. While Caro's book drew criticism from reviewers, and the Dallek biography was

16. RONNIE DUGGER, THE POLITICIAN: THE LIFE AND TIMES OF LYNDON JOHNSON: THE DRIVE FOR POWER, FROM THE FRONTIER TO MASTER OF THE SENATE (1982).

17. JAMES RESTON, JR., THE LONE STAR: THE LIFE OF JOHN CONNALLY (1989). Another important biography is RANDALL J. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION (2006).

18. *Weekend Saturday: Johnson's Senatorial Election in 1948* (NPR radio broadcast Aug. 15, 1998) (commenting on the infamous "Ballot Box 13," the guest, columnist Sam Attlesee of the Dallas Morning News, said, "somebody has it down there"). *See also* Kent Biffle, *Reliving the Scandal of Box 13*, DALLAS MORNING NEWS, Mar. 25, 1990, at 43A (describing the late reporting of the ballots from the Jim Wells County in Precinct 13).

19. In January 1955, Johnson became Majority Leader of the Senate; in January 1961, he became Vice President; and when President Kennedy was assassinated on November 22, 1963, he became President. *President Lyndon B. Johnson's Life and Times*, LYNDON BAINES JOHNSON LIBRARY & MUSEUM, http://www.lbjlibrary.org/about-lbj/timeline.html (last visited Oct. 8, 2011).

20. CARO, *supra* note 14, at xxxii. *Accord* DALLEK, *supra* note 15, at 7–8. *See also* PAUL K. CONKIN, BIG DADDY FROM THE PEDERNALES: LYNDON B. JOHNSON 118 (1986) ("This close, contested, corrupt election proved the most important turning point in Johnson's political career.").

21. CARO, *supra* note 14, at xxxii–xxiii.

acclaimed as "fairer,"[22] it is Caro who has provided the most factually detailed account not only of the politics and the campaign but also of the litigation cauldron in which that nomination was tested and from which, after three see-saw weeks, Johnson emerged victorious.[23] Any attempt to understand *LBJ v. Stevenson* should begin with Caro's extended account, supplemented by Dallek and other biographers who offer some additional facts.

However, Caro is a journalist by training and veteran biographer by experience;[24] Dallek is a political historian;[25] Dugger is another journalist;[26] and Reston is a novelist and journalist.[27] It is not a diminution of their work to observe that each overlooked some primary and secondary sources pertinent to the history of the litigation, misunderstood some elements and aspects of the legal proceedings, and generally failed to plow the ground as a legal historian or historically minded lawyer would have done.[28] This Article compiles the lawyers' pleadings and

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22. David M. Kennedy, *A Fairer Likeness*, THE ATL., Sept. 1991, at 114.

23. *Compare* CARO, *supra* note 14, at 322–84 (using over sixty pages to describe the litigation that ensued from the Johnson–Stevenson run-off), *with* DALLEK, *supra* note 15, at 329–39 (using only ten pages to describe the same).

24. His first volume on Johnson is THE YEARS OF LYNDON JOHNSON: PATH TO POWER (1982). Before that, he wrote an acclaimed biography of Robert Moses, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974).

25. Dallek received his Ph.D. from Columbia and taught at Boston University, UCLA, and Oxford. *Dr. Robert Dallek*, CENTER FOR NAT'L POL'Y (Apr. 11, 2008), http://www.centerfornationalpolicy.org/ht/display/ContentDetails/i/3541.

26. Dugger founded the Texas Observer. Josh Getlin, *Texas Observer No More*, L.A. TIMES, May 18, 1997, at E1, *available at* http://articles.latimes.com/1997-05-18/news/ls-59879_1_texas-observer.

27. *Biography of James Reston, Jr.*, JAMES RESTON, JR., http://www.restonbooks.com (last visited Oct. 8, 2011) (stating on author's personal website that he is the "author of 15 books, three plays, and numerous articles in national magazines").

28. Except for the federal district court's trial transcript, Caro did not review the underlying lawsuits, appellate case papers, or the various courts' orders and decisions, and relied instead on oral history interviews and newspaper accounts in an attempt to understand the legal battle. He failed, for instance, to find the original mandamus proceeding initiated by Johnson's counsel, and he did not consult most of the pleadings and orders of the multiple cases in the archives and various courts' clerks' files. *See* CARO, *supra* note 14, at 476–80 (listing sources consulted and only including a few pleadings and briefs in that list); *id.* at 423 ("[W]ritten documents can never tell the whole

briefs, the court documents, and the legal positions of the parties into an as accurate as possible description of the three weeks. It also analyzes the episode with particular reference to the ways the numerous lawyers went about their jobs in initiating and defending the resulting multiple, sometimes simultaneous, lawsuits and proceedings in a very short period of time with the goal of gaining control of the election for their respective clients.

C. *Johnson's Eighty-Seven-Vote Margin of Victory*

Texas was a one-party state in 1948; winning the Democratic Party primary was tantamount to winning the general election.[29] The favored candidate for the Senate race was the popular former governor, sixty-year-old Coke Stevenson.[30] Johnson was a forty-year-old, six-term Congressman from a rural district in Central Texas.[31] He had run for Senate seven years earlier, losing in a run-off election by a tiny margin to another governor, W. Lee ("Pappy") O'Daniel.[32] He was bored in the House, did not file for re-election, and staked his political career on his candidacy for Senate, which he declared on May 12, 1948, only days before O'Daniel announced that he would not stand for re-election.[33]

Johnson campaigned feverishly, even utilizing, for the first time in American politics, a helicopter to draw attention to his message and campaign more speedily from town to town.[34] Stevenson relied on his widespread popularity and did not actively campaign.[35] In the original primary election on July 24, 1948, Stevenson and Johnson finished first and second, respectively, with Stevenson leading by 71,460 out of 1.2 million votes cast in a field of twelve candidates.[36] For the necessary run-off election

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story, of course, ... I have also relied heavily on interviews with the men and women closest to Lyndon Johnson . . . .").

29. *Id.* at xxxi.

30. *See id.* at xxxii, 179 (describing Stevenson's political popularity).

31. *Id.* at 5.

32. *See id.* at 4 (describing 1941 election loss to O'Daniel).

33. *Id.* at 140, 194.

34. *Id.* at 211–23.

35. *Id.* at 238–39.

36. *Tabulation of Votes Cast for Each State Office Candidate in Democratic Primaries of 1948*, attachment to letter from Vann M. Kennedy,

five weeks later, Johnson electioneered ceaselessly.[37] He had raised and spent unprecedented amounts of cash from Texas and Eastern contributors in the initial primary and enjoyed the support of Texas businessmen like George and Herman Brown, the principals of the Texas-based contracting firm, Brown & Root.[38] During the run-off he continued to enjoy that support and to spend freely. Once again, Stevenson did not actively campaign.[39]

The run-off election was held on Saturday, August 28.[40] As was the custom, after the polls had closed and tallies had been made, the county election officials around the state telephoned their vote totals to the Texas Election Bureau, the unofficial tabulator sponsored by Texas newspapers.[41] The results favored Stevenson on election night and for the next five days with the margin varying from 854 to 31.[42] But after noon on Friday, September 3, six days after the polls had closed, the last 201 votes came in from Precinct 13 in Jim Wells County, with 200 for Johnson and only one for Stevenson.[43] That last surge provided Johnson's ostensible eighty-seven-vote margin of victory.[44] Allegations of voting irregularities arose immediately.[45]

Johnson's biographers have written, and one of his confidantes has stated in an oral history interview, that Johnson had learned a lesson from his extremely close defeat by Pappy O'Daniel in the senatorial primary race of 1941, a loss he believed was due to O'Daniel's use of fraudulent, decisive voting tactics at the last minute, after all of Johnson's votes had been reported.[46] In

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Secretary, State Democratic Executive Committee, to Clerk, U.S. District Court, Sept. 20, 1948, undocketed letter in file of Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640), *available at* the National Archives, Southwest Branch, Fort Worth, Texas.

37. CARO, *supra* note 14, at 268–302 (detailing Johnson's renewed efforts to win the run-off).

38. *Id.* at 180, 272–75.

39. *See id.* at 286 (describing how Stevenson's "old style" campaign was overwhelmed by Johnson's).

40. *Id.* at 303.

41. *Id.* at 309.

42. *Id.* at 312–16.

43. *Id.* at 317.

44. *Id.*

45. *Id.* at 318.

46. GEORGE NORRIS GREEN, THE ESTABLISHMENT IN TEXAS POLITICS: THE PRIMITIVE YEARS, 1938–1957 36–37 (1979); Interview by David G. McComb

the days after September 3, both Stevenson and Johnson accused each other of vote fraud, and one popular Texas historian wrote that "Johnson's men had not *defrauded* Stevenson, but successfully *outfrauded* him."[47] Yet, while he alleged in radio broadcasts[48] and in his federal court pleadings[49] that Stevenson was guilty of even greater vote fraud, Johnson's counsel never introduced any evidence of it in court or in public. In the federal district court hearing, Stevenson's lawyers did introduce specific evidence, testimonial and documentary, of vote fraud that Johnson's lawyers failed to rebut or even to cross-examine.[50] In his biography of Johnson, Caro notes that whatever Stevenson's allies may have been doing in Austin during those days immediately after the election, the candidate himself was relaxing back at his ranch.[51] Elsewhere, Caro has at length attempted to negate the Johnson camp's allegation of fraud on the part of Stevenson.[52]

In 1948, certain Texas counties in the Rio Grande Valley were still under the domination of local political machines.[53] In Duval County, the boss was George Parr, the "Duke of Duval," and his power extended to other counties in the Valley.[54] Duval County initially reported 4,197 votes for Johnson and 40 for Stevenson, later increasing Johnson's total by 425 ballots.[55] Parr

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with George R. Brown, in Austin, Tex. (July 5, 1972), at 5, transcript *available at* http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/brown_george_1969_0806.pdf.

47. T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 659 (1968) (emphasis in original).

48. CARO, *supra* note 14, at 319, 333.

49. *E.g.*, Petition for Temporary Restraining Order at 2–3, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686); Opposition to Granting of Temporary Injunction at 5–7, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640). *See infra* notes 104–108 and accompanying text (detailing Johnson's allegation of fraud against Stevenson).

50. *See* CARO, *supra* note 14, at 303 (describing the evidence and events of the hearing).

51. *Id.* at 313.

52. Robert A. Caro, *My Search for Coke Stevenson*, N.Y. TIMES, Feb. 3, 1991, (Book Review) at 1.

53. EVAN ANDERS, BOSS RULE IN SOUTH TEXAS: THE PROGRESSIVE ERA 283 (1982); J. GILBERTO QUEZADA, BORDER BOSS: MANUEL B. BRAVO AND ZAPATA COUNTY 4–15 (1999). *See also* DALLEK, *supra* note 15, at 329 (noting that the area was "notorious for boss rule, bloc voting, and doctored ballots").

54. CARO, *supra* note 14, at 186.

55. *Id.* at 265.

had caused votes to be cast for every single poll tax receipt in the county and had no more capacity to add votes himself.[56] His ally Ed Lloyd, however, who was the political boss in Jim Wells County, could and did add more,[57] including those last 201 votes on September 9.[58] When Stevenson learned the news of the very tardy results from the boss-controlled counties of Duval, Zapata, and Jim Wells, he was outraged, and he took immediate action.[59]

Time was short for Stevenson. One thing critical to an appreciation of both sides' litigation tactics after the State Convention, which Caro notes, but fails to explain clearly, is that the date of October 2 was the critical deadline to achieve control of the nomination. The Texas primary election statutes created a very tight time frame. By law, when a primary election, then held on the next to last Saturday of July, did not produce a majority vote for one candidate, a run-off election was required exactly five weeks later, a date falling in the last few days of August.[60] The State Convention always followed two and a half weeks later.[61] Upon certification of candidates by the State Convention, the Texas secretary of state was then required by statute to prescribe to the 254 county clerks the forms of official ballots to be used in the general election on the first Tuesday of November.[62] Texas law further required each county clerk to post publicly for ten days the names of all the candidates to appear on the ballot at the general election.[63]

In an affidavit submitted to the U.S. Supreme Court, the Texas secretary of state, Paul Brown, a party to the original

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56. *See* Martin Donell Kohout, *Duval County*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/hcd11 (last visited Oct. 6, 2011) ("The famous Box 13, which gave Johnson his eighty-seven-vote victory, was actually in Jim Wells County, but the manipulation of the returns was almost certainly directed by Parr.").

57. CARO, *supra* note 14, at 191.

58. CARO, *supra* note 14, at 317.

59. CARO, *supra* note 14, at 316–18.

60. TEX. ELEC. CODE ANN. § 3102 (Vernon 1948) (repealed 1951).

61. *Id.* at § 3131.

62. *Id.* at § 2925.

63. TEX. PENAL CODE § 206 (Vernon 1938), Act of 1905, 29th Leg., 1st C.S., ch. 11, § 132, 1905 Tex. Gen. Laws 520, 544, *repealed by* Act of May 9, 1985, 69th Leg., R.S., ch. 211, § 9, Tex. Gen. Laws 802, 1076.

mandamus proceedings in the Texas Supreme Court,[64] explained the statutory time frame:

> [The state statutes] mean that I should have in the hands of each of the 254 County Judges of the State of Texas, a sample ballot to contain the names of the nominees for each party *not later than October 2*. As a practical matter, in view of the fact that the means of communication with many of the 254 counties is limited to railroad or bus line, I must send out those blanks several days in advance of October 2. . . . Before sending out such blanks, I must have the proof prepared by the printer, proofread the same and the printing completed in advance of the time before the same are placed in the mail . . . .[65]

Thus, in the three weeks of litigation, the lawyers for both sides had their eyes on October 2 as the critical date toward which they worked to secure the placement of their respective clients' names on the general-election ballot in the slot for the Democratic Party candidate for U.S. Senator.

A lawyer himself,[66] Stevenson quickly put together teams to go to the Rio Grande Valley to investigate what had happened.[67] First, he sent one team, headed by San Antonio attorney Pete Tijerina, to Duval County to interview residents.[68] Many who were certified as having voted there informed Tijerina that they had not voted and that their county commissioner had picked up

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64. Caro misidentifies the secretary of state as Ben Ramsey, who succeeded Brown, but not until the following year, 1949. CARO, *supra* note 14, at 338.

65. Affidavit of Paul H. Brown, Ex. F to Johnson's Supplemental Motion for Stay, Johnson v. Stevenson (U.S. September 25, 1948) (unnumbered proceeding) (emphasis added).

66. In addition to ranching, Stevenson practiced law for more than fifty years, continuing to practice into his seventies. *See generally* Abilene Christian Coll. v. Landers, 371 S.W.2d 97 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.) (marking the last reported case in which Stevenson, then seventy-five, appeared as counsel for a party).

67. CARO, *supra* note 14, at 322.

68. *Id.*

their poll tax receipts and voted for them.[69] However, no notary public in that county was willing to notarize the witnesses' statements.[70] Soon, Duval County sheriff's deputies, including one carrying a submachine gun, stopped Tijerina and his team, spread-eagle searched them, and informed them that they had half an hour to depart the county, which they did.[71]

Second, Stevenson asked three attorneys to investigate the matter in Jim Wells County: Callan Graham, a young lawyer in Junction with strong ties to Stevenson, and two San Antonio law partners, Kellis Dibrell and James Gardner, who were former FBI agents.[72] When they arrived in Alice, the county seat, on Tuesday, September 7, they saw groups of unshaven men wearing pistols and carrying rifles along Main Street.[73] The three were armed only with a book on election law,[74] and they intended to inspect the election tally sheets and the voters' sign-in sheets, as Texas election law clearly provided any citizen may do.[75]

The sheets were in the possession of Tom Donald, the outgoing chair of the county's Democratic Executive Committee and the cashier of Parr's Texas State Bank of Alice.[76] In the bank office, the lawyers informed Donald that they were attorneys for Stevenson, cited the Texas statute providing that any citizen may inspect voting records, and asked to see the lists.[77] Donald responded: "I know that. But you can't see them because they're locked up in that vault, and I'm not going to unlock the vault.

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69. *Id.*

70. *Id.*

71. *Id.* at 322–23.

72. *Id.* at 323. Dallek states that Gardner went there at a later time with Stevenson. DALLEK, *supra* note 15, at 332.

73. Scott Parks, *Election Confusion, Texas Style: 1948 Primary Snared LBJ, Ex-Governor In Vote-Fraud Tangle*, DALLAS MORNING NEWS, Nov. 19, 2000, at 39A.

74. In 2000, at age eighty-six, Graham remembered, "It was scary going into town that day. . . . It's pretty funny now, but all I had was a law book." *Id.* Caro does not identify the book. CARO, *supra* note 14, at 323. The Author suspects it was the then-recently issued pamphlet, GEORGE SERGEANT, MANUAL OF ELECTION PROCEDURE COMPILED FOR THE TEXAS DEMOCRATIC STATE EXECUTIVE COMMITTEE (1945).

75. CARO, *supra* note 14, at 323.

76. *Id.* at 323.

77. *Id.*

That's why you can't."[78] The lawyers concluded that the lists contained proof that the critical 200 votes had been added to Johnson's total after the polls had closed.[79] From there, the lawyers went to see "reform" members of the county's Democratic Party Executive Committee, one of whom had seen the subject tally list for Precinct 13 and had noticed that the last 201 names on the list were written in alphabetical order and in blue rather than black ink.[80]

Third, with his teams of investigating lawyers stymied, Stevenson himself went to Jim Wells County and took an old friend, the legendary former Texas Ranger, Frank Hamer, who wore his sidearm during the trip.[81] In Alice, they met up with Dibrell and Gardner at a hotel, and in a scene Caro characterizes as reminiscent of the Old West, the Stevenson party walked 200 yards down Main Street to the bank as various groups of armed men in their path gave way.[82] Inside the bank, with one reporter also present, Stevenson cited the election law and demanded to see the list.[83] Donald pulled the Precinct 13 tally sheet and voter list out of his desk, and Dibrell and Gardner studied them; when they began to scribble notes, Donald yanked the papers back.[84]

But the two lawyers had time to observe not only that the last 201 names were in a different color ink, but also that the grand total figure on the tally sheet had been changed from 765 to 965—a loop had been added to the seven to make it a nine, representing 200 additional votes for Johnson.[85] The attorneys then located several of the persons on the list who gave affidavits that they had

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78. Interview by Michael C. Gillete with Callan Graham, in Austin, Tex. (Aug. 10, 1978), at 18, transcript available for download at http://millercenter.org/scripps/archive/oralhistories/detail/2513 [hereinafter Graham Interview].

79. CARO, *supra* note 14, at 324.

80. *Id.* at 323–24.

81. Hamer had served as a Texas Ranger for three decades, was wounded seventeen times, had killed fifty-three men, and was the officer who had tracked down and killed the outlaws Bonnie Parker and Clyde Barrow in Louisiana in 1934. H. GORDON FROST & JOHN H. JENKINS, "I'M FRANK HAMER": THE LIFE OF A TEXAS PEACE OFFICER 232–33 (1968). In 1948 he was employed by Texas Oil Company. CARO, *supra* note 14, at 326.

82. CARO, *supra* note 14, at 327.

83. *Id.* at 328.

84. *Id.*

85. *Id.* at 328–29.

not voted.[86] The lawyers also discovered that a number of the additional voters were deceased.[87] Stevenson prepared his own affidavit recounting these findings, filed it with the county clerk of Jim Wells County, and petitioned the Jim Wells County Democratic Executive Committee to meet and certify a new, corrected county tally.[88]

On September 9, the committee adopted a resolution addressed to Vann Kennedy, the secretary of the Texas Democratic Party Executive Committee.[89] The certificate of the committee, signed by Harry Lee Adams, the new chairman of the county executive committee, and H.L. Poole, the secretary of the committee, which was later introduced into evidence at the September 21 hearing in federal district court,[90] recites that a meeting of a quorum of the committee had been held on September 8 "to consider . . . the complaint of Coke R. Stevenson as to fraud and irregularities in the voting in Election Precinct No. 13," and that "evidence was heard" regarding the change in the returns for Precinct 13 from 765 for Johnson and 60 for Stevenson to 967 for the former and 61 for the latter.[91] It further stated that the "Poll List, Voters List and the Returns" ought to be examined but such documents were in the possession of Donald who "has refused to surrender said returns to the present Chairman."[92] The certificate concluded that, because it is unable to determine the correct vote, "the State Democratic Executive Committee should investigate and determine the number of votes received by each candidate in Election Precinct No. 13."[93] The certificate ends with a certification of the county clerk of Jim Wells County attesting that Adams is "the duly elected, qualified and acting Chairman" of the county committee.[94]

There things stood, on the eve of litigation.

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86. *Id.* at 328.
87. *Id.* at 329.
88. *Id.* at 327–30.
89. *Id.* at 330.
90. Partial Transcript of Hearing on Motion for Temporary Injunction at 58, Stevenson v. Tyson (N.D. Tex. Sept. 21, 1948) (No. 1640) [hereinafter Partial Transcript of Sept. 21 Hearing].
91. Plaintiff's Ex. 9 at 1, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).
92. *Id.*
93. *Id.* at 2.
94. *Id.* at 3.

II. THE THREE WEEKS OF LITIGATION

A. *Johnson's Lawyers File Suit in the State Court System and Gain Initial Control*

1. Friday, September 10

When Johnson learned of the September 8 meeting and the Adams-Poole report to the State Executive Committee is unclear, but while Stevenson and his team were wrapping up their evidence gathering and other efforts, Johnson's lawyers apparently learned on Friday, September 10, that the new leadership of the Jim Wells County committee was preparing to meet again on Saturday, September 11, for the purpose of making a corrected return of votes to the State Executive Committee.[95] On that Friday, the last business day before the State Convention was to commence, Johnson filed the first lawsuit.[96] In the petition, Johnson's attorneys expressed their client's concern that the Jim Wells County committee would in fact be meeting the next day for the purpose of changing the county's certification of votes that had been made to the secretary of the State Democratic Party.[97]

The pleading reflects haste on the part of Johnson's counsel. On September 10, Alvin J. Wirtz, a former state senator and Johnson's long-time personal lawyer and confidant who had played a significant role in the campaign, and his law partner, Everett L. Looney, filed the petition initiating the state court suit styled *Lyndon B. Johnson v. Coke R. Stevenson, et al.*[98] Named as defendants were Stevenson, Hamer, Dibrell, and nineteen members of the Jim Wells County Democratic Party Executive Committee,

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95. *Id.* at 330–31. The AUSTIN-AMERICAN STATESMAN reported on Saturday, September 11, that the committee was going to meet again that day, so it is not surprising that Johnson's lawyers learned of it the preceding day. *See id.* (noting that the AUSTIN AMERICAN-STATESMAN reported that "an entirely new resolution of certification [will] be drawn up by the new [county] Committee and presented to the Democratic State Executive Committee as a substitute for that filed by the outgoing committee").

96. CARO, *supra* note 14, at 334–35.

97. Petition for Temporary Restraining Order at 2, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept 10, 1948) (No. 81686).

98. Judge's Civil Docket, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

but not Tom Donald.[99] The pleading is untitled, but its jacket was labeled "Petition for Temporary Restraining Order."[100] The line of the caption for designation of the court district number of suit was typed as a blank and filled in by hand at the last moment.[101] The plaintiff's attorneys filed the suit in Travis County, in which the state's capitol of Austin is situated and where Johnson was at that time, rather than in Jim Wells County, the site of the events surrounding Ballot Box 13.[102]

The Petition contains five paragraphs of allegations and a prayer.[103] First, Johnson asserted that he "received a majority of the votes for nomination as a candidate for said office as the returns of said election were duly and legally canvassed by the County Executive Committees of the several counties wherein such election was held."[104] He then alleged:

> [T]he Defendants herein named have entered into a conspiracy and are acting together for the purpose of causing the Democratic Executive Committee of Jim Wells County to alter and change the returns from said County. . . . Stevenson, together with Defendants Dibrell and Hamer, have gone into Jim Wells County and, by threats and intimidation, have attempted to have the votes of one or more of the voting boxes in said County eliminated from the official canvass and official returns and to have new returns forwarded to the State Executive Committee, taking votes from Plaintiff in sufficient number to change the result of the election.[105]

Further allegations stated that Adams met with others at a private residence to plan how "to throw out and disregard the votes in Precinct No. 13 of said County on the ground of 'fraud and irregularities,'" citing a statement said to have been made by Poole

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99. Petition for Temporary Restraining Order at 1, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

100. *Id.* at 1.

101. *Id.*

102. *Id.*

103. *Id.* at 1–4.

104. *Id.* at 2.

105. *Id.* at 2–3.

to the Houston Chronicle newspaper.[106] Johnson argued that the committee had no authority to determine the charges of illegality or irregularity of votes in the election, insisting that, if not restrained, the defendants would "irreparably injure and damage Plaintiff and deprive him of his statutory rights."[107] Because Stevenson, Hamer, and Dibrell were seeking "by force and threats" to orchestrate the committee meeting, Johnson requested issuance of a temporary restraining order without notice, preventing the defendants "from recanvassing . . . the returns" and from sending to the State Executive Committee any return different from the prior one.[108] The pleading alleges no venue facts, and it cites none of the Texas Rules of Civil Procedure, which had been in effect since 1939 and included specific rules governing injunctive practice.[109] Nor does the pleading cite any case law.[110]

The pleading was signed by Wirtz and Looney.[111] Attached was an affidavit and a jurat signed by Johnson. In the affidavit, he swore that he had determined, after his own telephone inquiry, that the resident judge of Jim Wells County was presently in another county, too distant to be reached for presentation of the petition.[112] The last sentence declares: "The best information affiant has been able to obtain is that the defendant Adams will at any moment, unless restrained, seek to make a new tabulation and certification, for which affiant prays for injunction to prevent."[113] In the jurat, Johnson swore: "I am the person named as Plaintiff . . . . I am familiar with the facts alleged in said petition, and the facts therein alleged are true."[114] Caro found a "pattern" in

106. *Id.* at 3.

107. *Id.* at 3–4.

108. *Id.* at 4.

109. *See generally id.* (stating the alleged conspiracy and harm to Johnson without introducing any venue or Texas civil procedural issues).

110. *Id.*

111. CARO, *supra* note 14, at 335. Caro states that "Looney's name came first; Wirtz never put his name first on anything if he could help it." *Id.* But Wirtz's name and signature as counsel for Johnson is clearly first not only on this state court petition but also on several of Johnson's papers filed in the federal cases. *E.g.*, Petition for Temporary Restraining Order, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

112. Petition for Temporary Restraining Order at 5, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

113. *Id.*

114. *Id.* at 6.

the legal struggle from this opening volley to the final battle: Stevenson trying to open and Johnson trying to keep closed the record of voting in the three Rio Grande Valley counties.[115]

Caro reports correctly that Looney presented the petition to Judge Roy C. Archer, one of the district judges in Austin; however, he does not mention that the Travis County courthouse had been long closed when the papers were filed with the District Clerk at 9:50 P.M., indicated by the Clerk's handwritten notation on the file-stamp.[116] No notice was provided to Stevenson or anyone else.[117] Archer signed the temporary restraining order (TRO), which had been drafted by Johnson's counsel, reciting that the county committee will, unless restrained, recanvass or recount the votes "contrary to the provisions of the statute," which is not identified, referring to the meeting of the State Democratic Executive Committee that was to begin on Monday, September 10, in Fort Worth.[118] The order enjoined the defendants for a period not to exceed ten days.[119] Finally, the order set a hearing for 10:00 A.M. on September 13, at the courthouse in Alice, the county seat of Jim Wells County.[120] The TRO directed the clerk to issue notice to the defendants of the TRO and of the September 13 hearing conditioned on the plaintiff posting a bond, the amount of which Judge Archer hand-wrote as "$500.00."[121] The TRO is file-marked 9:55 P.M., five minutes after the petition was filed,[122] so if

115. CARO, *supra* note 14, at 334.

116. Petition for Temporary Restraining Order at 1, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686); CARO, *supra* note 14, at 334.

117. CARO, *supra* note 14, at 334. The relevant rule of civil procedure at that time provided that "[n]o temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." TEX. R. CIV. P. 680 (1948).

118. Temporary Restraining Order at 2, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

119. *Id.*

120. *Id.*

121. *Id.*

122. Temporary Restraining Order at 1, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).

a hearing was held, it was extremely abbreviated. The clerk then sent telegrams notifying defendants of the TRO.[123]

That is the end of the file in the district clerk's office in Travis County except for a notation at the foot of the official order of the district court that "[t]he original papers in this cause were transmitted to Jim Wells County, Texas, upon request of Plaintiff."[124] The clerk retained photostatic copies.[125] No motion to transfer venue was filed. The "request of Plaintiff" must have been oral, and apparently, Johnson's counsel took those original papers from the Travis County courthouse and delivered, or somehow caused their delivery, during the weekend to the district court in Jim Wells County, because on Monday morning, September 13, Judge Lorenz Broeter of that district court commenced the temporary injunction hearing in Alice.[126] That was about the same time the State Democratic Convention opened in Fort Worth.[127] Johnson's counsel had accomplished their job of obtaining control of the situation over that weekend, preventing any possible recount in Jim Wells County.

2. Monday, September 13, 10:00 A.M. to 3:00 P.M.

On Monday, September 13, as the State Democratic Convention convened in Fort Worth, the hearing in Judge Broeter's courtroom commenced at 10:00 A.M. in Alice.[128] Caro reports that George Parr himself strode into the courtroom and sat at Johnson's table.[129] Stevenson appeared by his counsel, Wilbur Matthews of San Antonio, Adams appeared in person and by counsel, Dibrell did not answer or appear, Poole and seven other members of the county committee appeared without counsel, and ten other members of the committee appeared in person and by

123. CARO, *supra* note 14, at 335.
124. Temporary Restraining Order at 2, Johnson v. Stevenson (126th Dist. Ct., Travis Cnty., Tex. Sept. 10, 1948) (No. 81686).
125. *Id.*
126. CARO, *supra* note 14, at 336.
127. *Id.*
128. *Id.* at 342.
129. *Id.*

counsel and filed an answer stating that they did not wish to contest the application for injunction.[130]

At mid-afternoon, after hearing some evidence and the legal arguments of both sides, Judge Broeter granted Johnson's counsel's motion to nonsuit Stevenson, Hamer, and Dibrell and overruled Adams's defensive pleas.[131] The court concluded that the Jim Wells County defendants, if not restrained, would recanvass or recount the votes

> by illegally passing on questions of law and mixed questions of law and fact contrary to the provisions of the statutes [not identified] and will certify to the . . . State Executive Committee a result other than that determined by a legal canvas . . . [by which] the will of the electorate will be defeated and plaintiff will be irreparably injured . . . .[132]

Judge Broeter immediately signed and the district clerk entered the judgment and order granting the temporary injunction.[133] Stevenson had been restrained for about sixty hours, but the local Executive Committee remained under an injunction against attempting to recount votes.[134]

Back at the convention, although they hoped the Jim Wells County Executive Committee would be freed of the TRO so that it could meet and quickly issue a new certification of the Precinct 13 tally, the Stevenson lawyers were ready with the evidence of vote fraud that they had obtained in the Rio Grande Valley.[135] After the temporary injunction was issued, the canvassing subcommittee of the State Democratic Executive Committee completed counting the

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130. *Id.*

131. Johnson v. Stevenson (Dist. Ct. of Jim Wells Cnty., Tex. Sept. 13, 1948) (No. 8376).

132. Order Granting Temporary Injunction, Johnson v. Stevenson (Dist. Ct. of Jim Wells Cnty., Tex. Sept. 13, 1948) (No. 8376). A certified copy of the order is located in the federal district court's file at the Southwest Branch of the National Archives in Fort Worth, Texas.

133. CARO, *supra* note 14, at 343.

134. *See id.* (describing the injunction and the impossibility of changing Box 13 tabs).

135. *See id.* at 346 (describing how Stevenson's lead attorney was prepared to prove fraud with names from voting lists in addition to affidavits).

votes on an adding machine, and the total favored Johnson by the eighty-seven votes.[136] On Johnson's behalf, attorney Charles I. Francis of Houston argued to the subcommittee chair, "[f]or this or any other committee to refuse to accept the vote as now certified would be violating [Judge Broeter's injunction]."[137] Nonetheless, the subcommittee voted 4–3 in Stevenson's favor, recommending that the State Executive Committee exclude those last 201 votes from Jim Wells County.[138]

3. September 13, 7:00 P.M. to Midnight

On September 13, at 7:00 P.M., the State Executive Committee began its meeting.[139] Stevenson attorneys Clint C. Small of Austin and Josh Groce of San Antonio presented some of the affidavits that the Stevenson team had gathered in the Rio Grande Valley to demonstrate fraud.[140] Johnson's attorneys Charles Francis and John D. Cofer joined by the Jim Wells County political boss, Ed Lloyd, contended that the proof had been procured by threats and intimidation.[141] After great contention and high and low drama, by a final vote of 29 to 28, the State Executive Committee disregarded the subcommittee's recommendation and approved the certification of Johnson's nomination at around midnight.[142] Technically, a final vote of all delegates to the Convention remained to be taken the next day, but the Executive Committee's action precipitated a latent split among the delegates, and "Dixiecrat" delegations from Dallas and Houston who favored Strom Thurmond for President—and who would have voted for Stevenson—marched out the next morning, September 14, clearing the path for a lopsided vote approving

136. *Id.* at 344.
137. *Id.*
138. *Id.*
139. *Id.* at 345.
140. *Id.* at 344.
141. *Id.* at 346.
142. For instance, Wirtz saved one vote for Johnson by taking a proxy from an Executive Committee member who collapsed from ptomaine poisoning before the stricken man was taken away; the decisive vote was cast by Charlie Gibson, who had been rushed to the Convention at the last minute in the Brown & Root airplane, and who had been dragged by Johnson supporters into the meeting to cast that vote. *Id.* at 348; DALLEK, *supra* note 15, at 335.

Johnson's nomination by the Convention delegates who remained.[143]

B. *Stevenson's Lawyers Move the Post-Election Dispute to the Federal Court System and Acquire Control*

1. Tuesday and Wednesday, September 14 and 15

Stevenson decided to challenge the result. When he made the decision is unclear. Caro claims it was after the Executive Committee's midnight vote.[144] However, Stevenson's lawyers had presented a strong case to the Executive Committee that the Jim Wells County return was based on fraudulent votes, and that evidence was in hand.[145] Stevenson must have known well beforehand that the evidence would be also available for use in any litigation, and with the party's state convention process now closed, the decision to challenge the vote through the courts was natural and probably anticipated by both sides.[146] Johnson had been the first to resort to litigation in state court, and Johnson's counsel probably anticipated any further litigation would be waged in that court system. But it was the litigation brought by Stevenson in the federal district court in Fort Worth that became the primary focus in the battle over the succeeding weeks.

Stevenson is remembered memorably in Caro's telling as "Mr. Texas," the rancher and former Governor from 1941 to 1947, but he was also a lawyer[147] and a former member and speaker of

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143. CARO, *supra* note 14, at 348.

144. *Id. at* 352.

145. *Id.* at 344. Robert Calvert, the chair of the State Democratic Party and later Chief Justice of the Texas Supreme Court, recalled in his oral history interview: "The evidence that was produced before the committee that evening left me convinced absolutely and without the shadow of a doubt that somebody had added two hundred votes in Box 13 in Jim Wells County for Johnson that were not actually cast for him." Interview by David McComb with Chief Justice Robert Calvert, The Supreme Court of Texas, in Austin, Tex. (May 6, 1971), at 15, transcript available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/calvert_robert_1971_0506.pdf.

146. One Johnson lawyer had shouted to Stevenson, "[H]ave your day in court. We'll meet you there." CARO, *supra* note 14, at 351.

147. September 2, the fifth day after the election, Stevenson was at the

the House of Representatives and Lieutenant Governor.[148] For counsel, Stevenson turned to someone he had known well for more than twenty years, former Governor Dan Moody of Austin.[149] Co-counsel with Moody during the trial phase were Small and Connie C. Renfro of Dallas, both of whom had been members of Moody's team in the Texas Legislature from 1927 to 1931, and T.R. James and W.E. Allen, law partners in Fort Worth.[150] Within a few days, Groce and Allen B. Connor of Fort Worth formally joined the team.[151]

The youngest Texas governor ever to serve in the office, Moody had served two terms at the end of the twenties.[152] Before that, as a district attorney from 1923 to 1925, Moody had successfully prosecuted the Ku Klux Klan.[153] As Texas attorney general from 1925 to 1927, he had exposed the corruption of Governor Miriam ("Ma") Ferguson,[154] who was elected in 1924 as a surrogate for her husband James ("Farmer Jim" or "Pa") Ferguson after he was impeached, removed from the governorship,

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Travis County courthouse "performing legal work for a rancher who was his neighbor in Kimble County." *Id.* at 316.

148. *Id.* at 164–67.

149. Stevenson had served as a state representative during Moody's second gubernatorial term. Moody may have become involved in this representation as early as the week Stevenson sent Graham, Dibrell, and Gardner to the Rio Grande Valley to investigate. Graham recalled:

> [Dan Moody] and Clint Small . . . were sort of the top lawyers on our side. Kellis Dibrell, Jim Gardner and myself and some other young squirt lawyers around were doing the legwork, as usually happens. We were going down and making an investigation and calling the information back or bringing it back to them.

Graham Interview, *supra* note 78, at 14.

150. CARO, *supra* note 14, at 346.

151. *See id.* at 352 (describing how Stevenson called Groce to ask to write the petition).

152. *Portraits of Texas Governors, The Politics of Personality Part 2, 1927-1939: Dan Moody*, TEXAS STATE LIBRARY AND ARCHIVES COMMISSION, https://www.tsl.state.tx.us/governors/personality/page2.html#Moody (last updated Sept. 19, 2011).

153. NORMAN D. BROWN, HOOD, BONNET, AND LITTLE BROWN JUG: TEXAS POLITICS 1921–1928 160 (1984).

154. *See id.* at 289–91 (describing Moody's investigation of Ferguson's involvement with highway fraud).

and forever barred from office in 1917.[155] Governor Moody was a classic New South "business-progressive,"[156] which brought him into conflict with Wirtz, who was a Ferguson-allied state senator in those days. Declining to run for a third term, Moody engaged in private practice in Austin beginning in 1931,[157] acquiring an excellent reputation as a skilled and highly respected litigator and appellate advocate in both state and federal cases.[158]

Moreover, Moody had run as an anti-Roosevelt Democrat in the U.S. Senate primary election of June 1941 against Roosevelt-endorsed candidate James V Allred, another former governor, and O'Daniel, who won re-election as Senator after having initially won the office against the Roosevelt-endorsed Johnson in a very close and controversial special election the year before, after Senator Morris Shepherd died in office during the final year of the term.[159] In short, Moody was not a political friend of Johnson or Allred. Perhaps most importantly, Moody was familiar with major election litigation and court precedents in Texas, beginning with the 1920s fight over the ineligibility of Pa Ferguson to stand for any office in the state,[160] continuing through controversies following Democratic nomination of Alfred E. Smith of New York for President in 1928,[161] and finally with the state

155. *Id.* at 253–54.

156. *See* GEORGE BROWN TINDALL, THE EMERGENCE OF THE NEW SOUTH, 1913–1945 224–33 (1967) (defining "business progressivism" as an attenuated form of the Progressive Movement in the New South that, during the 1920s, emphasized public services and efficiency in state government).

157. Richard T. Fleming, *Daniel James Moody, Jr.*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fmo19 (last visited Oct. 7, 2011).

158. Many decisions reflect his appearance as counsel over a legal career of three decades. *See, e.g.*, Buford v. Texas, 361 U.S. 837, 837 (1959) (mem.) (representing the petitioners); Sun Oil Co. v. Burford, 320 U.S. 214, 216 (1943) (representing the respondent); New Mexico v. Texas, 51 S. Ct. 363, 363 (1931) (serving as one of the attorneys representing the state of Texas).

159. GREEN, *supra* note 46, at 40–42; BEN R. GUTTERY, REPRESENTING TEXAS 115 (1st ed. 2008).

160. *See generally* Ferguson v. Wilcox, 28 S.W.2d 526, 535 (Tex. 1930) (denying Ferguson's writ of mandamus); Ferguson v. Maddox, 263 S.W. 888, 893 (Tex. 1924) (holding that the Governor's resignation did not impair the Senate's power to disqualify him from holding any office under the state).

161. Love v. Buckner, 49 S.W.2d 425, 425 (Tex. 1932) (holding that the Democratic State Executive Committee could require voters to take a pledge; Dan Moody representing the appellants in the case).

Democratic Party's continuous efforts to disenfranchise African-American voters throughout the twenties, thirties, and forties.[162]

Moody served as chief counsel for Stevenson.[163] According to Caro, it was Moody who formulated Stevenson's legal theory—that Johnson had deprived Stevenson of his civil rights in obtaining the election by fraud—and elected to litigate Stevenson's complaint in federal court.[164] This might seem an anomalous claim to make on behalf of Stevenson, who was a white, conservative Texas Democrat and no friend of minorities.[165] However, Moody and Stevenson knew that while a federal claim

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162. *See generally* CHARLES L. ZELDEN, THE BATTLE FOR THE BLACK BALLOT: SMITH V. ALLWRIGHT AND THE DEFEAT OF THE TEXAS ALL-WHITE PRIMARY (2004) (discussing Democrats' efforts to sustain the all-white primary in Texas).

163. Although he signed the complaint last of the four attorneys of record for Stevenson, he opened and closed in the hearing in the district court. Partial Transcript of Sept. 21 Hearing, *supra* note 90. Moody alone signed the Fifth Circuit appellate papers, and he appeared and argued in Justice Black's chambers. BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 94 (1988).

164. CARO, *supra* note 14, at 352.

165. As Governor in 1943, Stevenson approved and signed the following odious resolution of the Texas Legislature:

> That the Forty-eighth Legislature of the State of Texas go on record as declaring the following to be the public policy of this State:
>
> 1. All persons of the Caucasian Race within the jurisdiction of this State are entitled to the full and equal accommodations, advantages, facilities, and privileges of all public places of business or amusement, subject only to the conditions and limitations established by law, and rules and regulations applicable alike to all persons of the Caucasian Race.
>
> 2. Whoever denies to any person the full advantages . . . except for good cause applicable alike to all persons of the Caucasian Race . . . shall be considered as violating the good neighbor policy of our State.

Tex. H.R. Cong. Res. 105, 48th Leg. R.S. (1943). *See also* Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824, 826 (Tex. Civ. App.—San Antonio 1944, no writ) (discussing application of Texas House Resolution 105 to public swimming pools). Dallek states flatly that Stevenson was a racist who had denounced the Supreme Court's *Smith v. Allwright* decision that finally put an end to the all-white primary in Texas in 1944. DALLEK, *supra* note 15, at 316. Caro notes that, while Stevenson may have been a segregationist, Johnson at that time had his own dismal record of voting against civil rights legislation. CARO, *supra* note 52, at 1.

could be litigated in a state court,[166] they faced two substantial problems that precluded resort to state court in Stevenson's circumstances.

First, the case law contained several Texas Supreme Court precedents that grew out of the serial efforts of Pa Ferguson to get back on the ballot or to run his wife as a surrogate during the twenties and thirties. Most important was *Sterling v. Ferguson*,[167] a 1932 decision that both Johnson's and Stevenson's attorneys cited throughout the litigation. In that year, by a very close margin, Ma Ferguson, Moody's predecessor, won the run-off for the Democratic nomination for governor over the incumbent, and Moody's immediate gubernatorial successor, Ross Sterling.[168] Sterling filed a state court suit to contest the election, "alleging that Mrs. Ferguson received many illegal votes,"[169] and he obtained a TRO.[170] The next day, the Fergusons filed with the Texas Supreme Court an application for a writ of mandamus seeking to compel the Secretary of State to place Mrs. Ferguson's name on the ballot.[171] Before the Texas Supreme Court could rule, the state court dissolved the TRO, and Sterling appealed to the Court of Civil Appeals, which immediately certified the question to the Texas Supreme Court.[172]

The *Sterling* court consolidated the two cases and reviewed the multiple Texas statutes governing the timing and conduct of party primary elections, which required issuance of the official form of ballot at least thirty days before the general election day.[173] The court concluded that, while the courts of the state do have jurisdiction to entertain election contest suits,

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166. For example, in 1944, certain legislation that Stevenson had approved as Governor was challenged in state court on Fourteenth Amendment grounds. James v. Gulf Ins. Co., 179 S.W.2d 397, 401 (Tex. Civ. App.—Austin 1944, writ granted).

167. 53 S.W.2d 753 (Tex. 1932).

168. *See id.* at 753 (stating that on September 13, 1931, Ma Ferguson was declared the Democratic nominee for Governor).

169. *Id.* at 754.

170. *Id.*

171. *Id.*

172. *Id.* at 755.

173. Sterling v. Ferguson, 53 S.W.2d 753, 761 (Tex. 1932).

> [t]he nominee of a political party who holds a certificate to that effect, such as Mrs. Ferguson holds, gives that nominee *a certain definite standing*, and endows him, or her, with *a valuable right*, which may be enforced . . .
> . . . [and] the holder of a certificate such as that held by Mrs. Ferguson is entitled to have his, or her, name printed on the official election ballot until the certificate is set aside by a proper proceeding, such as an election contest; *provided that a contest filed in due time* . . . .
> . . . [The statutes governing the time for issuance of the official ballot by the Secretary of State] mean that *such an election contest becomes moot*, and the issues no longer justiciable *when the time comes* that *a final judgment* adjudging the validity or invalidity of the election certificate *cannot be heard in time for the certificate of the secretary of state to reach the county clerks . . . . When that time arrives the contest case is moot and should be dismissed.*[174]

The upshot was that the time period for election contests was extremely short, the result of the imperatives of the statutes governing primary and general elections that the legislature had adopted over several decades. Because there was no time for Sterling to prove his allegations, the Texas Supreme Court held that it was obliged to issue the requested mandamus to the secretary of state.[175]

Thus, under *Sterling*, not only did Johnson, as the holder of the nomination certificate from the State Convention, have the benefit of "a certain definite standing and . . . a valuable right," but there were only about three weeks within which to try to overcome that standing and that right through litigation in a state trial court. Otherwise the litigation would become moot. A mandamus action in the Texas Supreme Court would be a remedy available to the certified candidate, not to the challenger.

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174. *Id.* at 758–59, 760 (emphasis added).
175. *Id.* at 763.

Under Texas venue rules, the state courts in Austin would have been a proper state court venue.[176] But the second problem Moody and Stevenson faced in litigating their case in state court was that Wirtz and Looney had already demonstrated their ability to secure favorable orders in the state court in Austin when they obtained the late-night TRO on September 10. Judge Broeter in Alice, who was under the control or strong influence of Parr, had enlarged the TRO into a temporary injunction on September 13 after that case was transferred to his court.[177] Indeed, all of the state courts in the Valley were under the control of political bosses loyal to Johnson.[178] As Graham recalled: "It was useless to file a suit of any kind in Jim Wells County. Everybody's against you there. It would be a farce to do that. We didn't have much option but to go into federal court."[179] Nor was there time for a statewide recount.[180] Thus, Moody had to find a way to file suit in federal court.

At that time, federal civil practice had just undergone important changes. Only three months earlier Congress had revised and re-codified all statutes pertaining to the federal judiciary in Title 28 of the United States Code.[181] The Federal Rules of Civil Procedure, which had been in effect for ten years but were still widely referred to among Texas lawyers as "the New Rules,"[182] required only "notice pleading" under Rule 8(a) with more specificity required for allegations of fraud under Rule

176. REV. CIV. STAT. OF TEX. ANN. art. 1995 (Vernon 1925).

177. CARO, *supra* note 14, at 335–37.

178. *See generally* QUEZADA, *supra* note 53, at 98–101 (discussing dominant role of Democratic political machines in South Texas at time of Johnson v. Stevenson conflict).

179. Graham Interview, *supra* note 78, at 36.

180. *Id.* at 40 ("You can't possibly have a recount in that period of time.").

181. *See* Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 MIL. L. REV. 1, 9 n.49 (1992) ("In 1948, Congress completely revised and recodified title 28 of the United States Code . . . .").

182. Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 99 (2006). The author of the present Article (Josiah Daniel) began his law practice in 1978 in a law firm whose senior partners had begun their careers in the thirties and still referred to the Federal Rules as "the New Rules."

9(b).[183] The demurrer, formerly the source of much pretrial wrangling in federal practice, had been abolished in favor of the motion to dismiss under Rule 12, whether for lack of jurisdiction under subdivision (b)(1) or for failure to state a claim under subdivision (b)(6).[184] Moreover, the Federal Rules clearly provided for injunctive and other equitable relief and for the appointment of special masters.[185] Then, as now, federal district court jurisdiction was limited and depended on either diversity of citizenship—obviously lacking in this case—or else a federal question or other specific statutory authorization.[186] Moody therefore had to formulate a *federal* claim, which he imaginatively did: that Stevenson, as a *candidate*, had been deprived of his civil rights.

Moody's experience in civil rights voting litigation went back to the U.S. Supreme Court's 1927 decision, *Nixon v. Herndon*.[187] That decision originated as a suit for damages by L. A. Nixon, an African-American dentist, against two El Paso election judges who had denied Nixon the right to vote in the 1924 primary election based upon the state's 1923 white primary law.[188] When the federal district court dismissed that case, a writ of error was taken directly to the Supreme Court.[189] The defendants' El Paso lawyers then dropped out of the case; when the scheduled oral argument was held in Washington on January 4, 1927, no one appeared to argue against Dr. Nixon's NAACP-retained attorneys. According to Nixon's lead counsel, El Paso lawyer Fred C. Knollenberg, at the conclusion of the *Nixon v. Herndon* argument Moody requested permission to file a post-submission brief on behalf of the state, and the Court granted the request.[190]

Two weeks later, Moody was sworn in as Governor, and the writing and filing of the brief for the State fell to the new attorney general, Claude Pollard.[191] Whether Moody participated

183. FED. R. CIV. P. 8(a), 9(b) (1938).
184. FED. R. CIV. P. 12 (1938).
185. FED. R. CIV. P. 53, 65 (1938).
186. 28 U.S.C. 1331, 1332 (2006).
187. 273 U.S. 536 (1927).
188. *Id.* at 539.
189. *Id.* at 540.
190. CONREY BRYSON, DR. LAWRENCE A. NIXON AND THE WHITE PRIMARY 44 (1974).
191. *Id.*

in the drafting of the *Nixon v. Herndon* brief is unknown, but certainly he had learned about the issues and legal principles involved, the attitudes of the Supreme Court Justices, and the likelihood of the white primary law being held unconstitutional. Pollard's brief argued that "political questions are not within the province of the judiciary."[192] The Supreme Court's opinion, authored by Justice Oliver Wendell Holmes two months later, disposed of that argument as a "play upon words" and stating that the recoverability of private damages caused by political action had been settled "for over two hundred years."[193] The Court invalidated the white primary statute as a "direct and obvious infringement of the 14th [Amendment]."[194] Justice Holmes observed that there was no difference between denying the right to vote at a general election and denying the vote at the primary election that, ipso facto, determines the result at a general election.[195] The white primary law discriminated against blacks "by the distinction of color alone," and "color cannot be made the basis of a statutory classification affecting the right" to vote.[196]

Later that year, Moody, then Governor, called a special session of the legislature to enact new legislation to preserve the white primary in an altered form.[197] As adopted, the new statute provided that "[e]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."[198] The Democratic Party immediately adopted a resolution that "[a]ll white Democrats who are qualified voters under the Constitutions and laws of Texas . . . and none

192. *Id.* *See also* Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("The defendants moved to dismiss upon the ground that the subject-matter of the suit was political and not within the jurisdiction of the Court . . . .").

193. *Nixon*, 273 U.S. at 540.

194. *Id.* at 541.

195. *Id.* at 540.

196. *Id.* at 540–41.

197. *See* Nixon v. Condon, 286 U.S. 73, 81 (1932) (describing that promptly after the Court's decision in *Nixon v. Herndon*, the Texas Legislature enacted a new statute repealing the article condemned by the Court, and declaring the effect of the decision was to create an emergency and a need for immediate action).

198. REV. CIV. STAT. OF TEX. ANN. art. 3107 (Vernon 1925) (as amended by Acts 1927, 40th Leg., 1st C. S., 193, c.67, § 1).

other, be allowed to participate in the primary elections . . . ."[199] The NAACP then sponsored Dr. Nixon's second effort to invalidate the all-white primary, and Moody must have been familiar with the defensive arguments of the Democratic Party in that case—that the party was private in nature and that there was no state action involved within the meaning of the Fourteenth Amendment.[200] In the resulting 1932 Supreme Court decision, *Nixon v. Condon*, Justice Benjamin Cardozo voided the new version of the white primary on the ground that the state law unconstitutionally delegated to the State Executive Committee the power to unlawfully discriminate against black voters.[201]

Moody was also likely aware of the next iteration of the white primary, which was a resolution adopted immediately after *Condon* by the entire State Democratic Convention to the same effect as the prior Executive Committee resolution excluding African-Americans.[202] This version lasted until the Supreme Court invalidated the Texas all-white primary a third time in the 1944 case, *Smith v. Allwright*, holding the white primary system was indeed a violation of black voting rights pursuant to the Fifteenth Amendment.[203] That decision ended the all-white primary once and for all. It was also a decision that then-Governor Stevenson had publicly denounced as a "monstrous threat to our peace and security."[204]

It is unknown whether Moody had been a delegate to the State Convention, but he was certainly in Fort Worth at the time, and he met immediately with Stevenson and Stevenson's other lawyers.[205] According to Caro, Moody proposed that Stevenson "sue under the federal court's [sic] statute because he had been denied a civil right: the right to have the votes in the primary

199. ZELDEN, *supra* note 162, at 57. *See also* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 69 (2003) (explaining that the Texas Legislature enacted the white primary statute in 1923 proclaiming that only whites were qualified to vote in Democratic Party primaries).

200. ZELDEN, *supra* note 162, at 58.

201. 286 U.S. 73, 89 (1932).

202. ZELDEN, *supra* note 162, at 63.

203. 321 U.S. 649, 666 (1944).

204. DALLEK, *supra* note 15, at 316.

205. CARO, *supra* note 14, at 352.

counted honestly."[206] Caro says that Stevenson called and awoke Groce in the early morning hours of Tuesday, September 14, and asked him to turn his convention report into a pleading.[207] The lawyers must have worked diligently through the day of September 14 and into that night to complete Stevenson's Original Complaint, which named two defendants, Tom L. Tyson, chairman of the State Convention, and Vann Kennedy, the secretary of the State Democratic Party.[208] It averred that "[t]he rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas" with emoluments of office of a value exceeding $3,000, and it sought to restrain the defendants from certifying the nomination to the Texas secretary of state.[209]

In a succinct averment, the complaint's third paragraph alleged that subject-matter jurisdiction was obtained under the civil rights jurisdictional statute, 28 U.S.C. § 1343, on four grounds:

> The rights asserted in this action . . . and the right to invoke the jurisdiction of this Court to prevent the wrongs and threatened wrongs alleged, arise under [1] Section 4 of Article I and [2] the Seventeenth Amendment to the Constitution of the United States, and [3] under Section 43, Chapter 3, Title 8, United States Code, 1946, and [4] under Sections 51 and 52, Chapter 3, title 18, United States Code, 1948, and under Sections 241 and 242, Title 18, United States Code, the Act of Congress of June 25, 1948; and jurisdiction of this Court of this action is

206. *Id.* at 352. Caro states that Stevenson had declared in an affidavit that while in Alice at the bank, "[Stevenson] advised [Donald] that [he] was being deprived of [his] rights under federal law," so perhaps Stevenson had been mulling a theory that Johnson had violated his civil rights by the election fraud. *Id.* at 328. In any event, Moody, Stevenson's chief counsel, had substantial familiarity with voting rights litigation and precedents. *See id.* at 352 (describing Moody's experience as former governor and his knowledge of civil rights law).

207. *Id.* at 352–53.

208. *Id.* at 334.

209. Original Complaint at 1, 7, Stevenson v. Tyson (N.D. Tex. Sept. 14, 1948) (No. 1640).

> [therefore] provided by Section 1343, Title 28, United States Code . . . .[210]

Later, in Stevenson's Fifth Circuit and Supreme Court papers, Moody's and Stevenson's legal team elaborated their theory that the federal court had subject-matter jurisdiction, but in the district court they never cited or argued any case law supporting those disparate jurisdictional allegations. It was a broad effort to justify jurisdiction for a complaint in the nature of civil rights.

Paragraph III may be appraised as a "short and plain statement of the jurisdiction"; it simply recites the legal citations for several strands of law claimed to be applicable.[211] First, Article I, § 4 of the U.S. Constitution simply provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof";[212] there was no case law support for the idea that § 4 could be a source of a constitutional right that would support a cause of action to overturn a party nomination of a candidate for either house of Congress. Second, the idea for alleging a violation of the Seventeenth Amendment probably came from *Smith v. Allwright*. In that opinion, the Supreme Court noted that Smith, the black voter who had been denied a vote in the Texas primary in 1942, had alleged a violation of that amendment, but that the Court's decision did not adjudicate the allegation or even indicate whether it had any relevance.[213] Later, in the appellate papers, Moody never even cited the Seventeenth Amendment.

Third, the citation to § 43 of Title 8 of the U.S. Code, the code section at that time containing the Civil Rights Act,[214] was probably the strongest jurisdictional hook—except that a *white* candidate was invoking a statute historically invoked to vindicate the civil rights of minorities. Fourth, the references in the jurisdictional paragraph to four sections of Title 18, the federal criminal code, may seem odd since this was plainly a civil action.

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210. *Id.*
211. FED. R. CIV. P. 8(a)(1).
212. U.S. CONST. art. I, § 4.
213. Smith v. Allwright, 321 U.S. 649, 651 (1944).
214. Now codified as 42 U.S.C. § 1983 (2006).

In 1941, however, the Supreme Court in *United States v. Classic* had reversed the dismissal of a federal indictment under the cited sections of Title 18 for the fraud of Louisiana election officials in manipulating the outcome of a primary election.[215] Moody knew of the *Classic* case because he cited and discussed it later in his appellate briefs.

The last clause of Paragraph III of the Complaint alleged jurisdiction existed under § 1343 of the Judicial Code,[216] which creates jurisdiction in the district courts for civil rights-based actions. The congressional recodification of the Judicial Code earlier that year had consolidated three sections of former Title 28, substituted the phrase "civil action" for "suit" in order to conform to the usages of the Federal Rules, and made "numerous changes . . . in arrangement and phraseology."[217] Later, in the Court of Appeals and the Supreme Court, Moody would also cite 28 U.S.C. § 1331, the federal question statute;[218] although § 1343 required no allegation of jurisdictional amount,[219] § 1331 did, and that may be why Moody alleged in the complaint an amount in controversy exceeding the statutory minimum of $3,000.[220] Section 1344 provided jurisdiction for "election disputes," including election disputes for the office of United States Senator, but only where the deprivation of the vote was "on account of race."[221]

The complaint averred in some detail that the vote count was fraudulently in favor of Johnson by 105 votes in Zapata County and by 202 votes in Jim Wells County.[222] In Paragraph IX, Moody laid out Stevenson's theory most clearly:

> The right asserted by plaintiff to an honest count and an honest certification of the results of said primary election in Zapata and Jim Wells Counties, Texas, and the right to have the returns honestly reported to the State Democratic Executive Committee and its canvass of the returns based

215. 313 U.S. 299, 321 (1941).
216. Original Complaint, *supra* note 209, at 2.
217. H.R. REP. NO. 80-308, at A121 (1947).
218. Original Complaint, *supra* note 209, at 2.
219. 28 U.S.C. § 1343 (1948).
220. Original Complaint, *supra* note 209, at 1.
221. 28 U.S.C. § 1344 (1940).
222. Original Complaint, *supra* note 209, at 3–4.

> upon honest certification from the several counties of the state, are rights secured to plaintiff by the Constitution of the United States and Acts of Congress cited in the jurisdictional allegations above.[223]

As for the relief requested, Moody pled for a "peremptory order restraining" the chairman of the Convention and secretary of the State Democratic Party from certifying the nomination of Johnson.[224] He further prayed that judgment be entered permanently enjoining the issuance of a certificate of nomination of Johnson and, without citing the declaratory judgment statute, "declaring plaintiff received said nomination."[225]

The original complaint left blanks for the names of the specific court district and division and for the name of the chairman of the Democratic State Convention. The latter was handwritten in as Tom Tyson.[226] The district was handwritten as "Northern," and the division as "Dallas."[227] "Dallas" was then marked out and "Fort Worth" was inserted, perhaps reflecting that while the cause of action was being formulated and reduced to writing, the choice of forum and the judge within the chosen forum was still being discussed among Stevenson's counsel.[228] The pleadings did not explain why, or even allege that, the Northern District was a proper venue.[229] Perhaps it was because everyone

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223. *Id.* at 5–6.

224. *Id.* at 7.

225. *Id.* at para. XII. The federal declaratory judgment act was in effect, but Moody failed to mention it. Declaratory Judgment Act, 28 U.S.C. § 2201 (1948).

226. Original Complaint, *supra* note 209, at 1. The election of Tom Tyson as the Chair of the Convention occurred late on Tuesday, September 14, the second day of the Convention, well after the Monday midnight certification of Johnson as the candidate by the Executive Committee. By that time, Stevenson's supporters had departed the Convention, so the fact that the Stevenson lawyers had typed a blank for the name of the chair in the caption and the body of the complaint probably means that they had to find out afterward who had been elected to that position. Allen Duckworth & Dawson Duncan, DALLAS MORNING NEWS, Sept. 15, 1948, Sec. 1, at 1, 17.

227. CARO, *supra* note 14, at 352–53.

228. *Id.*

229. *See generally* Original Complaint, *supra* note 209, at 1 (making argument for jurisdiction in the case, but not venue).

on Stevenson's team was already in Fort Worth. Perhaps Stevenson's counsel feared that a federal court in the Western District of Texas, which includes Austin, might have been more deferential to Texas state courts in matters of Texas election law. Or perhaps the lawyers had a particular judge in mind, and he happened to be a resident in the Northern District.

Caro says that Stevenson and all his lawyers met in his Fort Worth hotel room to consider their choices of district judges in the Northern District and "[t]here seemed no good choice."[230] However, from the distance of six decades, it appears an easy decision. There were only three judges serving the Northern District. The first was Chief Judge William Hawley Atwell, assigned to the Dallas Division. Atwell was a Republican who had served as U.S. Attorney for the district for fifteen years, had been the Republican candidate for Governor in 1922, and had been appointed to the federal district court bench by President Warren G. Harding in 1923.[231] Atwell was progressive in his pre-bench years,[232] but he later became known for consistently ruling against NAACP suits to desegregate Dallas public schools.[233] He was known as a cantankerous and unpredictable jurist.[234] The second Northern District judge was Joe B. Dooley, a strong Democrat only very recently appointed by President Truman and a resident of Amarillo, 385 miles away. That left T. Whitfield Davidson, a seventy-two-year-old judge who had responsibility for the Fort Worth Division of the Northern District of Texas.

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230. CARO, *supra* note 14, at 353.

231. DARWIN PAYNE, AS OLD AS DALLAS ITSELF: A HISTORY OF THE LAWYERS OF DALLAS, THE DALLAS BAR ASSOCIATIONS, AND THE CITY THEY HELPED BUILD 93–94 (1999) [hereinafter PAYNE, AS OLD AS DALLAS ITSELF]; DARWIN PAYNE, BIG D: TRIUMPHS AND TROUBLES OF AN AMERICAN SUPERCITY IN THE 20TH CENTURY 71 (1984) [hereinafter PAYNE, BIG D].

232. Atwell provided office space to Dallas' first woman lawyer. PAYNE, AS OLD AS DALLAS ITSELF, *supra* note 231, at 126.

233. PAYNE, BIG D, *supra* note 231, at 294–95; PAYNE, AS OLD AS DALLAS ITSELF, *supra* note 231, at 94.

234. A prominent Dallas lawyer, Jack Hauer, recalled that when he began to practice law in 1948 in Dallas, Judge Atwell "loved a lawyer who put on his case quickly and stopped," demanded to be addressed as "the Court," and unpredictably terrorized all who practiced before him. Hauer added, "Atwell began [his life] ahead of his times and finished behind them." JACK HAUER, FINEST KIND! A MEMORABLE HALF CENTURY OF DALLAS LAWYERS (PLUS A FEW FROM OUT-OF-TOWN) 175–204 (1992).

Davidson was also well-known to Moody.[235] Davidson had served as Lieutenant Governor of Texas from 1923 to 1925, President of the Texas Bar Association in 1927, and General Counsel for The Praetorians, a Dallas-based insurance company, from 1927 to 1936.[236] He was active in Democratic politics, and in 1936, was appointed by President Franklin D. Roosevelt to the federal bench in the Northern District of Texas.[237] Caro says simply that Davidson was "noted for his independence."[238]

Stevenson and Davidson knew each other, but it is unclear how well. Both had been active in the dozen-year effort of elite lawyers to "incorporate" the Texas Bar Association, which had culminated in the Stevenson-co-sponsored State Bar Act of 1939.[239] I found one set of correspondence between the two. On September 13, 1943, under the letterhead of his federal court, Judge Davidson wrote a three-and-a-half page, single-spaced letter to one of the Regents of the University of Texas complaining of "un-American teaching" at that university.[240] On the same date Davidson forwarded a copy of that letter to Stevenson, then the sitting Governor, under a short cover letter saying, "I know you are interested in the matters I mention in this letter."[241] Stevenson sent a letter of thanks to Davidson a week later, noting that, "I know your conception of our organic structure of government."[242]

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235. T. WHITFIELD DAVIDSON, THE MEMOIRS OF T. WHITFIELD DAVIDSON 103 (1972) ("Governor Moody, Stevenson's counsel, and I had been very close."). Moody had once reversed a Davidson decision. *See* La Fon v. Grimes, 86 F.2d 809, 813 (5th Cir. 1936) (reversing a decision in trespass to try title suit).

236. Robert S. LaForte, *Thomas Whitfield Davidson*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fda29 (last visited Oct. 21, 2011).

237. DAVIDSON, *supra* note 235, at 91.

238. CARO, *supra* note 14, at 353. One biographer of Hugo Black demeans Davidson as "Tiddy Winks" Davidson. MURPHY, *supra* note 163, at 92.

239. *See generally* Josiah M. Daniel, III, *Creating the State Bar of Texas, 1923–1940*, 45 TEX. B.J. 454 (1982) (providing overview of the incorporation of the Texas Bar and the 1939 State Bar Act).

240. Letter from T. Whitfield Davidson to Coke Stevenson (Sept. 13, 1943) (on file with Texas State Archives).

241. *Id.*

242. Letter from Coke Stevenson to T. Whitfield Davidson (Sept. 22, 1943) (on file with Texas State Archives).

Davidson was also well acquainted with Johnson and his legal team. In open court on September 21, the judge stated:

> Gentlemen, if this case is not tried right, it will not be for the want of able counsel. To say nothing of men like Governor Moody, Mr. C[ro]oker and others of numerous counsel, I might especially mention my friend John Cofer [who served as] my parliamentarian . . . in the State Senate of Texas.[243]

The judge also mentioned his relationship with James Allred, who had served as Texas attorney general from 1931 to 1935 and Governor from 1935 to 1939,[244] and he remarked that as a lawyer he had represented Lady Bird Johnson's father for years.[245]

Most importantly for Stevenson, Davidson was more interested in the equities of the claim than in the subject-matter jurisdiction of his court. In his privately published memoirs, not cited by Caro, Davidson recalled that as a sitting judge he followed "a proposition of constitutional law, which though not expressly named in any provisions under the Bill of Rights, is fundamental: There shall be no wrong without a remedy."[246] Stevenson's counsel clearly picked the most favorable judge for this case.

On September 14, there was, however, one problem: Davidson was absent from the district, vacationing at his sister's cabin at Caddo Lake, the large natural lake in far East Texas more than 200 miles from Fort Worth.[247] In the very early hours of September 15th, Renfro drove to Caddo Lake to present to

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243. DAVIDSON, *supra* note 235, at 102. Davidson also acknowledged that he had been close to Allred and his family. *Id.* at 103. Allred had also served, upon appointment by President Roosevelt, as federal district judge in the Southern District of Texas from 1939 to 1942, at which point he resigned to run in the same 1942 Democratic Senatorial Primary with Pappy O'Daniel and Moody, finishing second. GREEN, *supra* note 46, at 40–43. In 1949 President Truman reappointed him to the Southern District bench. Floyd F. Ewing, *ALLRED, JAMES BURR V*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fal42 (last visited Oct. 12, 2011).

244. *Id.*

245. DAVIDSON, *supra* note 235, at 103.

246. *Id.*

247. CARO, *supra* note 14, at 353.

Davidson the original petition, which had been signed by all four of Stevenson's lawyers, and to request issuance of a TRO.[248] Over coffee at his breakfast table at 6:25 A.M., Davidson signed the TRO and set a temporary injunction hearing for September 21.[249] As Davidson recounted in his memoirs, he considered this "a case of vital interest."[250] In his own hand, the judge wrote at the foot of the complaint:

> September 15, 1948 at 6:25 A.M.
> This petition being considered, it is ordered that Tom L. Tyson and Vann M. Kennedy be restrained as prayed for pending a hearing hereon on Sept. 21, 1948 at 10 a.m. at Fort Worth, Texas, at which date this temporary order is made returnable.[251]

Renfro apparently drove straight back to Fort Worth to file the papers and the order because the clerk's docket sheet begins on September 15 with the notation "Filing Original Complaint and Entering Restraining Order" on that date, and the clerk endorsed the time of filing on the complaint as 1:00 P.M.[252]

Two days later, Moody filed an amended original complaint averring that, notwithstanding the 6:25 A.M. TRO, at 11:00 A.M. on September 15, Tyson, Kennedy, and Johnson had presented a certificate of nomination, naming Johnson as the Democratic Party candidate, to Paul H. Brown, the Texas Secretary of State, in Austin.[253] Filed on September 17 at 9:55 A.M., with Stevenson's verification, the amended pleading requested an enlargement of the TRO to cover those individuals, plus the three members of the Election Board of Tarrant County, as

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248. *Id.*
249. *Id.*
250. DAVIDSON, *supra* note 235, at 101.
251. Original Complaint, *supra* note 209, at 8.
252. *Id.*
253. Amended Original Complaint, Stevenson v. Tyson, (N.D. Tex. Sept. 17, 1948) (No. 1640). Caro made a factual error when he misidentified Ben Ramsey as the Texas secretary of state. CARO, *supra* note 14, at 338. Paul Brown was the secretary of state in 1948. *Id.* at 2. Beauford Jester appointed Ramsey as secretary of state in 1949. Richard M. Morehead, *Ramsey, Ben*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/fra61 (last visited Nov. 2, 2011).

representatives of a class of all 254 counties' election officials.[254] Although he had had two days to reflect on his pleading, Moody added no further allegations to elaborate the theory that Stevenson's civil rights had been violated and that he had a federal claim that created federal court subject-matter jurisdiction. He did not have to, because the judge had already accepted the case. Judge Davidson granted the enlarged temporary restraining order immediately, according to the clerk's file-mark, setting a bond at $1,000, which Stevenson instantly posted with Travelers Indemnity Company as his surety.[255] Connally accepted service of process on behalf of Johnson on September 16.[256] At this juncture, Stevenson's attorneys had accomplished their job, in Krieger-Newmann terms, of "gain[ing] control over the situation" for their client.[257]

For his defense, Johnson quickly called together eleven Texas attorneys who had been associated with him before or during the campaign and had been generally opposed to Stevenson over the years. His initial counsel of record were Alvin Wirtz of Austin; James V. Allred, the former Governor of Texas and former federal judge; John H. Crooker of Houston; Raymond E. Buck of Fort Worth; and B. Dudley Tarlton and Luther E. Jones, Jr. of Corpus Christi.[258] Soon, he also added John D. Cofer and Everett Looney.[259] Representing allied defendants, and clearly part of the overall Johnson team, were Cecil Burney of Corpus Christi, Danny Harris, who was Buck's law partner in Fort Worth, and A.W. Moursund of Johnson's hometown of Johnson City.[260] Luther Jones recalled later that Allred functioned as "sort of the leader" of this "fairly large group of lawyers who went up there [to Fort Worth] to help him" in the early round of the litigation.[261]

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254. Amended Original Complaint, *supra* note 253, at 3, 6.

255. Bond, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

256. Summons in a Civil Action addressed to Lyndon B. Johnson and Return on Service of Writ, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

257. KRIEGER, *supra* note 7, at 7.

258. Answer of Defendant at 3, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

259. CARO, *supra* note 14, at 357.

260. Partial Transcript of Sept. 21 Hearing, *supra* note 90, at 1–2.

261. Interview by David McComb with Luther E. Jones, Jr., in Corpus Christi, Tex. (June 13, 1969), at 24, *available at* http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/jones_luther_1969_0613.pdf [hereinafter Jones

2. Thursday, September 16

Overlooked by Caro and misunderstood by Dallek, there was also an attempt by Johnson's counsel, one day after Judge Davidson had signed the TRO, to reacquire control of the state court system.[262] On September 16, at 11:18 A.M., Wirtz, Looney, Allred, and Cofer filed a motion in the Texas Supreme Court requesting leave to file a petition for writ of mandamus to compel the secretary of state to issue an official ballot with Johnson's name on it.[263] Apologizing for "hasty preparation and filing of such petition," Johnson's counsel cited only one case, *Sterling v. Ferguson*, in support of the request to file a petition for mandamus against Brown, the secretary of state.[264]

At 3:00 P.M. that same day, Price Daniel, the Texas attorney general, and his assistant Joe R. Greenhill, filed a carefully worded affidavit in which Brown declared:

> [H]e will, under the present record of this office duly certify to the various County Judges in Texas the name of Lyndon B. Johnson as Democratic candidate for United States Senator in Texas, and that he has never stated that he would not so certify . . . and that the only way that he could be prevented from so doing would be a proper action in a proper court restraining him from so doing.[265]

Although Stevenson's lawyers had not had an opportunity to file anything in opposition, only forty-five minutes later the

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Interview].

262. *See* Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) ("This is an original proceeding in the form of a motion for leave to file a petition for mandamus."). Dallek mistook this original proceeding, which was filed in the State's highest civil court, for an "appeal" of the federal court's injunction, which could only be appealed through the federal appellate system. *See* DALLEK, *supra* note 15, at 337.

263. *Johnson*, 213 S.W.2d at 529–30 (Tex. 1948). The Supreme Court's docket sheet lists the exact time of the filing of each document in the case. Docket, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

264. Argument in Support of Motion for Leave to File Petition for Mandamus, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

265. Affidavit of Paul H. Brown, Exhibit F, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

clerk notated on the docket that the motion was overruled "because the respondent . . . Secretary of State, has notified the Court in writing that he has not refused and has no intention to refuse to perform the acts which the petition for mandamus seeks to compel him to perform."[266] Johnson again demonstrated his ability to prevail in the state court system. Although his lawyers did not receive a writ of mandamus or other order or action of the Supreme Court, they obtained its near-equivalent, a sworn statement of the secretary of state that he would certify Johnson's nomination unless "a proper court restrain[ed] him from so doing."[267] So, the focus returned to the federal court system.

3. Tuesday and Wednesday, September 21 and 22

At 10:45 A.M. on September 21, Johnson, Kennedy, and Tyson filed their motions to dismiss for want of jurisdiction.[268] Although failing to refer to Federal Rule of Civil Procedure 12(b)(1) in his "plea to the jurisdiction," Johnson's counsel argued that the court lacked subject-matter jurisdiction.[269] The "New Rules" were only ten years old, and Judge Davidson's memoir recalls Johnson's counsel pleading a "demurrer to Stevenson's complaint . . . taking also the nature of a motion to dismiss in that there was no cause of action" and "making contention that it should be a contest before the United States Senate on the final results."[270] Specifically, Johnson pled in twenty-two multifarious paragraphs that the district court was "wholly without jurisdiction" because relief "can be obtained only as a result of a contest of the Primary Election . . . and this Court has no jurisdiction to try, hear or determine an election contest."[271] That the litigation was really, in essence, an "election contest" for which federal jurisdiction did

266. Docket, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

267. Affidavit of Paul H. Brown, *supra* note 265.

268. Defendant Lyndon B. Johnson's Motion to Dismiss for Want of Jurisdiction, Stevenson v. Tyson (N.D. Tex. Sep. 21, 1948) (No. 1640).

269. *See* CARO, *supra* note 14, at 355 (noting Johnson's argument for lack of jurisdiction).

270. DAVIDSON, *supra* note 235, at 101–02.

271. Defendant Lyndon B. Johnson's Motion to Dismiss for Want of Jurisdiction, *supra* note 268, at 1–2.

not exist, was the Johnson lawyers' steadfast theme to the end; they must have believed it strongly because they made little preparation to present evidence for Johnson.

Most pertinently, Johnson's dismissal motion pointed out that the complaint did not allege a deprivation of "rights, privileges or immunities secured by the Constitution and laws thereunder."[272] The motion concluded with an extremely long paragraph that asserted Johnson's "vested legal right" to the nomination and that characterized Stevenson's citation of *Sterling v. Ferguson* as essentially an admission that Johnson was "entitle[d] . . . to have his name printed upon the official General Election ballot, unless the certificate is set aside by a proper proceeding such as an election contest."[273] The other defendants' and intervenors' motions to dismiss were of similar tenor. Separately, Johnson's counsel also filed his verified opposition to the granting of a temporary injunction that not only objected to the relief requested by Stevenson but further alleged that Johnson could show in unnamed counties that Stevenson had received many votes "by parties unknown, 'tombstone votes' and votes by prostitutes who had left the city."[274] That same day, members of the Election Board of Blanco County, Johnson's home county, also filed a motion to intervene as defendants, alleging that the members of the Tarrant County Election Board were inadequate representatives of a class because those Tarrant County officials had not answered and did not intend to defend the complaint.[275] The intervenors were represented by Looney and Moursund.[276]

On September 21, Judge Davidson began the temporary injunction hearing in his courtroom in the federal courthouse in Fort Worth.[277] At first, the court stated that it would hear the evidence before ruling on the dismissal motions, but after lengthy arguments by Johnson's counsel, it relented.[278] After arguments

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272. *Id.* at 4.

273. *Id.* at 7.

274. Opposition to Granting of Temporary Injunction at 7, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

275. Motion to Intervene as Defendants at 1, Stevenson v. Tyson (N.D. Sept. 21, Tex. 1948) (No. 1640).

276. *Id.*

277. CARO, *supra* note 14, at 353–65.

278. *See id.* at 354–55 (describing hearing on motion to dismiss, not case on merits).

on those motions, Judge Davidson spoke at length about the ancient concept of equity and concluded:

> There is a maze of decisions here growing out of the 15th Amendment, most of which bear in mind and have in mind the rights of a man to vote. In our mind if there was no statute on the books, [Stevenson] would still have an equitable hearing in this court. He comes to a United States Court complaining that he has been deprived of a right which was a valuable right and which was leading to an election, to the United States Senate. Therefore, there is involved a Federal right that he wants to adjudicate in the United States Court, and it is admitted by both parties that the right to determine that nomination exists nowhere, if not in this court. Under the circumstances, we are going to have to overrule the motion.[279]

Johnson's counsel knew immediately they had lost not only their motions to dismiss, but also the temporary injunction hearing.[280]

But the evidentiary portion of the hearing was still to come. Recognizing that they were going to have to scramble to seek appellate relief, Johnson's attorney, Allred, requested immediate entry of written orders overruling Johnson's and the Blanco County Election Board's motions to dismiss.[281] Allred orally withdrew Johnson's written opposition to a temporary injunction and moved the court to pretermit the taking of evidence and to rule based solely on the sworn complaint because "the passing of time is just as effective in behalf of the complainant as would be a preliminary or temporary injunction."[282] Groce responded coolly, "[w]e would like to introduce our evidence."[283] Davidson ruled: "I think we will hear the evidence."[284]

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279. Partial Transcript of Sept. 21 Hearing, *supra* note 90, at 6–7.
280. CARO, *supra* note 14, at 356–57.
281. *Id.* at 359.
282. Partial Transcript of Sept. 21 Hearing, *supra* note 90, at 1–4.
283. *Id.*
284. *Id.*

After lunch on the second day, September 22, thirteen witnesses testified for Stevenson.[285] Graham recalled later that "[i]t was substantially the same evidence, exactly the same" as had been presented to the Executive Committee.[286] Allred invoked the rule of witness exclusion from the courtroom, which the court granted.[287] When Dibrell and Gardner did not rise to depart the courtroom, Allred renewed that motion specifically as to them. But Judge Davidson overruled it, stating "members of the Bar are entitled to every consideration."[288] Throughout the afternoon, Allred objected to testimony fairly frequently, primarily on the ground of hearsay, almost all of which Judge Davidson overruled.[289] Harry Lee Adams, the chairman of the Jim Wells County Executive Committee, was the first witness, and James Gardner and witnesses from Alice testified to facts showing clearly that Ballot Box 13 had been stuffed.[290] Johnson's counsel put into evidence an affidavit by one of Stevenson's affiants retracting his prior affidavit testimony and a copy of Judge Broeter's injunction, but no live testimony or other exhibits.[291]

In his memoirs, Judge Davidson recalled that after hearing the evidence, he concluded that "the Senate was not a remedy for an alleged fraud committed in the primary."[292] He wrote:

> Several witnesses were heard bearing upon the election centering on Box 13. . . . It was apparent to me that a full set of facts should be before the Court before [I] finally ruled. I therefore appointed commissioners [special masters] to go to Jim Wells County and take depositions covering the points raised by the pleading and the evidence that had been produced in the preliminary trial. To await such action I issued a temporary injunction that

285. CARO, *supra* note 14, at 360.

286. Graham Interview, *supra* note 78, at 37.

287. CARO, *supra* note 14, at 360.

288. Partial Transcript of Sept. 21 Hearing, *supra* note 90, at 5.

289. *Id.*

290. For example, one witness testified that the county clerk had provided 200 fewer blank ballots for Precinct 13 in Jim Wells County than the tally reflected. CARO, *supra* note 14, at 360.

291. *Id.* at 360–61.

292. DAVIDSON, *supra* note 235, at 103.

> things remain in status quo until the commissioners proceeded to take the testimony and that it should be done with all dispatch.[293]

Judge Davidson announced that he was granting the temporary injunction and would appoint two special masters. He asked the lawyers for both sides to collaborate on the form of the written order and on the designation of persons to be appointed as masters.[294]

At the very end of the hearing, Allred implored the court to enter an order that could be immediately appealed and referred to "a statute [that] gives the right to appeal on an order granting a temporary injunction."[295] Moody pointed out that the statute, probably referring to the interlocutory appeal statute, was "discretionary with the court," but when Allred grumbled, "[w]e have some rights," Moody graciously agreed on the record to "do everything I can to facilitate getting up their record" or cooperating on a stipulation on the facts so that an immediate appeal could be taken.[296] Judge Davidson accepted that concession and indicated that he would grant a severance of the order so as to facilitate an appeal.[297]

That same day, September 23, Davidson signed the order overruling the motions to dismiss and signed the preliminary injunction order, which had been approved as to form by both sides, holding:

> There was evidence of fraud in the official returns from certain election officials in Jim Wells, Zapata, and possibly other counties in the State Democratic Executive Committee, without which there would have been a change in the official certification by the Officers of the State Convention as to who was the Democratic nominee for the Office of United

293. *Id.* at 104.

294. CARO, *supra* note 14, at 373–84. *See* James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 801 n.7 (1991) ("A vivid example of the traditional use of special masters is found in . . . *Johnson v. Stevenson*.").

295. Partial Transcript of Sept. 21 Hearing, *supra* note 90, at 75.

296. *Id.*

297. *Id.* at 76–77.

> States Senator and that an injunction is necessary to preserve the subject matter of the litigation pending trial on the merits and to prevent the deprivation of rights guaranteed by the Constitution and Laws of the United States.[298]

A separate order pursuant to Federal Rule of Civil Procedure 53 appointed two special masters to go to the Rio Grande Valley.[299] To one of these positions, Judge Davidson appointed W.R. Smith, Jr. of San Antonio, whom he delegated to go to Jim Wells County to hold hearings, and to examine poll lists, voter lists, tally sheets, returns, and all other facts pertinent to the returns from Precinct 13.[300] Smith was a former United States Attorney for the Western District of Texas who had secured two convictions of George Parr for tax evasion and probation violation.[301] Judge Davidson appointed Smith's former deputy, J.M. Burnett, as the other master, to go to Duval and Zapata Counties for the same purposes.[302] The special masters were directed to report to the court on or before October 2, 1948.[303] Stevenson's legal team had maintained control of the election situation they obtained when Judge Davidson granted the TRO a week earlier. Johnson's attorneys were dismayed and despondent.[304]

But Davidson also gave Johnson something of great value: the opportunity to immediately appeal. Had he not severed the injunctive order, Johnson's counsel would have had to seek a permissive interlocutory appeal under 28 U.S.C. § 1292, which requires consent both of the trial court and of the appellate court,

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298. Order Granting Temporary Injunction at 4, Stevenson v. Tyson (N.D. Tex. Sept. 23, 1948) (No. 1640) (located in the National Archives, Southwest Branch).

299. *See* CARO, *supra* note 14, at 364 (describing masters in chancery and their powers).

300. Order Appointing Special Masters at 1, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

301. CARO, *supra* note 14, at 374.

302. Order Appointing Special Masters, Stevenson v. Tyson (N.D. Tex. 1948) (No. 1640).

303. *Id.*

304. CARO, *supra* note 14, at 374.

and would have required more work and more time.[305] Otherwise, Johnson would have had to move the appellate court to permit the filing of mandamus proceeding against Judge Davidson, a slow and cumbersome procedure, particularly with the Fifth Circuit not in session.[306]

4. Friday, September 24

Caro details the conference of Johnson's numerous counsel after the hearing on September 21 to decide how to proceed and reports that those lawyers, meeting in a Fort Worth conference room, were gridlocked.[307] Separately, Allred, Crooker, Cofer, and Looney tried to draft pleadings, but no one could determine how to obtain quick relief via an appeal.[308] The Fifth Circuit and the Supreme Court were both out of session, neither scheduled to reconvene until October 4.[309] After hours of unresolved debating between the lawyers, Caro writes, Johnson took command himself and called for Abe Fortas.[310] However, it was actually Wirtz who recommended Fortas and made the telephone call.[311] Dallek reports that the entire Arnold, Fortas & Porter law firm had previously contributed money to Johnson's campaign and that Fortas's law partners, Paul Porter and Thurman Arnold, along with former Attorney General Francis Biddle, had advised Wirtz on September 18 about the theoretical possibility of bypassing the Court of Appeals for the Supreme Court.[312] In any event, after some phone calls, Fortas was located; conveniently, he was in Dallas, only thirty miles away.[313]

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305. 28 U.S.C. § 1292 (1948). *See* CARO, *supra* note 14, at 366 (describing process to overturn injunction).

306. *See* CARO, *supra* note 14, at 360 (explaining their appeals strategy).

307. *Id.* at 368.

308. *Id.* at 365, 368–69; Jones Interview, *supra* note 261, at 25.

309. CARO, *supra* note 14, at 366.

310. *Id.* at 365, 368–69.

311. MURPHY, *supra* note 163, at 90; Interview by Joe B. Frantz with Abe Fortas (Aug. 14, 1969), at 4, transcript available at http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/fortasa/fortas01.pdf [hereinafter Fortas Interview].

312. DALLEK, *supra* note 15, at 308–09.

313. One source reports that Johnson telephoned Stanley Marcus, founder of the Neiman Marcus department stores, and asked, "Do you know where in hell I can put my hands on Abe Fortas?" Marcus replied, "He's right here."

Fortas himself wrote and spoke later of these events, and both his principal biographers address it. After he had arrived and had been briefed, Fortas asked the "acres and acres of lawyers" to focus on the question: "What's the law on this?"[314] After an hour, with no answer forthcoming, Fortas said, "We had better get it on up to the Supreme Court; [Justice Hugo] Black will handle it expeditiously."[315] He gathered the papers, took Johnson's secretary Mary Rather into another room, and dictated a one-page outline of the argument and strategy, namely, to take an appeal to the Fifth Circuit with the expectation of an emergency stay motion being there refused, and then to immediately present the same motion to Justice Black,[316] the Justice assigned to handle matters coming out of the Fifth Circuit when the Supreme Court was out of session.[317]

On September 22, at 6:25 P.M., the Johnson team filed two notices of appeal with the district clerk: one for Johnson, represented by Allred, Crooker, Buck, Tarlton, and Jones, and one for the Blanco County Elections Board, represented by Moursund and Looney.[318] The notices were filed early, a day before the U.S. District Clerk's entry of the temporary injunction that contained the severance provision; Johnson's counsel were clearly in a rush. The question then arose for Johnson's team as to which Fifth Circuit judge the lawyers should select for presentation of Johnson's stay motion.

At that time, there were six judges on the Fifth Circuit Court of Appeals, which covered the federal judicial districts of Texas and five other Southern states. The Chief Judge was a Texan, Joseph C. Hutcheson, Jr., a resident of Houston.[319] When

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MURPHY, *supra* note 163, at 90. Fortas was in Dallas participating in depositions in an antitrust case. *Id.*

314. MURPHY, *supra* note 163, at 93; Fortas Interview, *supra* note 311, at 5.

315. MURPHY, *supra* note 163, at 93; Fortas Interview, *supra* note 311, at 6.

316. CARO, *supra* note 14, at 372.

317. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981 58 (1984).

318. Motion for Stay of Temporary Injunction at 6, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529).

319. Hutcheson had served as district judge in the Southern District of Texas from 1918 until his appointment to the Fifth Circuit in 1931. COUCH, *supra* note 317, at 55–56.

he had been a federal district judge in Houston, Hutcheson had consistently ruled against civil rights voting lawsuits.[320] He was a jurist whose judicial philosophy "emphasized the need for economic, social, and political stability."[321] Tommy Corcoran and others on Johnson's team of Washington lawyers concluded that Hutcheson's record augured well for Fortas's strategy, which contemplated a quick denial by any judge of the Court of Appeals so that papers could then be immediately filed with the Supreme Court.[322] With the Fifth Circuit out of session, Hutcheson was physically located in Houston at that time.[323]

Johnson's team had requested the expedited preparation of the hearing transcript and the rest of the trial court's record for the appeal, and the court reporters and the district clerk complied.[324] On Thursday or Friday, September 23 or 24, one of Johnson's attorneys, Luther Jones, flew to New Orleans in a Brown & Root plane,[325] paid the $25 filing fee on behalf of Johnson, and filed the Motion for Stay of Temporary Injunction with the clerk of the court.[326] The clerk's docket sheet reflects formal appearances for Johnson by Allred, Crooker, Looney, Tarlton, Cofer, and Buck, and appearances for Stevenson by Moody, Renfro, Groce, and James.[327] The motion argued that "there is no provision of the Constitution or the laws of the United States which gives the Federal District Courts the power to enjoin the certification of a person as the nominee of a political party for the office of the United States Senator."[328]

The clerk's records do not identify the lawyers who made the oral arguments to Hutcheson, which apparently ran for several

320. CARO, *supra* note 14, at 372.

321. CHARLES L. ZELDEN, JUSTICE LIES IN THE DISTRICT: THE U.S. COURT, SOUTHERN DISTRICT OF TEXAS, 1902–1960 79 (1993).

322. CARO, *supra* note 14, at 371 (stating that Fortas suggested presenting the weakest case to the Circuit Court in order to lose quickly, gambling that Justice Black would agree to hear the case as a single Justice and, after hearing, rule for their side).

323. CARO, *supra* note 14, at 372.

324. CARO, *supra* note 14, at 372.

325. Jones Interview, *supra* note 261, at 27. *See also* CARO, *supra* note 14, at 372.

326. CARO, *supra* note 14, at 372.

327. Motion to Stay Temporary Injunction at 8, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529).

328. *Id.* at 6.

hours,[329] but in an oral history interview, Crooker recalled that he presented the matter for Johnson.[330] Moody likely argued for Stevenson. After hearing counsel's arguments in chambers and then deliberating on the matter for about five more hours, Hutcheson issued a five-page ruling.[331] As the Fifth Circuit's official history puts it, "[c]onsistent with his conservatism, Hutcheson did not feel that he had greater authority than any other circuit judge, or that he could enlarge the powers of the office . . . ."[332] Sitting alone, with the Court out of session, he ruled that he was powerless to do anything but set the matter for hearing on the next regularly scheduled court day, October 4.[333] His decision summarized the jurisdictional issue and then assessed and dismissed the legal authorities cited to him by Johnson's lawyers, namely, Federal Rule of Civil Procedure 62(g), 28 U.S.C. § 377 (the All-Writs Statute), and 28 U.S.C. § 227, the interlocutory appeal statute.[334] Judge Hutcheson denied the motion without prejudice.[335] The judge determined that he simply lacked the power to stay the lower court's order.

C. *LBJ's Lawyers Reacquire Control with a Supreme Court Justice's Stay*

1. Monday and Tuesday, September 27 and 28

Back in Washington, Fortas was joined by his partners Thurman Arnold and Paul Porter and "thirty-five other lawyers," including New Deal veterans such as Tommy Corcoran, Ben

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329. There is no transcript of the hearing, and Hutcheson's order reflects only that counsel for both Johnson and Stevenson were present. CARO, *supra* note 14, at 372.

330. Statement in lieu of interview furnished to Dr. Joe B. Frantz by John H. Crooker, in Houston, Tex., (Aug. 18, 1970), *available at* http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/crooker_john_1970_0818.-pdf.

331. CARO, *supra* note 14, at 372.

332. COUCH, *supra* note 317, at 75.

333. Jerome I. Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORNELL L.Q. 12, 12 (1967).

334. On Motion for Stay of Temporary Injunction Granted by the District Judge at 58, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. Sept. 24, 1948) (No. 12529).

335. *Id.* at 61.

Cohen, and James H. Rauh.[336] The Supreme Court was out of session, not scheduled to convene until Monday, October 4,[337] two days after the Texas deadline of October 2. According to Caro, the day after Judge Hutcheson ruled, Corcoran and the three partners of Arnold, Fortas & Porter telephoned Johnson's request for a stay to Justice Hugo Black at his home in Alexandria, Virginia.[338] Black set a hearing for Tuesday, September 28.[339] Black's biographer states that on Sunday, September 26, Black's law clerk told Arnold he would hear the case on September 28, and Moody agreed to fly up for it.[340]

Dallek tells a slightly different version: that Arnold and Porter hand delivered the motion to stay on behalf of Johnson to the clerk of the Supreme Court.[341] The deputy clerk protested that he could not accept it for filing because no appeal had been docketed through the Fifth Circuit, but Arnold tossed the motion on the desk, stated that he was "effecting a lodgment," departed, and waited to see what happened.[342] The accounts may be reconcilable because the clerk's office was not open on the weekend, so the motion was clearly not "lodged" there until Monday, but telephone conversations about it could easily have occurred on Saturday and Sunday. The clerk's file contains a letter from the clerk to Justice Black dated Monday, September 27, stating that he enclosed "for your preliminary examination the motion for stay in the case of Johnson v. Stevenson."[343] The letter adds that "[b]oth Mr. Arnold, representing the petitioner, and Mr. Moody, representing the respondent, have no preference as to the time for the presentation of this application," and asks the Justice to advise of his desired time.[344]

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336. *See* Rauh Interview, *supra* note 1, at 3 ("There were a lot of real good lawyers over there [at Arnold, Porter & Fortas]. They didn't need any more, but Tom's idea of how you handle a case like this was to get a million good lawyers and then something would come out of it. . . . So I went over and we worked all afternoon, all night, on the case.").

337. 17 U.S.L.W. 3073 (1948).

338. CARO, *supra* note 14, at 373.

339. *Id.* at 373.

340. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 374 (1994).

341. DALLEK, *supra* note 15, at 339.

342. *Id.*

343. Letter from E.P. Cullinan to Hugo L. Black (Sept. 27, 1948) (on file with the National Archives).

344. *Id.*

The motion for stay that was "lodged" is highly unusual in that, while it bears the clerk's file-mark of September 27, it was never assigned any case or proceeding number. The motion was not accompanied by any record on appeal because that record was back at the Fifth Circuit clerk's office. In its twenty-one pages, the well-drafted legal motion reviews the course of proceedings to date in full detail with the pertinent underlying documents attached as exhibits.[345] Relying prominently on *Sterling v. Ferguson*, the motion presents six fairly succinct arguments: (1) that the trial court lacked jurisdiction because the dispute is, in essence, an "election contest under the laws of the State of Texas"; (2) that federal courts have no jurisdiction to adjudicate the validity of certifications of the authorized officers of the state Democratic Party; (3) that Johnson held a vested right to be certified as the nominee of the Democratic Party; (4) that 28 U.S.C. § 1344 deprives federal courts of such jurisdiction; (5) that the cause of action "does not arise under the laws of the United States and does not involve property or civil rights protected by the laws of the United States but relates only to political rights"; and (6) that the subject matter lies solely within the jurisdiction of the United States Senate.[346] Finally, the motion pleads that a stay "will in no way prejudice plaintiff's rights if on final determination, it is held that the Federal Courts have jurisdiction to determine whether . . . Johnson's name should appear on the official ballot."[347]

In 1948, there was no such federal procedure as "lodgment" in the appellate rules, the Supreme Court rules, or the Federal Rules of Civil Procedure. Dallek states that Arnold was recalling an obscure device in common law pleading.[348] Until 1938, there had been a "lodgment" rule in federal practice and it did pertain, in a way, to appeals, namely, Equity Rule 75.[349] That rule provided that when an appellant wishes to designate trial court evidence for the record on appeal, she should "lodge" the evidence

345. Supplemental Motion for Stay at 9–26, Johnson v. Stevenson (U.S. Oct. 4, 1948) (unnumbered proceeding).

346. *Id.* at 17–18.

347. *Id.* at 23–24.

348. DALLEK, *supra* note 15, at 339.

349. *See* Saul v. Saul, 104 F.2d 245, 248 (D.C. Cir. 1939) (citing Kelly v. United States, 300 U.S. 50, 57 n.1 (1937) (quoting Equity Rule 75)) (approving of Kelly's interpretation of Rule 75).

with the clerk and give notice of that "lodgment" to the appellee.[350] However, the designation of a portion of the appellate record in a lower court is a far different thing than authorizing the filing in the nation's highest court of a stay motion without a petition for certiorari or other process transmitted from the clerk of a court of appeals. Moreover, the Equity Rules had been abrogated by the Federal Rules for a decade. Arnold was improvising, and he succeeded in bluffing the clerk into filing the motion by deploying a legalistic word that must have had some resonance in the mind of the clerk. Without at least a paper file-marked by the clerk in hand, it is doubtful that Justice Black would have acted.

Johnson's motion asserts that, if the trial court has jurisdiction, it can later restrain the issuance of a certificate of election to Johnson or restrain the counting of votes for Johnson, or it can, by publishing its declaration, give notice to the public that Johnson is not a legal candidate and, finally, may restrain Johnson from taking a seat in the Senate.[351] The motion concludes by asserting that, without a stay, the name of no Democratic nominee would appear on the general election ballot and that only a stay would assure "the right of the people of Texas to vote on official ballots prepared and distributed according to law."[352] The prayer requested issuance of an order staying the temporary injunction of Judge Davidson and staying all further proceedings in that court until further order of the Supreme Court.[353] The pleading was signed by Wirtz, Allred, Arnold, Fortas, and Cox, with the names of eight other Texas lawyers for LBJ listed below the signature block.[354] Black set a hearing for Tuesday, September 28.[355]

Meanwhile, on Monday, September 27, the two special masters commenced hearings in borrowed courtrooms in the state courthouses in Jim Wells and Duval counties.[356] Many subpoenas were issued, but the majority of the witnesses had gone to Mexico

350. Equity Rule 75, U.S. Compiled Statutes, Ann. 1916 Malloy, ed.

351. Supplemental Motion for Stay at 24, Johnson v. Stevenson (U.S. Oct. 4, 1948) (unnumbered proceeding).

352. *Id.* at 25.

353. *Id.* at 25–26.

354. *Id.* at 26.

355. CARO, *supra* note 14, at 373.

356. *Id.* at 374.

or could not be found.[357] Those who did appear and testify, such as the chairman of Precinct 13, gave incredible answers about losing the poll lists and tally sheets while his car was parked at a bar.[358] Finally, in Jim Wells County, special master Smith called for all the ballot boxes of the county to be brought into the courtroom.[359] Johnson's counsel, Looney and Tarlton, protested vociferously, but on the second day Smith ordered all the boxes opened.[360] Since a number of them were padlocked, he hired a locksmith.[361]

At the same time on that Tuesday, September 28, Justice Black conducted a hearing at the Supreme Court.[362] There is no official record of the proceeding, and accounts of the hearing are sparse and varying. One writer says, without any back-up, that Black "hear[d] lengthy arguments in open court."[363] However, all other sources agree that the hearing was held in the Justice's chambers.[364] Representing Johnson were six attorneys—Fortas, Arnold, Porter, Hugh Cox, Wirtz, and Allred; Moody alone appeared for Stevenson.[365] Apparently one newspaper reporter was present.[366] In 1999, Dan Moody's son, Dan Moody, Jr., then a retired Austin lawyer, told me in a telephone interview that he remembered his father recalling that when he arrived at Justice Black's chambers, the numerous lawyers for Johnson were already there.[367] After the other side had completed their argument without mentioning what Moody, Jr. called "the states' rights angle," Black asked them suggestively, "Have you considered

357. *Id.*
358. *Id.* at 374–75.
359. *Id.* at 378.
360. *Id.*
361. Graham Interview, *supra* note 78, at 39.
362. CARO, *supra* note 14, at 379.
363. Chapman, *supra* note 333, at 12.
364. *See, e.g.*, CARO, *supra* note 14, at 379 ("Filing into Hugo Black's walnut-paneled, book-lined chambers in the Supreme Court building Tuesday morning were Lyndon Johnson's first team.").
365. *Id.*
366. Marshall McNeil, *How Fortas Gave LBJ His Start*, WASH. DAILY NEWS, Aug. 3, 1965, at 3 (reporting eighteen years later that he had been present at the hearing).
367. Telephone Interview with Dan Moody, Jr. (May 25, 1999) (on file with the author). Moody, Jr. had completed college and law school in September 1948. *Id.*

this?"[368] Johnson's lawyers then took a recess and came back to make that very argument.[369] The widow of Wirtz recalled later:

> I remember one phase of [the hearing]. Dan Moody . . . said that some town in the Valley where all the votes went for Lyndon just couldn't be right, there had to be fraud. And I remember my husband told the Judge that Governor Moody evidently had forgotten that when he ran for governor he got every vote in that town, just as Lyndon had gotten them.[370]

Black's biographer reports that Fortas focused on jurisdiction and Moody on fraud and the Civil Rights Act, which of course was his real argument as the basis for invoking federal court jurisdiction in the first place.[371]

Black asked sharp questions, having researched the case law with his son Hugo, Jr., a third-year law student who happened to be home at the time.[372] The biographer states:

> When Black indicated that he wanted counsel to address the Court's power to interfere with the electoral process, Moody felt that Black was suggesting what Fortas should assert and that he "had no chance to win after that." But Black, privately having little doubt that Johnson stole the election, was trying to give Moody a lifeline, however flimsy. He did not take it while Fortas subtly shifted his argument. The federal judge had overstepped his domain, Fortas concluded. Texas laws gave Johnson an "irrevocably and incontestably vested" right to be on the ballot. The

368. *Id.*

369. *Id.*

370. Interview by David McComb with Mrs. Alvin Wirtz, in Rochester, Minn. (Feb. 22, 1970), at 6, transcript available at http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/wirtz_mrs_1970_0222.pdf.

371. NEWMAN, *supra* note 340, at 374–75.

372. *Id.*

> whole case was "a political controversy, neither more or less."[373]

After lunch, Black announced his decision to grant the motion, explaining that he could find no statute authorizing a federal judge to act in a state election and that Stevenson had recourse to a forum other than the federal court because the Senate was the judge of its own members' qualifications.[374]

Johnson's counsel rushed to telephone the news to the courthouse in Alice, and the proceedings before the special masters came to a halt.[375] A written order remained to be prepared, and Moody stayed over to approve it as to form. The next day, Black entered the written order granting the stay.[376] The order is terse:

> ORDERED that the temporary injunction issued by the United States District Court for the Northern District of Texas, Fort Worth Division . . . be and the same hereby is stayed, and that the said temporary injunction is and shall be of no force or effect, until further order of the Supreme Court.[377]

Later Fortas would state that "[t]here really was no question about the merits of the case. The injunction was improvidently entered; that is, the federal judge enjoining the state election under these circumstances was just plain wrong."[378] But Joe Rauh always thought that Corcoran had spoken with Black before the hearing.[379] In his autobiography, William O. Douglas speculated that Black might have decided, with vote fraud alleged by both parties, that he would assist the more congenial candidate, Johnson.[380] Other speculations include Truman, Attorney General Tom Clark, or Sam Rayburn contacting Black, but the Justice's

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373. *Id.* at 375.

374. *Id.*

375. CARO, *supra* note 14, at 383.

376. Order to Stay Temporary Injunction at 1, Johnson v. Stevenson (U.S. Sept. 29, 1948) (unnumbered proceeding).

377. CARO, *supra* note 14, at 383.

378. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 200 (1990).

379. *Id.* at 202.

380. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 335 (1980).

biographer doubts it.[381] Johnson did throw an eightieth birthday party for Black at the White House in 1966, and toasted him: "If it weren't for Mr. Justice Black at one time, we might well be having this party. But one thing I know for sure, we wouldn't be having it here."[382]

Upon entry of the written stay order, telegrams began to fly. The clerk of the Supreme Court sent a telegram to Judge Davidson, advising of the stay.[383] Judge Davidson sent telegrams to his special masters to cease work.[384] In his memoirs, Judge Davidson recalled the last day of hearings in the Rio Grande Valley:

> There was some confusion in the testimony involving the care of the election boxes. Some of them were locked with padlocks, some of them had padlocks with the keys left in the locks, some of them were kept with one custodian and some with another. Box 13 or a box purporting to be Box 13 was hidden in the Clerk's office behind other records under the orders of the County Clerk to await further information after the conflict between the first report and the later one. Several of the subpoenas that were issued were returned *non est*.
>
> About this time in the commissioner's proceeding, [the special master] paused and read a telegram from the trial court that had appointed him commissioner, the telegram reading as follows:
>
> Honorable W R Smith
> Care of County Judge
> Alice Texas
>
> The Court is advised that Justice Black today signed an order in case of Johnson versus Stevenson which provides Quote The temporary injunction issued by the United States District Court for the Northern District of Texas Fort Worth

381. NEWMAN, *supra* note 340, at 376.
382. *Id.*
383. CARO, *supra* note 14, at 383.
384. *Id.*

> Division, on September 23rd 1948 in case entitled Coke R Stevenson versus Lyndon B Johnson et al Civil No. 1640 be and the same is hereby stayed and that the said temporary injunction is and shall be of no force and effect until further order of the Supreme Court end Quote Take no further action under order of this Court in said cause.[385]

Judge Davidson also observed that "[t]here were a number of witnesses present [before the special masters] who had [been] sworn later to be used," and went on to state somewhat cryptically: "The trial court's [i.e., Davidson's] temporary order stayed all proceeding until we received the reports of the commissioners when we would then be able to proceed with the trial of the case on the merits."[386] It was Hugo Black's order, not "the trial court's" temporary order, that stayed all proceedings in the U.S. District Court, and there was never a substantive report made by the special masters. Moreover, there was never a "trial . . . on the merits," because a week later the Fifth Circuit reversed Davidson and ordered dismissal of the action.[387] The final sentence of Judge Davidson's memoir about this episode is entirely correct: "The effect of Judge Black's decision was thus to the effect that Stevenson had no right in law to maintain his case."[388]

2. October 2 to January 31

Although Johnson had prevailed at the Supreme Court prior to the October 2 deadline, assuring the placement of his name as Democratic candidate on the ballot, the litigation continued, albeit in a wind-down mode. Quickly, Johnson's counsel moved both in the U.S. Supreme Court and in the Texas Supreme Court to attempt to consolidate the victory provided by Justice Black.

The proceeding in the Texas Supreme Court had lain dormant since September 17. Johnson's Texas lawyers returned to Austin on Tuesday, September 28, at 7:00 P.M. with a motion for

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385. DAVIDSON, *supra* note 235, at 104–05.

386. *Id.* at 105.

387. Johnson v. Stevenson, 170 F.2d 108, 111 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949).

388. DAVIDSON, *supra* note 235, at 105.

leave to refile the original petition for mandamus and to file a supplemental petition for writ of mandamus and prohibition, seeking to ensure that the secretary of state would place Johnson's name on the ballot.[389] Since Justice Black had orally granted his stay shortly after lunch that day, this filing, about four or so hours later with the Texas Supreme Court, appears to be a spur of the moment effort by Johnson's legal team to protect against Stevenson switching course to seek recourse in the state court system. Court clerks' offices usually close at or before 5:00 P.M., so as the first lawsuit in Judge Archer's court, Johnson's counsel must have asked for a favor. The next day the clerk set that motion for submission on Thursday, September 30, at 9:00 A.M.[390] At 8:45 A.M. on September 30, Greenhill, the executive assistant attorney general of Texas, filed Brown's answer.[391] While Stevenson never filed a response, Moody must have raced back from Washington because he did appear to participate in the oral argument.[392] At 11:59 A.M. that day, the Supreme Court of Texas entered its per curiam opinion.[393] In view of the speed with which it was issued, only three hours after the commencement of the oral argument, it must have been partially drafted by one of the judges or a law clerk prior to the hearing. In the decision, which was officially reported, the court denied the relief and denied Johnson's counsel's request to keep the file open just in case something happened.[394]

On Monday, October 4, Johnson's counsel filed with the entire U.S. Supreme Court a supplemental motion for stay, requesting that Justice Black's stay be enlarged to stay not only the temporary injunction but also "all further proceedings in that court."[395] At almost the same time, Moody filed with the Court a motion to vacate the stay order and to dismiss the proceedings.[396]

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389. Argument in Support of Motion for Leave to File Petition for Mandamus, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

390. Docket of the Supreme Court of Texas, Johnson v. Brown, 213 S.W.2d 529 (Tex. 1948) (No. A-1901).

391. *Id.*

392. *Id.*

393. Johnson v. Brown, 213 S.W.2d 529, 529 (Tex. 1948).

394. *Id.* at 530.

395. Supplemental Motion for Stay at 2, Johnson v. Stevenson (U.S. Oct. 4, 1948) (unnumbered proceeding).

396. Stevenson's Motion to Vacate Stay Order and Dismiss Proceedings,

On Tuesday, October 5, by 8–0 vote in conference, the Supreme Court denied Johnson's supplemental motion for stay and, at the same time, Stevenson's motion to vacate and dismiss.[397]

Meanwhile, the Fifth Circuit appeal had been docketed on Friday, September 24, and within a few days after Justice Black's stay, the battle resumed there.[398] Judge Hutcheson had set the appeal for October 4, and both the appellant's brief and the appellee's brief are file-marked with that date.[399] The docket sheet in the case reflects "argument and submission" before Judges Hutcheson, Sibley, and McCord.[400] Allred, Jones, and Crooker flew to Atlanta in the Brown & Root airplane and appeared for Johnson, with Crooker making the argument that day.[401] Johnson's Fifth Circuit brief, listing his same ten lawyers and submitted jointly with the Blanco County group, argued that the district court did not have jurisdiction, noting that there was no case on point, and asserting that there was no constitutional "right to have the election fairly conducted" and that there was no cognizable claim under the Civil Rights Act for a state law "election contest."[402] In the appellee's brief, Moody and his three co-counsel from the trial court made for the first time in full their argument to the contrary, citing all of the U.S. Supreme Court decisions consistently voiding the All White Primary: *Nixon v. Herndon*, *Nixon v. Condon*, and *Smith v. Allwright*.[403]

Stevenson v. Johnson (U.S. Oct. 2, 1948) (unnumbered proceeding).

397. Johnson v. Stevenson, 335 U.S. 801 (1948).

398. General Docket, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529), *cert. denied*, 336 U.S. 904 (1949) [hereinafter General Docket].

399. Brief for the Appellees, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529), *cert. denied*, 336 U.S. 904 (1949); Brief for the Appellant, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529), *cert. denied*, 336 U.S. 904 (1949).

400. General Docket, *supra* note 398.

401. Statement in lieu of interview furnished to Dr. Joe B. Frantz by John H. Crooker, in Houston, Tex., (Aug. 18, 1970), at 1, *available at* http://webstorage4.mcpa.virginia.edu/lbj/oralhistory/crooker_john_1970_0818-.pdf; Jones Interview, *supra* note 261, at 1.

402. Brief for the Appellant at 8, 14, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529), *cert. denied*, 336 U.S. 904 (1949).

403. Brief for the Appellees at 12–13, Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948) (No. 12529), *cert. denied*, 336 U.S. 904 (1949).

In the decision, Judge Hutcheson wrote for the panel, agreeing with Johnson and pointing Stevenson to the Senate for relief:

> We are of opinion [sic] that whatever may be the truth as to the fraudulent returns from certain precincts in the named counties, and whatever may be the truth as to illegal votes elsewhere which are claimed as more than an offset, the subject matter is not one to be taken cognizance of by the district court for the exercise of equitable relief. The object to be attained is precisely that of a contest of an election, the evidence so far heard is all appropriate to such a contest, as is that proposed to be taken by one or more masters which the record shows are to be appointed to go to all of the counties in which illegal returns or voting has [sic] been or may by amendment be alleged to have occurred. The Texas Statutes afford machinery for such a contest as part of their provision for both party nominations and final elections. It is urged that there is not time to review a statewide primary by such a contest before the general election comes on. But if there were no provision at all for contesting the result of a primary it would not give a district court jurisdiction which it lacks. The Constitution, Art. I, Sec. 5, after all makes each House of Congress the final judge of the qualifications, elections, and returns of their respective members; and if a State, as Texas has done, makes nominations by a primary to be a part of its election machinery, and if, as is alleged here, Democratic nomination insures election, no reason occurs to us why this constitutionally provided judgment of the election should not reach back to the nomination; and we judicially know that such Congressional investigations have included primaries.[404]

404. Johnson v. Stevenson, 170 F.2d 108, 109 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949).

On November 1, Moody sought to overturn the Fifth Circuit's decision, filing a petition on behalf of Stevenson seeking a writ of certiorari from the Supreme Court, which, unlike Johnson's earlier stay motion, received from the clerk a Supreme Court docket number, Case No. 466.[405] As he prepared the petition, Moody may have noticed that on October 21, only two weeks after the Fifth Circuit's decision, in a dissent in *MacDougall v. Green*, Justice Douglas and two other Justices cited approvingly the very Fifth Circuit decision from which Moody was seeking certiorari:

> Federal courts should be most hesitant to use the injunction in state elections . . . . If federal courts undertook the role of superintendence, disruption of the whole electoral process might result, and the elective system that is vital to our government might be paralyzed. Cf. *Johnson v. Stevenson*, 170 F.2d 108.[406]

On January 31, 1949, the Supreme Court denied Moody's certiorari petition.[407]

III. *LBJ V. STEVENSON* AND LAWYERING FOR CONTROL OF THE OUTCOME OF DISPUTED ELECTIONS

The reported decision in *Johnson v. Stevenson* has had negligible impact on American jurisprudence. The Supreme Court itself has cited it only once, in a per curium opinion two years later, as a curious "cf." following the statement, "[f]ederal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[408] It has been

405. Petition for Writ of Certiorari, Stevenson v. Johnson, (U.S. Nov. 1, 1948) (No. 466); 17 U.S.L.W. 3193 (1948).

406. MacDougall v. Green, 335 U.S. 281, 290 (1948) (Douglas, J., dissenting).

407. MINUTES OF THE SUPREME COURT OF THE UNITED STATES (Jan. 31, 1949) (No. 466); JOURNAL OF PROCEEDINGS, U.S. Sup. Ct., 17 U.S.L.W. 3227 (1949).

408. South v. Peters, 339 U.S. 276, 277 (1950) (per curiam).

cited only four times by the Fifth Circuit, most recently in 1985,[409] twice by Texas state appellate courts,[410] and by all other federal courts a total of thirteen times.[411] The lawyering of the two teams did not produce any jurisprudential landmark. The significance for Johnson, however, was enormous: but for the legal victory, he would not have become U.S. Senator, then Vice President, and ultimately, President. As Callan Graham stated to the Dallas Morning News in 2000, "[i]f we had won it for Governor Stevenson, there's no doubt it would have changed the course of our nation's history."[412]

Because this litigation was so consequential in its political effect, it has left a fairly full record not only of court documents but also lawyers' oral history interviews that enables this study of lawyering in election litigation. To be sure, an election lawsuit is not typical civil litigation. The proceedings occur in a tightly limited time frame—just three weeks in this case—and the forms of relief or remedies the parties seek are injunctive and equitable in nature, rather than legal or monetary. The lawyers who participate in election lawsuits typically work without payment for their services.[413] Moreover, unlike in normal civil litigation, compromise and settlement is never an option. Finally, this assessment is based on a single set of legal proceedings for control of a high office, conducted by elite, white, male lawyers of the late

409. Welch v. McKenzie, 765 F.2d 1311, 1314 n.1 (5th Cir. 1985); Seibert v. Baptist, 594 F.2d 423, 427 n.11 (5th Cir. 1979); Sierra Club v. Callaway, 499 F.2d 982, 989 (5th Cir. 1974); Hubbard v. Ammerman, 465 F.2d 1169, 1176 (5th Cir. 1972).

410. Frias v. Bd. of Trs., 584 S.W.2d 944, 949 (Tex. Civ. App.—El Paso 1979, writ dism'd w.o.j.); State ex rel. Kimmons v. Azle, 588 S.W.2d 666, 670 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

411. A Westlaw check shows that it was never cited in any reported decision associated with *Bush v. Gore* litigation.

412. *Election Confusion, Texas Style: 1948 Primary Snared LBJ, Ex-Governor In Vote-Fraud Tangle*, DALLAS MORNING NEWS, Nov. 19, 2000, at 39A, 51A.

413. Here, Johnson paid no attorneys' fees, but instead sent telegrams on October 1 to each of his lawyers stating, "You are a great lawyer and a devoted friend. Signed, Lyndon B. Johnson." Rauh Interview, *supra* note 1, at 4. He gave three of his Texas lawyers inscribed wristwatches. Interview by David McComb with Raymond Buck, Lawyer for Johnson, in Fort Worth, Tex. (May 27, 1969), at 11, transcript available at http://webstorage4.mcpa.virginia.edu/-lbj/oralhistory/buck_raymond_1969_0527.pdf.

1940s, such as Wirtz, Allred, Moody, and Fortas. The lawyering of this particular election contest may or may not be representative of election litigation and litigators generally. A broad and comparative history of the lawyering of election disputes, large and small, remains to be written.

But the story of *LBJ v. Stevenson* does provide several insights about the craft of lawyering as it was conducted for control of this election outcome. The history of the lawyers' efforts in 1948 illustrates the Krieger-Neumann axiom about the essence of the craft of lawyering, as each group of lawyers sought to achieve its client's objective by "gain[ing] control of the situation—to the extent possible," including by ignoring applicable procedural rules at key moments and by filing their pleadings in those specific courts and before those particular judges most likely to grant the desired injunctive relief. By closely studying the *LBJ v. Stevenson* pleadings, hearings, and court papers, it is possible to see a specific pattern in each side's lawyering.

First, the process began when each client consulted his lawyers about a significant problem, and his lawyers devised a solution. In each instance, the solution was to obtain injunctive relief from a court in order to acquire control of the outcome of the disputed election. For the second step, the attorneys made a strategic choice of court system—state or federal. It is tempting, from reading the biographers' accounts, to assume that in order to do their job of acquiring control of the situation for their clients, the lawyers simply picked the particular trial-court judge they wanted and then approached that judge and obtained the desired injunctive relief. It is true that each judge to whom the parties respectively turned during the three weeks were highly receptive to the respective plaintiffs' requests. But the process of lawyering here was more complex and nuanced. The lawyers first chose the court system, next crafted a legal theory to justify seeking relief in that system, and then searched for the best judge. This subtlety is demonstrated in the caption of Johnson's petition for TRO to the state court and the caption of Stevenson's federal-court complaint in which information identifying the courts was initially left blank, and then hand-written and subsequently altered.[414]

414. *Supra* notes 226–228 and accompanying text.

The third step was for the lawyers to formulate a legal theory to justify jurisdiction in the desired court to obtain the desired injunctive relief, and then to draft a pleading to articulate the rationale. For Johnson, the lawyers' theory was the consistently reiterated argument that the Texas Supreme Court ruling in *Sterling v. Ferguson* precluded any court from looking beyond the election reports of the political party. On Stevenson's behalf, Moody and his legal team engaged in more creative lawyering to formulate the theory that jurisdiction lay in the federal district court. In fact, the federal civil action brought by Stevenson against Johnson is the first time in American jurisprudence that a *candidate*, as opposed to a voter, attempted to utilize the Civil Rights Act to challenge fraudulent ballots as a violation of the candidate's civil rights. In 1948 there was no precedent for the claim.[415]

Fourth, the lawyers *then* selected a specific judge within the chosen court system, and filed and presented the pleading to the judge, who accepted the legal rationale and granted the desired injunctive relief on no, or extremely short, notice to the other side, and often at abnormal times of night or day. This pattern was demonstrated by the three injunctive orders obtained: Johnson's September 10 late-Friday-night TRO from the state court in Austin; Stevenson's September 15 crack-of-dawn TRO from the federal district judge vacationing far outside his district; and Johnson's stay order from Justice Black entered when the Supreme Court was out of session.

In connection with the legal positions each team of lawyers staked out for its client, deep ironies permeate this story and illustrate one characteristic of a successful candidate. For Stevenson and his lawyers, it is ironic that in order to justify the injunctive relief they sought, white, "states' rights" politicians and lawyers who for over two decades sought to maintain the All White Primary in Texas as an alleged "private and voluntary association" supposedly isolated from any "state action," resorted, in his time of desperation and with the goal of putting a "states'

415. Subsequently some case law has acknowledged that such a claim may lie under that Act. *See generally* Eunice A. Eichelberger, Annotation, *Actionability, Under 42 USCS § 1983, of Claim Arising Out of Maladministration of Election*, 66 A.L.R. FED. 750, at 4 (1984) (discussing cases where candidates sued on their own behalf).

rights" conservative into the U.S. Senate, to federal civil rights law and the U.S. Supreme Court precedents that, over that same twenty years, had sequentially voided all the various iterations of Texas's all-white primaries as violative of federal constitutional rights and civil rights law. Stevenson's lawyers had no choice; Johnson's counsel had control of the situation in the state courts, and there was no other way to justify a resort to federal court to right the wrong Stevenson averred in the fraudulent votes from the Rio Grande Valley. Chief counsel Dan Moody and the rest of Stevenson's team were excellent lawyers, and they did what was necessary to accomplish the client's goal. They disregarded their own political positions and histories and crafted a litigation position calculated to have the best chance of success: alleging that candidate Stevenson, a white conservative, had been deprived of his civil rights. Stevenson willingly authorized them to do so.

On the other hand, viewing Johnson and his counsel from this distance, it is also ironic that, in order to put a politician into the United States Senate, which became his stepping stone to the presidency—a presidency known for producing substantial advances in voting and civil rights law—chief Texas counsel Alvin Wirtz and chief Washington counsel Abe Fortas and Paul Porter, who were well known liberal New Deal veterans, resorted to a states-rights' legal posture in order to defeat Stevenson's federal civil-rights cause of action. Additionally, Johnson's counsel got Johnson out of federal court by obtaining from Justice Black, another New Dealer, the critical stay of Stevenson's federal court injunction and, ultimately, the dismissal by the Fifth Circuit of Stevenson's civil rights suit.[416]

Those ironies highlight the superb lawyering of this dispute. If Krieger and Neumann are correct that "a lawyer's job is to find a way—to the extent possible—for the client to gain control over a situation," then it mattered crucially who each party was able to engage as his lawyers and what ability each demonstrated to "find a way" to achieve the client's objective. In *LBJ v. Stevenson*, the "way" that was found by each side's counsel was, sometimes in disregard of the lawyer's personal politics, to take whatever steps were necessary—including ignoring procedural

416. While he only mentions post-election litigation in a single paragraph, biographer Woods does note this irony inherent in Black's stay. WOODS, *supra* note 17, at 217.

rules and the hour of the day—in order to place the matter before a specific judge most likely to grant the injunctive relief desired. Both sides displayed this ability and this boldness on separate occasions: Wirtz and Looney calling Judge Archer to the courthouse in nighttime hours to grant the first TRO on September 10; Moody and Renfro calling on Judge Davidson in pre-dawn hours to grant a more powerful federal-court TRO on September 15; and, finally and most importantly, Fortas, Arnold, and Porter calling on Justice Black, when the Supreme Court was not in session, to grant the stay on September 28 that ended the matter by giving Johnson final "control over the situation" in the run-off election of 1948. In short, it takes very able and determined lawyering, such as that provided by Johnson's counsel, in order to win the litigation that sometimes accompanies and determines the outcome of very close elections.

Bad Romance: The Uncertain Promise of Modeling Legal Standards of Proof with the Inference to the Best Explanation

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I. INTRODUCTION

Abductive reasoning, commonly described as "inference to the best explanation," has long found favor among many philosophers as a method of choosing between competing candidate explanations.[1] Inference to the best explanation (IBE) dictates that when confronted with a set of different explanations for a given phenomenon, we should examine the explanatory virtues of each of the respective explanations—such as, consilience, simplicity, coherence, lack of ad hocery, testability, and internal consistency[2]—and defeasibly accept as true the candidate explanation that does the *best* job of explaining the phenomenon.[3] Such an inference pattern is believed to be common in the reasoning conducted during daily life, but is at the same time equivalent to the deductive logical fallacy of "affirming the consequent."[4]

Recently, legal scholars have attempted to integrate the epistemic tool of IBE into legal philosophy. Specifically, scholars have tried to utilize IBE in the explication of highly nebulous legal standards of proof. The motivation for such attempts can be traced to the fact that legal standards of proof—both criminal and civil—often prove difficult to consistently and reliably apply.[5] Among a bevy of esteemed scholars, Ron Allen and Michael Pardo,[6] John Josephson,[7] and Paul Thagard[8] have all offered accounts of how IBE

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1. Larry Laudan, *Strange Bedfellows: Inference to the Best Explanation and the Criminal Standard of Proof* 1 (Univ. of Tex. Sch. of Law Pub. Research, Working Paper No. 143, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153062.

2. Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 LAW & PHIL. 223, 230 (2008).

3. *Id.* at 229.

4. Leo Groarke, *Informal Logic*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Fall 2008), http://plato.stanford.edu/archives/fall2008/entries/logic-informal/.

5. Laudan, *supra* note 1, at 1.

6. *See generally* Pardo & Allen, *supra* note 2 (demonstrating that IBE is helpful in understanding the juridical proof process).

7. John R. Josephson, *On the Proof Dynamics of Inference to the Best Explanation*, 22 CARDOZO L. REV. 1621, 1621–22 (2001) (arguing that IBE parallels evidentiary reasoning and proposing a definition for beyond a reasonable doubt).

8. Paul Thagard, *Why Wasn't O.J. Convicted? Emotional Coherence in Legal Inference*, 17 COGNITION & EMOTION 361, 361 (2003) (evaluating computational models that provide detailed simulations of juror reasoning, and

might be utilized to elucidate legal standards of proof. And it should come as no surprise that along with those optimistic about the utility of IBE in the context of legal standards of proof, there are those, like Larry Laudan, who would discount the role of IBE in explicating legal standards of proof.[9]

We will evaluate the arguments against IBE's role in modeling legal standards of proof. We will examine the assertions most often offered in support of this perspective, and provide responses to those assertions that indicate that such arguments are not highly persuasive. We do not aim to provide an unqualified defense of the utility of IBE in modeling legal standards of proof. There is a significant amount of work that must still be done before IBE may be conclusively said to model these standards. Nevertheless, we believe that IBE's potential for such a use is significant, and by identifying the remaining problematic issues that must be addressed, we delineate a path through which IBE can truly model legal standards of proof.

This article proceeds in six further parts. In Part II, we will lay out the details of IBE. In Part III, we will briefly describe the current issues with legal standards of proof and summarize proposed solutions to those issues which utilize IBE. In Part IV, we lay out the general objections to the described solutions involving IBE. In Part V, we address those objections. In Part VI, we identify lingering problems for the IBE models of legal standards of proof, along with some potential responses to those issues. In Part VII, we will provide some concluding remarks.

II. INFERENCE TO THE BEST EXPLANATION: A BRIEF SUMMARY

IBE begins with the idea that if we understand a given proposition as explaining a given phenomenon, then, in the absence of superior explanations, we may infer that the proposition is true.[10] When there are multiple explanations for the phenomenon, we infer that the proposition that *best* explains the phenomenon is true. Given

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arguing that emotional coherence provides the most plausible explanation for the jury's decision).

9. *See* Laudan, *supra* note 1, at 3 (concluding that IBE is not an adequate model for the criminal or civil standards of proof).

10. Pardo & Allen, *supra* note 2, at 223–24.

that background, IBE has the following general structure:

(1) $f_1, f_2, f_3, \ldots, f_n$ are facts that require explanation.

(2) $h_1, h_2, h_3, \ldots, h_n$ are each distinct explanations of the set of facts $\{f_1, f_2, f_3, \ldots, f_n\}$.

(3) The set of explanations $\{h_1, h_2, h_3, \ldots, h_n\}$ is the product of an earnest, good faith search and contains all discovered explanations.

(4) h_1 is the best explanation among $\{h_1, h_2, h_3, \ldots, h_n\}$ for $\{f_1, f_2, f_3, \ldots, f_n\}$.

(5) Ergo, h_1 is probably true.[11]

As presented, this formulation of IBE is inherently comparative. It examines the many potential explanations for a set of facts and selects the best among them. However, there is a distinct formulation of IBE that is non-comparative. The non-comparative formulation of IBE demonstrates the following structure:

(1) $f_1, f_2, f_3, \ldots, f_n$ are facts that require explanation.

(2) h_j is an explanation of the set of facts $\{f_1, f_2, f_3, \ldots, f_n\}$.

(3) h_j is the product of an earnest search and is the only explanation that was discovered.

(4) h_j meets the criteria of being a *good* explanation.

(5) Ergo, h_j is probably true.[12]

As noted, this formulation of IBE is used when only one explanation seems to exist.

The general structure of these two formulations will leave the thoughtful reader unsatisfied. The question remains: What qualifies an explanation as good, better, or best? Predictably, there is some controversy regarding the answer to this question. Some have suggested that the "goodness" of an explanation is dependent on its simplicity, plausibility, and the absence of ad hocery.[13] Others have suggested that goodness is linked to coherence with background beliefs, consilience, testability, and simplicity.[14] Still others have suggested that goodness is an expression of predictive power and

11. Laudan, *supra* note 1, at 4–5.

12. *Id.*

13. *See id.* at 5 (stating that these were the virtues considered important by IBE modeler Gil Harman).

14. WILLIAM LYCAN, JUDGMENT AND JUSTIFICATION 129–30 (1988); Thagard, *supra* note 8, at 362–63.

internal consistency.[15] One ardent exponent of IBE, Peter Lipton, has even suggested that goodness is a function of "loveliness."[16]

Any attempt to define "good," "better," or "best" would be hotly contested[17] and beyond the scope of this article. We need not advocate for any particular meaning of those terms in critiquing the arguments against using IBE as a model for legal standards of proof. It is enough that we cabin these issues and assume that we can fix a set of agreed-to criteria that will permit us to determine what is the best explanation among competing explanations. This assumption facilitates the discussion herein, and is appropriate given that the general objections to IBE are posited under this same assumption.[18] That said, in addressing the further problems for IBE, we will examine potential explanatory virtues and whether these virtues covary with the probability that the explanations are true.[19]

There are two important features of the IBE apparatus that should be emphasized. First, even in the previously articulated comparative version of IBE, theorists agree that some threshold explanatory *goodness* must exist in order to derive the conclusion.[20] For instance, if all candidate explanations are utterly ad hoc or possess little predictive power, then it cannot be licensed that even the best of a set of bad explanations is probably true.[21] There must be propositions in the set of candidate explanations that satisfy a certain level of threshold goodness. For example, the lack of ad hocery or the predictive power of at least some among the set of candidate explanations must exceed some threshold level.[22] Thus, in

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15. Josephson, *supra* note 7, at 1626.

16. PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 59 (2d ed. 2004). "Loveliness" is a technical term, but roughly it means the quality of aiding in our understanding of the phenomenon. *Id.*

17. *See supra* text accompanying notes 13–16 (showing that experts' definitions of "goodness" with regard to IBE vary widely).

18. Laudan, *supra* note 1, at 5. *See generally* Pardo & Allen, *supra* note 2 (laying out the general objections to IBE without discussing the differing potential explanatory virtues).

19. *See infra* Part V. (discussing the viability of the "high degree of virtue" and "no sufficiently plausible alternative" IBE models with respect to the beyond a reasonable doubt standard).

20. Laudan, *supra* note 1, at 6.

21. *Id.*

22. This level of threshold goodness may be vague and therefore it may be difficult to determine whether a theory near the threshold is above or below. For a discussion of vagueness predicates, see Roy Sorensen, *Vagueness*, *in* STANFORD

the background of the comparative version of IBE is a threshold *goodness* test that must be satisfied in order to conclude that a best explanation is probably true.[23]

Second, it seems that IBE theorists often assume that whatever features are utilized to define good, better, and best, the greater the presence of those features in an explanation, the more probable it is that the explanation is true. This assumption is highly controversial in part because, as previously articulated, the features of goodness are themselves controversial.[24] Nevertheless, this is an assumption that underlies attempts to model legal standards of proof using IBE, and it will remain a consideration throughout our analysis.[25]

III. PROBLEMS WITH LEGAL STANDARDS OF PROOF AND POTENTIAL IBE REMEDIES

A. Problems Identified

The most worrisome aspect of legal standards of proof is their lack of clarity. This is especially true when engaging the beyond a reasonable doubt standard (BARD), the standard used in American criminal prosecutions. Many commentators have expressed deep frustrations with the BARD standard. Larry Laudan calls it "obscure, incoherent, and muddled."[26] James Whitman, while acknowledging BARD as fundamental and familiar, describes

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ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Fall 2008), http://plato.stanford.edu/archives/fall2008/entries/vagueness/.

23. Laudan, *supra* note 1, at 5–6. Of course this threshold test is in the forefront of the non-comparative version of IBE. Indeed, in our own legal system, the "sufficiency of the evidence" test may be approximating this threshold goodness.

24. The epistemologist and philosopher Larry Laudan does not think that this assumption is warranted. *See* Laudan, *supra* note 1, at 13 ("It is one thing to assert—as the IBE schema does—that satisfaction of the explanatory virtues will give us explanations that are more probable than not. It is quite another to affirm that satisfaction of a turbo-charged version of the specifically explanatory virtues will yield explanations that are probable beyond a reasonable doubt.").

25. We address this issue in greater detail in Part VI.A, infra.

26. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 30 (2006).

the standard as "vexingly difficult to interpret and apply."[27] Not surprisingly, jurors, whose understanding of the standard is perhaps *most* important, are not immune to BARD's complexities either. Oftentimes jurors have "only the haziest notion"[28] of what BARD truly means and are "understandably baffled"[29] when applying it. Compounding the problem, judicial instruction on BARD is typically less than helpful, and often introduces conceptual and various other errors into the equation.[30] The same holds true, albeit to a much lesser extent, with the civil standard "by a preponderance of the evidence" (POE). Simply put, it is very difficult to clarify what makes any given party's explanation better or more likely true than any other.

As a result, both standards of proof are often pegged to subjective probabilities.[31] Laudan notes that courts often characterize the standards in terms of the mental states of the jurors tasked with evaluating evidence presented against those standards.[32] Courts may ask jurors whether they believe that a party is guilty or liable to the requisite degree.[33] This is curious because in other endeavors where truth is at issue, such as mathematics or the sciences, we do not inquire as to the subjective confidence in an answer of the mathematician or scientist—we want proof. The obvious problem is this: The question posed by a trial should be whether the evidence presented supports a verdict. In practice, the question may be coextensive with whether jurors have subjective confidence in a verdict.[34] But hopefully, the subjective confidence of the jurors is not unrelated to whether the evidence supports a verdict. In any event, framing the standards of proof in terms of subjective confidence does little to explicate any standard of proof or

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27. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 1 (2008).

28. LAUDAN, *supra* note 26, at 31.

29. WHITMAN, *supra* note 27, at 1.

30. LAUDAN, *supra* note 26, at 31.

31. "Subjective probability" understands probability as an individual's "degree of belief." Efforts to explain this notion have generated much literature. The basic point is that subjective probability standards focus on an individual's subjective belief about the relevant events. Alan Hájek, *Interpretations of Probability*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Spring 2008), http://plato.stanford.edu/archives/spr2010/entries/probability-interpret/.

32. LAUDAN, *supra* note 26, at 51–62.

33. *Id.*

34. *Id.*

its appropriate application.

B. *Proposed Remedies for the Identified Problems*

Some commentators assert that IBE can be used to cure the lack of clarity regarding legal standards of proof. Ron Allen and Michael Pardo offer an account of how IBE can specifically explicate the BARD and POE standards.[35] Allen and Pardo assert that the premises of IBE already generally mirror trial structure.[36] They deconstruct IBE into two distinct phases. The first phase includes the generation of candidate explanations, while the second phase includes the evaluation of those explanations.[37] Such a construction roughly relates to the two stages of a trial: (1) the presentation of evidence by involved parties and (2) the evaluation of the evidentiary presentations by judge or jury.[38] The identification of facts to be explained, the search for explanations, and the generation of a set of candidate explanations are all accomplished when the involved parties present their respective cases.[39] The identification of the candidate explanation which provides the *best* explanation and selecting that explanation as the winning explanation is accomplished during the judge or jury's evaluation of the competing cases presented.[40]

At this point, such an argument demonstrates an attractive parallel between IBE and the trial structure. But such an argument should also include an attempt to characterize the legal standards of proof in terms familiar to IBE. It is most productive to first examine such a characterization of POE before proceeding to a corresponding characterization of BARD.

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35. *See generally* Pardo & Allen, *supra* note 2 (explaining how IBE applies to the legal proof process).

36. *Id.* at 234–35.

37. *Id.*

38. *Id.*

39. This identification of explanations may also happen during jury deliberations, because jurors can identify possible explanations. This is a conceptually different activity than the evaluation of explanations.

40. Pardo & Allen, *supra* note 2 at 236–38.

1. Modeling POE

The explication of POE in terms familiar to IBE is relatively straightforward. When jurors are deliberating, they are evaluating the different candidate explanations proffered by the parties (and perhaps jurors as well). The jurors then collectively decide which explanation is the best—based on their chosen criteria—and find for the party whose case more substantially conforms to the best explanation. It has been empirically demonstrated that when evaluating competing explanations and identifying the best, jurors often rely on factors such as completeness and coherence.[41] Given this information, it appears as though the POE standard is a simple application of IBE.

2. Modeling BARD

We will now consider two alternative methods for the utilization of IBE to model BARD. First, we will examine the "No Sufficiently Plausible Alternative" model. Second, we will examine the "High Degree of Virtue" model.

a. No Sufficiently Plausible Alternative

It has been suggested that when working with the BARD standard, jurors are not actually choosing the best explanation from among the set of candidate explanations.[42] Instead, jurors are searching for a "sufficiently plausible" explanation of the facts that is consistent with a defendant's innocence.[43] If such an explanation is found, then the defendant is acquitted, and if no such explanation is found, a defendant is determined to be guilty.[44] Regarding these outcomes, Josephson writes:

> Guilt has been established beyond a reasonable doubt when there is no plausible alternative explanation for the data that does not imply the guilt of the defendant. An explanation is plausible if it is

41. Pardo & Allen, *supra* note 2, at 225 n.3, 235.
42. *Id.* at 238.
43. *Id.*
44. *Id.* at 239.

> internally consistent, consistent with the known facts, not highly implausible,[45] and it must represent a "real possibility" rather than a mere logical possibility. A real possibility does not suppose the violation of any known law of nature, nor does it suppose any behavior that is completely unique and unprecedented, nor any extremely improbable chain of coincidences. In determining whether an explanation is highly implausible, the following principles of plausibility apply:
>
> • A hypothesis is more plausible the more similar it is to a proposition taken to be actual. That is, what has happened once may be happening again.
>
> • A hypothesis is less plausible as its predictions fail, and more plausible as it passes this test.
>
> • A hypothesis is more plausible as its preconditions[46] obtain and less plausible if they do not.[47]

Josephson's account of plausibility demonstrates one possible way to use IBE to model BARD.[48] It is by no means, however, the only way to use IBE to model BARD.

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45. Josephson's definition here may have fallen into the trap of circularity, because he has proffered, as an element of "plausibility," that the explanation "not [be] highly implausible." Certainly, if we knew how to identify this element, we would not have to go much further. We think we should proceed being as charitable to Josephson as we can. To this end, we can treat being "not highly implausible" as a placeholder for the following bulleted list of conditions. We can also ignore it as a sloppy mistake, and define plausibility using just the other conditions.

46. Here too Josephson's account is unclear and possibly incorrect. Josephson does not define "precondition;" by "precondition" we take him to mean a condition that must be true in order for the hypothesis to stand a chance of being true—a necessary condition. But if the preconditions of a hypothesis fail, the hypothesis has been refuted—it is not merely less plausible.

47. Josephson, *supra* note 7, at 1642.

48. Note that we could alternatively cash out "sufficiently plausible" in terms of the threshold goodness IBE inquiry, appealing to a particular set of explanatory virtues.

b. High Degree of Virtue

Another way of adapting IBE to model BARD is by requiring a more significant presence of the explanatory criteria that mark an explanation as the best.[49] That is, the explanation presented by the prosecution need not simply be the best—it must be the best by a wide margin. Thagard writes, "From the perspective of the theory of explanatory coherence, reasonable doubt might be viewed as an additional constraint on the maximisation of coherence, requiring that hypotheses concerning guilt must be substantially more plausible than ones concerning innocence."[50] More precisely, this requires both absolutely and relatively high degrees of explanatory virtue. If there is only one candidate explanation, and this requirement is understood as merely a relative requirement, then such a requirement does not impose any further requirement beyond IBE. This seems intuitively wrong, because even when there is only one explanation, the standard remains higher.

C. Are These Proposals Solutions?

These proposals should be evaluated for their utility in remedying the identified problems. Objections will remain, but it is worthwhile to summarize the dialectic thus far. In the interest of brevity, we will address the various solutions collectively, while leaving more specific analyses for later.

Recall that the most significant problems with legal standards of proof concern their lack of clarity.[51] First, the standards are difficult to apply consistently and reliably because their respective meanings are difficult to ascertain with any specificity. Second, subjective mental states are often tied to legal standards of proof in attempts to provide clarity to those standards. The linkage of the standards to subjective mental states belies the very purpose of the standards. The standards should focus on whether the presented evidence supports the verdict—not whether the jurors have

49. *See* Thagard, *supra* note 8, at 362 (explaining that "a hypothesis . . . is accepted if doing so maximizes the overall coherence among pieces of evidence and the conflicting hypotheses that compete to explain the evidence").

50. *Id.* at 366–67.

51. *See supra* text accompanying notes 28–29 (noting that standards of proof are difficult for jurors to interpret).

subjective confidence in the verdict.

At the outset, we note that the proposed IBE solutions rectify the second problem—the inapt linkage of subjective mental states to legal standards of proof. With IBE's use of explanatory virtues like simplicity, coherence with background beliefs, and consilience, the consideration of subjective mental states is eliminated and the focus returns to whether the evidence supports the verdict through the explanatory virtues of the explanation.

With regard to clarity, modeling legal standards of proof through IBE takes a quick leap forward. At present, it is often unclear why one party's offered explanation is preferable to another party's explanation in the eyes of jurors. IBE can fill this lacuna by dictating to jurors the explanatory virtues that indicate goodness, probability, and ultimately, a winner, thus providing legal standards of proof with a much greater degree of clarity. If such an IBE solution were to be implemented in a trial setting in which jurors were confused as to what criteria should be considered when evaluating competing explanations, a judge could instruct the jury to consider the explanatory virtues of the competing cases. This, in turn, would inform the jury's assessment of whether an explanation is good enough to satisfy the relevant standard of proof. This approach is a marked improvement over the current typical circumstances where juror confusion is fed by judicial silence or mistake.

IV. PROBLEMS WITH THE PROPOSED SOLUTIONS

A. Problems with the IBE Model of POE

IBE appears to present an appropriate apparatus by which POE can be modeled, but there is one very significant potential problem. Suppose there are only two candidate explanations of a fact, and both are bad.[52] Given these two poor explanations, h_1 and h_2, IBE may still not license either argument, even if one is better,[53] because of the IBE requirement that a candidate explanation satisfy a threshold goodness—it cannot merely be the best of a bad bunch.[54]

52. Laudan, *supra* note 1, at 13–14.
53. *Id.*
54. *Id.*

Some have suggested that this result exposes a potential disanalogy between IBE and the civil standard.[55] It seems that in a civil trial, if one party's case is better than the other's, but fails to satisfy threshold goodness, the jury must still find for that party.[56] This is contrary to what IBE would license. Therefore, IBE cannot model the POE civil standard of proof.[57]

B. Problems with the IBE Model of BARD

Two distinct problems have been suggested with the traditional IBE model of BARD. Imagine a trial with two competing stories—the prosecutor's story and the defendant's story. Suppose both stories offer poor explanations. Even if the prosecutor's story were to enjoy some slim advantage in goodness, if we were to permit conviction in that case we would likely undertake too great a risk of convicting an innocent defendant. Such a risk is strongly disfavored by societal values.[58] However, it seems that traditional IBE licenses this counterintuitive and counterproductive result.[59] Given the opposite, if both competing stories are quite good, if the prosecutor's story is better, traditional IBE would require conviction.[60] However, the defendant's good explanation should allow for acquittal because, as even a plausible story, it should suffice to establish reasonable doubt.[61]

There are remedies to the issues raised by the use of traditional IBE in the BARD context, along the lines of the two proposed models discussed above. First, we could require that in order for the prosecutor's explanation to satisfy the BARD standard, it must possess a "higher degree of explanatory virtue," particularly in comparison to any other competing explanation. It must not simply be the best—it must be the best by a wide margin.[62] Second, we could require that in order for the prosecutor to satisfy the BARD

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 7–8.
59. *Id.*
60. *Id.*
61. *Id.*
62. *See supra* Part III.B.2.b. (discussing the fact that the explanation that is "best" must also be "best" by a margin wide enough to overcome any reasonable doubt presented by alternative explanations).

standard, there must not be *any* "sufficiently plausible" explanation consistent with innocence. And, in judging sufficient plausibility, we look to the explanatory virtues of the explanation.[63] Both suggestions require further consideration.

1. High Degree of Virtue

One concern with the IBE model of High Degree of Virtue is whether such a model eliminates the nebulous nature of the BARD standard. The chief ambition of using the IBE model in the BARD context is to provide clarity to the standard. However, the High Degree of Virtue model requires that we define the gap between the plausibility of the prosecutor's story and the plausibility of the defendant's story. Such a gap is itself highly nebulous. Laudan asserts that jurors would be equally baffled in applying this model of BARD, so they need not bother with this apparatus.[64] That is, jurors would struggle mightily with concepts such as simplicity, coherence with background beliefs, plausibility, and the like.

2. No Sufficiently Plausible Alternative

One potential issue with the No Sufficiently Plausible Alternative IBE model is that it contravenes the essential meaning of an "inference to the best explanation." Such a model asks whether a particular explanation is the only plausible explanation. However, the purpose of IBE is to answer the question of what to do in the event of multiple plausible explanations. The No Sufficiently Plausible Alternative model looks only to whether there is *one* plausible explanation of innocence. This seemingly rejects the preconditions for IBE to apply. Accordingly, it does not seem to be a useful IBE model.[65]

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63. *See supra* Part III.B.2. (outlining explanatory virtues, such as plausibility and coherence).

64. Laudan, *supra* note 1, at 8–9.

65. *Id.* at 13–14. Laudan further notes that any maneuvering that changes the definition of "best" will not help the situation. *Id.* at 11. If we change "best" to mean "lack of any plausible rival," we will break the crucial link in IBE between something being the best explanation and being probably true. *Id.* at 10–11. Furthermore, this would lead to the unintuitive result that "the same hypothesis [will be] credible in situation$_a$ [but] not worthy of belief in situation$_b$, even though the evidence and background beliefs in the two situations are indistinguishable."

V. RESPONSES TO THE IDENTIFIED ISSUES

A. Utilizing IBE in the POE Context

IBE advocates can offer a strong response to the objection raised against its utility in modeling POE. In articulating this response, it is important to consider the respective burdens of proof and persuasion. If a particular party is saddled with the burden of persuasion, then that party is obliged to convince the trier of fact to decide the dispute in that party's favor.[66]

Consider a case in which only two poor explanations exist—h_1 for the plaintiff and h_2 for the defendant. Both explanations are "poor" in that neither h_1 nor h_2 meet the threshold explanatory goodness—a minimum threshold of plausibility—required for license by IBE. The objection here is predicated on the assumption that the traditional IBE model requires that the jurors must decide for the plaintiff in the event h_1 demonstrates any superior quality of goodness to h_2. But this seems incorrect.

Imagine that a plaintiff proffers poor explanation h_1, but the defendant is silent and offers no competing explanation. As the explanation advanced by the plaintiff is poor, it will not satisfy the standard of threshold goodness; that is, it cannot satisfy the minimum threshold of plausibility. In such a case, the plaintiff has not satisfied his burden of persuasion. The law dictates that the jury must find for the defendant. Even if the defendant offers an equally poor explanation—or a *worse* explanation—the outcome is seemingly unchanged.[67] Whether the defendant responds to the plaintiff's argument with silence or poor explanation h_2, the plaintiff has not satisfied its burden of persuasion and the jury must find for the defendant.[68] If the jurors have no minimally plausible

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Id. at 11. Yet Laudan thinks this is not good, for "[g]iven the same evidence and same background beliefs, it cannot be reasonable to believe h1 is probably true and not reasonable to believe h1 is probably true." *Id.*

66. *See* El v. Se. Pa. Transp. Auth., 479 F.3d 232, 237 n.6 (3d Cir. 2007) ("The burden of persuasion . . . is the obligation to convince the factfinder at trial that a litigant's necessary propositions of fact are indeed true.").

67. This assumes that the defendant's poor explanation does not make him seem *more* liable—for example, by making him look less credible and thereby making the plaintiff's explanation more credible.

68. *See* Pardo & Allen, *supra* note 2, at 238 (stating that when two equally poor explanations are proffered, judgment will go against the party with the burden of persuasion).

explanations, the jurors are prevented from reaching any conclusion. As a default rule, when jurors are unable to reach a conclusion, the defendant prevails.[69]

Similarly, IBE demands that, given the existence of multiple hypotheses all falling short of threshold goodness, no hypotheses be licensed as probable. Consequently, it appears that IBE is aligned with POE on this concern.

B. Utilizing IBE in the BARD Context

1. High Degree of Virtue

Recall that the primary objection to utilizing the High Degree of Virtue model is that it fails to provide any greater degree of clarity.[70] This IBE proposal requires that, in order to gain a conviction, a prosecutor must offer an explanation that is substantially more plausible than all others. This plausibility gap is similar to the notion of reasonable doubt in terms of clarity—both are nebulous and not likely to facilitate juror comprehension of the relevant standards.

However, such pointed criticism seems overreaching. Some residual lack of clarity is inherent to the High Degree of Virtue model of IBE. This lack of clarity, however, is not necessarily fatal to the model's utility. It could be the case that the High Degree of Virtue model still serves a meaningful purpose by filling comprehension gaps and guiding jurors in the application of legal standards.

Recall that the typical effect of the BARD standard is to inspire utter confusion in those tasked with its application.[71] Because typical jurors lack any basis on which to make determinations regarding reasonable doubt, BARD has been characterized in terms of subjective states of mind.[72] That is, instead of focusing on whether the evidence supports a verdict, jurors

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69. This is because, as the plaintiff has offered no plausible explanation, the plaintiff has not carried the burden of persuasion.

70. *See supra* Part IV.B.1. (raising concern that High Degree of Virtue model does not eliminate nebulous nature of BARD standard).

71. *See supra* Part III.A. (discussing the view that the BARD standard is frustratingly difficult to apply).

72. LAUDAN, *supra* note 26, at 61 (stating that BARD has been defined "in terms of juror's subjective states of mind").

instead focus on their own subjective confidence in a verdict.

In response, IBE's modeling of BARD supplies a basis for how to evaluate whether a particular verdict has been proven beyond a reasonable doubt. Consider a hypothetical exchange between judge and jury: the judge instructs the jury as to the BARD standard, indicating that the jury must convict if and only if it is convinced beyond a reasonable doubt that the defendant is guilty. Baffled by the judge's initial explanation of the standard, the jurors ask for clarification as to the standard's meaning. In the absence of the IBE model, the judge is likely to either remain silent[73] or reference subjective mental states in an attempt to elucidate the standard.[74] Using the IBE model, the judge is enabled to respond more fruitfully. The judge is empowered to say, "Consider the competing explanations, and ask yourselves if each of the explanations demonstrate a high degree of simplicity, coherence with background beliefs, and consilience. If the degree to which these explanatory virtues are present is substantially higher than any other explanation consistent with the defendant's innocence, then you must convict." Although the possibility exists that the jurors may be unsure as to how to define "substantially higher," and the Higher Degree of Virtue model may not provide a thoroughly satisfying response to this point, it is likely that employing the Higher Degree of Virtue model would result in less juror confusion and a greater reliability in the application of the BARD standard than would exist in its absence.

At the very least, jurors may now conceptualize what kinds of features of an explanation make that explanation more likely to be true. The question as to whether an explanation is *very* good or *much* better than another explanation may remain a difficult question for a typical jury to answer. However, if the answer to this question is at least partly informed by providing the jury with the features of appropriate criteria for evaluating competing explanations, then such a question, while undoubtedly remaining difficult, will become significantly easier to answer. Jurors will still be required to

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73. *See* BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 2:4 ("Most of these courts have reached the conclusion that reasonable doubt need not be defined on the grounds that the term is self-explanatory, and a definition would tend only to confuse the jury.").

74. *See supra* text accompanying notes 31–34 (emphasizing the problem of subjectivity as it relates to both standards of proof and jury confidence in verdicts).

determine whether there exists a sufficient gap between the presences of explanatory virtues in two competing explanations, and this will likely remain a difficult determination. Nevertheless, such a question addresses a significantly narrower issue than the questions BARD asks absent this IBE model. Once a jury makes a determination on the component explanatory virtues, it may then compound those particular determinations to facilitate a determination on the global question.

It could be countered that such a model does not clarify the standards of proof, but rather addresses the grounds for evaluating explanations. That is, such a model values not how strongly the evidence supports the result, but what features of an explanation demonstrate that the evidence supports the result. Even still, we nonetheless clarify legal standards of proof by identifying the important component features of candidate explanations. If jurors are aware of the appropriate basis on which to evaluate an explanation, they are more capable of determining whether that explanation is good *and* whether that explanation is substantially better than another.

Consider a loosely analogical hypothetical: Two men are arguing whether one is substantially more bald than the other. To resolve this debate, they appeal to a group of random strangers. All of the strangers are endowed with luscious heads of hair and have never thoughtfully reflected on the subject of baldness. Accordingly, the random strangers perceive the question presented for their determination to be a difficult one. Specifically, determining whether one man is substantially more bald than the other is difficult to gauge.[75] This issue might be more easily resolved if the strangers were provided with some of the component features that bear on the issue of baldness: surface area of the head covered by hair (total and proportionally), hair length, hair thickness, and hair volume, or the curly or straight qualities of hair. This issue would be much easier to resolve if the two men demonstrated a substantial difference as to each of the factors, particularly if these factors may be then compounded to decide if there is a substantial global difference. In the same way, identifying the dimensions on which to evaluate a

75. For more on the famous philosophical problem of baldness (and related paradoxes), see Dominic Hyde, *Sorites Paradox*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Fall 2008), http://plato.stanford.edu/archives/fall2008/entries/sorites-paradox/.

candidate explanation can help illuminate a standard of proof. Consequently, while the High Degree of Virtue model is no panacea for modeling BARD, it nonetheless helps to clarify the standard in a meaningful way.

2. No Sufficiently Plausible Alternative

Recall that the complaint with the No Sufficiently Plausible Alternative model is that it seems completely disconnected from IBE.[76] It is granted that IBE is not likely to prove a perfect model for the BARD standard. Indeed, the very conclusion of IBE is that one hypothesis is probably true. And, as such a conclusion can be reached on the basis of goodness well short of the level required for BARD, pure IBE cannot hope to effectively model such a standard. Consequently, it would seem that IBE must be modified in some way if it is to serve as a means to model BARD.

In order to modify IBE thusly, we must identify and distinguish the core feature of IBE: that the explanatory virtues of an explanation bear on how probable that explanation is.[77] Reducing IBE to this characterization, it is clear that IBE can still serve to model BARD despite requiring subtle alterations to do so.

Recall that using IBE to model BARD indicates that a finding of guilt proven beyond a reasonable doubt is equivalent to a finding of the prosecutor's story as plausible *while at the same time* finding no plausible story consistent with the defendant's innocence.[78] Such a result relies on defining plausibility in terms of explanatory virtues. So, the proposed remodeling of BARD reflects the core consideration of IBE.

A persistent objector might argue that IBE is, above all else, a rule that allows us to infer the truth of a hypothesis—that it is, crucially, a rule that dictates a course of action when one is presented with multiple plausible explanations. Furthermore, the No Sufficiently Plausible Alternative theory operates only in the presence of, at most, a single plausible explanation, thereby

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76. *See supra* Part IV.B.2. (explaining that the No Sufficiently Plausible Alternative model only operates when there is only one plausible explanation, and thus is not a comparison of competing candidate explanations).

77. *See* Pardo & Allen, *supra* note 2, at 229–33 (describing IBE as, first and foremost, "explanation as a guide to inference").

78. *See supra* text accompanying notes 43–44 (explaining two-part process for determining guilt using BARD).

rendering IBE moot.

In response, we must first recognize that, although it may not be the *most* useful application of IBE, IBE does apply in cases where only one plausible explanation is available.[79] In such situations, it is only necessary to ask whether the single available explanation satisfies threshold goodness. If the answer is affirmative, then we are able to conclude that the answer is probable. This single-answer IBE solution isolates each putative explanation and asks whether each is plausible, a question answered by examining the presence of explanatory virtues.

Despite its differences from traditional IBE, the No Sufficiently Plausible Alternative model utilizes the most important feature of IBE to model BARD—the reliance on explanatory virtues in adjudging the likelihood of an explanation. Such an approach tracks precisely the single-explanation species of IBE.

VI. LINGERING ISSUES AND THOUGHTS ON SOLUTIONS

We have thus far claimed that the common objections to IBE modeling of legal standards of proof can be rebutted by the capable IBE theorist. However, several remaining points need to be addressed in order to fortify the case for IBE.

A. Lingering Issues with BARD

At least one IBE model of BARD seems to rely on the assumption that the greater the presence of explanatory virtues, the more probable it is that the explanation is true. The Higher Degree of Virtue model explicitly indicates that in order to supplement IBE to model the higher criminal standard of proof, we must require a maximized presence of explanatory virtue. Although this oft-asserted proposition remains unsupported,[80] this issue is a legitimate point of concern for the Higher Degree of Virtue proposal. If the principle proves untrue, then this model is clearly and fatally

79. *See supra* text accompanying note 12 (discussing that when only one explanation is available, IBE is used to evaluate whether the explanation is plausible).

80. Laudan, *supra* note 1, at 13.

undercut. Accordingly, this principle deserves serious consideration.

Suppose a rigorous search for candidate explanations is undertaken, and a set of candidate explanations $\{h_1, h_2, h_3, \ldots, h_n\}$ is revealed that putatively explains some set of facts. These explanations all exhibit threshold goodness, and the best—h_1—is selected as the winning explanation. Utilizing IBE, h_1 is probably true. However, suppose a new explanation h_j is discovered, such that when compared to h_i (and any of the other previously discarded candidate explanations) h_j is better. Utilizing IBE again, we should then conclude that h_j is probably true. But perhaps we can say more. The evaluation of h_j is a better evaluation than the evaluation of h_i. It has involved a more thorough search for explanations and has resulted in a winning explanation that exemplifies features of goodness to a higher degree. Thus, it seems that it should be more probable that h_j is true.

There is a strong counter to this line of reasoning. The aforementioned argument shifts its underlying proposition from "there is a higher probability that our IBE judgment, which asserts that h_j is probable, is correct because of the heightened degree of explanatory virtue" to "there is a higher probability that h_j is true." This might be unjustified, because it is unclear whether a higher degree of explanatory virtue translates into a higher probability that the explanation is true. There is strong reason to think that a higher degree of explanatory virtue—or at least a high degree of certain explanatory virtues—has no bearing on the likelihood of an explanation's truth. In particular, it is entirely unclear that the hallmark explanatory virtue of simplicity bears any relationship to the likelihood of an explanation being true. The fact that an explanation is simpler than another does not seem to bear on whether that explanation is more probable. Similarly, testability does not seem to covary with the likelihood of truth. The fact that a proposition can be tested for its truth does not seem to make it more likely that such a proposition is true.[81] As a final example, consider internal consistency. This virtue does not seem to admit comparatives. Rather, it admits a binary answer: an explanation is either internally consistent or it is not. The fact that an explanation is internally inconsistent merely indicates that it has a zero probability.

81. It could be that testable theories often make broader claims and as a result are more prone to being false. In this way, testability may actually signal a lower probability of a theory being true.

So, internal consistency does not heighten the likelihood of an explanation in a way that allows us to reach a degree of probability greater than simply "probable."

As noted, there are many different accounts of which features are the explanatory virtues that IBE should value. The features of simplicity, testability, and internal consistency are often identified in IBE accounts as explanatory virtues in spite of their lack of connection to the likelihood an explanation is true. As a result, their presence in an IBE account may actually undercut the lynchpin proposition that a higher degree of explanatory virtue implies a higher likelihood of the explanation being true.

An ambitious IBE proponent might respond that these three virtues *do* covary with probability. This is a difficult case to make. For the reasons previously discussed, there does not appear to be any plausible argument that internal consistency covaries with probability.[82] Perhaps, with regard to simplicity, an IBE proponent could endorse the ontological view that simpler theories are more likely to be true in a manner similar to the strong ontological version of Occam's Razor.[83] Obviously, such a view would garner considerable controversy and prove difficult to establish.

With regard to testability, the IBE proponent might suggest the following: when an explanation is testable, it allows us to discern whether it is true. After that explanation is subject to and survives testing, it shows itself to be more probable. In essence, this defense of testability's covariance with probability argues that testability, combined with coherence with background beliefs, covaries with probability. But this is not a true defense of testability. It seems that *passing the proffered test* and coherence with background beliefs are the features doing the most with regard to covariance with probability. Thus, the value of testability remains unclear.

That being said, this kind of response indicates another

82. The IBE theorist could argue that the binary-answer feature of internal consistency does not contribute to the weighing of explanations. It really only operates as a threshold question that eliminates certain candidates, and so we need not worry about it covarying with probability.

83. Occam's Razor is generally thought to be applicable only when the theories compared have the same predictive power. But presumably the virtue of simplicity may weigh in even when there is a difference in predictive power. Alan Baker, *Simplicity*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Summer 2011), http://plato.stanford.edu/archives/sum2011/entries/simplicity/.

potential IBE solution. In utilizing the IBE model, it could be possible to look only to explanatory virtues that covary with probability and require that an explanation demonstrate a heightened presence of these virtues in order to show itself more probable. One such explanatory virtue seems to be coherence with background beliefs. That is, if an explanation better coheres with background beliefs, that explanation is more probable. This is merely a corollary of induction. Furthermore, consilience appears to covary with probability: if an explanation is more like other successful explanations, then it will be more probable. This is also an instantiation of induction.

With this in mind, IBE proposals may ultimately have to be constructed quite differently. The High Degree of Virtue model might become the High Degree of *Certain Kinds* of Virtue model. Though such a model might be susceptible to familiar objections,[84] such a reimagining offers great promise.

It is important to note that the No Substantially Plausible Alternative model has a particularly curious feature. Recall that when only one plausible explanation exists, IBE licenses only that the explanation is probably true.[85] However, the No Substantially Plausible Alternative model posits that if there is only one plausible explanation, and that explanation is consistent with guilt, convict. If

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84. One familiar objection might be that once we utilize certain kinds of explanatory virtues and abandon other virtues, we may reasonably ask whether this analysis bears significant relation to IBE anymore. Since we are picking out the virtues that covary with probability, it seems that the focus on explanatory virtue has been substituted for a focus on probabilistic virtue. This is not bad, but it is not IBE. Of course, the IBE theorist could also claim that the explanatory virtues—the features that make explanations good—happen to covary with probability. This is a distinct solution from separating out explanatory virtues that covary with probability, because here the IBE theorist would be arguing that all of the explanatory virtues happen to covary with probability. The IBE theorist could accomplish this by arguing, as seen above, that simplicity, testability, and internal consistency covary with probability; but the IBE theorist could also abandon these features, claiming they are not explanatory virtues. The latter seems to be the best way for the IBE theorist to proceed, although it may be difficult to create a workable IBE model that does not involve simplicity, testability, or internal consistency. An IBE model lacking these explanatory virtues may not be tracking explanatory virtue properly, and in that sense the objection arises again that this is not related to IBE.

85. *See supra* Part III.B.2.b. (describing High Degree of Virtue model as establishing a high absolute standard of plausibility that can be applied to a single explanation).

IBE can only indicate that an explanation is probably true when modeling BARD, then it seems that convictions result only when guilt has been shown to be probably true. This is counterintuitive because BARD should represent a much higher standard.

There are at least two responses in defense of the No Substantially Plausible Alternative model. First, it could be said that IBE actually licenses the claim that an explanation is very likely true, not just probably true, when it is the only plausible explanation discovered after a thorough search for explanations. However, this is an ambitious claim, and it is not clear how it would be established.

A better response would be that a prosecutor's explanation must not be merely plausible, but must exhibit a greater degree of virtue. This idea is borrowed from the Higher Degree of Virtue model. In this event, the No Substantially Plausible Alternative model could license the conclusion that the explanation is not merely probable—it is *highly* probable. However, such a conclusion would depend on the aforementioned principle that the higher the presence of the explanatory virtue, the more probable it is that the explanation is true. This may be problematic for the reasons previously discussed, but, as we have seen, there is promise in this solution.

B. Lingering Issues with POE

The model of IBE as POE may provide some counterintuitive results in situations with multiple plausible theories. Imagine a situation in which there is one plausible explanation supporting the plaintiff and two plausible explanations supporting the defendant. Suppose that the plaintiff's explanation is 40% likely and that each of the defendant's explanations is 30% likely. Further suppose that the disjunction of the defendant's explanations is greater than 50%. Now assume that the plaintiff's explanation was superior in virtue to either of the defendant's explanations. In such a case, the IBE model of POE would direct the jurors to find for the plaintiff.[86] The plaintiff's story is the winner, and the verdict will be rendered for the plaintiff.[87] However, it is more likely that the law is on the

86. It should usually be the case that the plaintiff's explanation is superior in virtue. If the plaintiff's explanation is not usually superior in virtue despite being more probable, IBE has a problem in that explanatory virtue seemingly does not covary with probability.

87. Pardo & Allen, *supra* note 2, at 235.

defendant's side. In these situations, IBE as a model for POE seems to contradict the "more likely than not" POE standard. This is potentially problematic even where alternative pleading is not permitted, because jurors might conjure explanations on the defendant's behalf. Furthermore, appeals to threshold plausibility will not suffice as all explanations are plausible.

As an initial matter, it may be asked whether IBE contradicts the result dictated by POE. It may be true that POE does license the verdict for the plaintiff. One could argue that the POE standard simply compares the best candidate plaintiff explanation against the best candidate defendant story. This result would belie the characterization of POE as "the more likely than not" standard. Indeed, the view that "if the jury believes two mutually incompatible stories favor a party, the party gets the benefit of the disjunction of their probabilities" is prominent in the literature.[88] Thus, the IBE proponent could proceed by characterizing the POE standard differently, though this approach should be generally disfavored.

Another way to respond to objections to the IBE model of POE is to assert that the distinct arguments offered by the defendant should actually be combined in disjunction. If this approach is used, and the explanatory virtue of the plaintiff's explanation is inferior to the disjunctive explanation, a precisely correct result would be achieved.[89] This seems to be the best way of proceeding, though it does require a substantial amount of work by the IBE proponent. Specifically, IBE accounts may have to say more about how to judge the explanatory virtues of disjunctions because, at first glance, disjunctive explanations seem to score very poorly in the simplicity and non-ad hoc categories. As a result, it is unclear that a defendant's disjunctive explanation, though it is itself more probable than not, would be the best explanation according to IBE. Again, this would expose a disanalogy between IBE and POE.

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88. *See id.* at 249 (suggesting that Richard Friedman and Dale Nance argue for this principle of aggregating parties' stories).

89. If the explanatory virtue of the plaintiff's explanation was superior to the disjunctive explanation, this would simply expose a mistake by IBE. This is permissible since IBE is defeasible.

VII. CONCLUSION

We have argued that the proponents of IBE as a model for legal standards of proof can respond to the common objections against it. That being said, significant issues remain for the use of such a model. Among other problems, IBE models of BARD seem to rely on the assumption that the higher the presence of explanatory virtue, the more probable it is that the explanation is true. Though crucial to these IBE proposals, this principle has yet to find convincing support in its favor. Indeed, there are strong reasons to think it false, because some explanatory virtues—such as simplicity, testability, and internal coherence—do not seem to covary with probability. To address this worry, IBE proposals could be suitably altered to incorporate only explanatory virtues that do covary with probability. This solution has potential, but it also may undercut a separate but equally crucial aspect of IBE: a focus on explanatory virtue.

With regard to POE, IBE models seem to lead to counterintuitive results when there are multiple plausible explanations in favor of a defendant that aggregate to satisfy the "more than likely" threshold. When each definition for the defendant is inferior to the plaintiff's, the IBE model of POE would direct a verdict for the plaintiff. However, if the defendant's inferior explanations aggregate to greater than 50% likelihood, a verdict should be rendered for the defendant. In such a scenario, IBE seems to diverge from POE. The IBE proponent could respond that the defendant's explanations may be combined in disjunction, ensuring that IBE and POE ultimately align. This approach shows promise, but how to gauge the explanatory virtue of disjunctions requires explication. Disjunctive explanation may not be simple or non-ad hoc, and so IBE may not prefer such explanations. If this is the case, then IBE will again diverge from POE.

In light of the preceding, there is reason for optimism with regard to IBE's utility in modeling legal standards of proof. However, the possible responses to IBE counterarguments offered in this article are incomplete, and demonstrate that there is a significant amount of work yet to be done before IBE can truly be said to model legal standards of proof. Much of this may be accomplished by the careful crafting of the explanatory virtues considered in IBE proposals modeling legal standards of proof. As noted earlier, this is

a source of significant controversy, with many distinct solutions offered. Resolving this tension is both difficult and imperative to the utility of IBE. One thing is clear: the limited comprehension of legal standards of proof is less than satisfactory and deserves our attention and honest effort. IBE has shown great promise as an aid in remedying this shortcoming, and it behooves us to fully explore its potential.

Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases

Lori A. Roberts*

I. INTRODUCTION

"A lie told enough times becomes the truth."
Vladimir Lenin

There are few certainties in litigation, but one that any injured plaintiff with health care insurance can rely on is that a defendant tortfeasor will argue that the plaintiff's health care bills are illusory, and that the plaintiff will recover a windfall if he is allowed to recover the full amount of those bills as economic damages. This strategy is repeated so often, it's a cliché:

> Ms. Lopez slipped and fell at a grocery store, suffering various injuries.[1] Her medical bills totaled

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> $59,700.[2] Ms. Lopez's health care providers were contractually bound to accept significantly reduced amounts by her health care insurer as full payment and satisfaction for those bills.[3] Accordingly, the health care providers wrote off approximately $42,000 and the health care insurer paid the remaining balance of $16,837.[4] Before trial, the defendant tortfeasor moved in limine to prohibit Ms. Lopez from presenting evidence of the amount of the medical bills above what was actually paid by her health care insurer and accepted by the healthcare providers in satisfaction of billings.[5] The defendant tortfeasor argued that Ms. Lopez should only be able to present evidence of the $16,837, because the medical bills reflecting $59,700 "had nothing to do with anything because they were largely illusory or phantom," since neither she nor her medical insurer actually had to pay them.[6] The defendant tortfeasor argued that recovery of the $59,700 would be a windfall gain to Ms. Lopez.[7]

Like many states without legislation on point, the court in *Lopez* reasoned that the negotiated rate differential—the difference between the billed rate for medical care and the actual amount paid by the insurer as negotiated between the medical provider and the insurer—was a collateral source benefit and applied the common-law collateral source rule.[8] Specifically, the Arizona Court of Appeals

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1. Lopez v. Safeway Stores, Inc., 129 P.3d 487, 488 (Ariz. Ct. App. 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 491.
7. *Id.* at 495.
8. *Id.* at 496; RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF LIABILITY § 920A (1979) (stating that the collateral source rule provides that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of

reasoned that the collateral source rule was well established, and without legislative modification, it was bound to apply the doctrine.[9] In doing so, the court permitted Ms. Lopez to recover the entire amount billed to her by her health care providers as economic damages,[10] despite the defendant tortfeasor's characterization of the medical bills as "illusory"[11] and the plaintiff's recovery of that amount as a "windfall."[12] While the Arizona court did not adopt the defendant's characterizations of the plaintiff's medical bills as illusory or the plaintiff's recovery of that amount as a windfall, the skillful rhetoric, through repetition to courts and legislatures, is transforming these inaccurate labels into facts in many other states.

Nearly every state has addressed the issue of whether the negotiated rate differential should be considered a collateral source benefit and thus an injured plaintiff should be allowed to collect that entire amount as economic damages, or whether a plaintiff should be limited to recover only the amount the medical provider actually accepted from the plaintiff's health insurer in full satisfaction of the bills.[13] Nevertheless, there is considerable disparity among the states

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the harm for which the tortfeasor is liable"). *See infra* Part II.B. (outlining the use of the collateral source rule).

9. *Lopez*, 129 P.3d at 497.

10. *Id.*

11. *Id.* at 491.

12. *Id.* at 495.

13. Some, but not all, states distinguish policy reasons for applying the collateral source rule to the negotiated rate differential in circumstances where the plaintiff's insurance was private health care insurance as opposed to Medicaid or a state welfare-type insurance. *See generally* 77 A.L.R. 3d 366 (1977) (discussing effect of receiving public relief or gratuity on collateral source rule). This Article is limited to analyzing the application of the collateral source rule to cases where the injured plaintiff's medical bills were satisfied by private health insurance paid for by the plaintiff or by a third party on behalf of the plaintiff, rather than the tortfeasor, thus making the plaintiff personally liable via contract for her healthcare provider's charges. In particular, this Article only addresses the calculation of that portion of a plaintiff's economic damages that are covered by plaintiff's private health insurance. This Article does not address instances where, because Medicaid or another government-provided insurance satisfied the plaintiff's health care bills, a plaintiff incurs no personal liability for charges to the health care plan. For a discussion regarding policy implications involved in application of the collateral source rule where plaintiff is insured by Medicaid or state welfare insurance, see generally Guillermo Gabriel Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for*

regarding the application of the collateral source rule in these situations. The one consistency is the rhetorical theme advanced by defendants that the health care providers' bills are illusory—having no consequences in reality—and that the plaintiff's recovery of those billed costs would be a *windfall* gain.

Like Arizona, some jurisdictions consider the negotiated rate differential a collateral source benefit and apply the common-law collateral source rule. In some of these states the legislature has confirmed the applicability of the collateral source rule to these medical bills that were satisfied by write-offs and payments by plaintiff's private health insurance in personal injury cases. In other states, however, Ms. Lopez would have been limited to recovery of only $16,837 as economic damages. In these states, the legislatures have passed tort reform[14] legislation that has modified or abolished the collateral source rule in personal injury cases and has limited economic damages to the amount the medical care provider accepted from the plaintiff's health care insurer as satisfaction for the medical bills. A review of these legislative hearings reveals a recurring effort by liability insurance carriers to influence legislatures to consider actual medical bills as misleading assessments of a plaintiff's damages, and to recognize economic recovery in excess of a health care insurer's payment as a windfall. While persuasion through skillful choice of language is a routine and revered tool in the practice of law,[15] when, because of use and repetition, misleading

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Medicare and Medicaid Write-Offs, 55 U. KAN. L. REV. 463 (2007) (discussing policy implications involved in applying collateral source rule where plaintiff is insured by Medicaid or other state welfare insurance).

14. The term *tort reform* itself has been subject to debate. *See, e.g.*, Joshua D. Kelner, *Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. DAYTON L. REV. 243, 305 (2006) (arguing the term *tort reform* is a misnomer). *See also* Tort Deform, THE CIVIL JUSTICE DEF. BLOG (May 10, 2007), http://www.tortdeform.com (purporting to be a blog that "confronts and transcends the arguments put forth by the tort 'reform' movement, and advocates for access to justice and the civil justice system for all Americans").

15. *See generally* BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS (3d ed. 1999) (containing an entire section specifically covering word choice); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 113 (2008) (urging the reader to "banish jargon, hackneyed expressions, and needless Latin"); James E. Murray, *Understanding Law as Metaphor*, 34 J. OF LEGAL EDUC. 714 (1984) (discussing importance of metaphorical thinking in law); Kristen K. Robbins-Tiscione, *A Call To Combine Rhetorical Theory and Practice in the Legal*

rhetoric is relied upon by courts and legislatures as fact, the resulting rule of law is flawed.

Part I of this Article explores the unsavory legal and social implications of the terms *windfall* and *illusory* and the persuasive nature of these labels on courts, legislatures, and society. I then survey state appellate court decisions that address the issue of whether the negotiated rate differential is a collateral source benefit that should offset a plaintiff's recovery in personal injury cases, highlighting evidence of the rhetorical themes of labeling the plaintiff's medical bills as *illusory* or the plaintiff's recovery as a *windfall* to demonstrate that this pronounced strategy is commonly embedded in appellate court opinions. I also examine legislative notes and hearings to demonstrate that this same rhetoric is influencing how legislators think about the issue and respond to rulings of the judiciary applying the collateral source rule to personal injury recovery.

In Part II of this Article, I examine the logical fallacies of using the terms *illusory* and *windfall* to frame an injured plaintiff's health care bills and the recovery of that amount to support abolition of the collateral source rule in personal injury cases. I argue that despite this repeated rhetoric, medical care provider's bills are not illusory; those bills are real and a plaintiff's recovery of the amount billed by a health care provider is not a windfall, but rather it is a return on a prudent investment obtained through foresight and diligence by the plaintiff, one that society should want to encourage.

Part III of this Article examines the tension between the legislature and the judiciary regarding the application of the collateral source rule to a plaintiff's recovery of the negotiated rate differential in personal injury cases. What emerges is evidence that a body of law is being created based in part on the implications of

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Writing Classroom, 50 WASHBURN L.J. 319 (2011) (advocating incorporation of rhetorical theory in legal writing courses); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 308 (2010) (noting that priming makes certain words more immediate and accessible to the brain); Deborah Zalesne & David Nadvorney, *Integrating Academic Skills into First Year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning*, 28 PACE L. REV. 271, 288 (2008) (discussing the effective use of word choice in legal writing).

these labels, rather than reality. This rhetoric is influencing courts and legislatures to wrongly abrogate the collateral source rule as it applies in personal injury cases. I conclude that the negotiated rate differential is a collateral source benefit to a privately insured plaintiff and, applying the collateral source rule, economic damages, including the reasonable value of medical services, should be calculated by the amount charged by the health care provider. Neither the judiciary nor the legislature should abolish the collateral source rule in this context based on false notions that the medical bills are illusory or that plaintiffs will be recovering windfalls. This conclusion acknowledges the need for legislative and judicial safeguards to ensure that health care providers are not engaging in fraudulent pricing schemes aimed at gouging liability insurers and appreciates the realities of personal injury recovery. This conclusion also recognizes that persuasion though skillful word choice is a common and respected practice among lawyers. Nevertheless, when inflammatory labels are repeated so regularly that they gain a legitimacy that is relied upon by courts and legislatures, the terminology should be reexamined to ensure that rules of law are not, as here, being supported on rhetoric alone.

II. RHETORIC DIRECTED AT THE APPLICATION OF THE COLLATERAL SOURCE RULE IN PERSONAL INJURY CASES

As part of a plaintiff's economic damages in a personal injury case, an injured plaintiff is generally entitled to recover for the "reasonable value" of the medical services incurred by the plaintiff due to the defendant's tortious conduct.[16] There is considerable disparity, however, among jurisdictions regarding how to calculate the reasonable value of medical services when a private health care insurer satisfies a plaintiff's medical bills by negotiating discounts and then paying the medical care provider only a small fraction of the actual billed cost.[17] In the absence of contrary legislation, many

16. *See* 22 AM. JUR. 2D *Damages* § 396 (2003) (stating a plaintiff is entitled to recover both economic and non-economic damages).

17. There are several compilations of states' limitations on damages. *See, e.g.*, Bruce A. Menk, *A Review of State Law Concerning Paid vs. Billed Medical Expenses and the Collateral Source Rule*, ALFA INT'L, Issue 4, 2009, at 17 (analyzing billed versus paid medical expenses and the collateral source rule state-

states consider this negotiated rate differential a collateral source benefit and apply the common-law collateral source rule, allowing the plaintiff to recover the amount billed by the health care provider without regard to what the plaintiff's health insurer actually paid.[18] A few states applying the common-law collateral source rule do not consider the negotiated rate differential to be a collateral source benefit.[19] In those jurisdictions, although the collateral source rule is still technically intact, a plaintiff is only able to recover the amount paid by his health insurer to satisfy the medical bills.[20] Other states have legislatively modified the collateral source rule or abolished it all together.[21] The states that have modified the collateral source rule have done so in a myriad of ways, resulting in numerous

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by-state); *Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/index.php?issue=7344 (last visited Oct. 17, 2011) (listing all states' collateral source rule reforms); LexisNexis, Charts with Analysis: Torts, Tort Reform (follow "Legal" link, then "50 State Multi-Jurisdictional Surveys" then "Torts Multi-Jurisdictional Surveys with Analysis," and then "Tort Reform" link) (listing state-by-state limitations on and structure of damages).

18. *See* Menk, *supra* note 17, at 18–25 (listing several states that do not allow evidence of actual payments to reduce damage awards).

19. *See, e.g.*, Fischer v. Steffen, 797 N.W.2d 501, 513 (Wis. 2011) (holding that plaintiff was not entitled to recover the value of his insurer's subrogation claim after his insurer paid the policy limits for medical expenses and subsequently pursued and lost its subrogation claim in arbitration); Paulson v. Allstate Ins. Co., 665 N.W.2d 744, 754–55 (Wis. 2003) (holding that a motorist, who had already received the amount of the total car repair bill, was not entitled to the difference between the amount his insurer paid for car repairs and the amount it ultimately settled for in its agreement with the other driver's insurer).

20. *Fischer*, 797 N.W.2d at 513 (ruling that plaintiff was not able to recover total amount billed by insurer, but rather only amount actually paid by insurer and accepted by health care provider as satisfaction of medical bills).

21. *See* Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 213–46 (2009) (noting that the legislatures of twenty-eight states have either abolished or modified the collateral source rule in some context). The states that have modified the rule are: Alabama, Arizona, California, Florida, Hawaii, Illinois, Kentucky, Maine, Missouri, Montana, New Jersey, New Mexico, Oklahoma, Pennsylvania, and West Virginia. *Id.* The thirteen states that have completely abolished the rule are: Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon. *Id.*

versions of its practical application.[22] For example, in some jurisdictions the collateral source doctrine has been altered exclusively in cases of medical malpractice.[23] Some states have modified the doctrine in all civil actions,[24] and others have modified or abolished it specifically in actions for personal injury.[25] And

22. *See, e.g.*, ALASKA STAT. § 09.17.070 (2006) (modifying common-law collateral source rule by allowing court to reduce injured party's jury award to reflect un-subrogated collateral source payments in certain situations, thereby limiting the circumstances in which victim can receive double recovery while enhancing chances that tortfeasor may not be held fully accountable); N.Y. C.P.L.R. § 4545(a)–(c) (2011) (requiring verdict to be reduced in all personal injury or wrongful death cases where any collateral source payments have been made and specifically excluding payments from only life insurance, Medicare, and collateral sources entitled by law to lien against plaintiff's recovery); N.J. STAT. ANN. § 2A:15-97 (West 2010) (permitting court to deduct any "duplicative award" from plaintiff's recovery).

23. ALA. CODE § 6-5-545 (2008); ARIZ. REV. STAT. ANN. § 12-565 (2007); CAL. CIV. CODE § 3333.1 (West 2011); DEL. CODE ANN. tit. 18, § 6862 (2008); MASS. GEN. LAWS ch. 231, § 60 (2008); ME. REV. STAT. ANN. tit. 24, § 2906 (2007); NEB. REV. STAT. § 44-2819 (2007); OKLA. STAT. tit. 63, § 1-1708.1D (2007); 40 PA. CONS. STAT. § 1303.508 (2007); R.I. GEN. LAWS § 9-19-34.1 (2007); S.D. CODIFIED LAWS § 21-3-12 (2008); UTAH CODE ANN. 78B-3-405 (West 2007); WIS. STAT. § 893.55 (2007). *See* James J. Watson, Annotation, *Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions*, 74 A.L.R. 4th 32 (1989) (collecting and analyzing state and federal cases that discuss construction and validity of state statutes which abrogate collateral source rule in medical malpractice lawsuits).

24. ALASKA STAT. § 9.17.070 (2000); MINN. STAT. § 548.251 (2000); N.D. CENT. CODE § 32-03.2-06 (2001).

25. COLO. REV. STAT. 13-21-111.6 (1997); CONN. GEN. STAT. 52-225a (1991); FLA. STAT. ANN. 768.76 (West 1994); IDAHO CODE 6-1606 (Michie 1998); IND. CODE 34-44-1-2 (1998); IOWA CODE 668.14 (1998); MICH. COMP. LAWS 600.6303 (2000); MONT. CODE ANN. 27-1-308 (2009); N.J. STAT. ANN. 2A:15-97 (West 2000); N.Y. C.P.L.R. 4545(a). *See also* Jamie L. Wershbale, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 355–56 (2008) ("While current modifications to the collateral source rule vary nationwide, the reforms so far apply primarily to medical malpractice actions. Yet, the underlying rationale for reforming the collateral source rule—preventing plaintiff windfalls and decreasing insurance rates—applies in all personal injury actions. As the rationale is valid in all tort actions, it is difficult to understand why legislatures and courts across the nation have yet to abolish application of the collateral source rule across the board. . . . Given the current state of the law and insurance rates, it appears that the ultimate logical conclusion is complete abrogation of the collateral source rule in all tort actions.").

while some jurisdictions limit the admissibility of the medical bills,[26] others permit the bills into evidence but compel a post-trial set-off against an award of compensatory damages for the collateral source payment.[27] Still others allow both the amount paid and the amount billed into evidence, allowing a jury to decide the reasonable value of medical services.[28] With all these variations, the one unifying theme advanced by defendants and insurance liability carriers in nearly every jurisdiction that has addressed this issue—either through judicial application of the common law or legislative modification—is the rhetoric of the illusory nature of medical bills and windfall gains by plaintiffs and when a plaintiff has private health insurance.

Advancing the labels *illusory* and *windfall* to frame plaintiffs' medical bills and economic damages is a pronounced rhetorical device directed at the collateral source rule as applied to recovery of the negotiated rate differential in personal injury cases. I begin by exploring the unsavory legal and social implications of the terms *windfall* and *illusory* and the persuasive nature of these labels on courts, legislatures, and society. I then highlight examples of these rhetorical themes to demonstrate that this defense strategy is commonly embedded in appellate court opinions. Finally, I detail exemplars of legislative notes and hearings that show how this rhetoric is currently influencing legislators to respond to policies set by the judiciary when it applies the collateral source rule to a plaintiff's economic damages satisfied by private health care insurance.

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26. NEB. REV. STAT. ANN. § 44-2819 (West 1976) (stating that evidence of collateral source payments are not admissible in personal injury action, but such payments may be taken as credit against any judgment rendered).

27. *See, e.g.*, Goble v. Frohman, 901 So. 2d 830, 832–33 (Fla. 2005) (finding that amounts of contractual discount should be set off against award of compensatory damages); Slack v. Kelleher, 104 P.3d 958, 967 (Idaho 2004) (reducing district court judgment to account for Medicare write-off as collateral source).

28. *See, e.g.*, Robinson v. Bates, 857 N.E.2d 1195, 1200–01 (Ohio 2006) (holding that jury may determine that reasonable value of medical services is amount originally billed, amount accepted as payment, or some amount in between).

A. *Illusions and Windfalls*

"See, in my line of work you got to keep repeating things over and over and over again for the truth to sink in, to kind of catapult the propaganda."
President George W. Bush, Rochester, N.Y., May 24, 2005[29]

Panic over perceived frivolous lawsuits reached a fever pitch in the 1980s and spawned tort reform legislation nationwide in various forms, including limits on punitive damages, caps on attorneys' fees, non-economic damages, and even economic damages.[30] Much of this legislation was directed at medical malpractice cases and was fueled by society's concern regarding increasing health care costs and an out-of-control legal system with a perceived proliferation of "frivolous" litigation and accompanying mega-jury awards that were driving doctors from the practice of medicine in certain "problem states."[31] The push for tort reform was primarily advanced by insurance liability carriers seeking to limit their financial exposure to liability.[32] In retrospect, many studies

29. *President Participates in Social Security Conversation in New York*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (May 24, 2005, 10:48 AM), http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050524-3.html.

30. *See* Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform"*, 5 YALE J. HEALTH POL'Y L. & ETHICS 357, 357–58 (2005) (addressing unfounded rhetoric of lobbyists in medical malpractice tort reform legislation and arguing that "[t]ort reform lobbyists seeking to limit the rights of victims of medical malpractice through caps on damages often string together various concerns about health care in the United States that are unrelated to, or would not be addressed by, the reforms they seek[;] [i]n particular, the insurance industry and other tort reform proponents rely on misinformation and largely anecdotal evidence that the civil justice system is 'out of control' and needs to be scaled back. However, the facts reveal a different picture.").

31. *Id.* at 360. *See also* AM. ASS'N FOR JUSTICE, MEDICAL NEGLIGENCE: THE ROLE OF AMERICA'S CIVIL JUSTICE SYSTEM IN PROTECTING PATIENTS' RIGHTS 11 (2011), http://www.justice.org/resources/medical-negligence-primer.pdf (discussing five myths surrounding medical negligence).

32. *See* AM. ASS'N FOR JUSTICE, *supra* note 31, at 16 (arguing that most malpractice suits are legitimate and that medical negligence litigation does not directly affect number of physicians practicing in a certain state); Boehm, *supra* note 30, at 357–62 (discussing unfounded rhetoric of tort reform lobbyists).

have demonstrated that the rhetoric was unfounded.[33] Such legislation has saved insurance carriers billions of dollars, arguably little of which has been passed along to the public.[34]

A more recent trend has been to expand tort reform to include the abrogation of the collateral source rule in personal injury cases. As shown below, the labels *windfall* and *illusory* are powerful, and when attached to a financial recovery, offer strong negative connotations that influence courts and legislatures. Defendant tortfeasors and the insurance liability carriers paying the damages advance this rhetoric to take advantage of an injured plaintiff's foresight and prudence in carrying private health insurance and insert themselves as the beneficiary of plaintiff's private contractual relationship with a third party, the plaintiff's health insurance company.

A windfall is defined as receipt of financial gain that was not expected and not the result of something the recipient did.[35] Finding a $100 bill while walking down the street would be a classic

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33. Boehm, *supra* note 30, at 357–63. *E.g.*, BUDGET OFFICE, U.S. CONGRESS, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 1 (2004); OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 1 (1994).

34. Boehm, *supra* note 30, at 365 (demonstrating that tort reform in medical malpractice arena has failed to bring down insurance rates and that insurance companies themselves never promised any savings would be passed along to the public) (citing J. ROBERT HUNTER & JOANNE DOROSHOW, CTR. FOR JUST. & DEMOCRACY, PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES 19 (2002), http://insurance-reform.org/PremiumDeceit.pdf). *See also* Katherine Baicker and Amitabh Chandra, *Defensive Medicine and Disappearing Doctors*, 28 REGULATION 24, 28–31 (2005) (finding that "when the number or size of malpractice payments rises, there is very little accompanying increase in the malpractice premiums paid by physicians" and stating that "[a] closer look at available data suggests that some of the rhetoric surrounding this debate may be misleading. First, increases in malpractice premiums do not seem to be the driving force behind increases in premiums.").

35. THE NEW AMERICAN WEBSTER DICTIONARY (3d ed. 1995). *See also* Eric Kades, *Windfalls,* 108 YALE L.J. 1489, 1491 (1999) ("In common usage, a windfall is a 'casual or unexpected acquisition or advantage,' or an 'unexpectedly large or unforeseen profit.'"). Kades also notes the word's origin stems from medieval England "when commoners were forbidden to chop down trees for fuel. However, if a strong wind broke off branches or blew down trees, the debris was a lucky and legitimate find" (citing WILLIAM MORRIS & MARY MORRIS, MORRIS DICTIONARY OF WORD AND PHRASE ORIGINS 605 (1977)).

example. In contrast, a marketplace gain by freely negotiating parties is typically not a windfall, as the term is properly used.[36] The label however can be attached to any financial gain, thereby evoking negative connotations. Indeed, labeling a financial gain as a windfall is inflammatory; it paints the pecuniary interest as undeserved and undesirable, evoking feelings of envy and greed.[37] Moreover, the societal assumption is that if one party is receiving a windfall, another party is suffering an unjust financial loss and, therefore, the windfall should be duly abolished.[38] A benefit from a legitimate and useful investment, particularly one such as private medical insurance that society wants to encourage citizens to purchase, should not be arbitrarily termed a windfall because of these negative connotations.

The implications of misusing this label in legal discourse are significant because windfall gains are disfavored in our legal system.[39] When laws are not in place to prevent perceived windfalls, regulators often step in to "correct this loophole by promulgating new laws tailored to the situation that produced the unlawful windfall."[40] Thus, classifying any financial recovery as a windfall,

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36. *See* Christine Hurt, *The Windfall Myth*, 8 GEO. J.L. & PUB. POL'Y 339, 350–52, 354 (2010) (identifying various categories where this term is used in both legal discourse and popular culture, including "Illegal Windfalls"—"willful increases to wealth that violate either criminal or civil laws"; "Wrongful Windfalls"—"those not earned by either the provision of capital or services, or warranted to compensate for a loss or harm" or "void under contract doctrines such as fraudulent misrepresentation, mistake, or unconscionability"; "Classic Windfalls"—"benefit[s] that [are] not earned, but not prohibited by law, such as treasure[s] falling from the sky"; "Gratuitous Windfalls"—those arising where "payor intends a benefit upon the recipient, although the recipient did not provide any type of consideration"; and "Earned Windfalls"—"economic benefit[s] that [are] the return[s] on some action by the beneficiary"). Professor Hurt argues that an "Earned Windfall," is not a windfall at all, but rather flows from contract and property rights. *Id.* at 350–51. Due to popular contempt, however, the word is mischaracterized as an "illegal" or "wrongful" windfall. *Id.*

37. *Id.* at 341.

38. *See id.* at 342 (comically noting that "[o]nce an economic gain is spotted that seems suspiciously large or too easily earned, then like the 'pod people' in *Invasion of the Body Snatchers*, the observer must point and alert the public that this 'windfall' gain deviates from an acceptable baseline").

39. *Id. See also* Kades, *supra* note 35, at 1493, 1504 (exploring how courts have "used and abused the windfall label" since "courts frequently find a windfall where none exists by overlooking important ways in which parties make plans").

40. Hurt, *supra* note 36, at 342.

even when it is not, will prompt the legislature to respond.[41] For example, a "windfall profit" is "a profit that occurs suddenly as a result of an event not controlled by the company or person realizing the gain from the event."[42] This type of profit, often the result of unforeseen circumstances in the market, has prompted legislators to enact laws to tax these profits at a higher rate, or confiscate them all together.[43] Similarly, punitive damages are sometimes termed a windfall gain,[44] and while they are accepted in tort law as a necessary consequence for deterrence and punishment,[45] many states have enacted legislation to cap these types of damages.[46]

One source of society's "outrage, indignation, and envy"[47] associated with a windfall that prompts a legislative response is the notion that windfalls are a zero-sum game—if one party is receiving a windfall then another party must be assuming an excess loss.[48] This perception that a windfall is a zero-sum calculation is particularly biting when society is perceived to be on the paying end.[49] Thus, regardless of the arguable economic efficacy of the

41. *Id.* at 343.

42. *Windfall Profit Law & Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/w/windfall-profit%20/ (last visited Oct. 17, 2011).

43. Hurt, *supra* note 36, at 342.

44. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347, 352 (2003) (discussing existing conceptions of punitive damages and plaintiffs' windfall gains).

45. *Id.* at 370.

46. *See, e.g.*, ALASKA STAT. § 09.17.020(f) (Michie 2002) (limiting punitive damages to the larger of either three times the compensatory damages or $500,000); IND. CODE ANN. § 34-51-3-4 (Michie 1998) (imposing a punitive damages cap of the greater of three times compensatory damages or $50,000). *See also* Daniel Kahneman, David Schkade & Cass R. Sunstein, *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2094 (1998) (noting that many states are considering more conventional reforms which would impose caps); *Punitive Damages Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/show/7343 (last visited Oct. 3, 2011) (providing explanation of states' punitive damage limits).

47. Abstract, Christine Hurt, *The Windfall Myth*, 8 GEO. J.L. & PUB. POL'Y 339 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id-=1456466.

48. Hurt, *supra* note 36, at 380.

49. Furthering the perception that society at large is paying for unjustifiable financial gains that could be reduced with the abolition of the collateral source rule, some financial studies support this view. *See* Manfred H. Ledford, *A Suggested Role for Collateral Sources of Indemnification in Tort Reform Legislation,* 2 BUS. LAW BRIEF 27, 28 (2005) (proposing micro-economic model

collateral source rule,[50] where the party assuming the excess loss is—or is perceived to be—the consuming public, the outcry for a legislative response is particularly strong.[51]

Defense litigants and lobbyists advocating for abolition of the collateral source rule in personal injury actions also often characterize the amount billed to a plaintiff by a medical care provider as *illusory*,[52] calling them "phantom" or "fantasy"[53] bills.

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that demonstrates that collateral source rules are economically inefficient, with "claimants receiving windfalls at the expense of the rest of society"). Professor Manfred Ledford's model analyzes un-subrogated collateral source benefits, specifically life insurance policies paid to surviving claimants in wrongful death cases, and suggests that permitting these benefits to offset a claimant's award would result in "a more equitable and economically efficient solution." *Id.* at 32. *See also id.* at 31 (suggesting that plaintiff should not even be permitted to recover expenses incurred to obtain benefits, such as policy premiums). While acknowledging the apparent inequity since "had the premiums not been paid, there would have been more disposable income available to the plaintiff . . . [and] by not recognizing this type of expense, decedent/plaintiff would appear to be penalized for the responsible act of providing such protection," he concludes that it does "just the opposite in producing a less than equitable solution for society in general." *Id.* at 31. He argues a benefit is inured to plaintiff simply by the "sense of security [in] owning the benefit." *Id. But see* DAN B. DOBBS, LAW OF REMEDIES § 8.6(3) (2d ed. 1993) ("If the collateral source rule were abolished, the plaintiff would have paid for security and not for the opportunity for double recovery. He has paid for more only because the law, by allowing for double recovery, in effect requires him to pay for more.").

50. Conflicting studies further the debate regarding whether the collateral source rule is rational from an economic perspective. *Compare* Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and its Abolition: An Economic Perspective,* 15 KAN. J.L. & PUB. POL'Y 57, 57 (2005) (arguing that the collateral source rule is rational from both economic and legal perspectives), *with* Ledford, *supra* note 49, at 32 (concluding that, from a strictly financial perspective, "collateral source rules that prohibit the consideration of loss mitigating payments by third parties cause both net [financial] gains . . . and, in all likelihood, a net loss of real capital creation for society in entirety.").

51. Hurt, *supra* note 36, at 381.

52. *See e.g.*, Lopez, 129 P.3d at 487, 491 (Ariz. Ct. App. 2006) (noting that at oral argument, defendant Safeway contended that medical bills reflecting higher amount had "nothing to do with anything" because they were largely illusory or "phantom").

53. Leitinger v. Dbart, Inc., 736 N.W.2d 1, 17 (Wis. 2007) (noting defendant's argument that "the amounts billed by health care providers are 'fantasy,' 'arbitrary,' and 'random' figures that have no correlation to the reasonable value of the medical services actually provided"); Remsza v. Acuity A Mut. Ins. Co., No. 2005AP2701, 2006 WL 2136003, at *1 (Wis. Ct. App. Aug. 2, 2006) (noting defendant's contention "that the billed amounts were "fantasy

The obvious connotation is that these medical bills are fictional and have no consequences in reality, except seemingly to gouge the liability carriers. The term assumes that health care providers' contracts with patients—the contract every patient signs while they sit in the doctors waiting room, prior to seeing the doctor, confirming that the patients will be personally responsible for all bills, regardless of insurance—are unenforceable and simply a front for a fraud on liability carriers in case of litigation involving the patient and a tortfeasor. Using this term to characterize a plaintiff's health care bill takes advantage of society's acute outrage over medical care costs and exploits society's mistrust of health care costs and billing.[54]

In general usage, the term *illusory* means "deceptive, based on a false impression."[55] In legal discourse, it is often used to describe an unenforceable or unlawful action based on deceit or fraud.[56] For example, an illusory promise is one that courts will not enforce under contract principles,[57] and an illusory contract is one with no consideration.[58] The illusory-transfer doctrine is a property principle which provides that an *inter vivos* gift is unenforceable under the law if the donor retains so much control that there is no good-faith intent to relinquish the transferred property during the

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billing[s]" and therefore amount actually paid was admissible to allow jury to determine reasonable value of the medical services).

54. Doug Masson, *HB 1255 – Collateral Source Payments*, MASSON'S BLOG, A CITIZEN'S GUIDE OF INDIANA LAW (Feb. 3, 2010), http://www.masson.us/blog/?p=6192 (explaining that "the sticker price on a medical bill is often as reliable an indicator of its actual price as the sticker price on a car").

55. BLACK'S LAW DICTIONARY 816 (9th ed. 2009).

56. *See* United States v. Horton, 334 F.2d 153, 155 (2d Cir. 1964) (explaining that if prosecutor induces a guilty plea by illusory promise, the conviction would not stand because it would have been procured by deceit); Lynch v. State, 2 So. 3d 47, 61 (Fla. 2008) (stating in dicta that consent induced through fraud or deceit is illusory as a matter of law).

57. *See* Johnston v. Kruse, 261 S.W.3d 895, 898 (Tex. App.—Dallas 2008, no pet.) (emphasizing that an illusory promise in contract renders the contract unenforceable because the promisor retains the option to stop performance without notice).

58. *See* BLACK'S LAW DICTIONARY 370 (9th ed. 2009) (defining illusory contract as "[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation").

conveyor's lifetime.[59] In insurance law, the doctrine of illusory coverage requires an insurance policy to be interpreted so that it is not merely a illusion to the insured.[60] An illusory trust refers to an arrangement that giving the outward impression of being a trust but is not in fact a trust because of the powers retained by the settlor.[61] In all these contexts, the illusory label connotes a transaction that is not real and should not be upheld by the law.

B. Evidence of Rhetorical Themes in Case Law and Legislative Notes Addressing Recovery of the Negotiated Rate Differential

With certain exceptions, benefits received by a plaintiff from a source wholly independent of the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.[62] This common-law doctrine, known as the collateral source rule, is largely meant to "encourag[e] citizens to purchase and maintain insurance for personal injuries and for other eventualities."[63] Further, "[c]ourts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds."[64] The doctrine further ensures that the defendant tortfeasor will bear the full economic burden of the injury he causes and serves

59. *See* Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937) (holding that deceased's trust conveyance was not valid because it was illusory, that deceased never intended to divest himself of his property, and evidence illustrated that he was unwilling to divest himself of his property even when he was near death).

60. *See* Jostens, Inc. v. Northfield Ins. Co., 527 N.W.2d 116, 118 (Minn. Ct. App. 1995) (opining that the concept of illusory coverage is independent means to avoid unreasonable result when literal reading of insurance policy unfairly denies coverage).

61. Coosa River Water, Sewer & Fire Prot. Auth. v. S. Trust Bank, 611 So. 2d 1058, 1062–63 (Ala. 1993) ("[A] settlor may retain powers over the administration of the trust, but . . . , except in a declaratory trust, [the settlor] must give up control of the res or trust property itself.").

62. Dag E. Ytreberg, Annotation, *Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable*, 77 A.L.R. 3d 415, 420 (2011); Dag E. Ytreberg, *Collateral Source Rule: Receipt of Public Relief or Gratuity as Affecting Recovery in Personal Injury Action*, 77 A.L.R. 3d 366 (2009).

63. Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970).

64. *Id.*

as an efficient deterrent for similar behavior in the future.[65] As a practical matter, the collateral source doctrine serves as both a rule of evidence, prohibiting introduction at trial of any evidence of payments by a collateral source, and also a rule of damages, permitting an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of those damages by a collateral source, not the tortfeasor.[66]

The Restatement (Second) of Torts reflects this doctrine, providing that payments made by a collateral source to an injured party are not credited against a tortfeasor's liability.[67] This rule

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65. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 186–87 (6th ed. 2003).

66. Arthur v. Catour, 883 N.E.2d 847, 852 (Ill. 2005) (citing JAMES M. FISCHER, UNDERSTANDING REMEDIES §12(a) 77 (1999)).

67. RESTATEMENT (SECOND) OF TORTS § 920A (1979) (stating that the collateral source rule provides, "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."). *But see* RESTATEMENT (SECOND) OF TORTS § 911 (1979) (seemingly limiting plaintiff's medical damages claim to amount the health care insurer actually paid, but only in a limited context—where plaintiff "sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages"—and is generally not applicable to a plaintiff's recovery in a personal injury action). Comment h to Section 911, entitled "Value of services rendered," advises:

> The measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place. This may be distinct from and may be either greater or less than an amount that would be given for harm resulting from the loss of time by the injured person . . .
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> . . .
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> *When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged.* If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him. A person can recover even for an exorbitant amount that he was reasonable in paying in order to avert further harm.

§ 911 cmt. h (emphasis added).

applies to benefits including insurance policy payments, employment benefits, gratuities, and social legislation benefits.[68] Comment b to Section 920A suggests that given the choice between a "double recovery" for the plaintiff and a windfall to the defendant, the benefit should be afforded to the injured plaintiff.[69] The comment provides:

> Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. *The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor.* If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself.[70]

This common-law doctrine can, of course, be altered by statute,[71] and many states have chosen to do so with respect to its application to personal injury recovery.[72] Regardless of whether a state has legislatively modified the collateral source rule or applies it

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68. RESTATEMENT (SECOND) OF TORTS § 920A cmt. c.

69. *Id.* at § 920A cmt. b. *See also* AM. JUR. 2D *Damages* § 396, at 358 (2003) (noting that "a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury," and "recovery is not necessarily limited to expenditures actually made or obligations incurred for medical care").

70. RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (emphasis added).

71. *Id.* at § 920A cmt. d.

72. *See, e.g.*, CAL. CIV. CODE § 3333.1 (2011) (authorizing defendant to introduce evidence of "amount[s] payable as a benefit to the plaintiff as a result of the personal injury" by independent sources in personal injuries against health care providers); FLA. STAT. ANN. § 768.76 (2011) ("The court shall reduce the amount of [its] reward by the total of all amounts which have been paid for the benefit of the claimant or which are otherwise available to the claimant, from all collateral sources."); TENN. CODE ANN. § 29-26-119 (2010) (authorizing damages for malpractice liability "only to the extent that such costs are not paid or payable" by independent sources).

in its common-law form, the rhetorical themes of illusory medical bills and windfall recoveries are often aimed at the collateral source rule, sometimes with persuasive effect. The result is that while courts generally apply the common-law collateral source rule absent statutory modification, the inaccurate rhetoric is embedded in those judicial opinions and then repeated to the legislatures as a cry for a statutory response. The rhetoric then influences the legislatures to wrongfully abrogate the collateral-source rule in personal injury cases.

C. *Rhetorical Themes of Illusory Medical Bills and Windfall Gains in States Without Legislation Modifying or Abolishing the Collateral Source Rule in Personal Injury Cases*

Most state courts applying the common-law collateral source rule hold that the negotiated rate differential is a collateral source benefit and allow injured plaintiffs to recover the full amount of reasonable medical expenses billed, including amounts written off from the bills pursuant to contractual rate reductions.[73] As illustrated

73. Statutory modification of the collateral source rule in personal injury cases is absent or has been held unconstitutional in the following jurisdictions: Arizona: Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz. 2006); Arkansas: Shipp v. Franklin, 258 S.W.2d 744, 747 (Ark. 2007); California: Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d at 66–67; Delaware: Lomax v. Nationwide Mut. Ins. Co., 964 F.2d 1343, 1348 (3d Cir. 1992); Georgia: Ins. Co. of North America v. Fowler, 251 S.E.2d 594, 595 (Ga. 1978); Candler Hosp. v. Dent, 491 S.E.2d 868, 870 (Ga. 1997); Illinois: Label Printers v. Pflug, 616 N.E.2d 706, 709 (Ill. 1993); Kansas: Thompson v. KFB Ins. Co., 850 P.2d 773, 775 (Kan. 1993); Kentucky: O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (Ky. 1995); Louisiana: Bozeman v. State, 879 So. 2d 692, 700 (La. 2004); Maine: Werner v. Lane, 393 A.2d 1329, 1335 (Me. 1978); Maryland: Brice v. National R.R. Passenger Corp., 664 F. Supp. 220, 221 (D. Md. 1987), Massachusetts: Brown v. Leighton, 434 N.E.2d 176, 181–82 (Mass. 1982), Mississippi: Coker v. Five-Two Taxi Service, 52 So. 2d 835, 836 (Miss. 1951); Missouri: Overton v. United States, 619 F.2d 1299, 1305–06 (Mo. 1980); Nevada: Proctor v. Castelletti, 911 P.2d 853, 854 (Nev. 1996); New Hampshire: Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 782–83 (N.H. 1971); North Carolina: Kaminsky v. Sebile, 535 S.E.2d 109, 115 (N.C. 2000); Oklahoma: Nitzel v. Jackson, 879 P.2d 1222, 1223 (Okla. 1994); Pennsylvania: Littman v. Bell Tel. Co. of Pennsylvania, 172 A. 687, 692 (Pa. 1934); Rhode Island: Soucy v. Martin, 402 A.2d 1167, 1170–71 (R.I. 1979); South Carolina: Parker v. Spartanburg Sanitary Sewer Dist., 607 S.E.2d 711, 717–18

below, court opinions often evince that during litigation when arguing about the amount of recoverable compensatory damages, the defendant alluded to policy concerns regarding the illusory nature of medical bills or a windfall recovery to plaintiff. Interestingly, plaintiffs often do not challenge the term *windfall*, but rather respond that a windfall is permissible in the particular situation.[74] Plaintiffs often cite to the Restatement (Second) of Torts to support their argument, even though the Restatement (Second) of Torts does not use the term *windfall* to refer to plaintiff's economic gain at all, but rather uses that term to refer only to defendant's gain if the collateral source rule were not applied.[75] Courts rarely effectively analyze this terminology either. Instead, the rhetoric is apparently set forth by the defendants,[76] and simply noted by the courts.[77]

In some cases, courts adopt an apologetic tone in rejecting defendants' arguments regarding the illusory nature of the plaintiff's medical bills and the windfall that will benefit plaintiffs. For example, an appellate court in Arizona noted the defendant's concerns regarding illusory medical bills and plaintiff's windfall

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(S.C. 2005); South Dakota: Cruz v. Groth, 763 N.W.2d 810, 811 (S.D. 2009); Tennessee: Shelton v. Milam, 492 S.W.2d 917, 918 (Tenn. App. 1972); Utah: Phillips v. Bennett, 439 P.2d 457, 458 (Utah 1968); Vermont: Hall v. Miller, 465 A.2d 222, 227 (Vt. 1983); Virginia: Johnson v. Kellam, 175 S.E. 634, 637 (Va. 1934); Washington: Ciminski v. SCI Corp., 585 P.2d 1182, 1184–85 (Wash. 1978); Wisconsin; Leitinger v. DBart, Inc., 736 N.W.2d 1, 3–4 (Wis. 2007); Wyoming: Banks v. Crowner, 694 P.2d 101, 105 (Wyo. 1985).

74. *See, e.g.*, Acuar v. Letorneau, 531 S.E.2d 316, 323 (Va. 2000) ("To the extent that such a result provides a windfall to the injured party, we have previously recognized that consequence and concluded that the victim of the wrong rather than the wrongdoer should receive the windfall."); Schickling v. Aspinall, 369 S.E.2d 172, 174 (Va. 1988) (explaining that there are two types of windfalls—a plaintiff who receives double recovery for a single tort and a defendant who escapes liability for his wrong—and stating that since the law must sanction one windfall and deny the other, that the law favors the victim and not the wrongdoer).

75. RESTATEMENT (SECOND) OF TORTS § 920A cmt. c. (providing that given the choice between a "double recovery" for the plaintiff and a windfall to the defendant, the "benefit" should be afforded to the injured plaintiff).

76. *See, e.g.*, Rose v. Via Christi Health Sys. Inc., 113 P.3d 241, 245 (Kan. 2005) (using the term *windfall*).

77. *See, e.g.*, Moorhead v. Crozier Chester Med. Ctr., 765 A.2d 786, 791 (Pa. 2001) (noting, but not analyzing, that a portion of plaintiff's medical bills that were written off were "illusory" and recovery of that amount would provide plaintiff with a "windfall").

recovery, but held that while "the legislature is free to limit or abandon the collateral source rule in various areas, as it did in the medical malpractice arena . . . absent any such limiting statute or supreme court authority suggesting that the collateral source rule does not control in a [personal injury situation] . . . it [is] applicable."[78] In *Lopez*, the court even quoted portions of the defendant tortfeasor's motion to exclude the plaintiff's actual medical bills and oral argument describing the "illusory" and "phantom" nature of plaintiff's medical bills.[79] The court did not adopt the terminology in its holding, but, seemingly powerless to do anything otherwise, it permitted plaintiff's windfall, using that term when it stated, "[b]ecause the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer."[80]

Like Arizona, the state of California also has no legislation altering the common-law collateral source rule in all personal injury cases[81] and, until recently, there were seemingly conflicting opinions from the California appellate courts on this issue.[82] The California Court of Appeals in *Howell v. Hamilton Meats & Provisions, Inc.*[83]

78. Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496–97 (Ariz. Ct. App. 2006).

79. *Id.* at 491 n.1.

80. *Id.* at 496 (citing *Acuar*, 531 S.E.2d at 323).

81. CAL. CIV. CODE § 3333.1(a) modifies the collateral source rule in actions against medical providers by allowing the defendant to introduce evidence of a collateral source such as health or disability insurance benefits, but this statute does not apply to recovery in all personal injury cases.

82. *See* Cabrera v. E. Rojas Props. Inc., 122 Cal. Rptr. 3d 390, 396 (Cal. Ct. App. 2011) (holding that collateral source rule does not preclude reduction from amount billed by medical provider to amount actually paid by insurer); Hanif v. Hous. Auth., 246 Cal. Rptr. 192, 195 (Cal. Ct. App. 1988) (holding that "reasonable value" measure of recovery does not mean that injured plaintiff may recover from tortfeasor more than actual amount he paid or for which he incurred liability for poor medical care and services). *But see* Greer v. Buzghelia, 46 Cal. Rptr. 3d 780, 784 (Cal. Ct. App. 2006) (noting that it is error for plaintiff to recover medical expenses in excess of the paid or incurred, but that evidence of reasonable cost of medical care may be admitted); Nishihama v. San Francisco, 112 Cal. Rptr. 2d 861, 866 (Cal. Ct. App. 2001) ("A plaintiff in a personal injury action is entitled to recover from the defendant tortfeasor the reasonable value of medical services rendered to the plaintiff, including the amount paid by a collateral sources, such as an insurer.").

83. 101 Cal. Rptr. 3d 805 (Cal. Ct. App. 2009).

was the first California case to analyze these negotiated rate differentials under the collateral source rule.[84] In *Howell,* the California Court of Appeals departed from a line of California state precedent that had limited recovery of medical expenses by plaintiffs in personal injury cases to the amount actually paid by the plaintiff's health insurance carrier, rejecting previous rulings that the negotiated rate differential was not a collateral benefit in personal injury cases.[85] California plaintiffs were permitted to present evidence of the amount originally billed by medical providers, and post-trial, the court would reduce any medical expense award reflecting that billed amount, so long as the defendant was able to prove that the medical provider actually accepted that reduced amount.[86] In *Howell,* the plaintiff's automobile was hit by defendant's truck when the truck driver made an illegal turn.[87] At trial, the plaintiff was awarded $189,978.63 in compensatory damages, the full amount billed by her medical care providers.[88] The defendant argued that the award should be reduced to $59,691.73 because that was the amount the plaintiff's medical insurer actually paid.[89] The medical care providers wrote off the remaining $130,286.90 pursuant to a negotiated contract between the medical care provider and plaintiff's

84. Previously, the California Court of Appeals had addressed the issue without reference to the collateral source doctrine and ruled that the proper measure of damages is the amount actually paid for medical services pursuant to a contractually agreed-upon rate, rather than the face amount of original billings. *See Hanif,* 246 Cal. Rptr. at 195 (noting that "an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation"). *But see* DAN B. DOBBS, THE LAW OF TORTS § 380, at 134 n.23 (Supp. 2005) ("If confined to [its] facts, [*Hanif*] could be interpreted narrowly. *Hanif* involved a Medi-Cal (Medicaid) public assistance plaintiff and might be limited to such cases.").

85. *Howell,* 101 Cal. Rptr. 3d at 807–08 (distinguishing *Hanif,* noting that plaintiff in *Hanif* was Medicare beneficiary and, as such, had no legal obligation to pay amount originally billed by medical provider).

86. *See Greer,* 46 Cal. Rptr. 3d at 781 (affirming trial court's refusal to grant motion to reduce award because defendant did not request jury instruction that differentiated medical expenses from other economic damages). *See also* Cabrera v. E. Rojas Props., Inc., 122 Cal. Rptr. 3d 390, 396 (Cal. Ct. App. 2011) (holding that the collateral source rule does not bar reduction of plaintiff's recovery to amount paid by plaintiff's insurance provider rather than allowing recovery for full amount originally billed by her medical provider).

87. *Howell,* 101 Cal. Rptr. 3d at 808.

88. *Id.*

89. *Id.* at 809–10.

medical insurer.[90] The trial court agreed and reduced Howell's jury award to $59,691.73.[91] The appellate court reversed, finding that Howell was entitled to the full-billed amount of $189,978.63.[92] The Court of Appeals ruled that the amount of medical expenses written off by the medical providers was to be awarded to the plaintiff, affirming that the write-off was a "collateral benefit" of plaintiff's insurance policy.[93] The court reasoned that the amount of financial obligation for a plaintiff insured under a health care plan remains the total amount charged by the provider under its usual and customary rates, not merely the discounted amount actually paid.[94]

The California Supreme Court granted review of this case in March 2011.[95] In an amicus brief to the appellate court in support of the defendant, Hamilton Meat Company, the rhetoric of illusory medical bills and windfall gains was advanced again. The brief began by framing plaintiff's claim for recovery as a windfall:

> In this appeal, plaintiff complains that she did not receive a sufficient windfall recovery for medical expenses that she never paid and never will pay . . . . Plaintiff seeks to use a tort injury as a profit making proposition . . . by arbitraging the actual cost of medical services versus a "list" price that is never paid.[96]

The brief continued, characterizing plaintiff's medical bills as illusory, irrelevant evidence:

> The plaintiff should never have been allowed to introduce irrelevant evidence of inflated "prices" for medical services that were never paid or charged to

90. *Id.* at 810.
91. *Id.* at 811.
92. *Id.* at 825.
93. *Id.* at 815.
94. *Id.* at 816.
95. Howell v. Hamilton Meats & Provisions, Inc., 227 P.3d 342 (Cal. 2010).
96. Proposed Amicus Curiae Brief on Behalf of Ass'n of S. Cal. Def. Counsel in Support of Defendant and Respondent Hamilton Meats & Provisions Co. at 1, Howell v. Hamilton Meats & Provisions, Inc., 101 Cal. Rptr. 3d 805 (Cal. Ct. App. 2009) (No. D053620).

> her . . . . Plaintiff's evidence of illusory medical charges—charges never paid or to be paid by plaintiff nor anyone on her behalf—should never have been admitted in the first place.[97]

Howell responded that healthcare providers were not only entitled to, but did collect their usual and customary rates saying "the demonstrable and much publicized reality [was] that healthcare providers hound[ed] patients to the gates of financial Hell, including bankruptcy, for unpaid charges."[98] Howell did not let the *windfall* label slip by either; it reminded the court that the benefits of write-offs and pre-negotiated rates did not "fall from the sky" but rather were contracted and paid for by the plaintiff.[99]

Despite the heavy rhetoric found in the briefings, the California Supreme Court reversed the Court of Appeals, finding the plaintiff was not entitled to recover the amount billed for medical care if the plaintiff's health insurance paid for those bills.[100] The court refused to permit the plaintiff to recover the higher billed amount of medical expenses "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount."[101] Indeed, the California Supreme Court dismissed the collateral source rule as wholly inapplicable, stating, "[h]aving never incurred the full bill, plaintiff could not recover it in damages for economic loss . . . ." Certainly, the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay.'"[102]

Illinois also applies the common-law collateral source rule, extending liability to the entire amount billed by the plaintiff's health care providers, but the rhetoric is nevertheless noted in this jurisdiction as well. For example, in *Arthur v. Catour*, the plaintiff

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97. *Id.*

98. Appellant's Brief in Response to the Eight Amici Curiae Briefs Filed in Support of Respondent at 10, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011) (No. S179115) (citation omitted).

99. *Id.* at 26.

100. Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130, 1133 (Cal. 2011).

101. *Id.*

102. *Id.* at 1143 (citing Michael K. Beard, *The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits*, 21 AM. J. TRIAL ADVOC. 453, 489 (1988)).

sustained an injury to her leg while attending an auction at a farm.[103] She incurred over $19,000 in medical bills for treatment of her injuries, but because of her health insurer's contractual agreements with her healthcare provider, only about $13,500 was required to pay off the medical bills.[104] The appeals court noted that "[t]he purpose of compensatory tort damages is to compensate the plaintiff for [her] injuries, not to punish defendants or bestow a windfall upon plaintiffs," but then rejected the defendant's argument "that because plaintiff was never obligated to pay the full amount billed, the amount paid by her insurer is the true measure of her damages," concluding that the plaintiff was not limited to recover only the amount paid by her insurer.[105] In doing so, the court squarely addressed the issue of whether "difference between the amount charged and the amount paid [was] 'illusory.'"[106] The court noted:

> Although "discounting" of medical bills is a common practice in modern healthcare . . . it is a consequence of the power wielded by those entities, such as insurance companies, employers and governmental bodies, who pay the bills. While large "consumers" of healthcare such as insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. *In other words, simply because medical bills are often discounted does not mean that the plaintiff is not obligated to pay the billed amount.*[107]

At least one state applying the common-law collateral source rule has recently ruled that it does not always entitle a personal

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103. 833 N.E.2d 847, 849 (Ill. 2005). *See also* Natalie J. Kussart, Casenote, *Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule*, 31 S. ILL. U. L.J. 151 (2006) (indicating that Illinois General Assembly passed legislation in 2005 to cap non-economic damages in medical malpractice cases in response to medical malpractice "crisis").

104. *Arthur*, 833 N.E.2d at 850.

105. Arthur v. Catour, 803 N.E.2d 647, 649 (Ill. App. Ct. 2004) (citing Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 530 (Ill. 1989)).

106. *Id.* at 649.

107. *Id.* (emphasis added) (citations omitted).

injury victim to receive medical expenses already paid by the plaintiff's private health insurer. In *Fischer v. Steffen*, a Wisconsin plaintiff sustained injuries in a car accident.[108] The plaintiff's insurance policy paid the policy limit of $10,000 to the plaintiff for medical expenses and waived its right to subrogation.[109] At trial, the plaintiff was awarded $21,000 for pain and suffering, as well as $12,157 for reasonable medical expenses, which the court reduced by $10,000, the amount the plaintiff previously received from his insurer.[110] The Wisconsin Supreme Court began by noting that the plaintiff would recover a windfall if the collateral source rule were applied, stating the policies that grounded the collateral source rule: "(1) to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor, and (2) to allow the injured party, not the tortfeasor, to benefit from a windfall that may arise as a consequence of an outside payment."[111] The plaintiff argued that because the defendant paid $10,000 less than the full damages the defendant caused, the defendant should not benefit from the plaintiffs' insurance policy.[112] The plaintiff also contended that its insurer's subrogation claim should revert to them, not the defendant.[113] Defendant countered that the plaintiff's insurer's waiver of its right to subrogation created a windfall recovery for plaintiff.[114] Noting concern that ruling for the plaintiff would allow an injured party to receive a windfall, the court affirmed the court of appeals holding that the collateral source rule did not apply.[115]

D. Rhetorical Themes of Illusory Medical Bills and Windfall Gains in States with Legislation Modifying or Abolishing the Collateral Source Rule in Personal Injury Cases

Absent statutory modification, application of the collateral source rule is usually assured. As shown in the previous section, courts often repeat the labels set forth by the defendant

108. 797 N.W.2d 501, 502–03 (Wis. 2011).
109. *Id.* at 519.
110. *Id.* at 503.
111. *Id.* at 506.
112. *Id.* at 503.
113. *Id.* at 508.
114. *Id.*
115. *Id.* at 527.

characterizing the medical bills as illusory and the plaintiff's financial gain as a windfall with little acknowledgment of those labels as mere rhetoric.[116] However, there has been an increasing trend among states to legislatively limit an injured plaintiff's recovery to the actual amount of medical expenses paid by the plaintiff's health insurer.[117] Many legislatures' recent actions appear to be direct responses to the judicial opinions, suggesting that the courts' references to this rhetoric are restrained calls to the legislatures to act. While some legislative action has been unsuccessful, and other bills are still pending or are postponed, legislative notes evince the fact that the rhetoric directed at this issue is being inherited from the judiciary.

For example, the Colorado legislature partially negated the collateral source rule by requiring a trial court, following a damages verdict, to adjust the plaintiff's award by deducting compensation or benefits that the plaintiff received from collateral sources other than the tortfeasor.[118] One part of the statute, however, provides for a "contract exception" and retains the collateral source rule for certain benefits.[119] In allowing the application of the collateral source in cases where benefits were provided to the plaintiff due to a contract, the Colorado statute provides that "the verdict shall not be reduced by the amount by which [the injured plaintiff] has been or will be wholly or partially indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of [the plaintiff]."[120] The Colorado Supreme Court applied this statute in a 2010 personal injury case in which the plaintiff's medical bills were

116. *See supra* Part II.C. (highlighting cases in which courts have repeated the labels set forth by defendants).

117. *See* Benjet, *supra* note 21, at 213–46 (noting that the legislatures of twenty-eight states have either abolished or modified the collateral source rule in some context). The states that have modified the rule are: Alabama, Arizona, California, Florida, Hawaii, Illinois, Kentucky, Maine, Missouri, Montana, New Jersey, New Mexico, Oklahoma, Pennsylvania, and West Virginia. *Id.* The thirteen states that have completely abolished the rule are: Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, New York, North Dakota, Ohio, and Oregon. *Id.*

118. COLO. REV. STAT. ANN. § 13-21-111.6 (West 2005).

119. *Id. See also* Colo. Permanente Med. Group v. Evans, 926 P.2d 1218, 1230 (Colo. 1996) (noting "contract exception" and holding that plaintiff's medical expenses should not be deducted from jury award).

120. COLO. REV. STAT. ANN. § 13-21-111.6 (West 2005).

satisfied by discounts and payments made by the plaintiff's health insurance company, holding "the common-law collateral source rule remains in full force and effect" and the tortfeasor was not entitled to offset proceeds resulting from the plaintiff's insurance.[121] Addressing the reality of the medical bills, the court noted:

> While large "consumers" of healthcare such as insurance companies can negotiate favorable rates, those who are uninsured are often charged the full, undiscounted price. *In other words, simply because medical bills are often discounted does not mean that the plaintiff is not obligated to pay the billed amount.* Defendants may, if they choose, dispute the amount billed as unreasonable, but it does not become so merely because plaintiff's insurance company was able to negotiate a lesser charge.[122]

The court further justified plaintiff's windfall by reasoning:

> If either party is to receive a windfall, the rule awards it to the injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source, and not to the tortfeasor, who has done nothing to provide the compensation and seeks only to take advantage of third-party benefits obtained by the plaintiff.[123]

In response to this ruling, the Colorado legislature attempted to completely abrogate the collateral source rule.[124] A bill was introduced in early 2011 which stated that the legislation was

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121. Volunteers of Am. v. Gardenswartz, 242 P.3d 1080, 1084 (Colo. 2010).

122. *Id.* at 1087 (quoting Arthur v. Catour, 803 N.E.2d 647, 649 (Ill. App. 2004)) (emphasis added).

123. *Id.* at 1083.

124. The 68th General Assembly of Colorado proposed amending COLO. REV. STAT. § 13-21-111.6 to read: "In any action by any person or a legal representative to recover economic damages, recoverable damages for reasonable and necessary medical or health care, treatment or services, shall include only those amounts actually paid by or on behalf of the injured person to the health care services providers who rendered care, treatment or services . . . ." H.B. 11-1106, 68th Gen. Assemb., 1st Reg. Sess. § 1(3) (Colo. 2011).

necessary because, "[a]ccording to the holding in *Volunteers of America v. Gardenswartz*, Colorado's contract exception under the collateral source rule allows an injured party to receive compensatory damages above the amount paid by his or her insurance."[125] The bill specifically proposed that "[i]n an action by a person or a legal representative to recover economic damages, the recoverable damages for reasonable and necessary medical or health care, treatment, or services shall include only those amounts actually paid by or on behalf of the injured person to the providers."[126] While the bill is currently "[p]ostponed [i]ndefinitely,"[127] the rhetorical devices directed at the legislature are noteworthy. Ms. Heather Salg, a lawyer from the Colorado Defense Lawyers' Association, an amicus in *Gardenswartz*,[128] testified in support of the bill.[129] Her testimony included a discussion of "the history of medical expense recovery in Colorado . . . the current jury instructions in personal injury cases . . . [and] her opinion that actual damages, rather than

125. H.B. 11-1106, Bill Summary. The bill summary states:

> The purpose of this bill is to restate and reaffirm the general assembly's intent that the common-law collateral source rule is abrogated and to indicate that a recent decision of the Colorado Supreme Court (*Volunteers of America v. Gardenswartz*) interpreting the statute on reduction of damages for payments from collateral sources is contrary to the general assembly's intent to prevent compensatory damage awards for medical expenses from exceeding the amount accepted by the health care service provider for treating the injured party.

Id.

126. *Id.* § 1(2).

127. *Summarized History for Bill Number HB11-1106*, COLO. GEN. ASSEMB., http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont/F42E64852EF8E56D872578010060407E?Open&target=/clics/clics2011a/csl.nsf/billsummary/4B0CBC339B367F90872577DE0055C12E?opendocument (last visited Oct. 3, 2011).

128. Brief for Colorado Defense Lawyers Ass'n as Amici Curiae Supporting Petitioner, Tucker v. Volunteers of Am. Colo. Branch, 211 P.3d 708 (Colo. 2008) (No. 09 SC.20).

129. *Testimony from Heather Salg in Final Bill Summary for HB11-1106*, COLO. GEN. ASSEMB. (Mar. 3, 2011), http://www.leg.state.co.us/clics/clics2011A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/36d1c35e97653a0b8725784800726334?opendocument.

the amount billed, should be recoverable."[130] To make her point, Ms. Salg distributed a chart showing examples of "phantom damages" from recent Colorado lawsuits.[131] The chart detailed information from nine recent cases indicating the amount billed by providers for health care, the amount paid by health insurance to satisfy all charges, and the "[p]hantom [d]amages"—the difference never paid or owed.[132]

Indiana also has modified the collateral source rule by statute.[133] Indiana Code § 34-44-1-2 permits a defendant to introduce evidence of write-offs or lowered payments made to satisfy medical bills in a personal injury action.[134] In *Stanley v. Walker*, the Indiana Supreme Court held that the plaintiff's medical bills could be introduced to prove the amount of medical expenses when there was no substantial issue that the medical expenses were reasonable, but the collateral source rule, as codified in § 34-44-1-2, did not bar evidence of discounted amounts in order to determine the reasonable value of medical services.[135] The court reasoned that because the defendant sought to submit evidence to the jury concerning the amount accepted in satisfaction of the medical charges without referencing insurance, the evidence was admissible.[136] In response to this judicial decision, the Indiana General Assembly attempted to overturn the Supreme Court's opinion by introducing Indiana House Bill 1255, which would have restored the collateral source rule and prohibited a court from admitting into evidence a write-off, discount or other deduction associated with a collateral source payment in a personal injury or wrongful death action.[137] Representatives from the Defense Trial

130. *Id.*
131. *Id.*
132. *Id.*
133. IND. CODE § 34-44-1-2 (1998).
134. *Id.*
135. 906 N.E.2d 852, 858–59 (Ind. 2009).
136. *Id.* at 859.
137. Indiana H.B. 1255, 116th Gen. Assemb., 2d Regular Sess. (Ind. 2010), *available at* http://www.in.gov/legislative/bills/2010/HB/HB1255.1.html. The bill provides as follows:

> In a personal injury or wrongful death action, the court shall allow the admission into evidence of: (1) proof of collateral source payments other than: (A) payments of life insurance or other death benefits; (B) insurance benefits for which the plaintiff or members of the plaintiff's family have

Counsel of Indiana, Insurance Institute of Indiana, Indiana Department of Insurance, State Farm Insurance, Indiana State Medical Association, Indiana Hospital Association, Indiana Chamber of Commerce and Indiana Manufacturers Association spoke in opposition to the legislation and in support of the *Stanley* decision.[138] The Indiana Manufacturer's Association explained that the legislation is necessary due to "phantom damages [that] amount to a windfall profit for the plaintiff and especially for the personal injury attorney."[139] The Bill failed in the Senate Judiciary Committee.[140]

In November 2009, Ohio House Bill 361 was introduced[141] in an attempt to overrule an Ohio Supreme Court decision from earlier that year holding that the admission into evidence of payment amounts from health insurers to health care providers did not violate Ohio's statutory collateral source rule because such write-offs were not collateral source benefits at all.[142] Ohio House Bill 361 sought to

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> paid for directly; (C) payments made by: (i) the state or the United States; or (ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought; or (D) a write-off, discount, or other deduction associated with a collateral source payment. (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

Id. It should be noted that these legislative actions fall outside of this Article's survey period.

138. *Update on Civil Law*, THE LEGIS. UPDATE (Jan. 22, 2010), http://indianacourts.us/blogs/legislative/?m=2010&w=3.

139. *See ATRA Legislative Watch*, AM. TRUCKING ASS'N (Feb. 4, 2010), http://www.truckline.com/communities/insurancetaskforce/documents/atra%20legislative%20watch%20-%20volume%2023%20-%20No%203.pdf (stating that H.B. 1225 would allow injured party to collect for expenses he or she had no obligation to pay).

140. *Update on Civil Law*, THE LEGIS. UPDATE (Feb. 19, 2010), http://indianacourts.us/blogs/legislative/?m=2010&w=7.

141. OHIO H.R. J., 128th Gen. Assemb., Reg. Sess., at 2025 (Nov. 10, 2009), *available at* http://www.legislature.state.oh.us/JournalText128/HJ-11-10-09.pdf (last visited Oct. 3, 2011).

142. Jaques v. Manton, 928 N.E.2d 434, 436 (Ohio 2010) (holding that evidence of write-offs is admissible to show the reasonable value of medical expenses).

prohibit defendants in personal injury and wrongful death cases from introducing evidence of medical charges or fees that were written off, negotiated, or waived by the plaintiff's medical service provider or hospital.[143] An insurance defense lawyer representing the Ohio Association of Civil Trial Attorneys (OACTA) testified before the Ohio House Civil and Commercial Law Committee in opposition to House Bill 361, framing the issue as "[a] plaintiff's perceived entitlement to a windfall for phantom damages."[144] He further insisted that "[t]he amounts that are written off are simply amounts that disappear" and that "[i]f the . . . proposed legislation is enacted, those amounts will be revived in the form of a windfall for plaintiffs."[145]

The Connecticut General Assembly modified the collateral source rule by permitting the admissibility of evidence of collateral source payments and providing for awards to be offset by the amount paid by collateral sources less any amount paid by the claimant to secure the benefit.[146] In an attempt to repeal this statute, Connecticut House Bill 6492 was introduced in 2011.[147] Lobbyist Susan Giaccalone testified on behalf of the Insurance Association of Connecticut opposing the bill:

> Many times doctor's bills are cut because of insurance, because of a deal they've cut with the plaintiff. . . . This [bill] would allow them to get a windfall, sending up charges, driving up settlement

143. Jamey Pregon, *Testimony of the Ohio Association of Civil Trial Attorneys to the House Civil and Commercial Law Committee, HB 361 – Medical Bills and Evidence* (Jan. 19, 2010), *available at* http://dinklerpregon.com/news/2010/1/1.1/3.pdf.

144. *Id.*

145. *Id.* The final report of the Ohio Legislative Service Commission (OLSC), issued on May 2, 2011 shows that House Bill 361 was pending in the Ohio House Civil and Commercial Law Committee, but did not pass third consideration. OHIO LEGIS. SERV. COMM'N, FINAL STATUS REPORT OF LEGISLATION – 128TH GA (2011), *available at* http://www.lsc.state.oh.us/status128/srl128.pdf.

146. CONN. GEN. STAT. ANN. § 52.225a (West 2005 & Supp. 2011).

147. *See* H.B. 6492, 2011 Gen. Assemb., Jan. Sess. (Conn. 2011) ("Statement of Purpose: To provide that evidence that a health care provider accepted, or an insurer paid, a reduced amount of reimbursement for medical care shall not be admissible for the purpose of determining economic damages in civil actions.").

> amounts. It should be for the jury to decide why the bill was what it is. They should hear the full evidence of what was actually paid and not what the phantom charges were, which is current practice.[148]

When the Insurance Association of Connecticut issued a statement to the Judiciary Committee, urging rejection of this Bill, the rhetoric was repeated.[149]

In 2003, the Texas Legislature passed House Bill 4 that abrogated the collateral source rule.[150] Bill 4 amended a section of a Texas statute that previously provided: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."[151] Subject to great confusion among practitioners and judges, the statute prevented a plaintiff from recovering medical bills that were discounted or written off by medical providers pursuant to an agreement with the plaintiff's health care insurers.[152] In 2007, Texas House Bill 3281 proposed repealing this statute.[153] The bill proposed requiring defendants to pay the amount of plaintiffs' medical bills regardless of discounts or

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148. *H.B. 6492: An Act Concerning the Admissibility of Medical Bills in Civil Actions, Hearing Before the Judiciary Comm.*, 2011 Gen. Assemb., Jan. Sess, (Conn. March 9, 2011) (testimony of Susan Giaccalone).

149. *See H.B. 6492: An Act Concerning the Admissibility of Medical Bills in Civil Actions, Hearing Before the Judiciary Comm.*, 2011 Gen. Assemb., Jan. Sess, (Conn. March 9, 2011) (statement of the Ins. Ass'n of Conn.), *available at* http://www.cga.ct.gov/2011/juddata/tmy/2011hb-06492-r000309insurance%20association%20of%20connecticut-tmy.pdf (arguing that "prohibiting the introduction of evidence to show that medical expenses received were less than what was billed permits recovery for 'phantom damages'" and "allowing the recovery of such phantom charges creates an unearned windfall for claimants by forcing defendants to pay inflated economic damages based on inflated medical expenses").

150. Mills v. Fletcher, 229 S.W.3d 765, 769 (Tex. App.—San Antonio 2007, no pet.).

151. TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2011).

152. *See* Matbon v. Gries, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.) (concluding that "[a]mounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred"); *Mills*, 229 S.W.3d at 769 (holding "that section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or 'written off'").

153. H.B. 3281, 80th Leg., Reg. Sess. (Tex. 2007).

other write-offs as economic damages.[154] Governor Rick Perry vetoed the bill, stating that "[t]he purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions," and that they "should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid."[155]

Increasingly, legislatures are abrogating the application of the collateral source rule in personal injury cases, and this trend is being influenced by the rhetorical themes that health care providers' bills are illusory, having no consequences in reality, and that a plaintiff's recovery of those billed costs would be a windfall gain. As demonstrated in the next section, these labels are inaccurate and a body of new legislation is being propped up by rhetoric rather than reality.

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154. H.R. 80R-16121 at 1, 80th Leg., Reg. Sess., at 1 (Tex. 2007). The Bill Analysis section of the House Committee Report provides background on the purpose of Texas House Bill 3281:

> The 78th Legislature passed legislation which added Section 41.0105 to the Civil Practices and Remedy Code. This section states that a plaintiff in a law suit may only recover those medical or healthcare expenses which they had already paid or incurred, but does not allow for any future costs that the claimant may incur . . . . C.S.H.B. 3281 would amend this part of the statute in order to clarify that claimants may recover medical or health care expenses incurred actually paid or incurred by or on behalf of the claimant.

Id., *available at* http://www.legis.state.tx.us/tlodocs/80R/analysis/pdf/HB03281H-.pdf#navpanes=0 (last visited Oct. 3, 2011).

155. Governor Rick Perry, *Veto Statement* (June 15, 2007), *available at* http://www.capitol.state.tx.us/billlookup/BillSummary.aspx?LegSess=80R&Bill=HB3281.

III. THE POWER OF A WINDFALL AND THE ILLUSION OF ILLUSORY MEDICAL BILLS

In the name of "tort reform," there has been a steady attempt to avoid what many consider to be the [collateral source] rule's greatest evil: a windfall to the plaintiff. . . .[156]

As demonstrated above, the labels *windfall* and *illusory* have powerful legal and social implications, and these labels are commonly attached to an injured plaintiff's recovery of her medical bills when those bills have been discounted and then satisfied by reduced payments from the plaintiff's private health insurance. The labels are noted in judicial opinions and repeated to legislators responding to this issue. In this section, I argue that the labels are inaccurate, but with repetition they are becoming more legitimate pieces of the conversation each time the issue is addressed.

As a precursor to this discussion, it must be noted that rhetoric has been synonymous with law for centuries: "The ancient rhetorician Gorgias (in Plato's dialogue of that name) defined rhetoric as the art of persuading the people about matters of justice and injustice in the public places of the state . . . ."[157] Rhetoric has generally been accepted in the practice of law because "legal storytellers use stories rhetorically in an attempt to persuade others to accept their version of what happened,"[158] which is one of the main goals of lawyers in litigation. Because "law always operates through speakers located in particular times and places speaking to actual audiences about real people . . . [a]ll these things mark it as a rhetorical system."[159] This is conducive with the dictionary definition of the word rhetoric as "a skill in the effective use of speech."[160] Indeed, advocacy through skillful choice of language is a

156. Nora J. Pasman-Green & Ronald D. Richards, Jr., *Who Is Winning the Collateral Source Rule War? The Battleground in the Sixth Circuit States*, 31 TOL. L. REV. 425, 426 (1999).

157. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684–85 (1985).

158. Christine Metteer Lorillard, *Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children Under the Indian Child Welfare Act*, 8 WHITTIER J. CHILD & FAM. ADVOC. 191, 192 (2009).

159. White, *supra* note 157, at 692.

160. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 619 (11th ed. 2004).

routine and revered practice in litigation.[161] Even judges have emphasized that the use of rhetoric is allowed in their courtrooms.[162] Nevertheless, the rhetoric becomes dangerous when a body of law is propped up by the unsavory implications associated with certain labels, rather than reality.

As discussed above, the label *windfall* connotes a fear that the whole of society will pay for plaintiffs' excess recovery.[163] In personal injury cases, defendants underscore this concern that citizens will pay for plaintiffs' underserved financial gain through higher insurance premiums if the collateral source rule is applied since insurance liability carriers are the entities paying these damages. For example, an amicus brief filed on behalf of Association of Southern California Defense Counsel in support of the defendants in *Howell v. Hamilton Meat Co.*, argued:

> What if this Court effects a sea change in the law and remakes the collateral source rule, will that be a fair, just and good outcome? Well, the result will be that plaintiffs will recover windfall "compensatory" damages that, in fact, are not compensation for anything that anyone has paid to someone else. That money will not come out of nowhere. It will come from defendants and their insurers. The result will be that defendants will have to increase the prices that they charge to the public at large for goods and services that they sell and insurers will have to raise premiums charged to the public at large. Thus, *the*

161. *See supra* note 15 (citing several books and articles on legal writing stressing the importance of careful word choice in advocacy). *See also* Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcome of Complex Cases?*, 29 AM. J. TRIAL ADVOC. 19, 62 (2005) ("Careful word choice and cautious use of analogies accentuate the perception of being prepared in the minds of the jurors.").

162. *See* Hernandez v. Green, No. 05CV5291, 2007 WL 433396, at *10 (E.D.N.Y. Feb. 8, 2007) (emphasizing that certain irrefutable evidence fell within bounds of allowable rhetoric); State v. Lewellyn, No. 100,640, 2009 WL 3018073, at *8 (Kan. App. Sept. 18, 2009) (explaining that "[a] certain level of rhetoric is allowed in discussing the evidence and the defendant's version of events").

163. *See supra* text accompanying notes 47–51 (discussing how society's negative perception of the term *windfall* as a "zero-sum game" has prompted legislative responses aimed at preventing the consuming public from bearing the cost of "fictional" excess medical bills).

> *public at large will ultimately bear the burden of providing windfall profits to a select group*—tort litigation plaintiffs. That's neither fair, just, nor good public policy.[164]

However, economic studies have shown that liability judgments have little, if any, effect on liability insurance premiums and there is no correlation between tort reform and liability insurance rates.[165] In California, for example, where there is no legislation on point and courts have been bound by stare decisis since 2001 to permit recovery in personal injury cases for only the amount actually paid by a plaintiff's health care provider,[166] liability insurance premiums have not decreased.[167] Indeed, The American Insurance Association (AIA) and representatives of the American Tort Reform Association (ATRA) readily acknowledge this in a statement by the AIA: "[T]he insurance industry never promised that tort reform would achieve specific premium savings."[168]

Remarkably, rather than responding to the misleading nature of the terminology, plaintiffs often argue that the windfall is permitted in certain circumstances.[169] But recognizing the plaintiff's

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164. Proposed Amicus Curiae Brief on Behalf of the Ass'n of S. Cal. Def. Couns. in Support of Defendant and Respondent Hamilton Meats & Provisions, Inc. at 10, Howell v. Hamilton Meat & Provisions, Inc., 101 Cal. Rptr. 3d 805 (emphasis added).

165. AMS. FOR INS. REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 3 (2007), *available at* http://www.centerjd.org/air/StableLosses2007.pdf. *See, e.g.*, Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 209–10 (2005) (concluding that data collected from fifteen years of closed medical malpractice reports of the Texas Department of Insurance suggests a weak connection between claims-related costs and short or medium-term fluctuations in liability insurance premiums).

166. *See* Nishihama v. San Francisco, 112 Cal. Rptr. 2d 861, 867 (Cal. Ct. App. 2001) (holding that injured pedestrian was not entitled to damages for medical care since the amount that a hospital is entitled to receive as payment "turns on any agreement it has with the injured person or the injured person's insurer").

167. AMS. FOR INS. REFORM, *supra* note 165, at 3 (quoting March 13, 2002 statement).

168. *Id.* at 3.

169. *See, e.g.*, Fischer v. Steffen, 797 N.W.2d 501, 510 (Wis. 2011) (finding that "plaintiffs seem to be arguing that [the insurance company] has waived its

recovery as a type of windfall that the legal system permits propagates the false idea that the recovery is a windfall at all. Even the Restatements seem to support the characterization of plaintiff's recovery in these situations as a type of permissible windfall,[170] and one court has stated, "[t]o the extent that such a result provides a windfall to the injured party, we have previously recognized that consequence and concluded that the victim of the wrong rather than the wrongdoer should receive the windfall."[171] While such logic may be appealing to plaintiffs in the midst of litigation, it reinforces to the courts, the legislatures that may later respond, and the citizens reading news reports that plaintiffs are reaping an unjustified gain at the expense of society.

Labeling the recovery of the negotiated rate differential as a *windfall* in personal injury cases also defies basic contract principles because tortfeasors receive a discount on their liability due to a third party contract to which they were neither a party nor an intended beneficiary.[172] A person generally obtains health insurance by entering into a contract with a health insurer and maintains that insurance by paying premiums to the insurer.[173] As part of the contract, the insured typically must obtain care from a health care provider that is pre-selected by her insurer, and as part of the contract between the health care provider and the insurer, the health

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subrogation claim and that under the collateral source rule a windfall created by a waived subrogation claim should inure to the plaintiffs, not to the defendant"); Koffman v. Leichtfuss, 630 N.W.2d 201, 209 (Wis. 2001) ("The rule is grounded in the long-standing policy decision that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is the person who has been injured, not the one whose wrongful acts caused the injury." (citations omitted)).

170. *See* RESTATEMENT (SECOND) OF TORTS §920A cmt. b (1979) (explaining that a benefit from collateral sources directed to the injured party should not be shifted to the tortfeasor as a windfall).

171. Acuar v. Letorneau, 531 S.E.2d 316, 323 (Va. 2000).

172. *See* Marshall & Fitzgerald, *supra* note 50, at 59 ("[T]he full payment of damages by a tortfeasor clearly should have no effect on the wager made pursuant to a legally enforceable contract duly supported by valuable consideration to which the tortfeasor is not a party.").

173. *See* Beard, *supra* note 102, at 467–70 (discussing contractual nature of such agreements); Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 643 (2008) (explaining that insurers bargain for discounted rates for their customers, but uninsured people must contract to pay "prices that are several times insurers' prices and providers' actual costs").

care provider discounts its medical bills to the insured.[174] The insurer also negotiates alternative rate contracts with the medical care providers.[175] These discounted rates and write-offs are some of the benefits that an insured receives as part of the contract with the health insurers.[176] The discounts are shown on the benefit statements that an insured receives from his health care provider, which detail the original charges, the payments by the insurer, and the write-off taken by the health care provider.[177] Health care providers are willing to provide steep discounts off their customary and regular medical charges to the insurers in return for a steady stream of patients referred to the health care provider by the insurer, as well as other contract benefits such as an expedited payment, pre-approvals, marketing, and advertising.[178]

Another piece of this contractual relationship between the health care insurer and the insured, an injured plaintiff, is that insurers often have a contractual right to subrogation from the plaintiff. This entitles the insurer to a lien and the right to reimbursement for damages the plaintiff receives in a personal injury case attributable to payments made by the insurer.[179] A right of subrogation extends only to amounts paid by the insurer and

174. Beard, *supra* note 102, at 467.

175. *Id.* at 456.

176. *Id.* at 467.

177. *Id.* at 482.

178. Health care providers gain significant administrative and marketing advantages from health insurers in return for discounting their rate. WILLIAM O. CLEVERLEY & ANDREW E. CAMERON, ESSENTIALS OF HEALTH CARE FINANCE 301 (6th ed. 2006) (suggesting that a health care provider's willingness to accept a discount from its present price structure attracts new blocks of patients referred to the provider by insurance companies); SHAHRAM HESHMAT, FRAMEWORK FOR MARKET-BASED HOSPITAL PRICING DECISIONS 10 (1993) ("In return for obtaining preferred status (which is designed to increase the volume of business), providers make their services more attractive to payers through means such as discounting . . . ."); LAWRENCE F. WOLPER, HEALTH CARE ADMINISTRATION: PLANNING, IMPLEMENTING, AND MANAGING ORGANIZED DELIVERY SYSTEMS 553 (4th ed. 2004) (describing advantages such as "a large volume of business, rapid payment, ease of collection, and occasionally advance deposits").

179. 44 AM. JUR. *Insurance* § 1768, 1774, 1777 (2007). *See also* BLACK'S LAW DICTIONARY 1427 (6th ed. 1990) (defining subrogation as "[t]he substitution of one person in the place of another with reference to a lawful claim . . . . The right of one who has paid an obligation which another should have paid to be indemnified by the other").

therefore the right to subrogation does not allow a health care insurer to recover the amount of the contractual write-off.[180] The write-off can be significant[181] and with no right to subrogation by the insurer, if the plaintiff recovers this amount from the defendant tortfeasor, it is her gain that she has thoughtfully contracted for, and it is not meant to benefit the tortfeasor.[182] Indeed, the tortfeasor and his liability carrier are not intended beneficiaries in any of these contractual relationships.

When subrogation is at issue, a plaintiff's recovery of the actual amount that his health insurer billed may actually benefit the health insurer because it may encourage subrogation. For example, if a medical care provider bills a plaintiff $20,000 and then writes off $15,000 due to the contractual agreement with the insurer, the health care provider is paid only $5,000. If the insurance company is subrogated, the insurer can claim back $5,000 from the plaintiff when the plaintiff settles the case or obtains a verdict. If the plaintiff recovers $20,000 from the defendant tortfeasor, the insurer will likely be able to claim back the entire $5,000, the entire amount it paid out. The health insurer then has recovered all of what it paid out. If a plaintiff can only recover the $5,000 in medical expenses from the defendant tortfeasor, a plaintiff's attorney may attempt to

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180. *See* Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 436 (1938) (holding that insurer was entitled by way of subrogation to no more than amount paid on the policy).

181. *See, e.g.*, Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005) (holding that contractual discounts negotiated by HMO were subject to write-off, thus excluding $428,583.55 from subrogation by insurer).

182. *See* Kades, *supra* note 35, at 1524–25. Kades states:

> Failure to consider subrogation has led numerous courts to object to the collateral benefits rule as a windfall . . . [though] [p]roblems arise when administrative and transactional costs make it infeasible for insurers to include or apply subrogation clauses. Then a plaintiff collecting from both an insurer and the defendant does reap a windfall. Often, however, it is an efficient windfall. Denying insured plaintiffs recovery from tortfeasors when subrogation fails would mean that some tortfeasors will never pay for the damage they do. That will lead potential injurers to take suboptimal precautions and thus to cause an excessive number of torts. Allowing double recoveries is particularly attractive when there is minimal concern that victims are inducing harms in order to reap supercompensatory windfalls.

Id. (internal citations omitted).

negotiate that bill down further so that the insurer recovers less than the amount it could have otherwise claimed back. Health insurers may be willing to engage in these negotiations because they are aware that litigation costs and fees, including a percentage paid to the attorney under most contingency fee agreements, eat up much of the plaintiff's recovery; to encourage settlement and claim back any amount, a health insurer may agree to lower its subrogation claim.

Defendant tortfeasors and the liability insurance companies advancing the misleading rhetoric are the ones with a true windfall when the collateral source rule is not applied. Fewer lawsuits may be brought where abrogation of the collateral source rule renders some legitimate personal injury litigation futile since receipt of collateral benefits defined in the statute makes pursuit of a claim not worth the time and expense involved.[183] Abolition of the collateral source rule in personal injury cases will likely result in many personal injury claims either going unfiled or settling early,[184] a victory to liability insurance companies paying the tortfeasors defense costs and judgments, but a serious policy concern with respect to injured citizens' access to courts and the deterrent value of tort law. Moreover, personal injury lawyers paid on a contingency basis may necessarily make decisions regarding which cases to accept based on the potential recovery, and where recovery is limited because of collateral source payments, those prudent plaintiffs with the foresight to purchase health insurance become the least desirable

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183. *See* Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994) (finding Ohio statute abolishing collateral source rule unconstitutional, and noting "certain tort victims will realize that R.C. 2317.45 could render their trip to court futile . . . . For these tort victims, like plaintiffs herein, R.C. 2317.45 undermines the right to a jury trial, a meaningful remedy and open courts").

184. Michael B. Kelly, *What Makes the Collateral Source Rule Different?*, 39 AKRON L. R. 1171, 1179–80 (2006). Kelly states:

> Reforms to the collateral source rule could eliminate plaintiff's recovery, however, if they undermine a plaintiff's willingness to sue. By reducing, perhaps severely, the most easily proven aspect of damages, reforms to the collateral source rule may make a lawsuit seem like more hassle than it is worth. . . . [A] plaintiff whose primary loss is pecuniary and who has recovered most of it via insurance may decide to waive the rest of the claim or to settle it quickly.

Id.

clients. Where the plaintiff's primary loss is pecuniary and has already been paid through her private health insurance, there is no financial benefit to the plaintiff or a lawyer working on a contingency basis to file a lawsuit. The tortfeasors and liability carriers then have a lighter litigation load.

Finally, bills sent by medical care providers are not a sham for gouging liability carriers. They are real obligations that, but for a plaintiff's private health care insurance, the patient would be responsible for satisfying.[185] While the billed amount may not reflect the cost to the medical care provider for actually providing the service, the patient's responsibility for the bill is real, and but for insurance, the patient would be responsible for satisfying that amount.[186] That is, a privately insured patient actually incurs the medical provider's full charges and only by virtue of this private contract that he entered into in advance is he spared from paying the full amount.[187] While medical care providers often discount bills for uninsured patients, there is no legal obligation for them to do so.[188] If a plaintiff does not have medical insurance coverage, he may seek to negotiate the bill himself, but he is liable for the entire amount billed, and harsh collection tactics are often directed at these patients.[189]

When a medical care provider treats a patient, it has an enforceable claim for payment for its services, regardless of the patient's insurance status.[190] Indeed, this enforceability is illustrated

185. *See* Arthur v. Catour, 803 N.E.2d 647, 650 (Ill. App. Ct. 2004) (noting that the bill sent by Medicaid detailed real Medicaid expenses for which plaintiff must pay).

186. *See id.* (demonstrating that the bills are for Medicaid costs that plaintiff has paid or will have to pay).

187. *See id.* (noting that the plaintiff receives the benefit of his bargain with the insurance company).

188. *See* George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 102–04 (2005) (noting that the fact that medical bills do not reflect actual costs is result of third party reimbursement system).

189. *See* Lucette Lagnado, *Hospitals Try Extreme Measures to Collect Their Overdue Debts*, WALL ST. J., Oct. 30, 2003, at A1 (detailing tactics to collect bills from the uninsured including body attachments and civil arrest warrants).

190. *See* Mark Hall & Carl Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 669 (2008) (discussing courts' tendency to enforce medical contracts).

by the number of personal bankruptcy filings in the United States due to debt resulting from medical bills.[191]

The labels *illusory* and *windfall* are misleading when used to characterize an injured plaintiff's medical bills and the recovery of that amount as economic damages. An injured plaintiff's medical bills are not illusory; those bills are real and a plaintiff's recovery of the amount billed by a health care provider is not a windfall, but rather is a return on a prudent investment obtained through foresight and diligence by the plaintiff that society should want to encourage.

IV. A PROPOSAL TO MAINTAIN APPLICATION OF THE COLLATERAL SOURCE RULE

> *"How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg."*[192]

As demonstrated above, the labels *illusory* and *windfall* are tools skillfully used by defendant tortfeasors and insurance liability carriers to paint injured plaintiffs' medical bills and economic damages with a coat of objectionable connotations. The use of this rhetorical device is a prominent legal strategy directed at the collateral source rule as applied to recovery of the negotiated rate differential in personal injury cases. Despite the inaccuracy of this terminology, with repetition, a body of law is being created based in part on the implications associated with these labels, rather than reality.

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191. *See* Lucette Lagnado, *Taming Hospital Billing*, WALL ST. J., June 10, 2003, at B1 (noting that healthcare providers' requirement that uninsured pay higher rates often leads to bankruptcy); David Himmelstein, et al., *MarketWatch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFFAIRS (Feb. 2, 2005), *available at* http://content.healthaffairs.org/content/suppl/2005/01/28/hlthaff.-w5.63.DC1 (noting that half of interviewed American bankrupt families in 2001 cited medical causes for their financial distress).

192. This riddle was attributed to Abraham Lincoln and referenced by the respondent, Howell, in his responsive brief to the California Supreme Court in *Howell* in responding to the argument that appellant's medical bills were not real. Appellant's Brief in Response to the Eight Amici Curiae Briefs Filed in Support of Respondent at 27, Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011) (No. S179115) (citation omitted).

Economic damages to an injured plaintiff, including the reasonable value of medical services, should be calculated by the amount charged by the health care provider. The negotiated rate differential is a collateral source benefit to an insured plaintiff, and neither the judiciary nor the legislature should abolish the common-law collateral source rule in this context based on the inaccurate notion that the medical care providers' bills are illusory or that plaintiff will be recovering a windfall.

The tension between the legislature and the judiciary is demonstrated by the judiciary's near universal application of the doctrine and the legislative response to those decisions. Without direction from the legislature regarding application of the collateral source rule in a personal injury case, the judiciary should not interfere with the private contractual relationship between a plaintiff and his health care insurer.[193] Certainly, if abrogation of the collateral source rule is warranted in any circumstances, it is properly left to the legislature. But when the legislature steps into the arena of medical insurance benefits, the influences on the legislature should be based on reality rather than rhetoric. There is no foundation in law to legislatively redistribute an economic gain earned via a legitimate financial investment and freely-negotiated contract between third parties to the tortfeasor that caused the injury or that tortfeasor's insurer.

Even where legislatures have stepped into the arena of calculating compensatory damages for the "reasonable value of medical services," in cases where the negotiated rate differential is high, the layers of complexity and the time and expense necessary to fairly litigate the process is, as a practical matter, almost overwhelming.[194] For example, where evidence of discounts and

193. *See* Bynum v. Magno, 101 P.3d 1149, 1158–59 (Haw. 2004) (holding that contractual allowances or discounts are collateral benefits which belong to plaintiff and cannot inure to the benefit of a defendant absent specific statutory modification of the collateral source rule). *See also* Application of Consumer Attorneys of Cal. for Leave to File Amicus Curiae in Support of Plaintiffs and Respondents Codner at *7, Codner v. Wills, No. B198675, 2009 WL 4915839, (Cal. Jan 26, 2009) ("As a matter of contract law, the collateral source rule, and in deference to legislative prerogative, a court should not question the sufficiency of contractual consideration between plaintiff's health insurers and medical providers in order to reduce a defendant's liability.").

194. *See* Danielle A. Daigle, *The Collateral Source Rule in Alabama: A Practical Approach to Future Application of the Statutes Abrogating the Doctrine,*

write-offs are admissible, plaintiffs and defendants are required to expend considerable resources to gather and present evidence and witnesses to support the reasonable value of medical services. Because the discount procured by a health care provider arises out of a contractual relationship with health insurers and reflects a number of factors, both parties have to produce documents and witnesses to testify to this information. This necessarily prolongs trials and increases the costs associated with litigation, generally benefitting the defendant.

As a matter of fairness, legislation modifying the collateral source rule would have to require that a court set off the amount the person paid in obtaining the health insurance benefits. Thus, evidence of the amount of insurance premiums paid by the plaintiff to keep her health care insurance in force should also be admissible. This amount should, at minimum, be reimbursed to the plaintiff for her out-of-pocket financial expenses. Therefore, plaintiffs would have to prove the total amount in medical insurance premiums that they paid for years. This calculation is particularly complex when insurance is provided, in whole or part, as a piece of the plaintiff's compensation package by an employer. The issue of how far back the plaintiff should be reimbursed for maintaining the health insurance would also necessarily arise. Surely, at some point, the costs associated with plaintiff's maintenance of her health care insurance would exceed the amount of the discount or write-off that the defendant is attempting to avoid paying. Thus, legislation must also account for the situation in which the plaintiff's insurance premiums are higher than the negotiated rate differential.

A reality of personal injury litigation is the behind-the-scenes negotiation that often occurs when a plaintiff does not have health care insurance. Most uninsured plaintiffs negotiate their health care bills, and therefore, legislation that fails to account for this possibility ends up providing a greater award to the uninsured plaintiff than the insured one. The "usual and customary" charges for medical care are paid in full by very few uninsured patients or health care insurers, and abolition of the collateral source rule will

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53 ALA. L. REV. 1249, 1249–50 (2002) (addressing inherent ambiguity in statutes abrogating collateral source rule in civil actions, and discussing constructional difficulty posed by Alabama legislature's abrogation of the rule).

not account for the uninsured plaintiff's private negotiations with a health care provider, which may result in the uninsured plaintiff actually pocketing a larger recovery than the insured plaintiff.[195] For example, if a medical bill is $5,000, but the plaintiff's insurance company bargains the bill down to $1,000, with abrogation of the collateral source rule, the insured plaintiff would only recover the amount paid by the insurance company—the $1,000. If the insurance company has a right of subrogation, the recovery for the medical bills is sent to the health care provider, and the plaintiff pockets nothing. The more fortunate uninsured plaintiff can recover the full $5,000 that was billed to him by the health care insurer. The uninsured plaintiff may still negotiate the bill down, satisfy the bills with a significantly lower payment, and pocket the difference. Thus, the responsible plaintiff with the foresight to buy insurance and pay premiums over the course of many years may recover less than her uninsured counterparts. In this instance, application of the collateral source rule would encourage people to acquire insurance. Certainly, the fact that they have done so should not benefit the people who injure them, and, at the very least, an uninsured plaintiff should not end up with a greater recovery than an insured plaintiff.

While outside of the scope of this Article, these concerns acknowledge that safeguards are necessary to ensure that health care providers are not perpetrating fraudulent pricing schemes for the sole purpose of inflating personal injury recoveries.[196] Nevertheless, the proper remedy for truly illusory medical bills—ones that are actually fictional, phantom, fantastical, fraudulent, and meant only to gouge liability carriers and rightfully not upheld under the law—is to

195. *See* Lesley Alderman, *Bargaining Down the Medical Bills*, N.Y. TIMES, Mar. 13, 2009, at B6, *available at* http://www.nytimes.com/2009/03/14/health/-14patient.html?_r=2&ref=business (noting that financially distressed patients often negotiate lower medical bills).

196. Such reassurances, while outside the scope of this Article, are ripe for development though several checks that already exist. The Federal Bureau of Investigation (FBI) and the Office of the Inspector General (OIG) each have special agents dedicated to health-fraud projects. *See Health Care Fraud*, FBI, http://www.fbi.gov/about-us/investigate/white_collar/health-care-fraud (last visited Oct. 12, 2011) (describing the FBI's healthcare unit and its role in healthcare fraud investigations); *Medicaid Fraud Control Units—MFCUs*, OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://oig.hhs.gov/fraud/Medicaid-fraud-control-units-mfcu/index.asp (last visited Oct. 12, 2011) (describing the OIG's healthcare fraud units and their role in investigating Medicaid fraud).

ensure legal consequences for those medical care providers that are responsible for health care billing fraud. The judicial and legislative responses should not be to assume that medical bills have no consequences to an insured plaintiff and redirect to the defendant tortfeasor the legitimate financial benefit that the plaintiff contracted for with the health care insurer.

V. CONCLUSION

Despite its inaccuracy, framing an insured plaintiff's medical bills as illusory and a plaintiff's recovery of that amount as a *windfall* gain has become a pervasive rhetorical device advanced by defendant tortfeasors—and insurance liability carriers—to influence courts and legislatures to abolish the collateral source rule in personal injury cases. With such use and repetition, these labels have taken on credence and have become a part of the conversation each time the issue is addressed. While application of the collateral source rule is still mostly assured in the absence of legislation directing the judiciary otherwise, the unsavory social and legal implications of the labels *windfall* and *illusory* are embedded in many court opinions. States' legislatures are influenced by this same rhetoric to pass legislation abrogating the collateral source rule in personal injury cases, often responding directly to the policy concerns of illusory medical bills and windfall gains that are highlighted in court opinions. The result is that a body of tort legislation that wrongfully abrogates the collateral source rule is being created based on the implications associated with these labels, rather than reality.

To Love and Die in *Dixon*: An Argument for Stricter Judicial Review in Cases of Academic Misconduct

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I. INTRODUCTION

On May 8, 2010, Alabama State University honored several students by presenting them with diplomas during its spring commencement ceremony.[1] Although this event may seem

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1. Tina Joly, *News Details: Expelled ASU Students Receive Diplomas 50 Years Later*, ALA. STATE UNIV., May 8, 2010, http://www.alasu.edu/news/news-details/index.aspx?nid=255.

unremarkable, for those six students, it was the honor of a lifetime. To St. John Dixon, Joseph Peterson, James McFadden, Joe Reed, and the other students who were honored,[2] it provided closure on a dark chapter not only of their lives, but also for all of society in the United States. The diplomas were conferred fifty years after the students were expelled for their participation in the Civil Rights Movement of the 1960s.[3] These students were honored for their efforts to provide equality and hope for people of all races for years to come. Nevertheless, their actions had an unintended consequence; their expulsion from Alabama State College and the ensuing litigation changed the way courts review universities' handling of student misconduct.

Fifty years ago, those expelled students sued the Alabama State Board of Education on the ground that their expulsion denied them due process pursuant to the Fourteenth Amendment.[4] In a landmark ruling, and stemming from its desire to lay the foundation for equality, the Fifth Circuit held that public colleges and universities must extend due process rights to their students in disciplinary hearings.[5] Nevertheless, the progeny of *Dixon* has caused confusion regarding the contours of the due process rights afforded to students. Under Fifth Circuit precedent, if a student faces action by a university for academic reasons, rather than disciplinary ones, that student is not entitled to due process, and the courts will not step in to review such decisions.[6] This doctrine was based on a desire to prevent every academic decision made by a school, from admission to graduation, from being scrutinized by the courts,[7] but it carried with it an unintended consequence—confusion.[8] Public universities and colleges around the nation do not

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2. *Honoring the Sit-In Students*, 1 LIFT EVERY VOICE 1, 3 (2010), *available at* http://www.lib.alasu.edu/natctr/research/newsletter/issue01.pdf.

3. *Id.*

4. *See* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961) ("[D]ue process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.").

5. *Id.*

6. *See* Mahavongsanan v. Hall, 529 F.2d 448, 449–50 (5th Cir. 1976) (noting that because the matter before the court was academic in nature, the court would not apply due process scrutiny to the institution's actions).

7. *Id.* at 450.

8. Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 270–72 (1992).

always state the grounds for an academic punishment, and in many circumstances, discipline against students involves academic sanctions.[9] What, then, is the proper due process standard for these students? Fifty years after the groundbreaking case of *Dixon*, it appears that, in the context of academic disciplinary proceedings, students have gained little due process traction. In the current academic environment, academic plagiarism carries with it such a stigma that it is likely to haunt a student for years.[10] Considering this stigma, the stakes for students in cases of academic plagiarism and other academic infractions are undoubtedly high.

Further, the amount of leeway given to colleges and universities in the area of academic decisions is so broad that students who are being "disciplined" for violating student policies and procedures are subject to academic sanctions, with possibly little to no review by the courts.[11] This Note seeks to address the confusion between the standards for "academic" versus "disciplinary" dismissals and the consequences of this confusion. Part II.A examines the *Dixon* decision and the effect it had on the landscape of student due process. Part II.B describes several court cases (including *Dixon* itself) that brought the progression of student due process to a screeching halt, and how courts and scholars still struggle with this holding today. Part III.A examines the rationale behind these decisions and attempts to explain why courts feel the need to distinguish between academic and disciplinary dismissals, while Part III.B analyzes how the academic distinction has been applied to a myriad of issues facing college and university students and sheds light on the various problems that the academic disciplinary dichotomy has caused. Seeking to respond to these problems, Part IV.A proposes a new test for reviewing the disciplinary actions of tax-supported colleges and universities. Finally, Part IV.B applies this new test to the same scenarios

9. Mary Ann Connell & Donna Gurley, *The Right of Educational Institutions to Withhold or Revoke Academic Degrees*, 32 J.C. & U.L. 51, 57 (2005).

10. *See* Sarah Rimer, *When Plagiarism's Shadow Falls on Admired Scholars*, N.Y. TIMES, Nov. 24, 2004, at B9 (noting that plagiarism often results in expulsion for students).

11. Schweitzer, *supra* note 8, at 295.

outlined in Part III.B and illustrates how this test will protect much while changing little.

Universities should not be allowed to hide behind the veil of "academic" dismissal or discipline if the true reason for punishment is a disciplinary matter. If a tax-supported college or university chooses to punish a student for that student's wrongdoing, that student should be entitled to due process under the Fourteenth Amendment, even if the wrongdoing arises in an academic environment.

II. THE EVOLUTION OF DUE PROCESS FOR STUDENTS AT TAX-SUPPORTED COLLEGES AND UNIVERSITIES

A. *The Dawn of Due Process:* Dixon v. Alabama

Before *Dixon*, colleges and universities were granted deference in the way they disciplined students under the doctrine of *in loco parentis*,[12] or "in the place of a parent."[13] In fact, courts were almost loath to inject themselves into a complaint arising out of actions a school took against its students.[14] Nevertheless, mirroring the time period during which the case was heard by the Fifth Circuit, *Dixon* marked a dramatic change.

The events in *Dixon* center largely on the Civil Rights Movement of the 1960s.[15] As part of larger demonstrations throughout the South during this period, several African-American students from Alabama State College (now known as Alabama State

12. Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 487 (2003).

13. BLACK'S LAW DICTIONARY 858 (9th ed. 2009).

14. Eric Hoover, *'Animal House' at 30: O Bluto, Where Art Thou?*, CHRON. OF HIGHER EDUC., Sept. 5, 2008, at A1. *See also* Commonwealth v. Johnson, 35 N.E.2d 801, 804 (Mass. 1941) ("The fact that the attendance of a child, wholly independent of such child's misconduct, would impair the efficiency of the school may be sufficient ground for exclusion."); Barnard v. Inhabitants of Shelburne, 102 N.E. 1095, 1097 (Mass. 1913) ("A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.").

15. *History of Alabama State University*, ALA. STATE UNIV., http://www.lib.alasu.edu/archives/research/history/asu.html (last visited Sept. 28, 2011).

University[16]) held a sit-in at one of the local diners during lunch.[17] After the diner refused to serve the students, the students, in turn, refused to leave.[18] The same students were also believed to have organized multiple demonstrations throughout the City of Montgomery.[19] Shortly after the sit-in, Alabama State College expelled the students without providing any reason or even an opportunity for the students to appeal the decision.[20] The students, unwilling to accept their expulsion, took their case to court, where the federal district court promptly dismissed their case on the basis that the college had the right to expel students according to its own rules and regulations.[21] Even though the school provided no formal reason for the expulsion,[22] the district court concluded the students' participation in the civil rights demonstrations was the reason for expulsion[23] and ruled that the college was within its rights to expel the students for such conduct.[24] In siding with Alabama State College, the court stated that "[t]he right to attend a public college or university is not in and of itself a constitutional right."[25]

The Fifth Circuit rejected the conclusion of the district court.[26] Rather than basing its decision on the evidence or reasoning behind the expulsion, the Fifth Circuit concerned itself with the practice of Alabama State College in the past, which was to hold

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16. *Id.*

17. Joly, *supra* note 1.

18. *Id.*

19. *Id.*

20. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151 n.1 (5th Cir. 1961). In fact, the President of Alabama State College testified that he himself did not know the reason for the students' expulsion. *Id.* at 151. Eric Hoover, borrowing terminology from the movie ANIMAL HOUSE, colorfully described the way in which the students were treated: "It was, more or less, double-secret expulsion." Hoover, *supra* note 14, at A3; *see also* ANIMAL HOUSE (Universal Pictures 1978) (depicting the Dean of the fictional Faber College placing a college fraternity on "double-secret probation," in order to remove the college fraternity from the campus).

21. *See* Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 952 (M.D. Ala. 1961) ("[T]he prevailing law does not require the presentation of formal charges or a hearing prior to expulsion by the school authorities.").

22. Hoover, *supra* note 14, at A3.

23. *Dixon*, 186 F. Supp. at 952.

24. *Id.* at 952.

25. *Id.* at 950.

26. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961).

hearings prior to expulsion.[27] The Fifth Circuit also emphatically rejected the idea that, because the right to attend a university was not a constitutional right, the students were not entitled to due process.[28] Rather, the court chose to consider "the nature both of the private interest which [had] been impaired and the governmental power which [had] been exercised."[29] Noting that the private interest at stake was the right to remain at a student's college of choice and that the governmental power was expulsion from the college, the court held that the power of expulsion could not be exercised in an arbitrary manner.[30] The court reasoned that, because "a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts" regarding the alleged misconduct, "a hearing . . . [presenting] both sides in considerable detail is best suited to protect the rights of all involved."[31] Accordingly, the court reversed the suit,[32] thereby ushering in a new era of scrutiny for disciplinary action at colleges and universities.[33] No longer could events such as the ones leading up to *Dixon* result in a denial of due process; tax-supported colleges and universities needed to extend at least minimal due process to students in disciplinary proceedings.

B. A Cloud over the Dawn: Academic Dismissals

One phrase in *Dixon* indicated danger for the later interpretations of its holding: "[A] charge of misconduct, *as opposed to a failure to meet the scholastic standards of the college*," would

27. *See id.* ("[T]he evidence is without dispute that the usual practice at Alabama State College had been to give a hearing and opportunity to offer defenses before expelling a student.").

28. *See id.* at 156 ("One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.") (quoting Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894 (1961)).

29. *Id.*

30. *Id.* at 157.

31. *Id.* at 158–59.

32. *Id.* at 159.

33. Hoover, *supra* note 14, at A3. Mr. Hoover quotes Professor Peter F. Lake of Stetson University: "This was the first time a court had ever said anything remotely like that." *Id.*

require a hearing to satisfy due process.[34] The court's holding and this specific language suggested that disciplinary and academic sanctions would be treated differently; that suggestion turned out to be quite accurate. Shortly after the decision in *Dixon*, a distinction between "academic" and "disciplinary" dismissals of students began to arise in both the Fifth Circuit and other courts around the nation, including the United States Supreme Court.[35] In one such case, a medical student was dismissed after the faculty recommended her dismissal for poor academic performance.[36] The Supreme Court sided with the university, noting that procedures for academic dismissals should be "far less stringent" than the procedures for disciplinary ones.[37] In another case, *Mahavongsanan v. Hall*, a graduate student at Georgia Tech University sued the university for denying her a graduate degree on the basis that she failed one of the requisite exams.[38] The district court ruled in the plaintiff's favor on the basis that the defendant violated the plaintiff's due process rights.[39] Noting that the *Dixon* precedent had been limited to cases involving only "disciplinary decisions," the Fifth Circuit reversed the case.[40] The line of post-*Dixon* cases expresses a desire by the courts

34. *Dixon*, 294 F.2d at 158–59 (emphasis added).

35. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978) (holding that due process "calls for far less stringent procedural requirements in the case of an academic dismissal" than in a disciplinary dismissal); Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 278 (N.J. Super. Ct. App. Div. 1982) (upholding a university's decision to revoke a student's degree due to academic plagiarism). The court in *Napolitano* took particular care to note that the issue before it was of an academic nature, and noted that courts were near unanimous in ruling against the student "where academic suspensions or dismissal [are] involved." *Id.* at 273. *See also* Wright v. Tex. S. Univ., 392 F.2d 728, 729 (5th Cir. 1968) ("We know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards. Indeed, *Dixon* infers the contrary."); Militana v. Univ. of Miami, 236 So.2d 162, 164 (Fla. App. 1970) (noting that while notice and an opportunity to be heard were "certainly essential" to a student's due process rights when the student's dismissal is for disciplinary reasons, "such is not required when the dismissal is for academic failure").

36. *Horowitz*, 435 U.S. at 79–80.

37. *Id.* at 86.

38. Mahavongsanan v. Hall, 529 F.2d 448, 449–50 (5th Cir. 1976).

39. *Id.* at 449.

40. *Id.* at 449–50.

to move away from intrusion into the academic side of college and university life.

III. THE RATIONALE BEHIND THE ACADEMIC DISTINCTION AND ITS APPLICATION IN THE JUDICIAL PROCESS

A. The Case for Academic Aversion

The rationale for courts shying away from scrutinizing a college or university's academic decisions is logical on its face. As the Supreme Court noted in *Horowitz*, "[t]he need for flexibility [of the procedural due process requirements for students] is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct."[41] Indeed, the importance of this flexibility was noted as early as 1913, when the Supreme Judicial Court of Massachusetts stated that, while a hearing on disciplinary matters may aid the disciplinary process, hearings would be "useless or harmful" in academic matters.[42] When discussing the power for institutions to grant or revoke degrees, the Supreme Court of Ohio noted that prohibiting a university from revoking a degree would "undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the

41. 435 U.S. at 86.

42. Barnard v. Inhabitants of Shelburne, 102 N.E. 1095, 1097 (Mass. 1913). Although the *Barnard* case arose out of a case involving the public grade school system, *Id.* at 1096, this statement applies to tax-supported colleges and universities as well, and has been cited by courts accordingly. *E.g.*, *Horowitz*, 435 U.S. at 87 (applying the standard in *Barnard* to uphold the school's decision to deny a medical degree to a graduate student); Wong v. Regents of Univ. of Cal., 93 Cal. Rptr. 502, 507 (Cal. Ct. App. 1971) (adopting the policy argument in *Barnard* that academic freedom in institutions of learning supported a public medical school's decision to dismiss a student without interference from the courts). *See also* Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156, 160 (D. Vt. 1965) ("[I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals."); Mutsell v. Rose, 211 So. 2d 489, 498 (Ala. 1968) ("[T]he federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being reached to dismiss a student for failing to meet the required scholastic standards.").

certification which the degree represents."[43] In fact, the power to withhold or revoke degrees, and the court's willingness to accept the institution's decision, can be traced back nearly eight hundred years.[44]

Some argue that this deference toward colleges and universities arises out of a court's unwillingness, and perhaps nervousness, about the idea of having to inject itself into the role of analyzing a professor's grading decisions, which typically are the result of "a long process of interaction and observation between teacher and student."[45] Indeed, courts are often hesitant to inject themselves into deciding issues that require expertise or special knowledge.[46] Such intrusion would have judges acting as professors, deans, and administrators all at once. As one Supreme Court Justice has made clear, a judge being forced to assume the role of a job he or she does not hold can be problematic.[47]

While the court's rationale for distinguishing the academic decisions makes sense, it is not the existence of this distinction itself that is problematic, but rather the way in which it is applied. Abusing this distinction could significantly infringe on a student's due process rights.

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43. Waliga v. Bd. of Trs. of Kent State Univ., 488 N.E.2d 850, 852 (Ohio 1986).

44. *See id.* (citing The King v. Univ. of Cambridge, [1334] 8 Modern Rep. 148 (Eng.)) (discussing Chief Justice of the King's Bench's requirement of "reasonable cause" for revoking degree).

45. Schweitzer, *supra* note 8, at 272.

46. *See e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (reasoning that courts should defer to the interpretations of regulatory agencies because such agencies have expertise and knowledge that courts in general do not have, and that therefore court evaluation of the data and knowledge involved in making regulatory decisions would be inappropriate). *But see* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (limiting the *Chevron* doctrine to regulations having the "force of law"). Even though the Supreme Court has limited the *Chevron* doctrine through cases such as *Mead Corp.*, the rationale behind the *Chevron* case still suggests reluctance for courts to inject themselves into agency decisions requiring expertise or special knowledge.

47. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (stating that judges, when compared to experts at the Department of Health, are not suited to judge such matters as assisted suicide "any better than . . . nine people picked at random from the Kansas City telephone directory").

B. *The Application of the Academic Distinction*

Though the rationale for the distinction between "disciplinary" and "academic" dismissals is logical, the way in which courts apply this distinction is less so. This part examines several context-specific ways in which courts apply the academic distinction, which raise several questions regarding the constitutionality of this distinction.

1. Grades

Grading decisions are perhaps the least controversial application of the academic distinction. A mere three years after the decision in *Dixon*, the United States District Court for the District of Vermont heard the claim of a third-year medical student who had received a failing grade in one of his required classes.[48] The court, when examining the professor's decision, noted that its review of the grading decision was only appropriate if there was evidence that the school acted arbitrarily, capriciously, or in bad faith.[49] In another case, a law student brought an action after receiving a C-minus and a D in two of her classes at New York Law School.[50] Though the plaintiff enjoyed a temporary victory at the appellate court,[51] the New York Court of Appeals also employed the "arbitrary or capricious" standard and dismissed the student's claim.[52] In short, when faced with a lawsuit against a university for giving a student a poor grade, courts give the claims "short shrift"[53] and will likely continue to do so.

This is not always the case, however. At least one court has stated its willingness to rule in favor of the student if the institution

48. Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156, 158 (D. Vt. 1965).

49. *Id.* at 159.

50. Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104, 1105 (N.Y. 1990).

51. *Id.* at 1106. The Appellate Division allowed the plaintiff's claim to proceed to determine if the professor's decision to give the student the grade she received was a "rational exercise of discretion." *Id.* The Court of Appeals rejected this rational basis standard. *Id.* at 1007 ("Petitioner's allegations do not meet this [arbitrary and capricious] standard; rather, they go to the heart of the professor's substantive evaluation.").

52. *Id.* at 1107.

53. Schweitzer, *supra* note 8, at 294–95.

refuses to review a grade assigned to a student.[54] In *Sylvester v. Texas Southern University*, a student protested her "D" grade in a law school course, only to find her protests falling on deaf ears.[55] She, in fact, received no formal response from her professor, the dean, or any administrator, despite two formally written protests and continuous oral protests over the course of seven months.[56] The court noted that the school did have formal grade review procedures in place,[57] and that the school had proven itself "unable to follow the law it teaches."[58] Even after the school finally agreed to conduct a formal review by committee, it refused to take any meaningful action.[59] The court, taking all of this into account, decided to award the student a grade of "pass."[60]

The court's actions in the *Sylvester* case may seem contrary to the general rule of protecting an institution's freedom to make academic decisions such as awarding grades.[61] The conduct by Texas Southern University in *Sylvester*, however, was particularly extreme.[62] The court also took care to note that it was Texas Southern University's own policies and procedures and the university's failure to abide by those polices that made the case

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54. Sylvester v. Tex. S. Univ., 957 F. Supp. 944, 948 (S.D. Tex. 1997).

55. *Id.* at 945.

56. *Id.* at 946. The unhelpful attitude from the professor was not limited to his interactions with the plaintiff. Indeed, he arrived at a court-ordered review of plaintiff's grade with neither an answer key nor any model answer to which he could compare the plaintiff's exam. *Id.* at 946. When called before the court again, the professor refused to appear and had to be escorted into court by a U.S. Marshal. *Id.*

57. *Id.*

58. *Id.* at 944.

59. *Id.* at 946. The committee first ruled that it did not have jurisdiction to hear the claim. *Id.* After the court deemed that ruling unsatisfactory, the committee chairman expelled all students from the review committee, in complete contravention of the school's own procedures. *Id.* The committee also presented no evidence as "required by the school's rules." *Id.*

60. *Id.* at 948.

61. *See* Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156, 159 (D. Vt. 1965) (ruling that court may only review a grading decision if school acted arbitrarily, capriciously, or in bad faith); Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104, 1107 (N.Y. 1990) (employing an arbitrary or capricious standard to a school's grading decision).

62. *See supra* text accompanying note 56 (detailing the stubbornness with which the university responded to plaintiff's complaints).

susceptible to judicial scrutiny.[63] Moreover, the court acknowledged that the decision to award a grade of "pass" to the plaintiff was not an endorsement of the quality of the plaintiff's answers on her exam, but rather a rebuke of the university's failure to adhere to its own procedures.[64] Therefore, the decision was one of equity[65] and was not inconsistent with the courts' desire to protect the freedom of academic institutions and professors to grade students according to their own standards.

In a case where an institution actually complied with its own procedures for grade review, the court was perfectly willing to classify the matter as purely academic and give deference to the college or university.[66] In this case, the institution's policies and procedures did not require a formal hearing for grievances that addressed a "purely academic" issue.[67] The court accordingly dismissed the plaintiff's claim on the basis that the decision to award a specific grade was a purely academic issue and that the institution's decision was not arbitrary or capricious.[68]

The holdings in *Sylvester* and *Disesa* suggest that as long as a college or university exempts academic matters from its grievance procedures, or even as long as it has no formal procedures at all, the academic distinction can be left untouched when considering review of grades.

2. The Decision to Award a Degree

An institution's decision to award or deny a degree is treated similarly to grading disputes,[69] primarily because the nature of awarding and denying academic degrees is one of the hallmarks of

63. *Sylvester*, 957 F. Supp. at 947.
64. *Id.*
65. *Id.*
66. Disesa v. St. Louis Comm. Coll., 79 F.3d 92, 95 (8th Cir. 1996).
67. *Id.*
68. *Id.* at 95–96.
69. *See, e.g.*, Cieboter v. O'Connell, 236 So. 2d 470, 472 (Fla. Dist. Ct. App. 1970) (holding that the University of Florida did not violate plaintiff's due process rights by refusing to consider his dissertation because the university had determined that the plaintiff "had not demonstrated satisfactory development" in his education).

every institution's academic freedom.[70] Degree conferral is the academic issue in the *Hall* case,[71] and it is treated by the courts in the same manner as grading issues.[72] Without any kind of contract or code that alters the relationship between student and university, a court "will not participate in 'second-guessing the professional judgment of the University faculty on academic matters.'"[73] Due to courts' high level of deference in these types of situations, a student challenging a denial of a degree is unlikely to win under the current system.

3. Academic Dismissals

A student's challenge to an academic dismissal from an institution is not generally met with sympathy from the courts.[74] Even if a trial court does find in favor of the student, the ruling rarely survives an appeal.[75] Academic dismissal was at issue in the *Barnard* case, which established that it was legal to dismiss a student for failing to satisfy certain academic standards and that a review of such decisions by the courts would be inappropriate.[76] This sentiment was echoed in a more recent case as well.[77] Indeed, similar to grading disputes, courts will generally not scrutinize academic dismissal decisions unless the decision was arbitrary or

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70. *See* Connell & Gurley, *supra* note 9, at 51 ("One of the most important functions of an educational institution is the awarding of an academic degree.").

71. Mahavongsanan v. Hall, 529 F.2d 448, 449–50 (5th Cir. 1976).

72. *See* Doherty v. S. Coll. of Optometry, 862 F.2d 570, 578 (6th Cir. 1988) (agreeing with the school's decision to deny a degree to a student, noting that "this Court should not substitute its judgment for that of the educators involved."); Univ. of Miss. Med. Ctr. v. Hughes, 765 So. 2d 528, 540 (Miss. 2000) (restating the rule that academic decisions are not subject to due process review unless they are arbitrary and capricious).

73. Bissessur v. Ind. Univ. Bd. of Trs., 581 F.3d 599, 602 (7th Cir. 2009) (quoting Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992)).

74. JUDITH AREEN, HIGHER EDUCATION AND THE LAW 693 (2009).

75. *Id.* (citing Schweitzer, *supra* note 8, at 272).

76. Barnard v. Inhabitants of Shelburne, 102 N.E. 1095, 1097 (Mass. 1913); Schweitzer, *supra* note 8, at 294.

77. Spencer v. N.Y.C. Bd. of Higher Educ., 502 N.Y.S.2d 358, 359 (N.Y. Sup. Ct. 1986).

capricious.[78] The court in *Hines v. Riker* noted that this policy allowed "respect for the discretion of those best qualified to make such judgments" and that the medical school, and not the federal court, should "determine the qualifications of [plaintiff] to continue his medical studies."[79]

The Third Circuit repeated this principle in a case against Temple University.[80] In *Manning*, the court upheld dismissal of the plaintiff's claims because "the defendants' academic judgment in dismissing Manning was 'not beyond the pale of reasoned academic decision-making.'"[81] This is a trend to which courts around the country have adhered.[82] Therefore, unless the actions of the institution were arbitrary or capricious, students are unlikely to prevail in claims to prevent dismissal for academic reasons.

4. Cheating and Plagiarism

The prevalence of cheating and plagiarism among colleges and universities necessitates its inclusion as a separate category.[83] Further, the principles discussed in this Note have particular relevance to plagiarism due to plagiarism's duplicitous nature as both an academic and disciplinary matter for many colleges and universities.

At the Massachusetts Institute of Technology, for example, eighty-three percent of business students and sixty-three percent of humanities students admitted to cheating in some form during their

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78. *See* Hines v. Riker, 667 F.2d 699, 704 (8th Cir. 1981) (holding that university's decision to dismiss medical student was neither arbitrary nor capricious because the decision was made by entire faculty).

79. *Id.*

80. Manning v. Temple Univ., 157 F. App'x 509, 514–15 (3d Cir. 2005).

81. *Id.* at 515 (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 227–28 (1985)).

82. *See* Linson v. Trs. of the Univ. of Pa., No. Civ. A. 95-3681, 1996 WL 637810, at *4 (E.D. Penn. Nov. 4, 1996) (noting that a decision to dismiss a student for poor academic performance was within the university's discretion); Bergstrom v. Buettner, 697 F. Supp. 1098, 1100–02 (D. N.D. 1987) ("In an academic dismissal case . . . the only process which is due is an informal review and evaluation between the dismissing body and the student." (citing Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 (1978))).

83. *See* AREEN, *supra* note 74, at 735 n.4 (discussing the prevalence of cheating and plagiarism on college campuses).

time in college.[84] Accordingly, college and universities have begun to crack down.[85] How schools approach the punishment of students caught cheating or plagiarizing (or how the courts decide to treat such punishment) generally frames the redress students can seek for their punishments in court.[86] The New Jersey Appellate Division made that point clear in *Napolitano*, a case involving a student accused of plagiarizing a Spanish paper.[87] Since it was the last semester before the student was to graduate, the defendant withheld the student's degree, a common sanction for graduating seniors found to have plagiarized.[88] With one hand, the court wrote that the defendant had withheld twenty degrees "for disciplinary reasons" during the academic year (excluding the plaintiff);[89] with the other, it held that the action taken by the defendant was one involving "academic standards and not a case of violation of rules of conduct."[90] In doing so, the court denied the plaintiff's claim and allowed the sanction to stand.[91]

What is troubling about the court's opinion in *Napolitano* is that it shows for the first time that courts are willing to treat punishments that even they consider "disciplinary" as "academic," a treatment which allows courts to avoid interfering with the colleges' decisions.

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84. *See id.* (citing *83 Percent at MIT Admit They Cheated*, WASH. POST, Dec. 15, 1993, at A17).

85. *See* AREEN, *supra* note 74, at 693 (listing penalties imposed for cheating and plagiarism at colleges and universities including Duke and the University of Ohio).

86. *See* Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982) (noting that, because the student's alleged plagiarism was considered an "academic" matter, the court would not intervene). Although *Napolitano* is a lawsuit against a private university that is not subject to due process requirements under the Constitution, the court chose to adopt the principles stated in *Horowitz*, and therefore, its analysis of the issues is relevant to public institutions. *Id.* at 274.

87. *Id.* at 267.

88. *Id.* at 265.

89. *Id.*

90. *Id.* at 273.

91. *Id.* at 278.

This "academic" view of plagiarism was not limited to the court in *Napolitano*.[92] Even in cases where the institution holds a disciplinary hearing, courts may grant the institution wide latitude in this context.[93] This type of deference to colleges and universities is perhaps the most troubling of all, as it shows legitimate occurrences where a disciplinary matter was treated as academic and thus allowed the institution to avoid giving due process to its students.

5. "Non-Academic" Issues

While possibly not as newsworthy as cases of cheating or plagiarism, "non-academic" issues occasionally have academic consequences. When treated as an academic issue, the school is given deference according to the distinction between academic and disciplinary decisions. One such case involves a student at the Massachusetts Institute of Technology, Charles Yoo, who was involved in the hazing death of one of his fraternity brothers.[94] After discovering the role that Mr. Yoo played in the death, MIT decided to revoke Yoo's degree for a period of five years as punishment for his actions.[95] It is important to note that, because MIT is not a public institution, it is not bound by the due process constraints championed by *Dixon* and its progeny.[96] However, because the revocation of a degree is an academic rather than a disciplinary sanction, the *Yoo* case raises the relevant question of whether a public college or university would be able to escape procedural due process requirements in a similar scenario.

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92. *See* Mucci v. Rutgers, No. 08-4806 (RBK), 2011 WL 831967, at *16 (D. N.J. March 3, 2011) (ruling that the student was not entitled to heightened due process in a review of charges of plagiarism and poor academic performance because the student provided no evidence that the review was disciplinary rather than academic in nature).

93. *See* Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 439 (D. N.J. 1985) (holding that a student's due process rights were not violated even though the school's hearing failed to adhere to its own stated policies and procedures).

94. Yoo v. Mass. Inst. of Tech., No. 01-P-1057, 2004 WL 42248, at *1 (Mass. App. Ct. Jan. 8, 2004); *see also* Jayme L. Butcher, MIT v. Yoo*: Revocation of Academic Degrees for Non-Academic Reasons*, 51 CASE W. RES. L. REV. 749, 749–50 (2001) (explaining the circumstances surrounding the fraternity member's death and the reaction of MIT).

95. Yoo v. Mass. Inst. of Tech., No. 99-5566, 2001 WL 35820018, at *1 (Mass. Super. Ct. Apr. 27, 2001).

96. *Id.* at *4.

In some cases in which a student faces having a degree revoked or denied for non-academic reasons, public institutions do conduct formal hearings into the student's conduct.[97] In Mr. Yoo's case, MIT conducted a formal hearing to determine his culpability in the death of the fraternity pledge.[98] When the hearing determined that Yoo was culpable, the school then made the decision to revoke his degree.[99]

Courts also occasionally refuse to apply the same label of "academic" or "disciplinary" dismissal that institutions put forward. In *Roach v. University of Utah*, the university had rescinded a student's acceptance to a clinical program after it was discovered he had a sexual relationship with another student.[100] The court noted that the committee acted "summarily" in determining that he should not be allowed into the program.[101] Though the university argued that this decision was academic in nature,[102] the court held that "there is . . . no question that [plaintiff's dismissal] was a disciplinary dismissal and not an academic dismissal."[103]

At least one circuit has indicated non-academic issues do not invariably merit imposing procedural due process requirements on a university.[104] In *Fenje*, the court held that dismissing a student from a medical residency program for failure to be candid on his application for admission was an academic matter, not a disciplinary one.[105] In reaching this conclusion, the court reasoned that the

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97. *See, e.g.*, Jaber v. Wayne State Univ. Bd. of Governors, No. 09–11610, 2011 WL 824644, at *2 (E.D. Mich. March 7, 2011) (conducting a formal fact-finding hearing regarding a student's alleged plagiarism); Goodreau v. Rectors and Visitors of Univ. of Va., 116 F. Supp. 2d 694, 698–700 (W.D. Va. Oct. 10, 2000) (conducting a formal hearing regarding a student's alleged embezzlement of student organization funds).

98. *Yoo*, 2001 WL 35820018, at *6.

99. *Id.* at *1.

100. 968 F. Supp. 1446, 1449–50 (D. Utah 1997).

101. *Id.* at 1453.

102. *Id.*

103. *Id.* (noting that the University of Utah's decision to expel Roach was prompted by Roach's untruthful answers on his application, rather than any academic failure or misconduct).

104. *See* Fenje v. Feld, 398 F.3d 620, 629–30 (7th Cir. 2005) (holding that summary judgment was proper against a student who was dismissed for failure to be candid on his application for admission).

105. *Id.* at 625–26.

plaintiff's lack of candor on his application "was explicitly linked to his ability to adequately perform the duties of a resident" and was therefore appropriately couched as an academic issue.[106] On that basis, the court held that the student was not denied due process.[107]

These cases illustrate that there is less abuse of the academic and disciplinary distinction in cases of non-academic conduct, but the potential for abuse still exists. The potential for inconsistency (as shown by the decisions in these cases) is high enough to merit a reform of the process by which students are either allowed or denied due process when being sanctioned by public colleges or universities.

IV. THE ACADEMIC NATURE TEST: A STRICTER JUDICIAL REVIEW OF SANCTIONS AGAINST STUDENTS

A. *The Academic Nature Test*

The distinction between academic and disciplinary dismissal has worked in favor of courts because they have the ability to defer to the judgment of schools in disciplining their students; it has also worked in favor of the colleges because it protects the schools' academic freedom and gives them more leeway and flexibility in disciplining students. However, as the cases discussed in this Note illustrate, this policy has not worked in favor of students.

There are many instances in which the academic distinction has worked to the detriment of students' rights. But it has also worked to protect academic freedom and integrity at institutes of higher learning across the nation. Any solution to this problem must therefore strike a careful balance between institutions' ability to maintain academic integrity and students' rights guaranteed them under the United States Constitution. Failure to take both of these factors into account would not only be short-sighted, but it would lead to an eventual failure of the so-called "solution." In the cases illustrated above, courts have often chosen to defer to the interests of the institution's academic freedom.[108] If a solution fails to

106. *Id.* at 626.

107. *Id.*

108. *See supra* Part III.B. (citing numerous cases supporting academic freedom of institutions of higher learning).

adequately protect the institution's freedom, courts will take notice of that and side with the institution. Therefore, it is crucial that a solution to this problem be groundbreaking, but not so radical as to move too far away from protecting the interests of colleges and universities.

When deciding whether a case is of an academic or disciplinary nature, courts have focused primarily on the nature of the "offenses" and the channels through which the colleges addressed the situation.[109] However, this focus does not take into account the consequences of the action and whether that consequence is of an academic or a disciplinary nature. Therefore, when examining whether an action by a college or university against its student was academic or disciplinary in nature, the court should employ the following two-part test.

The court should first look at the consequence of the action taken against the student. Did the college or university expel, suspend, or remove the student from campus housing? Such an action would logically lend itself to being disciplinary in nature. If the consequence is disciplinary in nature, then the court should treat the case as involving a disciplinary issue and afford the student due process rights.

If the type of consequence is of an academic nature, however (including receiving a failing grade, having a degree withheld, or being dismissed from the school for failure to maintain academic standards[110]), the court should enquire into the school's reasons for subjecting the student to an academic sanction. Was it due to academic performance, or was it for a reason that should have been

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109. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 (1978) (noting the student's failure to attain certain academic standards and the school's decision to dismiss the student for poor performance); Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 275 (N.J. 1982) (noting that the student's plagiarism on a Spanish paper, and the University's decision to handle it as an academic matter, qualified the student's consequence as an academic matter).

110. *See, e.g.*, Hines v. Riker, 667 F.2d 699, 704 (8th Cir. 1981) (upholding the university's academic freedom to dismiss a student for failure to achieve the requisite academic standards); Connelly v. Univ. of Vt. & State Agric. Coll., 244 F. Supp. 156, 158 (D. Vt. 1965) (determining that the decision to award a grade is of an academic nature); Cieboter v. O'Connell, 236 So. 2d 470, 472 (Fla. Dist. Ct. App. 1970) (noting that degree decisions are within the academic freedom of colleges and universities).

treated as a disciplinary matter, such as violations of an institution's student code of conduct?[111] If the reasons point to an academic issue, then the court can show deference to the decision of the school as an academic matter. If, however, the circumstances leading to the sanction indicate that it was a disciplinary matter, then the court should treat it as such and ensure that the student is afforded due process rights. In short, if a sanction against a student is academic in nature, there should be a reasonable nexus between the conduct involved and the ultimate sanction.

B. *Application of the Academic Nature Test*

The "academic nature" test will ensure that in all of the scenarios described in Part III, the ideal balance between a student's due process interest and the institution's interest in academic freedom and integrity will be struck.[112] This test assumes that no other outside factors, such as college and university procedures, handbooks, codes of conduct, honor codes, or any other document or agreement would otherwise affect the nature of the action.

1. Grades

Using the academic nature test, grading decisions are still protected by their status as academic matters. The first question requires looking at the consequence to which the student was subjected. In this case, the consequence is the grade the student received, which is academic in nature, rather than disciplinary. Therefore, any court looking at this situation must address the second question: what was the reason the student received her grade? In most circumstances, a grade is based upon the student's performance in a class, based upon the professor's expectations for each student provided in the course syllabus. This is not a consequence of a student's conduct, but rather the result of their performance in the class. Both parts of this test suggest that grades, as long as they are based upon a student's performance in the class

111. *See* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158–59 (stating that "a charge of misconduct, as opposed to a failure to meet scholastic standards of the college," would require due process protection).

112. *See supra* Part III.B. (outlining of five possible scenarios in which a student is sanctioned by a college or university).

according to the syllabus, qualify as an academic matter that should be shielded from due process scrutiny.

2. The Decision to Award a Degree

A college or university's decision to award degrees will not likely be affected by this test, absent some unusual circumstance. The decision to award a degree, and thereby the decision to deny a degree, to a student is a pure academic consequence and thus can only be challenged if the second part of the test is satisfied. A student will only have recourse to challenge the denial of a degree if the circumstances surrounding the denial involve the college or university taking action against the student for a reason that is not related to academics. As long as the institution ties the student's denial to his or her academic performance or failure to otherwise fulfill the requirements of a degree, then the institution will be safe from due process scrutiny.

This test does, however, protect against an institution's hiding behind the veil of academic integrity by denying a degree to a student for any disciplinary reason. If the facts suggest that a student's degree was denied after committing an act that is against university policy or would lend itself to a disciplinary sanction, rather than an academic one, then the court would apply due process scrutiny and treat the matter as disciplinary.

3. Academic Dismissals

Dismissal from a tax-supported college or university for academic reasons (chiefly for failure to fulfill academic requirements for an extended period of time) will be treated no differently under the academic nature test, provided that the reason is for a student's failure to fulfill requirements expected of them per the institution's own policies. If those circumstances are present, then the consequence the student is facing—dismissal from the university—would seem to require due process scrutiny under the first part of the academic nature test. By contrast, when examining the circumstances leading to the student's dismissal, if the court finds that the institution dismissed the student for purely academic reasons, it will still shield the school's actions from due process

scrutiny. If, however, the college is claiming an "academic dismissal" based upon the student's conduct, rather than his or her performance, the court will treat it is a disciplinary matter and will apply due process scrutiny.

4. Cheating and Plagiarism

Inconsistencies in courts' treatments of students in cases of cheating and plagiarism would be eliminated by this new test. As outlined in Part III.B, some courts have treated plagiarism or cheating as solely an academic matter.[113] This new test would promote sounder judicial decision-making. Under the test, the consequence the student is facing for cheating or plagiarizing can range from receiving a failing grade, suspension, or expulsion to having a degree withheld. Therefore, the first part of the test is only satisfied in certain situations, but this does not affect the overall outcome of the case.

For example, if a student is expelled or suspended, he or she is facing a consequence that is clearly disciplinary in nature, meaning that the situation should immediately be treated as a disciplinary procedure that requires Fourteenth Amendment due process scrutiny. However, if the student is subjected to a failing grade or a revoked or withheld degree, the consequence appears to be academic in nature, meaning that the answer to the first question of the test leans in favor of the institution. The second part of the test requires looking at the circumstances that resulted in the action taken against the student. Plagiarism or cheating is a violation of an institution's standards of conduct.[114] A court staying out of such decisions would do nothing to academic integrity or freedom.[115] Therefore, it is not a matter of an academic nature, but one of an offense resulting in disciplinary action. Accordingly, the matter would be treated as disciplinary and would require a due process analysis.

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113. *See, e.g.*, Mucci v. Rutgers, No. 08-4806 (RBK), 2011 WL 831967, at *16 (D. N.J. March 3, 2011) (noting that, since the student had not provided evidence that plagiarism was not an academic matter, it would be treated as academic in nature); *Napolitano,* 453 A.2d at 275 (treating plagiarism as an academic matter).

114. *Supra* Part III.A.

115. *Supra* Part III.B.4.

Therefore, no matter the punishment to which the student is subjected, plagiarism and cheating would be treated as a disciplinary matter and would therefore prohibit colleges and universities from taking action against students without affording them due process under the Fourteenth Amendment.

5. "Non-Academic" Issues

This test would eliminate any cause for concern related to punishment for non-academic reasons, primarily because it would prevent courts from applying the "academic" label to a disciplinary matter, thereby permitting a school to circumvent due process. Each individual case would be examined, not just for the punishment being handed down, but the circumstances leading up to that punishment. Therefore, under this test, if Charles Yoo had his degree withheld at any public college or university under the same circumstances as in 2001,[116] the college would be forced in any jurisdiction to treat the matter as disciplinary because the cause of the academic sanction was disciplinary in nature. Therefore, any fears of inconsistency to the extent that it interferes with student due process rights are put to rest by this test.

This Note does not comment on the propriety of withholding a student's degree or subjecting a student to an academic sanction for a disciplinary violation; it merely analyzes such punishments in relation to the academic and disciplinary labels applied by the courts.[117]

V. CONCLUSION

Remembering the events that led to the expulsion of those six students from Alabama State University allows us to reflect not only upon the importance of the Civil Rights Movement from which the

116. *Yoo v. Mass. Inst. of Tech.*, No. 01-P-1057, 2004 WL 42248, at *1 (Mass. App. Ct. Jan. 8, 2004) (involving a student who was dismissed from MIT for alleged sexual misconduct).

117. *See supra* Part II.B. (discussing line of cases that all note the importance of a distinction between academic and disciplinary actions taken by colleges and universities).

case arose, but also upon the way in which those events crafted modern student disciplinary jurisprudence. It is fitting to reflect upon these events fifty years after the Fifth Circuit ruling in *Dixon* because it reminds us of how far we have come and of how far we have still to go. *Dixon* established due process rights for students in disciplinary proceedings at tax-supported colleges and universities, but the line of cases post-*Dixon* protects "academic" dismissals and discipline, allowing colleges and universities to hide behind this shield while denying students their rights under the Fourteenth Amendment.

The distinction between academic and disciplinary matters is not, in and of itself, a harmful concept. The judicial branch's deference to the academic decisions of college administrators and professors promotes academic freedom, protects relationships between students, and supports a desire for research, education, and development of the highest caliber. It also keeps the court from having to inject itself into every student's claim of unfair grading against a professor, or litigating every time a student is denied a degree. Inspecting every grade a professor gives his or her students under the microscope of the Fourteenth Amendment would be expensive, time-consuming, burdensome, and counterproductive. It could also force the court into a review of decisions made by persons in a specialized profession for which it may not be qualified.

However, applying this concept across the board has had rather dramatic and unintended consequences. Students have had degrees withheld or been suspended, expelled, or otherwise punished for cheating, plagiarism, and even violations of student handbooks, all under the guise of "academic" dismissals which are entitled to deference from courts.[118] Courts have examined these situations inconsistently, requiring due process in some instances but not in others. In order to protect the constitutional rights of these students, it is essential for the courts to clarify what issues qualify for protection as "academic" matters and what must be subject to due process analysis as "disciplinary" matters. Failure to do so will continue to jeopardize students' rights for years to come.

The challenge with any approach is that, in order to be successful, the approach must balance the interests of the courts, the institutions, and the students. The solution must protect academic

118. *Supra* Parts III.B.1.–III.B.4.

freedom while protecting due process. The academic nature test proposed in this Note provides that delicate balance. If the sanction is of an academic nature, there should be a reasonable nexus between the conduct involved and the ultimate consequence. If there is no nexus, then the student should be entitled to due process.

This proposed solution may sound like a great departure from current court precedent, but that simply is not the case. When examining the application of this test in Part IV, it requires little change for a large number of cases. That might lead one to then question why a new test is necessary at all if it does not change the results in a large number of cases. The answer is simple: the court, like every branch of government, is charged with protecting the constitutional rights of all. Therefore this new test is necessary if we wish to keep doing the work that *Dixon* started fifty years ago. If we do not change the current system, due process rights for students and their right to challenge actions taken against them in court will be forgotten.

Incentivizing Safety in the Dietary Supplement Industry

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I. INTRODUCTION

In a recent survey, 66% of respondents indicated that they consume dietary supplements.[1] The success of the dietary supplement industry, generating 26.7 billion dollars in 2009,[2] should come as no surprise considering that dietary supplements are often advertised as curing disease, building muscle, aiding weight loss, and increasing overall health and nutrition. The industry also benefits from a lack of consumer knowledge, as demonstrated by another statistic from the same survey, where 82% of Americans indicated they are confident in the safety and quality of dietary supplements.[3]

Beyond the potential benefits of dietary supplements and the rosy picture consumers have of supplement safety, there lurks a darker side. The United States Food and Drug Administration's (FDA) regulation of dietary supplements is many paces behind the regulation of drugs.[4] In fact, a dietary supplement is regulated much more like a food than a drug.[5] The predominant statutory workhorse

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1. *See* Erin Hlasney, *Supplement Usage, Consumer Confidence Remains Steady*, COUNCIL FOR REASONABLE NUTRITION (Sept. 30, 2010), http://www.crnusa.org/CRNPR10ConsumerSurvey_Usage+Confidence.html (discussing the results of a survey of 1,989 adults ages eighteen and over, conducted by Ipsos-Public Affairs for the Council for Responsible Nutrition).

2. *What's Behind Our Dietary Supplements Coverage*, CONSUMER REPORTS (Jan. 2011), http://www.consumerreports.org/health/natural-health/dietary-supplements-coverage/overview/index.htm.

3. Hlasney, *supra* note 1.

4. Phil B. Fontanarosa et al., *The Need for Regulation of Dietary Supplements—Lessons from Ephedra*, J. AM. MED. ASS'N, http://jama.ama-assn.org/content/289/12/1568.full. *See also Dietary Supplements*, FDA (Aug. 16, 2011), http://www.fda.gov/Food/DietarySupplements/default.htm (stating that supplements are governed by different standards than "conventional" foods and drugs).

5. *See Dietary Supplements*, FDA (Aug. 16, 2011), http://www.fda.gov/Food/DietarySupplements/default.htm (explaining that the FDA's role in dietary supplements does not begin until supplements enter the market).

is the Dietary Supplement Health and Education Act (DSHEA).[6] This statute was enacted in 1994, at a time when there were an estimated 600 U.S. dietary supplement manufacturers who marketed about 4,000 products.[7] Since the enactment of the DSHEA, the FDA estimates that an average of 1,000 new supplements are introduced into the market annually, and that more than 29,000 dietary supplements are currently available to consumers.[8]

If the 82% of surveyed Americans were correct in their assessment of the overall safety and quality in the industry,[9] the DSHEA would be a sufficient regulatory tool. Nevertheless, there are reasons to believe that many dietary supplements are actually harmful and that the DSHEA is not strict enough to ensure consumer safety. For example, between 1993 and 2003, the FDA received 2,277 adverse event reports from dietary supplements containing ephedrine.[10] These adverse events included serious harms such as heart attacks, strokes, seizures, and deaths.[11] Because the DSHEA only grants the FDA limited regulatory power,[12] it was not until 2004 that the FDA was able to ban the sale of dietary supplements containing ephedrine.[13]

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6. Dietary Supplement Health and Education Act of 1994 (DSHEA), Pub. L. No. 103-417, 108 Stat. 4325 (1994) (codified at scattered sections of 21 and 42 U.S.C. (2006)).

7. COMM'N ON DIETARY SUPPLEMENT LABELS, REPORT OF THE COMMISSION ON DIETARY SUPPLEMENT LABELS 17 (1997), *available at* http://www.health.gov/dietsupp/final.pdf.

8. ALLISON SARUBIN, THE HEALTH PROFESSIONAL'S GUIDE TO POPULAR DIETARY SUPPLEMENTS 3 (2000).

9. *See* Hlansey, *supra* note 1 (describing 2010 study revealing that 82% of American adults feel confident in the "safety, quality, and effectiveness" of dietary supplements).

10. U.S. GEN. ACCOUNTING OFFICE, DIETARY SUPPLEMENTS CONTAINING EPHEDRA: HEALTH RISKS AND FDA'S OVERSIGHT 2 (2003), *available at* http://www.gao.gov/new.items/d031042t.pdf.

11. *Id. See also* Giordano v. Mkt. Am., Inc., 599 F.3d 87, 91 (2d Cir. 2010) (discussing the risks associated with ephedrine use).

12. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4328, § 402 (1994) (granting the FDA the power to deem a dietary supplement or ingredient in a dietary supplement adulterated and remove it from the market only after meeting its burden of proof).

13. *Consumer Advisory Ephedra*, NAT'L CTR. FOR COMPLEMENTARY & ALT. MED. (July 2009), http://nccam.nih.gov/news/alerts/ephedra/consumeradvisory.htm.

This note will address the problems plaguing the dietary supplement industry and potential solutions. A detailed discussion of the DSHEA, harms from dietary supplements, and actions the FDA has taken will help explain why there is a regulatory gap in the industry. The note will then address this problem by proposing solutions in the form of incentive plans aimed at manufacturers, consumers, scientists, and the federal government. Because it is difficult and time-consuming to pass new legislation, there is a need for a novel, incentive-based approach. By devising incentive plans that target the main actors in the industry, the regulatory gap can be closed without the need for much, if any, new legislation.

II. THE PROBLEM: CURRENT STATUS OF THE DIETARY SUPPLEMENT INDUSTRY AND RESULTING HARMS

Since the DSHEA was enacted, the FDA has banned very few dietary supplements.[14] Some might think this is an indication that dietary supplements are inherently safe, but that assumption is mistaken. A discussion of the current law and the consumer harms that have resulted from dietary supplements will make clear that the DSHEA has left a regulatory gap in the dietary supplement industry.

A. Current Legislation

1. Dietary Supplement Health and Education Act

The FDA regulates dietary supplements "under a different set of regulations than those covering 'conventional' foods and drugs."[15] For a drug to be approved for human consumption and sold in the

14. *See* United States v. 5 Unlabeled Boxes, 572 F.3d 169, 172 (3d Cir. 2009) (noting that the ephedrine alkaloid final rule was the first time the FDA banned an entire class of dietary supplements under the DSHEA). *See also FDA News Release*, FDA (Aug. 21, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108715.htm ("On Aug. 17, the U.S. Court of Appeals for the Tenth Circuit in Denver upheld the Food and Drug Administration's (FDA) final rule declaring all dietary supplements containing ephedrine alkaloids adulterated . . . .").

15. *Dietary Supplements*, FDA (Aug. 16, 2011), http://www.fda.gov/Food/DietarySupplements/default.htm.

U.S., a drug manufacturer must perform extensive testing.[16] Drug tests are first performed on animals and then on humans to determine the drug's safety and benefits of use.[17] The results of these tests are then sent to the FDA's Center for Drug Evaluation and Research (CDER).[18] At this point, a team of CDER physicians, statisticians, chemists, pharmacologists, and other scientists review the data and proposed labeling.[19] The reviewing team performs a balancing test to determine if the drug's health benefits outweigh its known risks.[20] If the test weighs in favor of the benefits, the drug is approved for sale.[21]

In contrast to the rigorous regulation of drugs, the DSHEA mandates a hands-off approach to dietary supplement regulation.[22] The dietary supplement manufacturer is wholly responsible for ensuring that the supplement is safe *before* it is marketed,[23] while the FDA is responsible for taking action against unsafe dietary supplement products only *after* they reach the market.[24] In addition, most manufacturers "do not need to register their products with the FDA nor [sic] get FDA approval before producing or selling dietary supplements."[25] The DSHEA also places the burden of proving that a dietary supplement is adulterated on the FDA.[26] To satisfy that burden of proof, the FDA must demonstrate that the challenged dietary supplement "presents a significant or unreasonable risk of illness or injury."[27] This is a difficult burden to overcome because the FDA must compile enough evidence to show why the dietary supplement's risk is "significant" or "unreasonable."[28]

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16. *Approved Drugs: Questions and Answers*, FDA (Aug. 12, 2011), http://www.fda.gov/Drugs/ResourcesForYou/Consumers/UCM054420.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Dietary Supplements*, FDA (Aug. 16, 2011), http://www.fda.gov/Food/DietarySupplements/default.htm.

23. *Id.*

24. *Id.*

25. *Id.*

26. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4328, § 402 (1994).

27. *Id.*

28. *Id.*

The DSHEA defines a dietary supplement as a "product (other than tobacco) intended to supplement the diet that bears or contains one or more" of the dietary ingredients listed in the statute.[29] The statute lists the following dietary ingredients: vitamins, minerals, herbs or other botanicals, and amino acids.[30] Also included in the statute are two catch-all provisions, which state that a dietary supplement is a "dietary substance for use by man to supplement the diet by increasing the total dietary intake"[31] or "a concentrate, metabolite, constituent, extract, or combination" of the other listed ingredients.[32]

The DSHEA also contains a section explaining how the FDA must treat new dietary ingredients.[33] Under this section, a "dietary supplement which contains a new dietary ingredient shall be deemed adulterated under section 402(f) unless it meets" one of two tests articulated in the statute.[34] The first test is satisfied if the dietary supplement only contains dietary ingredients that were already present in the food supply as an "article used for food in a form in which the food has not been chemically altered."[35] The alternative requirement is satisfied if the new dietary ingredient has a history of use or other evidence of safety when used in conditions that suggest it will "reasonably be expected to be safe."[36] These two ways to avoid an adulteration label are extremely broad and encompass many of the "would be" new dietary ingredients.[37]

The last section in the DSHEA establishes the Office of Dietary Supplements (ODS) within the National Institutes of Health (NIH).[38] The purpose of the ODS is to study dietary supplement benefits to improve healthcare and to coordinate and compile

29. *Id.* at 4327, § 321(a).
30. *Id.*
31. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4327, § 201 (1994).
32. *Id.* at 4327, § 201.
33. *Id.* at 4331–32, § 413(a) (1994).
34. *Id.*
35. *Id.* at 4331, § 413.
36. *Id.*
37. *See* Michael McGutten & Anthony L. Young, *Premarket Notifications of New Dietary Ingredients—a Ten-Year Review*, 59 FOOD & DRUG L.J. 228, 234 (2004) (explaining that the FDA found that the following were not "dietary ingredients": a hormone, a desiccated medicinal leech, and pathogenic microbes such as streptococcus).
38. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4334–35, § 485C (1994).

research on dietary supplements.[39] There is also a section authorizing Congress to make annual appropriations to the ODS.[40]

2. Dietary Supplements and Nonprescription Drug Consumer Protection Act

Another statute that regulates the dietary supplement industry is the Dietary Supplement and Nonprescription Drug Consumer Protection Act (CPA).[41] The CPA was enacted in 2006, and it amended the Food, Drug, and Cosmetic Act by adding a section about serious adverse event reporting.[42] Under the CPA, an "adverse event" is "any health-related event associated with the use of a dietary supplement that is adverse."[43] A "serious adverse event" is one that results in death, a life-threatening experience, in-patient hospitalization, a persistent or significant disability or incapacity, a congenital anomaly or birth defect, or one where a medical or surgical intervention is needed to prevent one of the other outcomes previously listed.[44] The statute goes on to set forth stringent reporting requirements as well as rules for the maintenance and inspection of records kept by dietary supplement manufacturers.[45]

B. Harm Arising from Dietary Supplements

While this note focuses on dietary supplement harms, it is important to acknowledge dietary supplement benefits as well. Experts at the Mayo Clinic say that if you are a generally healthy individual, and you eat a balanced diet, then "daily dietary supplements may not be worth the expense."[46] However, if you are a

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39. *Id.*

40. *See id.* at 4335, § 485C(e) (authorizing appropriations to carry out this section of the DSHEA).

41. Dietary Supplement and Nonprescription Drug Consumer Protection Act (CPA), Pub. L. No. 109-462, 120 Stat. 3469 (2006) (codified at scattered sections of 21 U.S.C. (2006)).

42. CPA, Pub. L. No. 109-462, 120 Stat. 3469, 3469–70, § 760 (2006).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Dietary Supplements: Nutrition in a Pill?*, MAYO CLINIC (June 5, 2010), http://www.mayoclinic.com/health/supplements/NU00198.

person who is unable to consume enough healthy foods or have "certain conditions," then dietary supplements may be beneficial.[47] Conditions warranting dietary supplement use include: a person who does not eat well or consumes less than 1,600 calories a day; a vegan or vegetarian who eats a limited variety of foods, a pregnant woman or one who is trying to become pregnant or is breast-feeding, a woman who has heavy bleeding during her menstrual period; a post-menopausal woman, a person who has a medical condition affecting how his body absorbs, uses, or excretes nutrients; or a person who has had digestive tract surgery that makes him unable to absorb or digest nutrients properly.[48]

Despite the real benefits that dietary supplements may offer to particular individuals, they can also cause a number of harms. Because the risk of harm from drugs is high, it is more apparent to Congress and consumers that strict protections should be built into the regulatory system.[49] But dietary supplements are not considered drugs,[50] and their regulation is extremely light.[51] Even though dietary supplement harms may be less severe than drug harms, there is still a need for protections to be built into the dietary supplement industry to safeguard consumers. Dietary supplement consumers experience harm from adverse reactions, drug interactions, contamination, undeclared materials, insufficient labeling, and opportunity costs.

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47. *Id.*

48. *Id.*

49. *See Approved Risk Evaluation and Mitigation Strategies*, FDA, http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111350.htm (last updated Nov. 17, 2011) (stating that pursuant to the Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823, the FDA has the authority to require a Risk Evaluation and Mitigation Strategy (REMS) from manufacturers to ensure that the benefits of a drug or biological product outweigh its risks).

50. *Dietary Supplements*, FDA (Aug. 16, 2011), http://www.fda.gov/Food/DietarySupplements/default.htm.

51. *See supra* Part II.A. (comparing the rigorous FDA regime for testing drugs with the far more lax process for approving dietary supplements under the DSHEA).

1. Adverse Reactions

Despite the commonly-held belief that dietary supplements are inherently safe,[52] many dietary supplements cause adverse reactions. The FDA encourages consumers and healthcare providers to report adverse events associated with dietary supplement use, and the CPA mandates that manufacturers report serious adverse events to the FDA as well.[53] Reporting to the FDA is voluntary, however, and some estimate that less than 1% of all adverse events are actually reported.[54] Reasons for this lack of reporting may include: low consumer awareness of the importance of reporting or the availability of a reporting system, consumer reluctance to report alternative supplement use, and consumer failure to view the dietary supplement as the cause of an adverse event because they believe supplements are safe and "natural."[55]

Looking beyond FDA reporting, *Consumer Reports* developed a list of the twelve most dangerous dietary ingredients that are found in dietary supplements today.[56] These ingredients have been linked to health hazards like cancer, heart problems, liver and kidney damage, and death.[57] Not only are these dietary ingredients innately harmful, but the DSHEA also exacerbates the harm by making it difficult for the FDA to recall a dietary supplement.[58]

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52. Hlasney, *supra* note 1.

53. *See* CPA, Pub. L. No. 109-462, 120 Stat. 3469, 3470, § 760 (2006) (describing manufacturer reporting requirements for serious adverse dietary supplement events); *Dietary Supplements - Adverse Event Reporting*, FDA (May 7, 2009), http://www.fda.gov/Food/DietarySupplements/Alerts/ucm111110.htm (instructing consumers to report illness or injury associated with use of a dietary supplement).

54. NAT'L CTR. FOR BIOTECHNOLOGY INFO., USE OF DIETARY SUPPLEMENTS BY MILITARY PERSONNEL 342 (2008), *available at* http://www.ncbi.nlm.nih.gov/books/NBK3976/.

55. *Id. See also supra* text accompanying note 3 (describing a study showing that 82% of people believe supplements are safe).

56. *12 Supplements You Should Avoid*, CONSUMER REPORTS (Sept. 2010), http://www.consumerreports.org/health/natural-health/dietary-supplements/supplement-side-effects/index.htm.

57. *Id.*

58. *See* DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4327, § 201 (1994) (defining dietary supplement as a product including an article approved by the FDA as a new drug or licensed as a biologic, unless the Secretary of Health and Human Services issues "a regulation, after notice and comment, finding that the

Even extremely dangerous dietary supplements are often left on the market for extended periods of time before the FDA can take action. For example, it took a decade to ban the ephedrine alkaloids used in weight-loss products.[59] During the time it took to gather information for the product ban, supplements containing ephedrine were linked to thousands of adverse events,[60] such as heart attacks, strokes, seizures, and deaths.[61] There are also dietary supplements that cause minor side effects that often fly under the radar, such as vomiting, heart-rhythm disorders, fainting, high blood pressure, and toxicity.[62]

2. Drug Interactions

In addition to causing adverse reactions, dietary supplements may also be harmful because of negative interactions with drugs or other dietary supplements that a consumer might be taking. The herbal dietary supplement, St. John's Wort, is a prime example of this type of negative synergy between dietary supplements and drugs.[63] Public Citizen, a non-profit consumer rights group, wrote a letter to the FDA in 2000 describing the potentially serious drug interactions between St. John's Wort and a number of prescription drugs.[64] The United Kingdom's Committee on Safety of Medicines warned doctors and patients to stop using St. John's Wort while

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article, when used as a dietary supplement under the conditions of use and dosages set forth in the labeling for such dietary supplements is unlawful"). *See also What's Behind Our Dietary Supplements Coverage*, CONSUMER REPORTS (Jan. 2011), http://www.consumerreports.org/health/natural-health/dietary-supplements-covera ge/overview/index.htm (explaining that the FDA must show a dietary supplement poses "a significant or unreasonable risk" in order to ban the supplement).

59. *Id.*

60. *Id.*

61. *Dietary Supplements Containing Ephedra: Health Risks and FDA's Oversight*, U.S. GOV'T ACCOUNTABILITY OFFICE (July 23, 2003), http://www.gao.gov/products/GAO-03-1042T. *See also* Giordano v. Mkt. Am., Inc., 599 F.3d 87, 91 (2d Cir. 2010) (discussing the risks associated with ephedrine use).

62. *12 Supplements You Should Avoid*, CONSUMER REPORTS (Sept. 2010), http://www.consumerreports.org/health/natural-health/dietary-supplements/supplement-side-effects/index.htm.

63. Sidney Wolfe & Larry Sasich, *Letter Concerning Recent Warnings About Drug Interactions with St. John's Wort*, PUBLIC CITIZEN (Mar. 2, 2000), http://www.citizen.org/Page.aspx?pid=2144.

64. *Id.*

taking a number of different drugs.[65] A few of the stated side effects of the negative interactions included reduced blood levels, seizures, loss of control of heart rhythm or heart failure, and loss of control of asthma or chronic airflow limitation.[66] Because the FDA was not required to regulate St. John's Wort before it entered the market, it had no way to guard against the negative drug interactions prior to the marketing of the supplement. Interactions between dietary supplements and the prescription drugs that consumers take can be extremely damaging.

3. Contamination

Dietary supplements, like many food products, are also susceptible to contamination. Salmonella is a common dietary supplement contaminant.[67] On the FDA's alert website, there are several cited cases of salmonella contamination.[68] There are probably many unreported cases considering the size of the supplement market and how thinly the FDA's regulatory capabilities are spread. However, the FDA has taken action to try to reduce the amount of contamination by promulgating current good manufacturing practices.[69]

4. Undeclared Ingredients and Insufficient Labeling

Even more common than contamination is the presence of undeclared ingredients in dietary supplements; the FDA's alert website cites around 34 instances of this problem in the last few

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65. *Id.*

66. *Id.*

67. *See Recalls, Market Withdrawals, & Safety Alerts Search*, FDA, http://www.fda.gov/Safety/Recalls/default.htm (last visited Sept. 23, 2011) (showing seven recalls of dietary supplements due to salmonella contamination between June 2010 and April 2011).

68. *Id.*

69. *Dietary Supplement Current Good Manufacturing Practices (CGMPs) and Interim Final Rule (IFR) Facts*, FDA (June 22, 2007), http://www.fda.gov/Food/DietarySupplements/GuidanceComplianceRegulatoryInformation/RegulationsLaws/ucm110858.htm.

years.[70] These undeclared ingredients include unapproved drugs that have been found in dietary supplements on the market, but that were not present on supplement labels.[71] According to a recent *Consumer Reports* article, many supplements on the market are tainted with synthetic steroids or active ingredients found in prescription drugs.[72] These supplements are often marketed for weight loss, sexual enhancement, and bodybuilding.[73]

There are a variety of issues associated with the presence of undisclosed ingredients in dietary supplements. As discussed above, there is always the chance that a dietary supplement will have a negative interaction with another product a consumer is taking.[74] Additionally, a consumer could be allergic to undisclosed ingredients and suffer a severe allergic reaction. Moreover, if dietary supplement manufacturers are able to slip new drugs or supplements into their products, they are in effect bypassing one of the only regulatory powers the DSHEA grants the FDA: the regulation of new dietary ingredients.[75]

5. Opportunity Costs

There is also a much more subtle sort of harm involved with the consumption of dietary supplements. This harm surfaces when consumers choose to forgo medical care, doctor visits, and drugs and instead satisfy their healthcare needs through the purchase of dietary supplements. Consumers risk passing up the care they truly require for a dietary supplement that might harm their health. Unlike drug manufacturers, a dietary supplement manufacturer does not have to

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70. *Recalls, Market Withdrawals, & Safety Alerts Search*, FDA, http://www.fda.gov/Safety/Recalls/default.htm (last visited Sept. 23, 2011).

71. *Id.*

72. Doug Podolsky, *FDA "Mans Up" on Tainted Dietary Supplements*, CONSUMER REPORTS (Dec. 15, 2010), http://news.consumerreports.org/health/2010/12/sexual-enhancement-fda-gets-tough-on-tainted-dietary-supplements.html.

73. *Id.*

74. *See supra* Part II.B.2. (discussing the potential dangers of drug interactions between dietary supplements and medicines).

75. *See* DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4331, § 413 (1994) (granting the FDA the power to deem adulterated new dietary ingredients unless they meet specific requirements).

prove that a supplement is effective[76] because dietary supplements are not intended to treat, diagnose, mitigate, prevent, or cure disease.[77]

Additionally, consumers with limited financial resources often spend their money on dietary supplements rather than alternative forms of care. Consumers who purchase weight loss dietary supplements often choose the quick and easy cure of a supplement over the more time-consuming alternatives of healthy diets and exercise. While consumers should have the right to make their own consumption choices, the risks attending these opportunity costs are additional reasons why dietary supplement consumption can be harmful.

C. FDA Action

The FDA is extremely limited in the recourse it can take against harmful dietary supplements. As discussed earlier, the DSHEA hardly bestows any regulatory authority on the FDA.[78] Manufacturers are the ones in charge of ensuring that a dietary supplement is safe for the market.[79] To date, there have already been sixteen dietary supplement alerts reported in 2011, and judging from the numbers in 2010, many more will follow.[80] Many of the alerts are merely notices about the FDA's concerns regarding supplements or warnings to consumers; they are not actual bans on the products.[81] Warnings can only go so far to promote safety. For consumers

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76. *Frequently Asked Questions (FAQ)*, OFFICE OF DIETARY SUPPLEMENTS (ODS), http://ods.od.nih.gov/Health_Information/ODS_Frequently_Asked_Questions.aspx#Information (last updated June 6, 2011).

77. *See id.* (describing how ODS believes "supplements should not replace prescribed medications or the variety of foods important to a healthful diet").

78. *See supra* Part II.A. (discussing the limited power given to the FDA to regulate dietary supplements).

79. *See* DSHEA, Pub L. No. 103-417, 108 Stat. 4325, 4331, § 402 (1994) (allowing the Department of Health and Human Services to promulgate regulations on good manufacturing practices for dietary supplements only after notice and comment rulemaking).

80. *See Recalls, Market Withdrawals, & Safety Alerts Search*, FDA, http://www.fda.gov/Safety/Recalls/default.htm (last visited Sept. 23, 2011) (listing forty-six recalls of dietary supplements in 2010).

81. *Id.*

without access to the internet or who do not spend time researching the products they purchase, these warnings are of little value.

Although the FDA is limited in its regulatory authority to actually remove products from the market or regulate them pre-release, it should be credited for taking a number of steps to try to improve safety. For example, the FDA devised current good manufacturing practices to help guard against dietary supplement contamination,[82] and it has also asked the dietary supplement industry to report supplements it suspects were tainted.[83] Additionally, on its website, the FDA provides access to alerts about supplements, which can help provide consumers with current information about dangerous supplements that have not been recalled.[84] While all of these efforts should be applauded, the FDA's reach can only go so far with its limited regulatory authority and manpower. As long as the DSHEA remains in place, stronger incentives are needed in the dietary supplement industry to ensure safer products for consumers.

III. THE SOLUTION: INCENTIVE PLANS

It is evident based on the discussion above that there is a regulatory gap in the dietary supplement industry. All of this could be corrected in one fell swoop if Congress passed a statute that would grant the FDA greater power to regulate the industry. However, new legislation is not easy to come by as deadlock in Congress is all too common. Moreover, there is a prevailing attitude, noted in the "Findings" section of the DSHEA, that "dietary supplements are safe within a broad range of intake, and safety problems with the supplements are relatively rare."[85] Many also feel that consumers need access to safe dietary supplements in order to

82. *Dietary Supplement Current Good Manufacturing Practices (CGMPs) and Interim Final Rule (IFR) Facts*, FDA (June 22, 2007), http://www.fda.gov/Food/DietarySupplements/GuidanceComplianceRegulatoryInformation/RegulationsLaws/ucm110858.htm.

83. Podolsky, *supra* note 72.

84. *Recalls, Market Withdrawals, & Safety Alerts Search*, FDA, http://www.fda.gov/Safety/Recalls/default.htm (last updated Sept. 23, 2011).

85. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4325–26, Findings (14) (1994).

promote wellness.[86] Since new legislation is not on the horizon, there is a need for other types of action that will promote a safer dietary supplement industry. By focusing incentive plans at the key actors in the dietary supplement industry—manufacturers, consumers, scientists, and the federal government—the overall safety of the dietary supplement industry will be improved.

This section discusses each actor's current role in the dietary supplement industry and then describes ideas for how to incentivize those actors to promote safety. Manufacturers will be discussed first, followed by consumers, scientists, and the federal government. The manufacturer and consumer incentives are the most important because they are most likely to impact the status quo. Scientists offer an additional benefit to the industry, but their role in promoting safety is not as crucial. The federal government's role in promoting safety depends on whether or not the other actors are incentivized.

A. Manufacturers

This section will begin by examining the current role manufacturers play in the dietary supplement industry. Next, I hypothesize ways to incentivize manufacturers to increase safety in the industry by improving the quality of their products and performing more testing. These plans include a market-based approach and incentives created through litigation. I will also discuss potential problems resulting from these plans.

1. Current Role of Manufacturers

Dietary supplement manufacturers push strongly against regulation.[87] This is not surprising considering that they generate massive amounts of profit without having to spend the costs associated with thorough product testing.[88] Manufacturers fear

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86. *Id.*

87. Leon Jaroff, *Beyond Ephedra*, TIME (Feb. 10, 2004) (discussing the massive lobbying campaign by the health food industry against FDA regulations).

88. *See supra* text accompanying note 2 (describing the massive profits yielded by dietary supplement manufacturers) and note 25 (stating that dietary supplement manufacturers are not required to obtain FDA approval before sending a product to the market).

increased costs associated with product testing, and many are probably concerned about what the tests would reveal.[89] Therefore, the light regulation of the DSHEA seems to be operating perfectly for manufacturers, and because manufacturers are largely driven by profit, they have an incentive to maintain the current system.

Under the DSHEA, manufacturers have almost complete control of product regulation.[90] All dietary supplements that were on the market prior to the DSHEA are grandfathered in as safe,[91] and "new dietary ingredients," while covered by the statute, still face only limited regulation.[92] Because the FDA has the burden of proving that a supplement "presents a significant or unreasonable risk of illness or injury,"[93] manufacturers can produce dietary supplements with little fear of FDA action. Given the limited resources available to the FDA to police thousands of supplements on the market,[94] manufacturers have great incentives to capitalize profits even with the slight risk that a product will eventually face litigation.

Furthermore, even if a dietary supplement has been demonstrated to result in some level of harm to consumers, it often takes the FDA a number of years to act.[95] During that time, manufacturers generate large profits from dietary supplement sales.[96]

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89. *See* Wendy Wagner, *Using Competition-Based Regulation to Bridge the Toxics Data Gap*, 83 IND. L.J. 629, 636 (2008) ("[T]ort system thus compounds the perverse incentives of the regulatory and market systems favoring ignorance.").

90. *See generally* DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4328, § 402 (1994) (granting the FDA the power to deem a dietary supplement or ingredient in a dietary supplement adulterated and remove it from the market only after meeting its burden of proof).

91. *Id.* at 4331–32, § 413 (codified at 21 U.S.C. § 350b(d) (2006)) (defining new dietary ingredients as those marketed after October 15, 1994).

92. *Id.* at 4331–32, § 413.

93. *Id.* at 4328, § 402.

94. *See supra* text accompanying note 8 ("Since the enactment of the DSHEA, the FDA estimates that an average of 1,000 new supplements are introduced into the market annually, and that more than 29,000 dietary supplements are currently available to consumers.").

95. *See supra* text accompanying note 59 (noting that it took the FDA nearly a decade to ban ephedrine).

96. *CR Investigates: Dangerous Supplements Still at Large*, CONSUMER REPORTS (May 2004), *available at* http://www.edh-doctor.com/articles/Dangerous_Supplements.pdf (discussing the large amount of money that dietary supplement manufacturers can make even after the government issues warnings about their supplements).

Even after the FDA warns against a dietary supplement's use, manufacturers do not have to recall the product.[97]

For all of these reasons, one would suspect manufacturers to be one of the most difficult actors to incentivize towards producing safer products. How can one incentivize a manufacturer to regulate an activity that risks cutting profits and comes with an unknown possibility of gain when the status quo is so profitable? The following discussion introduces plans that provide manufacturers with clear incentives to increase product safety.

2. Incentivizing Manufacturers Through Use of the Market

The market can be a powerful tool for incentivizing manufacturers to increase the overall safety of dietary supplements. One way to use the market to incentivize manufacturers is to implement a five-star plan. This novel plan would involve a rating system located on dietary supplement labels that would give safer products a competitive advantage in the market.

a. How it Works

The five-star plan will work as an incentive to entice manufacturers to increase dietary supplement testing and research, as well as to increase the quality of the ingredients and the overall safety of the product. The ODS would be in charge of the five-star plan because it is a neutral organization run through the NIH, which already has a sizeable budget.[98] The ODS also has sovereign

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97. 21 U.S.C. § 350l (2006) (providing if there is "a reasonable probability that an article of food . . . is adulterated under section 342 of this title . . . and the use of or exposure to such article will cause serious adverse health consequences or death to humans or animals, the Secretary [of the U.S. Department of Health and Human Services] shall provide the responsible party . . . with an *opportunity* to cease distribution and recall such article." (emphasis added)).

98. *See Budget*, ODS, http://ods.od.nih.gov/About/Budget.aspx (last visited Sept. 23, 2011) (showing an annual budget ranging from twenty-six to thirty million dollars between 2004 and 2010). The ODS could decide to charge a fee for the rating. This would help the ODS cover the cost of administering the program if it did not have enough money in its budget.

immunity, which will protect it from lawsuits concerning ratings.[99] Manufacturers who choose to be a part of the plan will submit copies of their testing, research, and manufacturing procedures on individual dietary supplement products to the ODS. The ODS will then examine the submitted materials and generate a rating between one and five stars for the dietary supplement. Five stars would be the highest rating a dietary supplement could obtain. The ODS will determine the rating given to the supplements by looking at a number of factors including, but not limited to: the extent of product testing, the adverse side effects found and reported, the quality of the ingredients, the consistency of the product, and the overall manufacturing practices.

After the ODS has determined a rating, the manufacturer will have the option whether or not to place the rating on its labels. Theoretically, a manufacturer who is not pleased with the ODS's rating decision could opt out of placing the rating on its labels. Providing manufacturers with this option will hopefully encourage them to apply for a rating from the ODS without the fear of negative repercussions.

In order for the rating plan to be effective, there must be an effort by the ODS to inform consumers about the rating plan and what it means about the dietary supplements they purchase. The ODS can publish a description of the rating plan and the factors examined on its website. Additionally, it can push for a media campaign that will run for a short period of time informing consumers about the rating system and how to seek more information.[100] The media campaign should target key outlets that would reach dietary supplement purchasers like television and health magazines. This public campaign about the plan will entice manufacturers to participate because it will show them that they risk losing a share in the market if they do not participate. The plan provides for the potential of substantial gains. It will also be fairly intuitive to an average consumer that a five-star rating will be preferable to a two-star rating. This will be made more obvious by the labels themselves, which will include a phrase like "5-star

99. FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent waiver, sovereign immunity shields federal government and its agencies from suit.").

100. If the ODS decides to charge a fee for the ratings, it could use some of the money from these fees to fund the media campaign.

superior quality rating determined by the Office of Dietary Supplements, an office within the National Institute of Health."

b. Why Manufacturers Will Want to Implement This Plan

The media push, information on the ODS website, and the dietary supplement label will ensure that consumers are made aware of the benefits associated with purchasing a dietary supplement with a high star-rated label. The stars will create a competitive advantage in the marketplace for dietary supplements that achieve a high rating. The dietary supplement industry is very competitive with an abundance of brands currently on the market. On Target's website for example, consumers can shop by brand by selecting from such brands as Centrum, Dr. Greene, Natrol, Nature Made, and Origin.[101] A search for "supplement" on Target's website returns over 300 different products.[102] Specialty stores like GNC, which focus on selling supplements and products promoting healthy living, have over 170 different dietary supplement brands listed on their website.[103] With so many manufacturers offering products that seem virtually identical, this rating system can simultaneously help ensure that a given manufacturer's products stand out and increase the safety of products on the market.

Additionally, a manufacturer with high star ratings on its products can probably charge a slight premium over products with lower ratings or none at all. At first, the manufacturer could use the premium to cover the additional costs of studies and safety improvements made to the dietary supplements.[104] After those costs are covered, this increase in price will be pure profit and will be coupled with a likelihood of increased market share as well. Dietary supplements with lower stars or no rating might be driven out of the market. As long as manufacturers keep the increases in prices

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101. TARGET, http://www.target.com/Vitamins-SupplementsHealth/b/ref=sc_iw_r_2_0_1233130011?node=1263829011 (last visited Sept. 23, 2011).

102. TARGET, http://www.target.com (search for "supplement" in the search box).

103. GNC, http://www.gnc.com/home/index.jsp (last visited Sept. 23, 2011).

104. The premium price could also cover the rating fee, if the ODS chooses to impose one.

reasonable, consumers should be willing to purchase a safer, ODS-approved product over one with no signs of safety or outside approval.

c. *Potential Problems*

Like every innovative system, there are potential problems with the implementation of the five-star plan. A crucial problem concerns the reliability of the information that manufacturers will provide the ODS. The system would be set up so that the advantages resulting from the extra costs of research, testing, and improved safety measures are only achieved if the end result is a high rating. This might incentivize manufacturers to manipulate their research results in a direction that shows the overall safety of their products. There are all sorts of ways for data to be manipulated, some conscious and some unconscious.[105] While manufacturers will be required to submit their results and all of the data from the studies to provide the ODS with the opportunity to examine their methods, it will be difficult for the ODS to know if the data was manipulated. This system is only beneficial to the health and well-being of consumers if the research results are legitimate.

In order to correct this problem, there will need to be built-in whistle-blower protections for the manufacturers' employees, so they can report fraudulent test results. Additionally, the ODS will have to rely on the ethics of the manufacturers' scientists involved in the testing. This may be problematic because the scientists may be pushed by the manufacturers to achieve the desired results. Despite this concern, the scientists' ethics would provide some security in the accuracy of the system.[106] If the ODS is concerned about scientific integrity, it can require forms to be submitted with the studies that promise researcher independence.[107] Furthermore, if scientific integrity becomes a problem, the ODS can promulgate testing

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105. *See* SHELDON KRIMSKY, SCIENCE IN THE PRIVATE INTEREST 125–40 (2003) (stating that although many scientists do not believe financial benefits that are connected to their research would affect the way they perform science, but that manipulation can still occur).

106. *See id.* at 130. ("[I]t is widely accepted among members of the scientific community that the 'state of mind' of the scientist is not prone to the same influences that are known to corrupt the behavior of public officials.").

107. Thanks to Professor Wendy Wagner for this idea.

protocols to streamline the way that studies are performed and data is collected.[108]

Additionally, there is a valid concern that statutory authorization would be required to allow the ODS to implement the system. The ODS was created by federal mandate in the DSHEA,[109] but the power to rate supplements was not specifically listed. While rating is not expressly mandated, the DSHEA does state that the purpose of the ODS is "(1) to explore more fully the potential role of dietary supplements . . . and (2) to promote scientific study of the benefits of dietary supplements in maintaining health and preventing chronic disease and other health-related conditions."[110] Because the addition of an ODS-supervised rating plan helps to fulfill the mandates of the DSHEA by promoting the study of the benefits of dietary supplements, it would likely be allowed in the absence of a statutory amendment.

A final concern is that manufacturers might be hesitant to participate in this type of program, and that they may form agreements to abstain from the five-star plan in an effort to keep prices and quality low and maintain the status quo. However, there appear to be enough manufacturers fighting for a share in the dietary supplement industry to warrant the advantages presumed by this plan.[111] It is plausible that many products will not be distinguished by the ratings, but even removing a few competitors will increase each manufacturer's overall market share.

3. Incentives Through Litigation

Tort litigation provides a means to incentivize manufacturers in various industries to regulate the safety of their products. In the dietary supplement industry, however, there is reason to believe that tort litigation only covers the worst sorts of products, such as ephedrine.[112] Dietary supplement tort suits are so few and far

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108. Thanks to Professor Wendy Wagner for this idea.

109. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4334, § 485(C) (1994).

110. *Id.*

111. *See supra* Part III.A.2.b (discussing the large number of products and brands of dietary supplements sold at GNC and Target).

112. One-third of the cases retrieved by Westlaw while searching "dietary supplement" in the same paragraph as "tort" involved cases with ephedrine. *See also* United States v. 5 Unlabeled Boxes, 572 F.3d 169, 172 (3d Cir. 2009) (noting

between, that the threat of a suit probably does not offer much of an incentive to manufacturers to make dietary supplements safer.[113]

Under the current regulatory system, manufacturers have every right to feel shielded from legal liability. This is in part because consumers face high barriers to entry. For example, in tort actions involving dietary supplements, it is extremely difficult for users who are harmed by use to show causation, just as in actions involving drug-related harms.[114] Additionally, many consumers lose in court because they are barred by the statute of limitations.[115] Even outside the context of consumer tort litigation, manufacturers can feel safe because the FDA must meet a high burden of proof and has limited resources to examine every supplement on the market.

The implementation of new litigation tools may offer a bright hope for increased safety in the market.[116] Even if just one new litigation strategy became available, there would be an added risk factor for manufacturers to consider when producing products that slipped through the DSHEA's "reasonably safe" requirements, but

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that the ephedrine alkaloid final rule was the first time the FDA banned an entire class of dietary supplements under the DSHEA); *FDA News Release*, FDA (Aug. 21, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108715.htm ("On Aug. 17, the U.S. Court of Appeals for the Tenth Circuit in Denver upheld the Food and Drug Administration's (FDA) final rule declaring all dietary supplements containing ephedrine alkaloids adulterated. . . ." (emphasis omitted)).

113. Only twelve federal cases were returned by Westlaw while running a search for "dietary supplement" and "tort" in the same paragraph. Additionally, only 713 federal cases even contain the phrase "dietary supplement."

114. *See* McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1236–38 (11th Cir. 2005) (reversing jury verdict for plaintiffs in product liability action because plaintiffs' experts failed to satisfy the standards of reliability required under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and thus could not demonstrate the needed causation).

115. *See* Sayre v. General Nutrition Corp., No. 94-2593, 1995 U.S. App. LEXIS 27637, at *7 (4th Cir. Sep. 29, 1995) (affirming dismissal of claim barred by West Virginia's two-year statute of limitations); Barela v. Showa Denko K.K., No. 93-1469, 1996 U.S. Dist. LEXIS 7830, at *23 (D.N.M. Jan. 28, 1996) (granting defendant's motion for summary judgment on statute of limitations grounds).

116. New theoretical litigation tools for the dietary supplement industry might include: an expanded form of *qui tam* litigation to serve as a private right of action against a manufacturer; a private right of action made possible through serious adverse event reporting that is mandated under the CPA; and expanded tort claims for dignitary damages and deprivation of choice.

that actually had serious harms.[117] Although this threat of increased litigation will not be as beneficial as the market-driven incentives discussed above[118] in preventing harm to consumers on the front-end, it might offer an incentive for manufacturers to increase the level of minimum safety of their products. After a new litigation strategy is added, a manufacturer will have to expand its risk analysis to account for the possibility of increased litigation costs. With the increased likelihood that a consumer or class of consumers will file a lawsuit, as well as the increased possibility that the consumer or class of consumers will be victorious in the suit, manufacturers will have to spend more time considering the costs associated with litigating harm. This risk of litigation will, perhaps, incentivize them to make their dietary supplements safer in order to avoid steep litigation costs and damage awards.

B. Consumers

The consumer incentive section of this note will begin by describing the current role that consumers play in the dietary supplement industry. Then the note will discuss ways to incentivize consumers to push for more protections and increased safety by providing them with better access to information.

1. Current Role of Consumers

The dietary supplement industry generated $26.7 billion in 2009.[119] Additionally, the industry services approximately 66% of American adults.[120] Consumers should be able to dictate the market by choosing the dietary supplements that are the most effective and healthy. This is not the reality, however, because most consumers believe that dietary supplements are inherently safe.[121] Because

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117. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4331, § 413 (1994).

118. *See supra* Part III.A.2. (proposing using the market to incentivize manufacturers to increase the safety of dietary supplements).

119. *What's Behind Our Dietary Supplements Coverage*, CONSUMER REPORTS (Jan. 2011), http://www.consumerreports.org/health/natural-health/dietary-supplements-coverage/overview/index.htm.

120. Hlasney, *supra* text accompanying note 1.

121. *See id.* (discussing a study that revealed 82% of American adults think dietary supplements are safe).

consumers' perceptions of dietary supplements are skewed, they do not know that they should be wary of the products that they put into their bodies. The dietary supplements that many Americans rely on to improve their health are largely unregulated and many even pose health risks.[122]

Consumers are partially to blame for the current regulation of dietary supplements. Before the DSHEA was enacted, consumers put a lot of pressure on Congress favoring deregulation.[123] There are a host of reasons why consumers wanted to deregulate the dietary supplement industry. Many consumers enjoy dietary supplements because they promise a quick cure, such as weight loss without exercise or a balanced diet.[124] Other consumers take dietary supplements in the hopes of achieving some of the same benefits that they would get through the use of prescription medications, without spending the time or cost associated with a trip to the doctor.[125] Dietary supplements also may appear to possess therapeutic properties without the risks associated with drugs.[126] They may also be more affordable when compared to prescription medications, especially for consumers with limited budgets or who lack health insurance.[127]

Additionally, many consumers believe that increased regulation of the dietary supplement industry would increase prices, a result that they desperately do not want.[128] This fear is valid because increased regulation and testing of dietary supplements without any sort of subsidy or market incentive would likely increase manufacturer costs, forcing them to raise the costs of supplements.

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122. *See supra* Part II.B. (discussing harms associated with dietary supplement use).

123. *See* Stephen H. McNamara, *Dietary Supplements of Botanicals and Other Substances: A New Era of Regulation*, 50 FOOD & DRUG L.J. 341, 341 (1995) (discussing the pressure on Congress to reduce regulation of supplements).

124. Barbara A. Noah, *Foreword: Dietary Supplement Regulation in Flux*, 31 AM. J. L. & MED. 147, 147 (2005).

125. Rahi Azizi, *"Supplementing" the DSHEA: Congress Must Invest the FDA with Greater Regulatory Authority over Nutraceutical Manufacturers by Amending the Dietary Supplement Health and Education Act*, 98 CAL. L. REV. 439, 444 (2010).

126. *Id.*

127. *Id.* at 446–47.

128. Christina Crawford, *Where is the Middle Ground on Dietary Supplements?*, AM. HOLISTIC HEALTH ASS'N, http://ahha.org/articles.asp?id=22 (last visited Sept. 23, 2011).

The FDA drug approval usually takes twelve to fifteen years and costs, on average, about $500 million.[129] Most dietary supplement manufacturers would not be able to raise that amount of capital for approval of each of their dietary supplements.[130]

Manufacturers have also shaped consumer opinion about dietary supplements. Prior to the enactment of the DSHEA, manufacturers and retailers manipulated consumers and encouraged them to lobby Congress for the deregulation of dietary supplements.[131] Dietary supplement retailers organized a "National Blackout Day," where supplements that *might* have been affected by increased FDA regulation were covered with black fabric to symbolize the possibility that those dietary supplements would be removed from the market.[132] The industry also ran television commercials that depicted Mel Gibson handcuffed by FDA agents for possessing vitamins.[133] This caused consumers to believe that many dietary supplements would be removed from the market if they did not lobby for less stringent regulation.[134] They wrote to Congress and signed petitions favoring deregulation.[135] The result of this lobbying was the enactment of the DSHEA.[136]

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129. Alan F. Holmer, *Pharmaceutical Careers in the USA*, MEDICAL SCHOOLS & NURSING COLLEGES, http://www.medical-colleges.net/pharmaceutical4.htm (last visited Sept. 23, 2011).

130. *Id.*

131. Iona N. Kaiser, *Dietary Supplements: Can the Law Control the Hype?*, 37 HOUS. L. REV. 1249, 1258 (2000).

132. *Id.*

133. Henry I. Miller & David Longtin, *Death by Dietary Supplement*, HOOVER INST. (Aug. 1, 2000), http://www.hoover.org/publications/policy-review/article/7630.

134. Kaiser, *supra* note 131, at 1258.

135. ETHAN B. RUSSO & VIRGINIA M. TYLER, HANDBOOK OF PSYCHOTROPIC HERBS: A SCIENTIFIC ANALYSIS OF HERBAL REMEDIES FOR PSYCHIATRIC CONDITIONS 25 (2001) ("Millions of consumers called, wrote, and visited members of Congress, urging their support of DSHEA.").

136. Alessa Thomas, *Making Sense of Supplements: Suggestions for Improving the Regulation of Dietary Supplements in the United States*, 2010 MICH. ST. L. REV. 203, 213–14 (2010).

2. Incentivizing Consumers to Seek Information

For all of the reasons described above,[137] consumers are actors that push against regulation of dietary supplements. Thus, there is a need to incentivize consumers to reverse their natural tendency to buy into manufacturer manipulation. This reversal can be accomplished by providing consumers with clear information about the harms and benefits of dietary supplements and by empowering consumer action groups.

Consumers tend to be suspicious of the pharmaceutical industry for its perceived self-interested tendencies and focus on profits.[138] Interestingly, the same skepticism does not appear to be present in the dietary supplement industry.[139] Perhaps this inconsistency is due to a lack of knowledge about dietary supplement regulation. If consumers knew that dietary supplement manufacturers are the chief regulators of their own products,[140] they might feel differently. Access to better information would likely cause consumers to reevaluate their purchases. Once more information is available, consumers will likely reach a tipping point where they decide that the potential utility of certain supplements no longer outweighs the potential risks.

If the savvy consumer makes the decision to research a dietary supplement, there is no shortage of information available on the Internet. The ODS has online resources describing federally-funded research projects related to dietary supplements and fact sheets on various supplements.[141] The FDA also has many online resources including consumer information and tips for usage as well

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137. *See supra* Part III.B.1. (discussing why consumers favor the deregulation of dietary supplements).

138. *Id.*

139. *See* Lauren J. Sloane, *Herbal Garden of Good and Evil: The Ongoing Struggle of Dietary Supplement Regulation*, ADMIN. L. REV. 323, 332 (1999) (stating that herbal remedies offer a sense of control to consumers that are suspicious and wary of the medical establishment).

140. *See* DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4331, § 402 (1994) (allowing the Department of Health and Human Services to promulgate good manufacturing practice regulations for dietary supplements after notice and comment).

141. *Mission, Origin, and Mandate*, ODS, http://ods.od.nih.gov/About/MissionOriginMandate.aspx (last visited Sept. 23, 2011).

as alerts on supplements that pose health risks.[142] With all of this available information, it would seem that consumers should be able to make the best choices when purchasing dietary supplements.

But, if this information is so readily available, why do people still purchase supplements that the FDA has warned are dangerous?[143] While the information is available, the assumption of safety that most consumers associate with dietary supplements in combination with a passive attitude towards seeking information lead to a market where consumers purchase without properly educating themselves.

How can this trend be corrected? How can consumers be incentivized to seek information and push for more regulation for the dietary supplement industry when they seem to be largely driven by fast cures and low prices? The answer seems obvious: the information needs to be accessible in more venues and in a more open manner. By targeting information at health magazines and increasing consumer action group involvement, consumers will become more informed about potential harms and thus be led to demand safer products.

a. Targeting Information at Health Magazines

Many dietary supplement consumers are health and body conscious, wanting fast cures and overall healthy living. It would be wise to target information at media outlets that are already popular among supplement users. Some examples include health and body magazines such as *Prevention*, *Women's Health*, *Men's Health*, *Self*, and many others. These magazines provide another way to access information besides the Internet. Articles in these magazines could update consumers about the current state of dietary supplement law. Magazines could also publish updates on recent adverse event reporting and FDA warnings about dietary supplements on the

142. *Consumer Information on Dietary Supplements*, FDA (July 31, 2009), http://www.fda.gov/Food/DietarySupplements/ConsumerInformation/default.htm.

143. *Dietary Supplement Alerts and Safety Information*, FDA (Oct. 6, 2009), http://www.fda.gov/Food/DietarySupplements/Alerts/default.htm.

market. Articles might also discuss highly-rated supplements.[144] These types of articles will help consumers gain valuable information without being overloaded all at once or turned off by an overly grim outlook on supplements. At the end of the articles, the FDA and the ODS websites could be listed as sources for more information.

If the FDA and the ODS are willing to work in conjunction with a few of these health magazines in order to increase consumer knowledge, they might be able to provide financial incentives for the magazines to publish these articles. Magazine publishers may worry that negative supplement articles might turn off the dietary supplement manufacturers who provide money for advertisements in their magazines. However, the article ideas discussed above target mostly positive or neutral information about supplements, with the only negative articles emerging from the dietary supplements that have had adverse events reported. Companies manufacturing safer dietary supplement will benefit from an increased awareness of their products.

b. Consumer Action Groups

Another way to increase consumer information and involvement in the dietary supplement industry is to make better use of the consumer action groups that are already in place. One group, Public Citizen, is a consumer action group that advocates for many consumer issues including dietary supplement safety.[145] Public Citizen took a stand against the harmful dietary supplements Ephedra, Nic Lite, and St. John's Wort[146] by writing letters to the FDA urging them to take action on these products. The letters also provided valuable information about the potential dangers of the supplements.[147] For Ephedra, Public Citizen also posted information and petitions on its website.[148]

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144. Lists of highly-rated supplements would be easily accessible if the five-star rating plan was implemented.

145. *About Us*, PUBLIC CITIZEN, http://www.citizen.org/Page.aspx?pid=2306 (last visited Sept. 23, 2011).

146. *Dietary Supplement Projects*, PUBLIC CITIZEN, http://www.citizen.org/Page.aspx?pid=4553 (last visited Sept. 23, 2011).

147. *Petition Requesting a Ban of Ephedra*, PUBLIC CITIZEN, http://www.citizen.org/Page.aspx?pid=2140 (last visited Sept. 23, 2011).

148. *Id.*

Consumer action groups like Public Citizen could serve many useful purposes. They might increase the general public's knowledge about dietary supplements and publicize their letters on a national stage to urge reform and bring attention to harmful dietary supplements. If they increase dietary supplement coverage, they could also bring the FDA's attention to harmful products it might have overlooked.

There are tools in place to help consumer action groups broadcast their voice. Groups like Public Citizen could pair with web-based consumer information centers such as the *Consumer Reports* website. *Consumer Reports* is published by Consumers Union, an "expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves."[149] *Consumer Reports* is one of the top-ten most circulated magazines in the country and has the most subscribers of any site of its kind.[150] With its mission statement and high level of readership, *Consumer Reports* is a natural pairing for consumer advocacy groups. Groups like Public Citizen could inquire about publishing articles, petitions, and letters on the *Consumer Reports* website to take advantage of the large audience. Consumers will benefit from increased information about dietary supplements, and few costs will be incurred because the vehicles for broadcasting the articles are already in place.

C. Scientists

This section will begin by examining the current role scientists play in the dietary supplement industry. I will then move on to discuss ways to incentivize scientists to increase their research on dietary supplements. The two main methods for incentivizing scientists to increase studies include providing more grant money and increasing the availability of awards and prestige.

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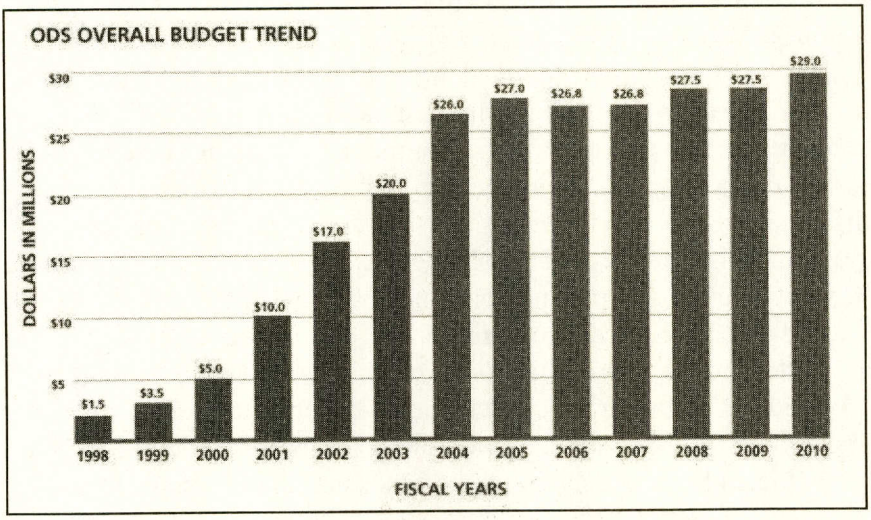
149. *Our Mission*, CONSUMER REPORTS, http://www.consumerreports.org/cro/aboutus/mission/overview/index.htm (last visited Sept. 23, 2011).

150. *Id.*

1. Current Role of Scientists

The main source of federal funding for dietary supplement research comes from the ODS.[151] There is a large budget available from the ODS for scientists to study dietary supplements, and it has increased dramatically since the inception of the ODS.[152] In 2010, the ODS budget was $29 million dollars as shown in Figure 1.

Figure 1[153]



The 2010 budget was divided among four main groups, as shown in Figure 2: grants, contracts, interagency agreements, and workshops.[154] The largest portion of the budget, 62%, is awarded to grants, which indicates the ODS funds a significant amount of scientific research on dietary supplements.[155] Additionally, the ODS has a database, called the Computer Access to Research on Dietary Supplements, which contains information about federally-funded

151. *See Mission, Origin, and Mandate*, ODS, http://ods.od.nih.gov/About/MissionOriginMandate.aspx (last visited Sept. 23, 2011) (discussing the purpose of ODS in promoting scientific research of dietary supplements).

152. *Budget*, ODS, http://ods.od.nih.gov/About/Budget.aspx (last visited Sept. 23, 2011).

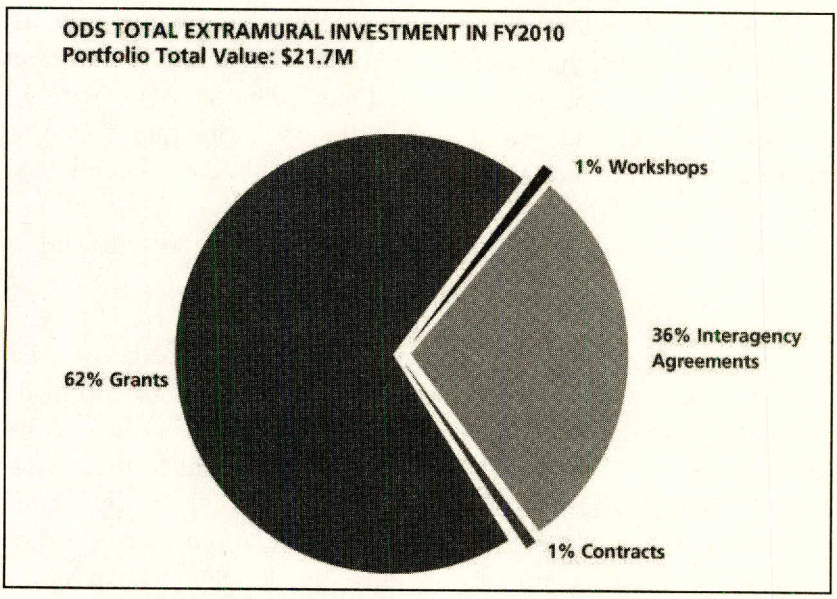
153. *Id.*

154. *Budget*, ODS, http://ods.od.nih.gov/About/Budget.aspx (last visited Sept. 23, 2011).

155. *Id.*

research projects pertaining to dietary supplements.[156] The research budget for the ODS is targeted at studying how dietary supplements can limit or reduce the risk of diseases.[157] While the mission of the ODS as stated in the DSHEA seems to direct the ODS to research the potential benefits of dietary supplements,[158] the ODS does have a statement in its mandate that acknowledges the importance of exploring supplement risks.[159]

Figure 2



156. *Computer Access to Research on Dietary Supplements (CARDS) Database*, ODS, http://ods.od.nih.gov/Research/CARDS_Database.aspx (last visited Sept. 23, 2011).

157. This was determined based on the duties of the ODS as described in DSHEA § 485C. DSHEA, Pub. L. No. 103-417, 108 Stat. 4325, 4334–35, § 485C (1994).

158. *Id.*

159. *Mission, Origin, and Mandate*, ODS, http://ods.od.nih.gov/About/MissionOriginMandate.aspx (last visited Sept. 23, 2011).

2. Incentivizing Scientists to Research

If the federal government could provide increased targeted federal grants to help bolster the budget of the ODS, then dietary supplement research would increase. This would be an easy way for the federal government to improve safety in the industry without implementing new legislation. In order to conduct sophisticated research, a scientist needs funding for a lab and assistants. Scientists depend on grant money to fund their complex and expensive research. With extra funds available, more studies that are currently in the pipeline for dietary supplements will be able to be realized. It is also likely that scientists often determine their area of study based on where they can locate funding. Thus, scientists who would not have originally considered studying dietary supplements might be incentivized to study them when more funding becomes available.

3. Incentivizing Scientists with Prestige and Awards

Prestige and scientific achievement awards are given when a scientist makes a novel discovery. With so much research afloat across the country, scientists who seek prestige in the scientific community need a way to stand out. It is likely that further research in the dietary supplement industry will offer such an opportunity. Since manufacturers currently have little incentive to study dietary supplements, there is probably a lack of adequate research in this area, making it ripe for important discovery and its accompanying prestige. New discoveries give scientists the opportunity for future grants, material for new articles to publish in scientific journals, and prestige for the university or organization with which they may be associated. Also, if manufacturers implement the market-based incentive plan previously discussed,[160] then there will be an added demand for scientists in this area because manufacturers will be increasing the amount of testing on their products.

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160. *See supra* Part III.A.2. (proposing using a five-star rating system to incentivize manufacturers to increase the safety of dietary supplements).

D. The Federal Government

This section begins with a discussion of the current role the federal government plays in the dietary supplement industry. It concludes with the future role of the federal government in the dietary supplement industry.

1. Current Role of the Federal Government

The federal government is responsible for the creation of the regulations that control the dietary supplement industry, DSHEA and CPA. New legislation to further regulate the dietary supplement industry has been proposed in Congress, but has not been approved.[161] Additionally, Congress is in charge of making appropriations to the ODS each year. They appropriated $29 million in 2010, up from $27.5 million in 2009.[162]

2. Future Role of the Federal Government

The necessity to approach dietary supplement safety with incentive strategies is due to the reality that it can be extremely difficult for Congress to enact new legislation. This difficulty is largely the result of political battles that create stalemates between political parties and between the House and Senate. There are also many critical issues that plague the United States and require Congress's attention at any given time: the financial crisis, healthcare reform, wars, and unemployment, to name a few. A lower priority issue, like the dietary supplement industry, often takes a backseat to more immediately serious national issues. The difficulty in enacting legislation is exacerbated in an industry like the dietary supplement industry, because there is a very powerful coalition of political supporters and dietary supplement manufacturers who adamantly support deregulation. Given the challenges inherent in the industry, incentive plans are likely the best way to make an immediate impact.

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161. Henry Miller & David Longtin, *Death by Dietary Supplement*, FORBES (Mar. 23, 2010), http://www.forbes.com/2010/03/23/dietary-supplemetns-herbal-fda-opinions-contributors-henry-i-miller-david-longtin.html.

162. *See supra* Figure 1.

The FDA was given little regulatory authority in the DSHEA in large part because the key actors involved in the dietary supplement industry wanted deregulation.[163] Consumers feared increased regulation would hinder their access to supplements, and manufacturers felt increased regulation would cut into profits.[164] By creating incentive plans that motivate the key actors to promote safety, it is likely that the industry as a whole will become a safer place. As the market becomes safer and the actors involved stop fighting against increased measures for safety, the federal government will probably follow the trend and be less wary of future legislation as well. Even if new legislation is never enacted, the implementation of some or all of these incentive plans will dramatically increase safety in the industry.

If there is still a need for legislation on this issue after the implementation of some of the incentive plans discussed, it will likely be in the form of greater regulatory authority for the FDA. Senator McCain and a bipartisan group of senators proposed a few statutory changes that have not been approved.[165] Their proposed legislation suggested requiring all dietary supplement manufacturers to register with the FDA and empowering the FDA to issue "a mandatory recall order" if there is a reasonable likelihood that a supplement contains a harmful substance or could otherwise cause serious health problems.[166]

Additionally, as discussed earlier in this note,[167] there are other ways that the federal government can be involved in incentivizing safe practices by channeling more funding to the ODS to fund scientific research. Increased funding will serve the dual functions of providing the ODS with more resources to study dietary supplements, and making the industry a more appealing place for scientists to enter and conduct research.[168]

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163. *See* Azizi, *supra* note 125, at 453 (explaining that the difficulty in amending the DSHEA is due to balancing the interests of manufacturers, consumers, and the government).

164. *Id.*

165. Miller & Longtin, *supra* note 161.

166. *Id.*

167. *See supra* Part III.C.2. (describing how the federal government could increase access to grant money).

168. *Id.*

IV. CONCLUSION

The difficulty in achieving new legislation warrants novel approaches to problems currently plaguing society. This is evidenced by the fact that there has been a regulatory gap in the dietary supplement industry for the past seventeen years since the enactment of the DSHEA. By devising incentive plans that target the main actors in the dietary supplement industry—manufacturers, consumers, scientists, and the federal government—this regulatory gap can be closed without the need for much, if any, new legislation. As consumer awareness increases, manufacturers find economic reasons to produce safer supplements, and as scientists increase research, the dietary supplement industry will become a safer place, with or without new federal regulation.

Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions

Aimee Lewis*

I. INTRODUCTION

Imagine that you want to do some contract work on the side. You and the company agree on a price up front. You sign a contract with the company's project manager to do the project for them. You

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spend years working on this project and do good work. You achieve the best results that you possibly can for the company.

When you have finished the work and everyone is happy with the results, you are told by the company's CEO that the price you agreed to at the beginning was too high. After all of the time that you put into this project, and all of the other work that you had to turn down to complete this project, you are told that you will only receive a portion of the agreed-upon price.

I would guess that this situation sounds unreasonable to you. After all, you did the work, and everyone is happy with the results. Why should you not get the full amount that you were promised? Yet, this is the situation faced by many lawyers who charge contingent fees for their services. At the end of the day, a judge will decide that the lawyer is only entitled to a percentage of the agreed-upon fee based on a determination that the contractual fee is not reasonable.

A contingent fee is often summarized as "no win, no pay."[1] Under these arrangements, the attorney is paid only if the client wins the case.[2] Typically in these situations, the attorneys' fee is satisfied by a percentage of the amount recovered for the client.[3] If the client recovers no money, the lawyer is not paid as "any percentage of nothing is nothing."[4] These fees are generally associated with plaintiffs' attorneys, but are not so limited.[5] The traditional justification for this sort of fee arrangement is that it allows plaintiffs to bring claims they might not otherwise be able to afford to bring.[6]

There are risks inherent in choosing to work on a contingent fee basis.[7] For one thing, it is difficult for a lawyer to determine what, if any, amount he will be paid for taking on the case.[8] The lawyer is also not certain of the amount of investment he will have to make to take the case to resolution.[9] Thus, before taking a case, a contingency-fee lawyer has to guess how much time and money he

1. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 9 (2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 9–10 (2004).
6. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43 (1989).
7. KRITZER, *supra* note 1, at 17.
8. *Id.*
9. *Id.*

will need to invest in the case and how much he can expect to recover for his client and himself.[10]

This paper focuses on contingent fees in the specific circumstances of mass actions or multi-district litigation (MDL). It considers the way in which judges impose caps on attorneys' fees in those cases simply by looking at the case after a settlement has been reached and focusing on the aggregate, rather than individual, attorneys' fees.

Part II focuses on judicial authority to take this action. It begins by examining the traditional power of judges to regulate the ethical behavior of lawyers. Next, it considers the court's additional power to regulate settlements in the specific circumstance of class action litigation. Finally, it discusses the recent trend of combining these two judicial powers to create a right to regulate matters in the context of mass actions.

Part III focuses on the reasons why fee reduction may not always be warranted and, more specifically, highlights two considerations that might discourage the regulation of these fees. First, it considers the argument that freedom of contract interests should prevent courts from interfering with the agreements that lawyers enter into with their clients. After that, it discusses the argument that reasonableness should be determined based on the circumstances at the time when the parties entered into the individual agreement.

Part IV focuses on the long-term consequences of these fee caps on the litigation of mass actions. First, it discusses the limitation on the ability of clients to find lawyers if the fees are reduced to a point at which the cases will not be profitable. It then considers the possibility that the courts would be performing a legislative function by declaring which claims can and cannot be brought.

II. ORIGINS OF JUDICIAL AUTHORITY TO REGULATE CONTINGENT FEES IN MASS ACTIONS

Judges in recent cases have essentially combined two previously recognized judicial powers to justify their actions in

10. *Id.* at 17–18.

reducing fees in mass actions.[11] This part of the paper analyzes these previously recognized judicial powers and their application to mass actions in the *Zyprexa* and *Vioxx* cases.

A. *The Judicial Capacity to Regulate the Ethics of Lawyers*

Since its relatively early history, the United States Supreme Court has recognized the authority of courts to regulate the ethical behavior of attorneys.[12] In *Ex parte Burr*, the Court declared that the power to regulate the behavior of lawyers should only be exercised with caution.[13] However, in order to provide for "respectability of the bar" and "its harmony with the bench," this power is necessary.[14]

Lawyers have the ethical duty to charge their clients a reasonable fee.[15] The rule does not specifically define which fees are or are not reasonable, but it does give a list of factors to consider in determining reasonableness.[16] One of these factors is whether or not the fee is contingent.[17] The inclusion of contingency as a factor for the determination of whether or not the fee is unreasonable implies that there is some sort of prejudice against the reasonableness of a contingent fee. This implication is further proved by the explicit requirement that all contingent fee agreements be in writing and signed by the client.[18]

In *Taylor v. Bemiss*, the Supreme Court determined that the authority of courts in cases regarding the ethical behavior of attorneys extends to the authority to determine the reasonableness of contingent fee agreements.[19] Under *Taylor*, courts have the authority

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11. *See, e.g.*, *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 610–13 (E.D. La. 2008) (applying the logic of *Zyprexa*); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 491–93 (E.D.N.Y. 2006) (discussing judicial authority over the ethical behavior of attorneys and the role of judges in the settlement of class actions when reaching a determination that the court has the power to regulate fees in a mass action).

12. *See Ex parte* Burr, 22 U.S. 529, 530 (1824) (explaining that the authority to regulate lawyers belongs with the courts).

13. *Id.* at 531.

14. *Id.* at 530–31.

15. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2004).

16. *Id.*

17. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(8) (2004).

18. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2004).

19. Taylor v. Bemiss, 110 U.S. 42, 45 (1884).

to protect an aggrieved client by determining that the attorneys' fees are "clearly excessive."[20] The aim of the courts, then, is to protect clients by evaluating the contingent fees for reasonableness,[21] considering the suspicion that exists with regard to contingent fee agreements.[22]

While courts have the authority to rule on various ethical violations of attorneys,[23] there seems to be an inherent suspicion of unreasonableness surrounding contingent fees that does not exist with other ethical issues or other forms of attorney compensation.[24] This inherent suspicion may be important in explaining contingent fee caps in mass actions, such as the *Vioxx* and *Zyprexa* cases.[25]

B. *The Judicial Power to Regulate Settlements in Class Actions*

To properly understand the effect of the regulation allowed in class action litigation, one must first understand exactly what class action litigation entails. A class action allows certain members of a class to sue on behalf of the entire class.[26] Even though not all members of the class have officially been joined to the suit, the members of the class who file suit will serve as representatives of the entire class to avoid the impracticability of joining all of the members individually.[27] One reason to allow certification of a class action is that common issues of fact and law "predominate over any questions affecting only individual members."[28] In order to be certified as a class action, the case must meet certain requirements

20. *Id.*
21. *Id.*
22. *Id.*
23. *Ex parte* Burr, 22 U.S. 529, 530 (1824).
24. *See Taylor*, 110 U.S. at 45 (noting a suspicion "naturally attaches" to contracts based on contingent fees); MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(8) (2004) (listing "whether the fee is fixed or contingent" as a factor to be considered in determining the reasonableness of a fee); *Id.* at 1.5(c) (stipulating requirements for a contingent fee agreement).
25. *See infra* Part II.C. (discussing the suspicion against contingent fees and fee caps in two particular cases).
26. FED. R. CIV. P. 23(a).
27. FED. R. CIV. P. 23(a)(1)–(4).
28. FED. R. CIV. P. 23(b)(3).

that do not apply to other types of aggregate litigation.[29] These differences, including the fact that not all members of a class are joined to the suit,[30] can likely help explain why courts are specifically given so many rights to regulate class action litigation.

In class action litigation, the courts have express power to regulate attorneys and their fees.[31] Class actions also require court approval for all settlements.[32] For example, in *In re Agent Orange*, a class action suit, the court used a lodestar formula to determine whether or not the attorneys' fees were reasonable.[33] The lodestar formula calculates the attorneys' fees using an hourly rate based on attorney fees typically charged in the area.[34] After determining the appropriate hourly rate, the court has the option to either raise or lower the attorneys' fees based on factors such as "risk of litigation and quality of representation."[35] Use of this formula means that even if an attorney had already contracted with a client for a contingent percentage of his recovery in what later became a class action, the court can recalculate the fees awarded to him using this hourly rate lodestar formula.

C. *Extension of These Two Powers to Capping Fees in Mass Actions*

Before one can appreciate a full analysis of the justifications that courts have provided when essentially extending the class action

29. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113 (2010) (discussing the differences between the requirements of an MDL and a class action; explaining that other types of aggregate litigation might not meet the standards of commonality, typicality, numerosity, adequacy of representation, predominance, and superiority required of class actions by Federal Rule of Civil Procedure 23, and that other types of aggregate litigation might not have a representative plaintiff or court-appointed class counsel).

30. FED. R. CIV. P. 23(a)(1).

31. FED. R. CIV. P. 23(g)(1)(C), 23(h) (stating that "[i]n appointing class counsel, the court . . . may order potential class counsel . . . to propose terms for attorney's fees" and that "[i]n a certified class action, the court may award reasonable attorney's fees").

32. FED. R. CIV. P. 23(e)(1)–(2).

33. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1305–06 (E.D.N.Y. 1985).

34. *Id.*

35. *Id.* at 1306.

regulations to mass actions, one needs a proper understanding of how mass actions, specifically MDLs, differ from class actions. First, Rule 23 only applies to class action litigation.[36] MDLs are not class actions. MDL, a product of the 1960s, allows a court to transfer federal cases with "common questions of fact" to a single court to handle pretrial proceedings.[37] The main benefit of transferring these cases to MDL proceedings is the conservation of time and money by coordinating discovery.[38] In theory, at the end of the pretrial proceedings, the cases are remanded back to their original courts.[39] One key difference between class actions and MDL cases is that in MDL cases, all of the cases transferred to a MDL court are already pending in federal courts.[40] This means that all of the plaintiffs have chosen to bring the claims and have likely hired attorneys prior to filing them.[41] This is not the case in class actions, which cover all members of a class regardless of filing.[42]

While the MDL procedure was originally designed for the purpose of handling pretrial proceedings, judges have begun using it as a means of negotiating settlements.[43] Even though MDL courts do not have jurisdiction over related state cases, these settlement negotiations can be coordinated with the lawyers in those cases to

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36. FED. R. CIV. P. 23(a).

37. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2205–06 (2008).

38. *Id.* at 2206.

39. *Overview*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited Sept. 25, 2011). In reality, as seen in the *Vioxx* case, MDLs serve as an efficient way to reach a global settlement between the parties, which would otherwise be difficult given that the cases are spread across many jurisdictions prior to consolidation. *See* Sherman, *supra* note 37, at 2208, 2213–14 (discussing the potential use of the MDL consolidation to reach a global settlement and the example of one such settlement in the *Vioxx* case).

40. *Overview*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited Sept. 25, 2011).

41. Unless, of course, the claimant chooses to bring the case on a *pro se* basis without the representation of an attorney. For more on this, see *infra* note 135 (highlighting fact that very few *pro se* litigants exist in the mass tort context).

42. FED. R. CIV. P. 23(a)(1).

43. *See* Sherman, *supra* note 37, at 2206 (explaining that courts often encourage settlements and use the MDL process to completely resolve the litigation).

achieve finality in the litigation.[44] Because MDLs are not class actions under Rule 23, the court would not be required to approve the settlement as it must in class action litigation.[45] Thus, the power of courts to impose caps on the attorneys' fees in these cases cannot be premised on Rule 23.

Despite the fact that approval by judges is not strictly necessary in the private settlements that arise out of MDL cases, judges in recent cases have taken it upon themselves to impose caps on the fees charged by the plaintiffs' attorneys.[46] Essentially, these cases stemmed from Judge Jack B. Weinstein's decision to characterize the *Zyprexa* MDL as a "quasi-class action."[47] By creating the quasi-class action, Weinstein gave himself the power to regulate the fees that the plaintiffs' attorneys were to receive despite the fact he was working with a "private agreement between individual plaintiffs and the defendant."[48] In making his determination that the fees needed to be reduced, Judge Weinstein focused his attention on the economies of scale achieved through the MDL form.[49] The MDL goal of providing for more efficient litigation, in Weinstein's opinion, created an excessive reward for the attorneys who had, by his own admission, worked hard to reach the settlement.[50] Even if the fees may have been fair when the litigation began, the economies of scale involved later deprived them of their original reasonableness.[51]

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44. *Id.* at 2208.

45. FED. R. CIV. P. 23(e)(1)–(2).

46. *See, e.g.*, *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 611–13 (E.D. La. 2008) (applying the logic of *Zyprexa*); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 491–93 (E.D.N.Y. 2006) (discussing role of judges in the settlement of class actions when reaching a determination that the court has power to regulate fees in a mass action); Transcript of Hearing of March 19, 2010 at 54, *In re* World Trade Center Disaster Site Litigation, 2010 WL 4683610 (S.D.N.Y. Nov. 15, 2010) (Nos. 21 MC 100 AKH, 21 MC 103) (asserting that because the case had dominated the court's docket, the judge had the right to review it).

47. *Zyprexa*, 424 F. Supp. 2d at 490–91.

48. *Id.*

49. *Id.* at 493–94. Note that Judge Weinstein and the judges that followed in his footsteps gave other reasons for reducing the fees as well, but they are less compelling and will be briefly discussed later. *See infra* Part III.B. (discussing the different reasons that judges in *Zyprexa* and *Vioxx* gave for capping fees).

50. *Zyprexa*, 424 F. Supp. 2d at 493–94.

51. *Id.* at 493.

The *Vioxx* case followed the precedent set by *Zyprexa* to reduce fees awarded to the plaintiffs' attorneys.[52] In that case, Judge Eldon B. Fallon found many similarities between the settlement at issue and the *Zyprexa* settlement;[53] these similarities were sufficient to classify the *Vioxx* MDL as a quasi-class action as well.[54] In classifying the case as a quasi-class action, Judge Fallon gave himself the authority to review the fees at issue for reasonableness.[55] Judge Fallon, however, had a stronger argument for the establishment of his right: the settlement agreement in that case gave him some amount of authority.[56] Again, the court focused some attention on the economies of scale involved as a basis for determining that the fees were unreasonable.[57]

III. REDUCTION OF FEES NOT ALWAYS AN APPROPRIATE MEASURE

There are several reasons why it may not necessarily be appropriate to reduce the fees upon which attorneys and clients agree. This part of the paper will focus on two considerations: freedom of contract and the need to examine the fees on a more individualized basis. This focus is not meant to suggest that there are no other arguments against judicially imposed caps on attorneys' fees, but only that these two reasons are particularly useful in this instance.

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52. *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008).

53. *See id.* (finding both cases were brought by a large number of plaintiffs subject to the same court-approved settlement matrix, both cases utilized special masters to assist in reaching a settlement, and both cases had large settlement funds held in escrow).

54. *Id.* at 612.

55. *See id.* ("the . . . settlement may properly be analyzed as occurring in a quasi-class action, giving the court equitable authority to review contingent fee contracts for reasonableness . . . .").

56. *See id.* at 614 ("The Settlement Agreement expressly grants this Court the authority to oversee various aspects of the global settlement administration.").

57. *See id.* at 616 (noting that prior decisions taking into consideration the economies of scale provided by global settlements when determining the reasonableness of contingent fee contracts "provide helpful guidance . . . in the instant case.").

A. *Freedom of Contract*

One suggested method for handling the payment of attorneys' fees is relying on the private contracts entered into by the attorney and the client.[58] The idea here is that no matter what effort the lawyers put into the negotiation of the final settlement, they should be paid based on their contracts with their client, as well as any contracts they enter into with the other lawyers working on the particular MDL.[59]

The first step in an attorney–client relationship is the signing of an agreement.[60] It is a common view that fee contracts entered into at the beginning of the attorney–client relationship are arm's-length transactions.[61] The thought, then, is that at the time of the agreement, the client sees the attorney as he would anyone else trying to sell him something.[62] Some legal scholars, like Lester Brickman, believe that this is the wrong way to view these contracts.[63] Brickman believes that the fiduciary relationship should impact lawyers' negotiations with their clients.[64] He also asserts that lawyers need to get their clients' informed consent regarding the choice of fee, so they will know which fee structure best suits their interests.[65]

If the retainer contract is an arm's-length agreement, it is not tempered by the lawyer's fiduciary duties to the client. The client, then, should be considered free to agree to any fee that he considers reasonable.[66] We see this sort of contract in other situations. Retail transactions, for example, would fall into the category of arm's-length agreements. We would not allow a person who entered into an agreement to buy a car for a specific price to decide that the price is excessive and pay only a part of what is due. The freedom of

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58. Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 442–43 (1998).

59. *Id.*

60. KRITZER, *supra* note 1, at 113.

61. Brickman, *supra* note 6, at 55.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 49–50.

66. *See id.* at 56–57 (explaining that under the arm's-length theory, a contingent fee agreement is "unassailable").

contract argument would view a fee agreement between a lawyer and his client in this same way.

Nevertheless, the argument against the regulation of contingent fees is unpersuasive. Even if we were to consider most fee agreements to be arm's-length agreements, some special scrutiny has been reserved for contingent fee agreements.[67] As previously noted, there seems to be some sort of bias against contingent fee agreements.[68] This suspicion rears its ugly head particularly clearly in cases such as *Vioxx* and *Zyprexa*, which focus on the potentially excessive fees charged by plaintiffs' attorneys.[69] These cases do not discuss the reasonableness of the fees charged by the defense attorneys.[70] Contingent fees are primarily the domain of plaintiffs' attorneys.[71] Because of this, cases focusing exclusively on the rewards going to plaintiffs' counsel could be driven by an inherent suspicion of contingent fees. Due to this suspicion of contingent fees, it is hard to believe that these fees can or will be treated as arm's-length agreements by courts.

Furthermore, even if the courts were to find that all fee agreements were arm's-length agreements, the argument for freedom of contract would still be unpersuasive because Model Rule 1.5 already exists.[72] There is no doubt that there is some potential for the lawyers to exert control over their clients.[73] This potential gives a valid purpose to Rule 1.5. If clients might take some cue from their attorneys, then Rule 1.5 serves to prevent lawyers from taking

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67. *Id.* at 55–56. *See also* McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir. 1985) ("Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts.").

68. *See supra* Part II.A. (discussing an apparent bias against contingent fees). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(8) (2004) (listing "whether the fee is fixed or contingent" as a factor to be considered in determining the fee's reasonableness).

69. *See In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 616–17 (E.D. La. 2008) (evaluating only the fees charged by the plaintiffs' attorneys); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 493 (E.D.N.Y. 2006) (discussing the possibility that there is a risk that any of the fee agreements reached by the plaintiffs' lawyers may provide for excessive fees).

70. *Id.*

71. KRITZER, *supra* note 1, at 9.

72. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2004).

73. KRITZER, *supra* note 1, at 124–26 (discussing the issue of control in the lawyer–client relationship and the conflicting studies regarding which party to the relationship exerts control).

advantage of their clients' trust or injury in contract negotiations by imposing some fiduciary duty on the lawyer at the time of contract.[74] The model rule thus serves the purpose of preventing lawyers from taking advantage of clients by charging excessive fees. Because the danger of this sort of influence is real,[75] the rule serves a purpose and essentially negates the usefulness of the freedom of contract argument. There is a reason for the rule, and it seems to be aimed at preventing lawyers from claiming that the contract should govern no matter how excessive the fee.

B. The Need to Consider Reasonableness of Contracts on the Basis of the Individual Circumstances at the Time the Agreement Was Made

There is a stronger argument against the sort of blanket fee reductions in these recent mass actions: the reasonableness of an attorney's fee should be determined by considering the circumstances of the agreement at the time that it was signed.

The MDL courts cap the plaintiffs' attorneys' contingent fees, finding the fees unreasonable without any consideration of the reasonableness of the individual contracts.[76] Along with economies of scale,[77] courts considered the mental and physical health of clients in general[78] and the overall award for the attorneys.[79] These considerations, like the economies of scale, are general considerations that ignore the reasonableness of individual fees.

Additionally, the fees are evaluated after the fact, rather than by examining the circumstances at the time of the contracts.[80] The

74. Brickman, *supra* note 6, at 66.

75. KRITZER, *supra* note 1, at 124–26 (discussing conflicting studies regarding the issue of control in the lawyer–client relationship, but stating that "many more studies report that lawyers dominate" the relationship with their clients).

76. *See, e.g.*, *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 617 (E.D. La. 2008) (stating that the attorneys have all benefited from the efficiency of the MDL and that the clients should also so benefit from lower fees); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 493 (E.D.N.Y. 2006) (focusing on the global settlement and the fact that all the attorneys benefited from efficiency).

77. *Vioxx*, 574 F. Supp. 2d at 617; *Zyprexa*, 424 F. Supp. 2d at 493.

78. *Zyprexa*, 424 F. Supp. 2d at 491–92.

79. *Vioxx*, 574 F. Supp. 2d at 618.

80. *See Zyprexa*, 424 F. Supp. 2d at 493 (noting that fee arrangements are to be reconsidered because arrangements that may have been fair under the original

Zyprexa case noted that fees that might have seemed reasonable at the time of the contract may become unreasonable due to the efficiency of the MDL.[81] By making this assertion, the court seems to suggest that the determination of the reasonableness of the fee should be made with an *ex post* rather than an *ex ante* determination. This argument seems hard to swallow because it is impossible for an attorney to choose a fee that is guaranteed to be exactly correct at the end of litigation based on the information that he has at the beginning.[82] As discussed earlier, lawyers entering into contingent fee agreements do so with little idea about what they should actually expect.[83] A determination of a fee that will be undoubtedly reasonable based on that information may require lawyers to underestimate their expected fees to avoid the sort of windfall of excessive fees that *Zyprexa* implies in requiring a determination of reasonableness after the fact.[84]

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contacts may no longer be so after the firms benefit from coordinated discovery and economies of scale).

81. *Id.*

82. While not the subject of this paper, this same logic could be used to argue against the use of a lodestar formula in the determination of the reasonableness of contingent fees. As discussed above, courts have used a lodestar formula to consider the reasonableness of a contingent fee after the fact. *E.g.* M. Berenson Co. v. Faneuil Hall Marketplace, 671 F. Supp. 819, 830–33 (D. Mass. 1987); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1296, 1305–06 (E.D.N.Y. 1985). *See supra* notes 33–35 and accompanying text (discussing the use of the lodestar formula in the *Agent Orange* case). As with other *ex post* determinations, this sort of determination does not fit with the limited information available to the attorney at the time of the agreement. *See supra* notes 7–10 and accompanying text (discussing the information available to an attorney when the agreement is signed). The determinations regarding an appropriate contingent fee are based on the anticipated risk and investment taken on by the attorney. KRITZER, *supra* note 1, at 17. A determination of reasonableness based on the actual hours worked would not take into account the limited information that an attorney possesses at the start of litigation. It is unreasonable to expect attorneys to have crystal balls that they can use to determine exactly how many hours they will work and pick the proper percentage of the settlement they will get to match an appropriate hourly rate for that many hours worked.

83. *See supra* text accompanying notes 7–10 (discussing the scant information available to an attorney at the time the agreement is signed and the predictions that an attorney must make before taking a case).

84. *Zyprexa*, 424 F. Supp. 2d at 493.

1. Judges Must Consider the Risks Lawyers Take

The court in *Vioxx* noted that the plaintiffs' attorneys took a risk in taking on their cases.[85] Despite this recognition of the risk involved, there is nothing in the case to suggest that such risk was carefully considered in determining the fees' reasonableness.[86] Acknowledging the risk, after all, is different from factoring it into a fee determination. In fact, the court provided no reasoning for how it arrived at this seemingly arbitrary figure—only an assurance that it was fair.[87]

As Brickman acknowledges, it is possible to view every case as involving some risk of non-recovery.[88] That said, it is clear to him that in many cases, that risk is not really reasonable.[89] Often new claims are brought after a substantial amount of the work necessary for recovery has already been done.[90] The fear, then, is that attorneys taking on these later cases may reap a reward without taking on much risk or putting in much work.[91] Brickman suggests that contingent fees must be proportionate to the risk involved in the litigation to be reasonable.[92] By taking cases on a contingent-fee basis, the attorneys take on some amount of risk, at least in theory.[93] This risk would be used to estimate the proper fee that the attorney should charge for the case.[94]

Because lawyers take cases at different times in the litigation process, they take on claims for mass actions at points in time at which different levels of risk and investment would be required. To determine that the fee in a contract is unreasonable, a court must be convinced that the risk and investment involved would not be a good justification for the level of the fee charged in the agreement. In setting maximum fees, the courts are not giving any consideration to

85. *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 616 (E.D. La. 2008).

86. *See id.* at 617–18 (deciding to set the fees at a maximum of 32% without explaining why that number was correct).

87. *Id.*

88. *See* Brickman, *supra* note 6, at 90–91 (explaining that using a broad perspective on risk, all cases could be seen as having some risk).

89. *Id.*

90. Curtis & Resnik, *supra* note 58, at 444.

91. *Id.*

92. Brickman, *supra* note 6, at 94.

93. KRITZER, *supra* note 1, at 17–18.

94. *Id.*

these varying levels of risk.[95] In fact, the court in *Zyprexa* went so far as to say that individual determinations are not necessary.[96] In determining that all of the fees should be capped at the same amount without regard to individual risk, the court attempts to deter "free riding"[97] by essentially punishing those attorneys who came into the litigation at a point requiring more risk and larger investment. Setting a specific cap such as this does not provide for contingent fees that are proportionate to the risk taken by the attorneys.

2. Economies of Scale Not Sufficient Reason for Blanket Fee Reduction

Probably the most persuasive reason offered by the MDL courts for determining that attorneys' fees were unreasonable are the economies of scale created by the efficiencies inherent in MDL.[98] The argument is that the attorneys benefit from the efficiency of the MDL process because it eliminates the need to conduct individual discovery.[99]

This argument would probably be very convincing if clients did not benefit from the efficiencies in the same way that attorneys do. Saving on costs saves money for everyone as costs generally come out of the client's recovery just as attorneys' fees do.[100] Additionally, efficiency saves time for attorneys as well as clients, who can now recover sooner, rather than waiting a number of years

95. *See supra* note 76 and accompanying text (citing cases in which courts considered the fees in the aggregate).

96. *See In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 493 (E.D.N.Y. 2006) (stating that the power to make a determination regarding the reasonableness of fees does not require a court to look at the individual attorney–client agreements).

97. Curtis & Resnik, *supra* note 58, at 444.

98. *See, e.g.*, *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 617 (E.D. La. 2008) (stating that the attorneys have all benefited from the efficiency of the MDL and that the clients should so benefit from lower fees); *Zyprexa*, 424 F. Supp. 2d at 493 (focusing on the global settlement and the fact that all the attorneys benefited from efficiency).

99. *Zyprexa*, 424 F. Supp. 2d at 493; Sherman, *supra* note 37, at 2205–06.

100. WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 14:6 (4th ed. 2011).

to collect their money.[101] Also, it is necessary to note that with aggregation comes bargaining power. Without the MDL, clients might not recover anything, especially when we consider that few of the *Vioxx* cases that went to trial at the time of the settlement resulted in recovery for the plaintiffs.[102] The settlement that resulted from the MDL, on the other hand, led to recovery for about 50,000 plaintiffs.[103] Interestingly, even as the courts reduced fees, they commented on how well the plaintiffs' attorneys served their clients.[104]

It is also interesting to note that plaintiffs' attorneys are already asked to pay for some of the efficiency in the process before the fees are cut. Courts have applied the common fund doctrine[105] in MDLs to require plaintiffs' attorneys to compensate the lead attorneys through a common benefit fund.[106] In *Vioxx*, for example, Judge Fallon set a common benefit fee at 8%.[107] This percentage was set to come out of the plaintiffs' attorneys' fees.[108] The result was that after the 32% cap set by Judge Fallon, the lawyers still needed to pay this 8% fee, leaving them with a fee of 24%.[109] Assume that an attorney originally charged a contingent fee of 40%. If a judge caps the fee at 32%, then accounting for the common benefit fee of 8%, the attorney is now only entitled to receive 24%, which means that the judge has essentially taken away 40% of the money the attorney was originally expecting.

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101. *See* HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 17.03, at 367 (2d ed. 1985) (stating that unified discovery leads to greater efficiency and MDL process has lead to faster recovery for clients).

102. *See* Jane Akre, *Merck Partial Payments for Vioxx to Begin This Month*, INJURY BOARD NATIONAL NEWSDESK (Aug. 7, 2008), http://news.injuryboard.com/merck-partial-payments-for-vioxx-begin-this-month.aspx (stating that Merck, the maker of Vioxx, had won eleven of the trials and lost five prior to settlement).

103. *Vioxx*, 574 F. Supp. 2d at 617.

104. *See, e.g.*, *Zyprexa*, 424 F. Supp. 2d at 493 ("[T]he court recognizes the exceptional and complicated nature of this important case, the skilled work of the able attorneys involved in it, and the exceptional result achieved . . . .").

105. *See* Silver & Miller, *supra* note 29, at 109 (defining the common fund doctrine as the judicial practice of awarding lead attorneys in MDLs a percentage of the total recovery as a restitution-based fee).

106. Silver and Miller, *supra* note 29, at 120–21.

107. *Id.* at 140.

108. *Id.*

109. *Id.*

Again, it is relevant to mention that these courts did not evaluate the reasonableness of the fees charged by defense counsel.[110] These courts focused only on the economies of scale, which ultimately led to the determination that the fees were excessive.[111] No attention was paid to the fact that these economies of scale also benefit the defendant. To illustrate, the coordinated discovery that comes with the MDL structure eliminates repetition for the defendants, who will not need to respond to discovery requests from each of the individual plaintiffs.[112] Just as the MDL saves time and money for the plaintiff, it also saves time and money for the defendant. Merck, the maker of Vioxx, spent at least $1.5 billion on legal fees to defend the drug.[113] If you consider that the plaintiffs' attorneys' fees were capped at a total of around $1.55 billion,[114] the amount spent on the defense is quite significant, especially considering that there were more than one thousand law firms involved on the plaintiffs' side.[115] If the amount of money awarded to the plaintiffs' attorneys is enough to be unreasonable based on the economies of scale that require less work for everyone,[116] why is the same not true of the defense fees?

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110. *See supra* notes 76–78 and accompanying text (discussing that the courts only consider the plaintiffs' attorneys' fees).

111. *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 617 (E.D. La. 2008); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 493 (E.D.N.Y. 2006).

112. Sherman, *supra* note 37, at 2206.

113. *See* Akre, *supra* note 102 (stating that at that time, Merck had spent "1.53 [billion in] legal costs on defense research and individual trials"); *Merck To Fund $4.85B Vioxx Settlement*, CBS NEWS.COM (Feb. 11, 2009), http://www.cbsnews.com/stories/2008/07/17/business/main4269301.shtml ("The Vioxx case has cost Merck at least $6.38 billion, including more than $1.53 billion . . . on legal costs for defense research and individual trials . . . ."). *See also* David Voreacos & Allen Johnson, *Merck Paid 3,468 Death Claims to Resolve Vioxx Suits*, BLOOMBERG (Jul. 27, 2010, 4:27 PM), http://www.bloomberg.com/news/2010-07-27/merck-paid-3-468-death-claims-to-resolve-vioxx-suits.html (noting that at the time of the settlement fund, Merck reserved an additional $1.9 billion to fight other Vioxx claims).

114. *Vioxx*, 574 F. Supp. 2d at 618.

115. *See* Voreacos & Johnson, *supra* note 113 ("A total of 1,061 different law firms handled Vioxx claims.").

116. *Vioxx*, 574 F. Supp. 2d at 617.

IV. LONG-TERM CONSEQUENCES OF BLANKET FEE REDUCTIONS IN MASS ACTIONS

As this paper has shown in Parts II and III, judges have essentially expanded their power to create the right to place blanket constraints on the fees that plaintiffs' attorneys charge in MDLs. This right, however, implicates long-term effects that the judges may not have considered as they made their decisions. In exercising this authority, judges are effectively closing the courthouse doors to even the most legitimate claims brought by plaintiffs in certain classes of cases.

A. Inability of Plaintiffs to Find Representation

Proponents of tort reform love the idea of blanket fee caps in MDLs.[117] Fee caps, such as those seen in *Vioxx* and *Zyprexa*, could, in the long run, make it difficult for plaintiffs to find lawyers to represent them in mass tort litigation.[118]

Contingent fee agreements require lawyers to accept some amount of risk.[119] Calculation of a proper contingent fee requires a determination of the amount of risk involved.[120] If an attorney determines that his mass tort case will be profitable for him if he succeeds and charges a 40% contingent fee, then a reduction in that fee to 33.3% would greatly lower his profits. The lawyer has made a contract with his client prior to filing the case, anticipating that if he succeeds in reaching a settlement or a verdict, he can expect to receive 40% of the anticipated recovery. He has determined that this 40% would be sufficient to pay him back for the years that his firm has spent on this litigation, sometimes devoting all of its resources to

117. *See, e.g.*, Terry Carter, *Tort Reform Texas Style*, A.B.A. J. (Oct. 2006), at 30, 34 (reporting that Texas Governor Rick Perry, a proponent of tort reform, proposed a cap on contingent fees). *See also* Silver & Miller, *supra* note 29, at 140 (discussing the effects of fee cuts on the economics of lawyers representing clients in mass tort cases).

118. *See* Silver & Miller, *supra* note 29, at 140 ("This will harm claimants by making representation harder to find and by reducing the value of their cases.").

119. *See* KRITZER, *supra* note 1, at 17–19 (discussing the risk inherent in contingent fee arrangements and how these risks differ from those seen in other investments).

120. *Id. See also*, Brickman, *supra* note 6, at 94 (stating that a risk premium charged in a contingent fee needs to be proportionate to the actual risk involved).

one case at the exclusion of any other source of income. The reduced fee he receives may not be enough to cover all of his bills. At some point, a fee will be so low that the lawyer can no longer make a profit from the case.

In their article, Charles Silver and Geoffrey Miller point to studies on the impact of other price or wage controls.[121] The studies predict that a situation similar to the one described in the preceding paragraph is likely to occur when these controls take a tight hold on the business of mass tort litigation.[122] In general, when prices are set too low, both the quality and the quantity of the goods or services will decline.[123] This idea, of course, makes sense. If it is no longer profitable to take on a certain business endeavor, fewer people and businesses will be interested in taking it on. Applying this principle to the business of mass tort litigation, if judges were to continue the pattern of reducing attorneys' fees in certain classes of cases, those cases would become unprofitable to handle on a contingent fee basis, and most attorneys would stop taking them.

As discussed above, the typical justification for the contingent fee is that it allows parties to bring claims that they might not otherwise be able to afford.[124] With a contingent fee arrangement, a client will not have to pay an attorney for his work if he does not recover anything for the client or otherwise win the case.[125] Thus, under this sort of arrangement, the client is only liable to the attorney for a fee if the client recovers from the case. His recovery would put him in a position to pay his attorney when he would not have been able to do so before the recovery. In essence, clients who cannot afford to pay an attorney out of their own pockets are able to get representation through the contingent fee model that they would not otherwise be able to get, regardless of the outcome.

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121. Silver & Miller, *supra* note 29, at 140.

122. *Id.*

123. *Id.*; *see also* Hugh Rockoff, *Price Controls*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2007), *available at* http://www.econlib.org/library/Enc/PriceControls.html ("Price ceilings . . . cause shortages."); Thomas Sowell, *An Ancient Fallacy: Price Controls*, CAPITALISM MAG. (June 27, 2002), http://www.capmag.com/article.asp?ID=1684 ("It is not just the quantity supplied that declines under price controls. Quality also declines.").

124. *See supra* notes 6–7 and accompanying text (discussing the justification given for the use of contingent fees).

125. KRITZER, *supra* note 1, at 9.

If the contingent fee model becomes unprofitable for a lawyer due to a pattern of blanket fee reductions in this class of cases, lawyers will likely refuse to take these cases on a contingent fee basis.[126] This would apply even to the most meritorious cases, as the fee reductions could prevent the cases from being profitable even if the attorney gets a large settlement or a favorable verdict. When lawyers refuse to take these cases on a contingency basis, claimants who would be unable to pay a lawyer out-of-pocket will be unable to find any representation regardless of the merits of their claims. This inability to find representation on a contingent fee basis closes the courthouse doors to these cases altogether. As the proponents of tort reform know, "claimants who cannot hire lawyers cannot sue."[127] For the most part, then, if the lawyers cannot be found, the claims cannot be brought at all.

B. Courts Would Essentially Perform Legislative Function of Declaring Which Claims Can Be Brought

As discussed above, courts have the right to regulate the conduct of attorneys.[128] Under Model Rule 1.5, the court would always have the ability to determine if an individual fee is "reasonable."[129] When you extend this regulation on a mass scale, however, it begins to look more like legislation.

If claims can no longer be brought because of decisions by judges who are expanding their own power, the courts have (intentionally or not) declared that these are not valid claims. Under the Constitution, Congress is given the sole power to make laws.[130] This power is given to Congress because of its position as the

126. *See supra* notes 119–121 and accompanying text (discussing the possibility that these cases will become unprofitable and that lawyers are not likely to take unprofitable cases).

127. Silver & Miller, *supra* note 29, at 140. While I do recognize the possibility that *pro se* litigants might bring their cases without lawyers, I point to footnote 121 of the Silver and Miller article, which highlights the fact that very few *pro se* litigants exist in the context of mass torts. *Id.* at 140 n.121.

128. *See supra* Part II.A. (discussing the courts' right to regulate the ethical behavior of attorneys).

129. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2004).

130. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper . . .").

reservoir of all of the legislative power of the United States.[131] Congress, exercising its power to regulate interstate commerce, would likely have the authority to set the sorts of blanket caps that courts have set in MDLs.[132]

Courts, unlike Congress, are not given the power to make laws. The power of the judiciary is limited to "cases" and "controversies."[133] While the situations in which the judges reduced the fees resulted from cases, there is no mention in these cases of any complaints by the plaintiffs regarding the fees charged. Thus, the issue of excessive fees was actually not at issue in these cases.[134] Without any complaints by the clients, the courts are taking it upon themselves to decide that the attorneys' fees need to be regulated.

Even so, based on Model Rule 1.5's reasonableness requirement, an individual determination of the reasonableness of the attorneys' fees would not be so objectionable.[135] The courts in *Vioxx* and *Zyprexa*, however, looked at the fees generally.[136] An analysis of the fees in the aggregate does not begin to consider whether the attorneys are charging reasonable fees in their contracts with their clients. By ignoring the need to analyze the reasonableness of the specific fees, courts are going beyond mere regulation of the ethical conduct of the attorneys. Courts are instead indicating that attorneys cannot charge more than a certain amount regardless of the circumstances, and by doing so, are essentially removing any

131. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

132. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.").

133. U.S. CONST. art. III, § 2, cl. 1.

134. *See, e.g.*, *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 607 (E.D. La. 2008) (stating that the court believes it should discuss attorneys' fees even though the fees were not at issue); *In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) (explaining that special masters were asked to look at the fees, but not suggesting that this was done at the request of any of the plaintiffs).

135. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2004) (setting forth the reasonableness requirement).

136. *Vioxx*, 574 F. Supp. at 617; *Zyprexa*, 424 F. Supp. 2d at 493.

incentive for attorneys to continue taking cases that fall into this class.[137]

The long-term consequences of the sort of general regulation that these courts are doing tends to make this sort of regulation fall into the realm of the legislature. One analogous situation is fee-shifting in federal cases. Under some specific circumstances, Congress has allowed courts to shift attorneys' fees in cases that protect certain federal rights, so that plaintiffs bringing those cases will have their attorneys' fees paid by the losing defendants.[138] In *Alyeska Pipeline Service Co. v. Wilderness Society*, the United States Supreme Court held that it was up to Congress, not the courts, to decide which circumstances made fee-shifting appropriate.[139] In that case, the appellate court had followed a rule that would allow courts discretion to determine when fee-shifting should be allowed "depending upon the courts' assessment . . . of the public policies involved in particular cases."[140] The Supreme Court found this rule unacceptable on the ground that Congress carved out specific exceptions under which fee-shifting would occur and did not leave this determination open to the courts.[141] It is up to the legislature, then, to determine which circumstances merit the shifting of fees.

Similarly, one could say that general blanket caps on attorneys' fees should be properly left in the domain of the legislature. As Judge Fallon pointed out in the *Vioxx* case,[142] several state legislatures have taken it upon themselves to place caps on contingent fees.[143] These legislatures have already placed limits on the fees to be charged in their jurisdiction. By generally capping the

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137. *See supra* Part III.A. (explaining the role of Model Rule 1.5 in assessing attorneys' fees).

138. *See, e.g.*, 15 U.S.C. § 15 (2006) (providing that antitrust judgments may include reasonable attorneys' fees for the plaintiff). *See also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260–62 (1975) (holding that Congress may make exceptions to the American Rule that each party will bear its own litigation costs and provide for fee shifting by statute).

139. *Alyeska Pipeline*, 421 U.S. at 262.

140. *Id.* at 269.

141. *Id.*

142. *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 615 (E.D. La. 2008).

143. *See, e.g.*, CAL. BUS. & PROF'L CODE § 6146 (West 2003) (capping contingent fees for professional negligence claims); ME. REV. STAT. ANN. tit. 24, § 2961 (2000) (same); OKLA. STAT. tit. 5, § 7 (2011) (capping all contingency fees at 50% of net amount of judgment recovered).

fees of all of the plaintiffs' attorneys in these cases, judges run the risk either of imposing limits in jurisdictions that would prefer not to have them or of imposing limits that go beyond those set out by the legislatures in their individual jurisdictions. A continuous pattern of these blanket caps would result in courts stepping on the toes of legislatures and forcing them to accept limits on contingent fees that they may have specifically chosen not to incorporate in their laws.

By forcing caps in jurisdictions that do not have caps or by lowering caps in jurisdictions that have higher caps, the long-term impact of a continuous pattern of contingent fee regulation among federal judges in MDLs would serve a legislative rather than judicial function. There is, after all, no argument by the court that the fee caps set by the state legislatures go beyond the power of the legislatures to make laws.[144] It seems, therefore, more prudent to leave this sort of regulation to the legislatures where it belongs.

V. CONCLUSION

The MDL is becoming a common way to reach a final resolution in large-scale mass actions.[145] It does not meet the formalities of class actions, but provides a forum in which the parties can negotiate a global settlement.[146] The recent trend in capping the fees received by plaintiffs' attorneys in these cases, however, forces some of the class action formality into this form of litigation.

In giving themselves the power to regulate attorneys' fees in MDL settlements, judges have extended their authority to regulate class actions and the ethical behavior of attorneys. By taking on this authority, judges limit the ability of plaintiffs' attorneys to take these cases and recoup their costs. By imposing blanket limitations in these cases, courts are saying that no lawyer can reasonably charge more than a certain percentage of the recovery in those cases. These caps, however, may prevent lawyers from handling these cases on a contingent fee basis because it is expensive and time-consuming to invest in mass torts.

If a client cannot find an attorney willing to take his case on a contingent fee basis, he may not be able to bring the case at all.

144. *Id.*
145. Sherman, *supra* note 37, at 2206.
146. *Id.*

Many clients cannot afford to cover costs and pay attorneys an hourly rate. Contingent fees allow them to get representation despite these limitations. By taking away the plaintiffs' ability to get representation, the courts are essentially declaring which claims can be brought. This is a function that the courts should not take on, not only because it is legislative in nature, but because it limits access to justice.