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Doctoring the Testimony: Treating Physicians, Rule 26, and the Challenges of Causation Testimony

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* United States Magistrate Judge, District of New Mexico. This article benefited greatly from the insights of the experienced plaintiff's and defense lawyers who reviewed it, and I thank Michael Dickman, Scott Eaton, Terry Guebert, Todd Ingram, Jonlyn Martinez, John Polk, Robert Sabin, Robert Schuster, Michael Shickich, Stephen Simone, James Sullivan, and Jolene Youngers for their comments. I also thank John Hutchison, M.D., James Kelly, Ph.D., George Bach, Max Minzner, and Ted Occhialino from the University of New Mexico, and my colleague Stephan Vidmar for their helpful comments on a previous draft, and my law clerks, H. Camille Papini-Chapla and J. Brad Emmons, for their valuable assistance at various stages of the article.

I. INTRODUCTION

The federal courtroom has been overrun by experts.[1] Medical professionals may be the most common expert witnesses at trial; a survey of federal judges indicated that medical and mental health witnesses constitute more than 40% of the experts who testified at trial.[2] Medical testimony in the courtroom exists in an adversarial setting in which each party seeks to present its strongest case, which invariably leads to conflicts between experts representing both sides.[3] Treating physicians are often less-than-willing participants in the fray.[4]

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1. *See* Sullivan v. Glock, 175 F.R.D. 497, 499 (D. Md. 1997) ("the use of expert witnesses in civil and criminal trials has exploded" since the adoption of the Federal Rules of Evidence) (citing Faust F. Rossi, *Modern Evidence and the Expert Witness*, *in* AM. BAR ASS'N, THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 254 (2d ed. 1989)).

2. John B. Wong et al., *Reference Guide on Medical Testimony*, *in* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 687 *1 (3d ed. 2011).

3. *See, e.g.*, Tompkins v. Philip Morris USA, Inc., 362 F.3d 882, 887–890 (6th Cir. 2004) (showing that in a products liability action against cigarette manufacturers, plaintiff presented testimony from an oncologist, a pathologist, and the director of a prominent cancer research center, while defendants presented testimony from a medical specialist in occupational and environmental exposure, a biostatistician, and a university hospital's chief anatomic pathologist).

4. E-mail from Robert Schuster to author (Feb. 17, 2013) (on file with author); Letter from James Sullivan to author (Feb. 12, 2013) (on file with author).

For years, there has been confusion about the role and proper scope of treating physicians' testimony at trial and what disclosures must be made about their testimony during discovery. Courts have had difficulty in determining whether treating physicians are expert witnesses or lay witnesses when they testify about their care and treatment of a patient.[5] Courts have also struggled to distinguish treating physicians from physicians "retained or specially employed to provide expert testimony in the case," and to determine when treating physicians are required to prepare a Rule 26 expert report.[6] In an attempt to resolve this issue, Federal Rule of Civil Procedure 26 was amended in 2010 to provide that expert witnesses not retained or specially employed by a party are not required to provide a written report, but the party calling them is required to state the subject matter of their testimony and provide a summary of the facts or opinions to which the witnesses are expected to testify.[7] The new Rule 26(a)(2)(C) fails to delineate the proper scope of testimony from treating physicians subject to the summary disclosure requirement and, three years into the implementation of the new rule, courts have already reached divergent results on when summary disclosure of treating physician testimony is appropriate.[8]

There is also debate over the propriety of treating physicians testifying on matters outside the immediate scope of their course of

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5. *See, e.g.*, Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995) ("The issue as to whether a treating physician is an expert pursuant to Rule 26(b)(4)(C) continues to be a problem.").

6. *See, e.g.*, Sullivan v. Glock, 175 F.R.D. 497, 499 (D. Md. 1997) (noting that "substantial uncertainty" still exists regarding the nature of Rule 26 disclosures with respect to hybrid witnesses).

7. FED. R. CIV. P. 26(a)(2)(C).

8. *Compare* Crabbs v. Wal-Mart Stores, Inc., No. 4:09-cv-00519-RAW, 2011 WL 499141, at *1 (S.D. Iowa Feb. 4, 2009) (noting that non-retained treating physicians and other caregivers fall under the summary disclosure requirement in Rule 26(a)(2)(C)), *with* Hermann v. Hartford Cas. Ins. Co., Civ. A. No. 11-cv-03188-REB-MEH, 2012 WL 5569769, at 3–4 (D. Colo. Nov. 15, 2012) (holding that, to the extent treating physicians are retained for expert testimony beyond the scope of treatment rendered, they are not exempt from the Rule 26(a)(2)(B) formal report requirement).

treatment, such as causation.[9] Expert testimony is tightly controlled in the courtroom, pursuant to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[10] and Federal Rule of Evidence 702.[11] Under these standards, judges must serve as gatekeepers that keep scientific and other expert testimony that is not reliable and relevant out of the courtroom.[12] Courts fear that jurors may be overwhelmed by complex expert testimony when presented by experts with impressive credentials, and the the primary purpose of the court's gatekeeping function "is to protect juries from being bamboozled by technical evidence of dubious merit."[13] While expert testimony does not have to fit in the classic hard science paradigm to be admissible, it must be more than the unsupported opinion of a qualified expert.[14] Causation of the plaintiff's injury is a hotly contested issue in most cases; when the injury has multiple potential causes, expert testimony is required to establish the causal connection.[15] Thus, courts must often address not only whether

9. *See* Courtney E. Campbell, Note, *Where Do Treating Physicians Belong as Witnesses in the Seventh Circuit?*, 9 IND. HEALTH L. REV. 247, 248 (2012) (stating that "[b]efore the 1993 amendments to Federal Rule of Civil Procedure 26(a), a doctor needed to be disclosed as an expert only when he was testifying as to causation or speaking beyond the scope of his or her treatment of a patient.").

10. 509 U.S. 579 (1993).

11. FED. R. EVID. 702(c)–(d).

12. *Daubert*, 509 U.S. at 597; *see* FED. R. EVID. 702(c)–(d) (requiring that expert witness testimony use reliable methods and apply those methods to the facts of the specific case).

13. Smithkline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011, 1042 (N.D. Ill. 2003) (Posner, J., sitting by designation); David L. Faigman, *Admissibility Regimes: The "Opinion Rule" and Other Oddities and Exceptions to Scientific Evidence, the Scientific Revolution, and Common Sense*, 36 SW. U. L. REV. 699, 712–13 (2008). A substantial body of research casts doubt on the belief that jurors overvalue expert testimony. *See* Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 13–17 (2013) (arguing that jurors are just as likely to overvalue direct, factual testimony as they are expert testimony).

14. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 139–41 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146–47 (1997).

15. *See Daubert*, 509 U.S. at 584 (discussing the district court's conclusion that "expert opinion which is not based on epidemiological evidence is not admissible to establish causation"); Brock v. Merrell Dow Pharm., Inc., 874 F.2d 307, 308 (5th Cir. 1989) (describing how "[c]ausation was a hotly contested issue").

treating physicians are properly qualified to testify on causation but also whether their methodology for determining causation is reliable and relevant. This article will examine these issues and explain how they are best analyzed.

Part II of this article will begin with the basic, albeit often-overlooked, reality that treating physicians are expert witnesses under Rule 26. When treating physicians give opinion testimony about treatment of their patients, they are testifying as expert witnesses because they have education, training, and professional experience that qualifies them as experts, and because they are relying upon scientific, technical, or specialized knowledge within the scope of Rule 702. Although a number of cases allow treating physicians to give lay opinion testimony about the diagnosis and treatment of their patients, these cases have not examined the concept of expertise in appropriate detail and have failed to properly consider the 2000 Amendments to Rule 701 of the Federal Rules of Evidence.

Part III will distinguish treating physicians from retained expert witnesses and discuss both when treating physicians are required to prepare a Rule 26(a)(2)(B) written report as well as when a party calling a treating physician may provide summary disclosures under Rule 26(a)(2)(C). As long as the physician testifies only to opinions developed during the course of treatment, the physician is not one retained or specially employed as an expert and need not prepare a written report. Courts disagree about what opinions a physician normally develops during the course of treatment, with the primary area of dispute being whether a treating physician forms an opinion on causation during treatment. Rule 26(a)(2)(C) was added in 2010 to resolve the divergent views in federal court on when a treating physician is required to provide a written report, but the cases construing the rule have reached contradictory results. In addition, because summary disclosures do not include the facts or data considered by the treating physician in reaching his conclusions, opposing parties can be unfairly surprised if treating physicians testify to opinions formed after treatment was concluded or based on materials not reviewed during treatment.

Part IV will discuss the issues that courts address when treating physicians are called to testify about causation of an

individual's injury or condition. Courts must examine both whether the physician is qualified to give an opinion on causation and whether the physician's methodology for reaching his conclusions on causation is sufficiently reliable and relevant under *Daubert* and Rule 702. Clinical medicine is not based on scientific knowledge, and testimony from treating physicians should not be evaluated using the *Daubert* factors for analysis of scientific testimony. Medical testimony is based on specialized knowledge and experience, and testimony about causation should be evaluated to see if the physician used a proper differential etiology process to determine causation. Treating physicians typically do not determine causation during the normal course of treatment, and causation opinions in clinical practice may be based on temporal proximity or on inferential or intuitive leaps that do not meet *Daubert* reliability standards. Courts must be careful not to supplant the role of the jury by being overly aggressive gatekeepers, however, and any doubts about the admissibility of expert evidence on causation should be resolved in favor of admission of the evidence.

II. TREATING PHYSICIANS ARE EXPERT WITNESSES

Intuition tells us that when it comes to medical care, physicians are experts. After completing college, medical doctors attend medical school for four years, during which time they study preclinical and clinical sciences basic to the practice of medicine and participate in rotations through different areas of medicine to gain clinical experience.[16] Physicians who wish to be licensed must pass the United States Medical Licensing Examination, a three-part test that assesses physicians' ability to safely practice medicine.[17] Most physicians attend three to seven years of postgraduate training (a residency) in a medical or surgical specialty, and some physicians

16. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 21:16 (2012); Wong et al., *supra* note 2, at 695. A doctor of osteopathy receives similar training with an emphasis on the musculoskeletal system, and dentists attend dental school for four years. *Id.* at 696; *Current and Future Dental Students*, AM. DENTAL ASS'N, http://www.ada.org/students.aspx (last visited June 14, 2013).

17. Wong et al., *supra* note 2, at 695; *About USMLE*, U.S. MED. LICENSING EXAMINATION, http://www.usmle.org/about/ (last visited Aug. 20, 2012).

also complete additional subspecialty fellowship training.[18] Physicians must meet the licensing requirements of the states in which they wish to practice and be credentialed for hospital privileges; some physicians also take board certification examinations to become board certified in a medical or surgical specialty.[19] Physicians are also required by state medical boards to attend continuing medical education courses to acquire new medical knowledge and maintain clinical competence.[20] A physician may also spend many years working in a particular medical area, gaining expertise while treating patients in that area.[21]

Courts have not uniformly recognized that physicians are experts. The Tenth Circuit's decision in *Davoll v. Webb* is perhaps the leading cause of confusion about whether treating physicians are expert witnesses when they testify about their treatment of a patient.[22] Jack Davoll sustained injuries when his police car was struck by another vehicle during a high-speed car chase, and he filed a claim under the Americans with Disabilities Act against the City of Denver.[23] During discovery, Davoll did not disclose his treating physician as an expert witness and did not provide a written report from him.[24] Over the City's objection, the district court allowed the

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18. Wong et al., *supra* note 2, at 697; *AAN Online Press Room for Media*, AM. ACAD. NEUROLOGY, http://www.aan.com/go/pressroom (last visited Feb. 5, 2013) (noting that many neurologists, in addition to completing medical school, a one-year internship, and at least three years of specialized training in neurology, also have additional training in other subspecialties of neurology).

19. Wong et al., *supra* note 2, at 698–99. The American Board of Medical Specialties provides certification in twenty-four medical specialties, while the American Osteopathic Association certifies osteopathic physicians in eighteen osteopathic specialties. *Id.* at 698–99.

20. *Id.* at 700.

21. *See, e.g.*, Watson v. United States, 485 F.3d 1100, 1106 (10th Cir. 2007) (qualifying a prison's clinical director as an expert in federal prison health care where he possessed a medical degree; completed a family practice residency and was board certified in family practice; had advanced training in cardiac, pediatric, and advanced trauma life support; served for four years as the clinical chief and emergency room director at an air force base; and served for five years as the medical director of a federal prison transfer center).

22. 194 F.3d 1116 (10th Cir. 1999).

23. *Id.*

24. *Id.* at 1138.

physician to testify at trial as a lay witness concerning his diagnosis of Davoll's condition and his prognosis for the future.[25] The Tenth Circuit affirmed the admission of the treating physician's testimony as a lay witness, concluding that a treating physician is not considered an expert witness if the physician testifies about observations based on personal knowledge, including treatment of the party.[26] The court noted that treating physicians testifying as lay witnesses are permitted to state "'expert' facts" to the jury in order to explain their testimony.[27] The court further stated that treating physicians testifying as lay witnesses could offer opinions based on their experience as a physician that helped the jury to understand the witnesses' decision-making process.[28]

The approach taken by the Tenth Circuit in *Davoll* does not properly distinguish between lay testimony and expert testimony.[29] Lay witnesses must testify based on personal knowledge of the facts to which they will testify.[30] Expert witnesses, on the other hand, may testify based on either firsthand knowledge of the facts or knowledge received in other ways.[31] The critical distinction between lay testimony and expert testimony is that the expert witness must possess some scientific, technical, or other specialized knowledge

25. *Id.* at 1126–27, 1138. The physician testified that Davoll suffered from degenerative disk disease, a permanent condition which caused him severe back pain; that Davoll was restricted to light- to medium-duty jobs; and that Davoll could be paralyzed if he were to get into an altercation. *Id.* at 1126–27.

26. *Id.* at 1138 (citing Richardson v. Consol. Rail Corp., 17 F.3d 213, 218 (7th Cir. 1994)).

27. *Id.*

28. *Id.* (quoting Weese v. Schukman, 98 F.3d 542, 550 (10th Cir. 1996)).

29. *See* DAVID H. KAYE ET AL., THE NEW WIGMORE: EXPERT EVIDENCE § 4.2.1 n.11 (2013) (considering cases such as *Davoll* to be "erroneous"); *see also* United States v. Caballero, 277 F.3d 1235, 1247 (10th Cir. 2002) (recognizing that Federal Rules of Evidence 701 and 702 distinguish between lay and expert testimony, not between lay and expert witnesses, and that the same witness can provide both lay and expert testimony in a case).

30. *See* United States v. Johnson, 617 F.3d 286, 292–93 (4th Cir. 2010).

31. *See* FED. R. EVID. 703 advisory committee's note (1972 amendments) (noting that expert testimony may be based upon (1) first hand observations made by the expert, (2) matters the expert has learned at trial, either through a hypothetical question or from listening to the testimony of other witnesses, or (3) matters the expert has learned about outside of court and through means other than direct perception).

that the jury does not possess.[32] Lay testimony "results from a process of reasoning familiar in everyday life."[33] By contrast, expert testimony "results from a process of reasoning which can be mastered only by specialists in the field."[34]

There was some confusion in the case law about the proper scope of lay testimony before *Davoll* was decided. Before December 2000, Rule 701 allowed lay testimony subject to only two restrictions: that the lay testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[35] Some cases had held, incorrectly, that lay witnesses could testify to matters beyond the realm of common experience because courts' liberalization of Rule 701 had "blurred any rigid distinction that may have existed between lay witnesses and expert witnesses."[36] Other courts mistakenly allowed lay testimony on technical issues such as product defects or causation.[37] The *Davoll* court overlooked an earlier decision from the Tenth Circuit which recognized that the proper interpretation of Rule 701 was that it did "not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness."[38]

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32. United States v. Conn., 297 F.3d 548, 554 (7th Cir. 2002); *see also* FED. R. EVID. 701 (explaining that lay witnesses do not provide testimony on these bases); United States v. Perkins, 470 F.3d 150, 155 (4th Cir. 2006).

33. FED. R. EVID. 701 advisory committee's note (2000 amendments) (quoting State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)).

34. *Id.*

35. FED. R. EVID. 701 (1997).

36. *See, e.g.*, United States v. Paiva, 892 F.2d 148, 157 (1st Cir. 1989) (citing 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 701[01], [02] (1988)) (holding that a drug user can testify to establish the identity of cocaine based on past experience, personal knowledge, and observation, even if the drug user is testifying as a lay witness).

37. *See, e.g.*, Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1199–1203 (3d Cir. 1994); United States v. Meyers, 972 F.2d 1566, 1577–78 (11th Cir. 1992) (allowing a police officer's testimony regarding whether a stun gun caused burn marks).

38. Randolph v. Collectramatic, Inc., 590 F.2d 844, 846 (10th Cir. 1979).

Any confusion that may have existed before *Davoll* concerning the proper scope of lay testimony should have been resolved when Federal Rule of Evidence 701 was amended in December 2000. As amended, Rule 701 states that lay opinion testimony is admissible only if it is "not based on scientific, technical[,] or other specialized knowledge within the scope of Rule 702."[39] Rule 701 was amended to prevent parties from "proffering an expert in lay witness clothing" to evade reliability determinations under *Daubert*.[40] Further, the rule now makes it clear that "any part of a witness' testimony that is based on scientific, technical[,] or other specialized knowledge" is expert testimony governed by the expert witness disclosure requirements set forth in Rule 26.[41]

While it is true that treating physicians rely on firsthand knowledge when they testify about treatment of their patients, a physician's ability to make the observations in the first place typically requires medical expertise.[42] For example, a physician's description of injuries a patient sustained in an accident is an example of observational testimony that requires specialized knowledge.[43] In *Mohney v. USA Hockey, Inc.*, the treating physician examined a seventeen-year-old hockey player who crashed into the boards of a hockey rink and suffered a spinal cord injury that rendered him a quadriplegic.[44] Neuroscience is a highly complex field, and a lay observer of those spinal injuries "would lack the vocabulary to describe what he saw with precision or the knowledge of which observations mattered."[45] Thus, the treating physician in *Mohney*, and other treating physicians, are not properly classified as lay witnesses merely because they are relying on firsthand observations.

The scope of testimony that a physician may give as a lay witness is extremely limited. As one court recognized, physicians

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39. FED. R. EVID. 701(c).

40. FED. R. EVID. 701 advisory committee's note (2000 amendments); *see* Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993) (setting standards for determining reliability of physician testimony).

41. FED. R. EVID. 701 advisory committee's note (2000 amendments).

42. Lamere v. N.Y. State Office for the Aging, 223 F.R.D. 85, 92 (N.D.N.Y. 2004); KAYE ET AL., *supra* note 29, § 4.2.1.

43. KAYE ET AL., *supra* note 29, § 4.2.1.

44. 138 F. App'x 804, 806–07 (6th Cir. 2005).

45. KAYE ET AL., *supra* note 29, § 4.2.1.

use scientific, technical, or other specialized knowledge in forming their opinions, even if they do so "unintentionally and unconsciously."[46] The reason patients seek medical advice from their physicians is to take advantage of a physician's specialized knowledge.[47] Thus, a treating physician who testifies as a lay witness may testify to his personal observations, i.e., that he observed blood during his examination, or that the patient was coughing or running a fever.[48] Occasionally, matters concerning treatment would be obvious to a juror; in those cases, a treating physician could testify as a lay witness to a diagnosis of a gunshot wound or a pedestrian's broken leg resulting from an automobile accident.[49] However, except for these rare situations, a treating physician may not testify as a lay witness to his diagnosis of a medical condition, his treatment decisions, causation of the injury, or the patient's prognosis because such opinions would not only be based on scientific, technical, or other specialized knowledge but

46. Montoya v. Sheldon, 286 F.R.D. 602, 619 (D.N.M. 2012).

47. Aumand v. Dartmouth Hitchcock Med. Ctr., 611 F. Supp. 2d 78, 88 (D.N.H. 2009).

48. *See* FED. R. EVID. 701 advisory committee's note (2000 amendments) (explaining that the observations of witnesses are allowable testimony under Rule 701); *Montoya*, 286 F.R.D. at 619 (quoting STEPHAN A. SALTZBERG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 701.02(7) (9th ed. 2006)) (holding that a treating physician can testify to a patient's panic attacks that he observed).

49. *See* Wills v. Amerada Hess Corp., 379 F.3d 32, 46 (2d Cir. 2004) (citing Salem v. U.S. Lines, Co., 370 U.S. 31 (1962) ("It is well settled that expert testimony is unnecessary in cases where jurors are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training."); Brandon v. Vill. of Mayfield, 179 F. Supp. 2d 847, 859 (N.D. Ill. 2001) (holding that a physician's diagnosis of a gunshot wound required "no specialized or 'expert' knowledge . . . .").

would also be derived from professional experience, which falls within the scope of Rule 702.[50]

The amendment to Rule 701 makes clear that there is no overlap between lay and expert testimony for physicians and that physicians are testifying as expert witnesses whenever their testimony is based on scientific, technical, or other specialized knowledge.[51] A surprising number of cases have followed *Davoll* and have allowed treating physicians to give opinion testimony as

50. Musser v. Gentiva Health Servs., 356 F.3d 751, 756-57 n.2 (7th Cir. 2004); *see also* United States v. Urena, 659 F.3d 903, 908 (9th Cir. 2011) (holding that a treating physician testifying as a lay witness may not testify to causation); *Montoya*, 286 F.R.D. at 620 (holding that a treating physician testifying as a lay witness cannot testify to causation, diagnosis, or future prognosis); Aumand v. Dartmouth Hitchcock Med. Ctr., 611 F. Supp. 2d 78, 88 (D.N.H. 2009) (determining that a treating physician's diagnoses, prognoses, and other conclusions as to the patient's condition are examples of the physician's "specialized knowledge"); Ferris v. Pa. Fed'n. Bhd. of Maint. of Way Emp., 153 F. Supp. 2d 736, 744–45 (E.D. Pa. 2001) (stating that a treating physician's testimony on causation "would necessarily be based on his expert knowledge."); FAIGMAN ET AL., *supra* note 16, § 21:40 (concluding that diagnosis and treatment recommendations are a matter of clinical judgment, based on information from the patient and the application of medical knowledge, skill, and experience).

51. A similar evolution occurred concerning the admissibility of police officer testimony. Before the 2000 amendment to Rule 701, some courts had allowed police officers to testify as lay witnesses about drug terminology, drug trafficking, and gang membership. *See, e.g.*, United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995) (allowing a police officer to testify as a lay witness against a motorcycle gang "warlord" about the connections between firearm possession and drug trafficking). Since the amendment to Rule 701 took effect, courts have recognized that a police officer must be qualified as an expert under Rule 702 to testify about these topics. *See, e.g.*, United States v. Garcia, 413 F.3d 201, 215–17 (2d Cir. 2005) (holding that a police officer's conclusions regarding the roles played by alleged narcotics conspirators constituted expert testimony based on his specialized training and experience in narcotics trafficking).

lay witnesses.[52] The better-reasoned cases recognize that the amendments to Rule 701 have superseded *Davoll*'s position that treating physicians may testify as lay witnesses.[53] Thus, when treating physicians testify about the care and treatment of their patients, they are providing expert testimony because they have the education, training, and professional experience that qualifies them as experts, and because their testimony consists of opinions based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[54]

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52. *See* Williams v. Mast Biosurgery USA, Inc., 644 F.3d 1312, 1316–18 (11th Cir. 2011) (holding that a treating physician not identified as an expert may offer lay testimony about scientific or technical matters if the testimony is grounded in the physician's personal observations and technical experience); Blameuser v. Hasenfang, 345 F. App'x 184, 186–87 (7th Cir. 2009) (finding a physician's testimony as to treatment and diagnosis of assault to be lay testimony); United States v. Henderson, 409 F.3d 1293, 1300 (11th Cir. 2005) (concluding that a treating physician's "diagnosis of the injury itself" constitutes permissible lay testimony); Blodgett v. United States, No. 2:06-CV-00565DAK, 2008 WL 1944011, at *4–5 (D. Utah May 1, 2008) (finding physicians' testimony as to causation of injuries to be lay testimony).

53. *See, e.g.*, Collins v. Prudential Inv. & Ret. Servs., 119 F. App'x 371, 379–80 (3d Cir. 2005) (holding that a treating physician, when not designated as an expert witness, may testify as to diagnosis and treatment only); *Musser*, 356 F.3d at 756–57 n.2 (explaining that under the current text of Rule 26, occurrence witnesses "cannot provide opinions 'based on scientific, technical, or other specialized knowledge . . . .'" and, thus, if a treating physician provides an opinion based on such knowledge he is acting as an expert witness); *Montoya*, 286 F.R.D. at 611–12 (explaining that treating physicians may testify as to "'what they saw and what they did' in caring for the patient without disclosure as an expert witness, but no more"); *Aumand*, 611 F. Supp. 2d at 88–89 (stating that "Rule 701, however, allows lay testimony as to 'opinions and inferences' only if, among other restrictions, they are 'not based on scientific, technical, or other specialized knowledge within the scope of Rule 702," and that "a treating physician's diagnosis, prognosis, or similar conclusions as to the patient's condition . . . are outside the scope of Rule 701"); Kirkham v. Société Air France, 236 F.R.D. 9, 11 n.2 (D.D.C. 2006) (stating that the 2000 amendments to Rule 701 and advisory committee's notes make it clear that a treating physician may be an expert witness under certain circumstances); *Ferris*, 153 F. Supp. 2d at 745 n.6 (questioning whether there are still circumstances under which a treating physician could offer lay testimony under Rule 701).

54. *See infra* text accompanying notes 224–261.

III. DISCLOSURE OF TREATING PHYSICIAN TESTIMONY UNDER RULE 26

Federal Rule of Civil Procedure 26, the core rule on civil discovery, governs the disclosure of expert testimony in civil cases.[55] A party who wishes to offer expert testimony under Federal Rule of Evidence 702, 703, or 705 must disclose the identity of the expert witness to opposing counsel.[56] Because treating physicians provide expert testimony when they testify about treatment of their patients, they must be disclosed as expert witnesses.[57] The extent of further disclosures under the rule depends upon the type of expert.[58]

A witness who is "retained or specially employed to provide expert testimony in the case or . . . whose duties as the party's employee regularly involve giving expert testimony" must prepare and sign a comprehensive written report.[59] The report must contain: (a) a complete statement of the expert's opinions and the reasons for them; (b) the facts or data considered by the expert in forming the opinions; (c) the exhibits that will be used to summarize or support the opinions; (d) the expert's qualifications and a list of publications authored in the last ten years; (e) a list of cases in which the witness has testified as an expert in the last four years; and (f) a statement of the expert's compensation in the case.[60] The purpose behind Rule 26's written report requirement is to give the opposing party notice of the substance of the expert's testimony so it can decide whether to

55. FED. R. CIV. P. 26(a)(2).

56. FED. R. CIV. P. 26(a)(2)(A).

57. *See supra* Part II (arguing that treating physicians are expert witnesses because they necessarily use scientific, technical, or specialized knowledge to diagnose and treat patients); FED. R. CIV. P. 26(a)(2)(B) (requiring disclosure of expert witnesses).

58. Consulting experts who are retained in anticipation of litigation or for preparation for trial, but are not expected to be called as witnesses at trial, are beyond the scope of this article. For rules relevant to such experts, see FED. R. CIV. P. 26(b)(4)(D).

59. FED. R. CIV. P. 26(a)(2)(B). This article does not address treating physicians whose duties as employees regularly involve giving expert testimony.

60. *Id.*

depose the expert, retain another expert to rebut the expert's testimony, or take other appropriate action.[61]

A witness who is not retained or specially employed to provide expert testimony is not required to file a written report, but the party calling the witness must disclose the subject matter on which the expert will present evidence and a summary of the facts and opinions to which the expert is expected to testify.[62] This less stringent summary disclosure requirement is intended to make it easier for non-retained experts to testify without preparing a comprehensive written report.[63] While a physician who must submit a written report may not be deposed until after the report is provided, there is no similar requirement that a party must wait for a summary disclosure before deposing a treating physician who is not retained to provide expert testimony.[64]

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61. *See* FED. R. CIV. P. 26(a)(1) advisory committee's note (1993 amendments) (explaining that the rule's purpose is to require disclosure sufficiently in advance of trial to allow parties to determine, with reasonable time, the best course of action); Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 734 (7th Cir. 2010) (citations omitted) (stating that the purpose of filing Rule 26 disclosure reports is "to provide adequate notice . . . to give the opposing party time to prepare for a response.").

62. FED. R. CIV. P. 26(a)(2)(C).

63. *See* FED. R. CIV. P. 26 advisory committee's notes (2010 amendments) (cautioning courts against requiring "undue detail" from non-retained witnesses who may not be as responsive to counsel as retained witnesses).

64. *See* FED. R. CIV. P. 26(b)(4)(A) (allowing a party to oppose any witness while restricting depositions until after a report is filed on behalf of expert witnesses). However, it may be advisable to depose the physician after the summary disclosure clarifies the physician's expected testimony because the medical records may be ambiguous or incomplete, and the physician may testify to matters not determined during treatment. *See* Ballinger v. Casey's Gen. Store, Inc., No. 1:10-cv-1439-JMS-TAB, 2012 WL 1099823, at *4–5 (S.D. Ind. Mar. 29, 2012) (medical records "do not necessarily provide an accurate or complete summary of [a physician's] expected testimony" because they are not typically created to be used for litigation purposes); Coleman v. Am. Family Mut. Ins. Co., 274 F.R.D. 641, 644 (N.D. Ind. 2011) (a treating physician may testify about opinions formed after treatment).

When interpreting a formal procedural rule, the starting point is the language of the rule itself.[65] Rule 26 neither defines when an expert has been "retained or specially employed to provide expert testimony" nor mentions treating physicians in the text of the rule.[66] A physician hired after the fact to develop opinions based upon his review of the medical records, diagnostic reports, medical literature, and other documents is a retained expert, and typically, there is no dispute about this status.[67] A more difficult issue is presented by the treating physician, a percipient witness who happens to be an expert. He may be asked to give expert opinion on matters related to his treatment of the patient and matters he did not consider during treatment.

A. Treating Physicians Distinguished From Retained Physicians

A variety of medical professionals may qualify as treating physicians under Rule 26. One expert witness referral service claims to have independent medical experts in more than 900 specialties.[68] Some physicians, such as family practice physicians or pediatricians, have a broad knowledge of medicine and provide primary care to their patients.[69] Other physicians specialize in a particular field and may receive their patients on referral from physicians who have a more general practice.[70] For example, a patient with chest pain may be referred by his family physician to a cardiologist, who specializes

65. Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 6 (1st Cir. 2011) (citation omitted).

66. FED. R. CIV. P. 26(a)(2).

67. *See, e.g.*, Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 669 (6th Cir. 2010) ("In addition to Tamraz's treating physicians, the plaintiffs and defendants each hired a doctor to examine Tamraz.").

68. *About Us*, TASA GROUP, http://www.tasanet.com/about.aspx (last visited Nov. 22, 2013).

69. *Specialty Information: Pediatrics*, ASS'N AM. MED. COLLS. (May 2013), https://www.aamc.org/cim/specialty/list/us/336860/pediatrics.html.

70. AMA Code of Medical Ethics Op. 3.04, *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion304.page (stating that a physician may refer a patient to a physician-specialist or a limited practitioner based on their individual competence and ability to provide the services needed by the patient).

in diseases of the heart and blood vessels.[71] Orthopedic surgeons and neurosurgeons are also specialists and are often called upon to treat victims of trauma.[72] Physicians such as pathologists and radiologists, who usually do not directly treat patients, would not normally testify as a treating physician.[73] Other medical professionals who may testify as a treating physician include nurse practitioners and pharmacists as well as dental and mental health professionals.[74]

It can be difficult to determine whether a physician is a treating physician or has been retained, and the court cannot rely on an attorney's characterization of the relationship.[75] One major factor distinguishing a treating physician from a retained physician is the context in which the physician becomes familiar with the patient. Most treating physicians do not see patients on referral from a lawyer and are not consulted for litigation purposes, but rather learn about the patient's injuries and medical history through their care

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71. *See* Am. Coll. of Cardiology, *What is a Cardiologist?*, CARDIOSMART (2013), http://www.cardiosmart.org/Heart-Basics/what-is-a-Cardiologist (last visited Sept. 28, 2013) ("[A] cardiologist is a doctor with special training and skill in finding, treating, and preventing diseases of the heart and blood vessels.").

72. *See* Am. Acad. of Orthopaedic Surgeons, *Fractures (Broken Bones)*, ORTHOINFO (Oct. 2012), http://www.orthoinfo.org/topic.cfm?topic=A00139 (discussing the types of fractures treated by orthopedic surgeons); *Spinal Cord Injury*, AM. ASS'N NEUROLOGICAL SURGEONS (Nov. 2005), https://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Spinal%20Cord%20Injury.aspx (reviewing the type of spinal damage commonly treated by neurosurgeons).

73. FAIGMAN ET AL., *supra* note 16, § 21:29.

74. Gilster v. Primebank, 884 F.Supp.2d 811, 843 n.8 (N.D. Iowa 2012) (observing that a nurse practitioner may testify as a "treating practitioner and not an expert specifically retained for trial"); Deutsch v. Novartis, 768 F. Supp. 2d 420, 469–71 (E.D.N.Y. 2011) (recognizing that a dentist, an oral surgeon, and an oral and maxillofacial surgeon may testify as treating physicians); Ferris v. Pa. Fed'n. Bhd. of Maint. of Way Emps., 153 F.Supp.2d 736, 741–42 (E.D. Pa. 2001) (allowing a psychologist to testify under the rules for treating physicians). *But see* Genier v. Astrue, 298 F. App'x 105, 108 (2d Cir. 2008) (recognizing that nurse practitioners, unlike treating physicians, are considered "other sources" whose opinions are given less deference than those of physicians under Social Security regulations) (citing 20 C.F.R. § 416.913(d)(1) (2013)).

75. Kirkham v. Société Air France, 236 F.R.D. 9, 12 (D.D.C. 2006).

and treatment of the patient.[76] Because of this underlying physician–patient relationship, a treating physician acquires his knowledge and information about his patient as a result of treatment and independent of the litigation itself.[77] Of course, a physician who does not treat the patient cannot qualify as a treating physician,[78] but depending on the nature and frequency of treatment, a treating physician may only have treated the patient a few times or after long intervals.[79] Treating physicians are entitled to reasonable compensation for the time they spend in discovery, and receiving payment for such services does not transform a treating physician into a retained

76. *See* Goodman v. Staples the Office Superstore, LLC, 644 F.3d 817, 825 (9th Cir. 2011) (discussing how the physician formed his opinion during the course of treatment); Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Co. 1995) (stating the treating physician's "testimony is based on [his] personal knowledge of the treatment of the patient"). For this reason, the Social Security Administration gives extra weight to the opinions of treating physicians and has a comprehensive definition of treating source. *See* 20 C.F.R. § 404.1502 (2013) (stating that a "treating source" means a physician "you see, or have seen . . . with a frequency consistent with accepted medical practice for the type of treatment and/or evaluation required for your medical condition(s)").

77. *See Goodman*, 644 F.3d at 825 (citation omitted) (determining the treating physician did not have to disclose an expert report because evidence in the record showed he "formed his opinion during the course of treatment"); *see also* Am. Prop. Constr. Co. v. Sprenger Lang Found., 274 F.R.D. 1, 4 (D.D.C. 2011) (describing a treating physician as "someone whose testimony turns in part on scientific, technical, or other specialized knowledge, but who has a relationship to the subject matter of the action independent of the litigation itself").

78. *See* Prince v. Duke Univ., 392 S.E.2d 388, 389–90 (N.C. 1990) (determining that a neuropathologist who reviewed slides after decedent's death was not a treating physician). *But see* Elgas v. Colo. Belle Corp., 179 F.R.D. 296, 299–300 (D. Nev. 1998) (finding that a directing physician at a medical clinic who did not personally treat a patient, but who consulted with the nurse practitioner who did, is a treating physician to the extent he has knowledge of plaintiff's medical condition through consultation); Miller v. Phillips, 959 P.2d 1247, 1249–51 (Alaska 1998) (holding that a supervising obstetrician who consulted with a midwife but who did not personally treat the patient could testify as treating physician).

79. 20 C.F.R. § 404.1502; Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 174 (6th Cir. 2009) (explaining how the plaintiff saw an ear, nose, and throat doctor two times in three and a half years).

physician for purposes of Rule 26.[80] Finally, a patient may have several treating physicians.[81]

The civil justice system benefits from encouraging treating physicians to participate in litigation involving their patients.[82] Treating physicians are more naturally involved with a patient's life and may take a more balanced approach to the litigated issue than retained experts.[83] Also, treating physicians are potentially powerful expert witnesses because they can testify directly about the patients' statements that are made for and reasonably pertinent to medical diagnosis or treatment.[84] Treating physicians are often portrayed to the jury as neutral or disinterested witnesses, in contrast to the other side's highly paid partisan expert.[85]

While treating physicians may seem less partisan than retained experts, their testimony must still be carefully scrutinized. Treating physicians may become advocates for their patients in

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80. Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995); *see* Kirkham v. Société Air France, 236 F.R.D. 9, 12 (D.D.C. 2006) (citation omitted) (holding that compensation is permitted for a treating physician, and such compensation does not transform him into a retained expert.)

81. *See, e.g.*, Deutsch v. Novartis, 768 F. Supp. 2d 420, 469–70 (E.D.N.Y. 2011) (detailing how a plaintiff's decedent had been treated by a primary care physician, general dentist, oral surgeon, oral and maxillofacial surgeon, and oncologist).

82. E-mail from Schuster, *supra* note 4.

83. *Id.*

84. FED. R. EVID. 803(4). While statements as to causation are admissible if they are reasonably pertinent to diagnosis or treatment, statements as to fault ordinarily are not admissible. *See* FED. R. EVID. 803(4) advisory committee's note (1972 amendment) (providing an example of a barred statement of fault in note to paragraph 4).

85. *See* Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 676 (6th Cir. 2010) (plaintiff emphasized the treating physician's neutrality and repeatedly mentioned the physician "received no payment for his testimony, unlike the manufacturers' only expert.").

litigation involving their patients' injuries.[86] Also, as discussed further in Part IV, treating physicians may not be qualified to give an opinion on the matter at issue in the case, and their methodology may not be sufficiently reliable as determined by the inquiry mandated in *Daubert* and Rule 702.[87] Further, many treating physicians "are personally committed to the path of therapy [they chose] for their patients and many view any criticism of their decisions as a personal affront. Which is a bigger obstacle to a correct understanding of the facts, money or ego?"[88]

There is a great deal of skepticism about testimony from retained experts, often called "hired guns" or other less flattering titles.[89] Some lawyers have well-established referral patterns with sympathetic physicians that the lawyers know will testify favorably for their clients.[90] Even when lawyers have no say about which physicians treat a patient, they may choose their retained experts from a deep pool of qualified people.[91] Bias seems to be an

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86. *See [ST-8] Statement on the Physician Acting as an Expert Witness*, AM. C. SURGEONS (Apr. 2011), *available at* http://www.facs.org/fellows_info/statements/st-8.html ("Physician expert witnesses are expected to be impartial and should not adopt a position as an advocate or partisan in the legal proceedings."); Am. Med. Ass'n, *Opinion 6.01 – Contingent Physician Fees*, AMA CODE MED. ETHICS (June 1994), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion601.page? (warning physicians against "becom[ing] less of a healer and more of an advocate or partisan in [legal] proceedings").

87. See *infra* Part IV.

88. E-mail from James Kelly, Ph.D., former Dir. of Research, Dep't of Surgery, Univ. of N. M., to author (July 17, 2013) (on file with author); *see also* Randye Retkin et al., *Lawyers and Doctors Working Together–A Formidable Team*, 20 HEALTH LAW Oct. 2007, at 33 (noting that in malpractice cases, "[p]hysicians resent having their integrity and professional competency challenged"); Allen K. Hutkin, *Resolving the Medical Malpractice Crisis: Alternatives to Litigation*, 4 J. L. & HEALTH 21, 31 (1990) ("Physicians often find it difficult to settle cases short of trial because they hate to 'admit they may have done something wrong.'" (citation omitted)).

89. Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L. J. 465, 475 n.24 (2000).

90. Perkins v. United States, 626 F. Supp. 2d 587, 590–91, 591 n.6 (E.D. Va. 2009); Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1354–55, 1364–65 (M.D. Ga. 2007); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1132–33 (1991).

91. Easton, *supra* note 89, at 482.

inevitable part of a system where parties choose their own experts because lawyers will hire experts who they believe will present evidence in a light most favorable to their client.[92] Lawyers can sift through a large number of potential experts until they find one who agrees with their theory of the case, and the jury will never know.[93]

Experts are often well-paid, and "common sense suggests that a financial stake can influence an expert's testimony. . . ."[94] As one lawyer stated, expert witnesses "are not pristine; I do not pay $1,000 an hour for an expert to tell the court how good my opponent's case is."[95] Expert witnesses are also subject to more subtle pressures from the lawyers who retain them.[96] Lawyers can influence an expert's testimony by controlling the flow of information to the expert or by deciding whether the expert continues to earn fees in the case.[97] Experts agree that lawyers pressure them to soften potentially unfavorable testimony, strengthen favorable testimony, and be less tentative in their opinions.[98] Occasionally, lawyers negotiate with their experts about the exact language that the expert will use to describe his opinion.[99] Experts understand that their prospect of future employment as an expert depends on assisting the lawyer in obtaining a successful resolution of the present case.[100]

A party has a different relationship with its retained expert than with a treating physician. A party who retains an expert witness to provide testimony in a case will have ready access to and more

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92. *Id.*; FAIGMAN ET AL., *supra* note 16, § 3:13.

93. FED. R. CIV. P. 26(b)(4)(D) (providing that consulting experts are generally not disclosed to the opposing party); Easton, *supra* note 89, at 499.

94. Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, 973 (7th Cir. 2001).

95. FED. R. CIV. P. 26 advisory committee's note (2008) (Minutes of Rules Committee Meetings), at 18 [hereinafter "Advisory Committee Minutes"], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2008-min.pdf.

96. Easton, *supra* note 89, at 491–99; Joseph Sanders, *Expert Witness Ethics*, 76 FORDHAM L. REV. 1539, 1575–79 (2007).

97. Easton, *supra* note 89, at 495–96.

98. Sanders, *supra* note 96, at 1577–78.

99. *Id.*; FAIGMAN ET AL., *supra* note 16, § 3:13.

100. FAIGMAN ET AL., *supra* note 16, § 3:13.

control over that witness and can expect the expert to cooperate in preparing a Rule 26(a)(2)(B) report.[101] As one court recognized, "[A] litigant who retains an expert witness has control of that witness and will have the expert's cooperation [during discovery]. A party generally does not have . . . ready access to or control over treating physicians."[102]

One other important distinction between a treating physician and a retained physician concerns the extent of protection for communications between a party's attorney and the physician. Rule 26(b)(4)(B) provides work-product protection for drafts of expert reports and summary disclosures.[103] However, Rule 26(b)(4)(C) provides work-product protection only for communications between an attorney and an expert physician required to provide a Rule 26 written report, except to the extent that the communications relate to the expert's compensation or identify facts, data or assumptions the attorney provided and the expert relied upon in forming his opinions.[104] The rule does not protect communications between counsel and a treating physician subject to the summary disclosure requirement, although the communications could be protected under other doctrines.[105] This lack of protection for communications between attorneys and treating physicians could induce attorneys to hire treating physicians as expert witnesses to ensure that their communications are protected as work product.[106]

When determining whether a physician is a treating physician or a retained expert, factors that a court should consider include whether: (1) the physician's relationship with the patient began before the incident in question, shortly after the incident, or close in time to trial; (2) another physician or a lawyer referred the patient to

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101. Tzystuck v. Chi. Transit Auth., 529 N.E.2d 525, 530 (Ill. 1988); 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2031.2 (3d ed. 2012).

102. *Tzystuck*, 529 N.E.2d at 530.

103 FED. R. CIV. P. 26(b)(4)(B).

104. FED. R. CIV. P. 26(b)(4)(C).

105. *See id.* (protecting only "drafts of any report or disclosure required under Rule 26(a)(2) . . . ."); FED. R. CIV. P. 26 advisory committee's note (2010 amendments) ("Rule 26(b)(4)(B) is added to provide work-product protection . . . for drafts of expert reports or disclosures.").

106. E-mail from Michael Shickich to author (Aug. 8, 2013) (on file with author).

the physician; (3) the lawyer has an established practice of referring patients to the physician; (4) the physician regularly sees patients who have cases in litigation; (5) the physician testifies almost exclusively for one side of a case; (6) the physician sent copies of the patient's medical records to a lawyer contemporaneously with treatment; and (7) the physician billed a medical insurance provider or a lawyer for treatment provided.[107] If the court finds that the physician has been retained, the physician is subject to the extensive written report requirements of Rule 26(a)(2)(B).[108] A party that fails to file a written report concerning treating physician testimony may be precluded from presenting the physician's expert testimony.[109]

B. Written Reports from Treating Physicians

As noted previously, Rule 26(a)(2) neither mentions treating physicians nor defines when experts have been retained or specially employed, which would require them to prepare a written report. The 1993 Advisory Committee note to Rule 26 states, "A treating physician can be deposed or called to testify at trial without any requirement for a written report."[110] The Advisory Committee notes are not approved by the Supreme Court and have no independent precedential value.[111] If a rule is ambiguous, a court may look to a

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107. Kirkham v. Société Air France, 236 F.R.D. 9, 13 (D.D.C. 2006); *see also* Noffsinger v. Valspar Corp., No. 09-C-916, 2011 WL 9795, at *4–5 (N.D. Ill. Jan. 3, 2011) (weighing factors to determine whether a physician is characterized as a treating physician or a hired expert); Perkins v. United States, 626 F. Supp. 2d 587, 591 (E.D. Va. 2009) (finding the "evidence overwhelmingly indicates that Dr. Cloud was specially retained for litigation" and thus, must provide an expert report); Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1354 (M.D. Ga. 2007) (applying Federal Rule of Evidence 702 and finding that the doctor was a "hired gun expert").

108. *See Perkins*, 626 F. Supp. 2d at 591 (finding that a physician specially retained to provide an expert opinion must file a report under Rule 26(a)(2)(B)).

109. *See* FED. R. CIV. P. 37(c)(1); Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011); Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 735 (7th Cir. 2010).

110. FED. R. CIV. P. 26 advisory committee's note (1993 amendments).

111. 1 CHARLES ALAN WRIGHT & ANDRES D. LEIPOLD, FEDERAL PRACTICE & PROCEDURE § 32 (4th ed. 2008).

clear Advisory Committee note to help resolve the ambiguity.[112] However, when an Advisory Committee note adds a requirement not set forth in the rule, the note must be disregarded.[113] Although an Advisory Committee note may be helpful in interpreting a rule, ultimately the text of the rule governs.[114] The 1993 Advisory Committee note provides little help in interpreting Rule 26(a)(2). The note addresses neither the proper scope of a treating physician's testimony nor the requisite report a treating physician must prepare if he offers opinions beyond the scope of treatment or based on materials not reviewed during treatment.[115] It is to these issues that I now turn.

1. Opinions Formed During Treatment

A treating physician is generally excused from preparing a Rule 26 written report because he was not retained to provide expert testimony; rather, he is a percipient witness of the treatment he rendered using his expertise.[116] A treating physician's opinion testimony "arises not from his enlistment as an expert but, rather, from his ground-level involvement in the events giving rise to the litigation."[117] A treating physician's contemporaneous medical records document his observations, findings, and treatment; requiring him to prepare a written report before testifying would take time that he could spend treating his patients and might deter the

112. *In re* Sealed Case, 141 F.3d 337, 342 (D.C. Cir. 1998). *Contra* United States v. Davila, 133 S. Ct. 2139, 2150 (2013) (Scalia, J., concurring) (asserting that the Advisory Committee's view is not authoritative and the court must rely on the text of the rule to resolve the issue).

113. Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43, 48–49 (D. Mass. 2011).

114. United States v. Carey, 120 F.3d 509, 512 (4th Cir. 1997).

115. FED. R. CIV. P. 26 advisory committee note (1993 amendments).

116. Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 824 (9th Cir. 2011) (citing Fed. R. Civ. P. advisory committee's notes (1993)); *see also* Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 6 (1st Cir. 2011) (finding that an exterminator who did not hold himself out as an expert was not "retained or specially employed" by the plaintiffs).

117. *Downey*, 633 F.3d at 6; KAYE ET AL., *supra* note 29, § 4.2.2.

physician from testifying in litigation.[118] As long as the physician testifies only to opinions he developed as a percipient witness, the physician is not one "retained or specially employed" as an expert.[119] Thus, a treating physician generally may testify to matters within the scope of the treatment he rendered—based on what he learned through actual treatment of the patient—without preparing a written report.[120]

Widely divergent views have developed in federal court about what opinions a treating physician normally forms during the course of treatment.[121] This dispute has become so acute that courts

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118. *See* Watson v. United States, 485 F.3d 1100, 1107 (10th Cir. 2007) ("[R]esources might be diverted from patient care if treating physicians were required to issue expert reports as a precondition to testifying."); Katherine A. Rocco, *Rule 26(A)(2)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure?*, 76 FORDHAM L. REV. 2227, 2228 (2008) (discussing policy considerations that weigh against requiring every expert witness to submit a written report).

119. *Goodman*, 644 F.3d at 824 (internal quotation marks omitted); *Downey*, 633 F.3d at 7.

120. *Goodman*, 644 F.3d at 819, 825 (citing Fielden v. CSX Transp., Inc., 482 F.3d 866, 871 (6th Cir. 2007)).

121. Although beyond the scope of this article, it does not appear that a physician develops an opinion on the extent of permanent impairment or disability during the ordinary course of treatment. Although some cases state that physicians determine these issues during treatment, the courts cite no medical authority to support this proposition. *See, e.g.*, Shapardon v. W. Beach Estates, 172 F.R.D. 415, 416–17 (D. Haw. 1997) ("Treating physicians commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of disability, if any, caused by the condition or injury."); Piper v. Harnischfeger Corp., 170 F.R.D. 173, 175 (D. Nev. 1997) ("It is common place for a treating physician . . . to consider things such as the cause of the medical condition, the diagnosis, the prognosis, and the extent of disability caused by the condition, if any."). Treating physicians generally do not have time to perform the rigorous, detailed functional assessment required to quantify impairment or disability and often refer their patients to an independent physician to make such determinations. *See* AM. MED. ASS'N, GUIDES TO THE EVALUATION OF THE PERMANENT IMPAIRMENT 19–20, 23–24 (Robert D. Rondinelli et al., eds., 6th ed. 2008) (noting impairment assessments are "not likely to be used in the practice of therapeutic medicine," and that while treating physicians may perform impairment ratings on their patients, such ratings "are not independent and therefore may be subject to greater scrutiny").

have resorted to standing orders and local rules to give clarity on the proper scope of testimony from a treating physician.[122] Courts have had particular difficulty determining whether a physician develops an opinion on causation during the ordinary course of a patient's treatment.[123]

In *Fielden v. CSX Transportation, Inc.*, the plaintiff brought an action claiming that repetitive wrist movement during his employment with CSX caused carpal tunnel syndrome.[124] The district court excluded testimony from one of the plaintiff's treating physicians on the issue of causation because the physician did not prepare a written report.[125] The Sixth Circuit reversed because it found that the physician formed his opinion on causation during treatment.[126] The court quoted from what it called a "thoughtful" decision that allowed a treating physician to give expert testimony on causation without an expert report because

> [i]t is within the normal range of duties for a health care provider to develop opinions regarding causation and prognosis during the ordinary course of an examination. . . . [T]o properly treat and diagnose a patient, the doctor needs to understand the cause of a patient's injuries.[127]

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122. *See* Bartnick v. CSX Transp., Inc., No. 1:11-CV-1120, 2013 WL 1113991, at *2 (N.D.N.Y. Mar. 18, 2013) (relying on the standing order of the court, which required disclosure of all known facts and opinions that may form the basis of a medical opinion, to promote clarity of the scientific basis upon which the opinion rests); Krischel v. Hennessy, 533 F. Supp. 2d 790, 795–96 (N.D. Ill. 2008) (relying on standing order and local rules to require a detailed report when a treating physician provides expert testimony); U.S.D.C. D. Wyo. L.R. 26.1(g)(4); D.N.M.LR-Civ. 26.3(b).

123. *See, e.g.*, *Piper*, 170 F.R.D. at 175 (detailing the difficulty of determining whether a treating physician can give expert testimony) (quoting Baker v. Taco Bell Corp., 163 F.R.D. 348, 349 (D. Colo. 1995)).

124. 482 F.3d 866, 867 (6th Cir. 2007).

125. *Id.* at 869.

126. *Id.*

127. *Id.* at 870 (quoting Martin v. CSX Transp., Inc., 215 F.R.D. 554, 557 (S.D. Ind. 2003)); *see also* Bartlett v. Mut. Pharm. Co., 742 F. Supp. 2d 182, 200 (D.N.H. 2010); Headley v. Ferro Corp., 630 F. Supp. 2d 1261, 1266 (W.D. Wash. 2008); Garcia v. City of Springfield Police Dept., 230 F.R.D. 247, 248–49 (D. Mass. 2005); Elgas v. Colo. Belle Corp., 179 F.R.D. 296, 299–300 (D. Nev. 1998).

CSX did not contest that repetitive wrist movement could cause carpal tunnel syndrome in some patients, and the Sixth Circuit recognized that, when the medical condition or its causation are at issue, as in *Fielden*, courts are more likely to require treating physicians to provide an expert report.[128]

Other courts have concluded that physicians do not develop opinions on causation during treatment.[129] As one court stated "[o]ne matter that is typically not based on observations during the course of treatment" is the cause of a patient's injuries.[130] The court reasoned that "when a treating physician opines as to causation, prognosis, or future disability, [he] is going beyond what he saw and did and why he did it. He is going beyond his personal involvement in the facts of the case and giving an opinion formed because there is a lawsuit."[131]

These courts that have considered whether physicians form an opinion on causation during treatment have at least one thing in common: they simply make assumptions about this issue and fail to cite any medical authority in support of their position.[132] In fact, physicians are trained to diagnose and treat medical problems *without* determining causation to a legal standard.[133] Clinical medicine is primarily concerned with the prevention, diagnosis, and treatment of disease.[134] Treating physicians are primarily concerned with making treatment decisions for individual patients based on the

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128. *Fielden*, 482 F.3d at 871.

129. *See, e.g.*, Scholl v. Pateder, Civ. A. No. 09-CV-02959-PAB-KLM, 2011 WL 2473284, at *4 (D. Colo. June 22, 2011); *see also* Bynum v. MVM, Inc., 241 F.R.D. 52, 53–54 (D.D.C. 2007) (stating a physician is limited to testifying to events he has personally witnessed); Leathers v. Pfizer, Inc., 233 F.R.D. 687, 696–99 (N.D. Ga. 2006) (holding that opinion statements by doctor who was serving as fact witness on causation was an expert witnesses and should be struck).

130. *Scholl*, 2011 WL 2473284, *4 (citing Griffith v. Ne. Ill. Reg'l Commuter R.R. Corp., 233 F.R.D. 513, 518 (N.D. Ill. 2006)).

131. *Id.* (alteration in original) (quoting *Griffith*, 233 F.R.D. at 518).

132. As Judge Posner observed, judicial opinions (and law review articles) are full of confident assertions that have no demonstrable factual basis. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986).

133. Wong et al., *supra* note 2, at 693–94.

134. FAIGMAN ET AL., *supra* note 16, § 21:28.

information they have at that time. To do so, the physician will gather information by reviewing patient history, performing physical examination, and carrying out diagnostic testing.[135] The cause of a patient's condition is generally of little concern to a treating physician, unless it relates to treatment.[136] A physician's goal is typically not to determine causation, but to recommend the best therapeutic options for his patient.[137] "[W]hen analyzing the patient's symptoms and making a judgment based on the available medical evidence, a physician will not expressly identify a 'proximate cause' or 'substantial factor.'"[138] As Professor Faigman explained, "An oncologist might be curious about what caused his or her patient's leukemia, but the doctor's first task is to diagnose and treat the condition, not to determine whether trichloroethylene, electromagnetic fields, a genetic disorder, or something else caused it."[139] Testifying about causation "requires making judgments that physicians do not ordinarily make in their profession, making these judgments outside of physicians' customary patient encounters, and adapting the opinion in a way that fits the legal standard."[140]

The fact that most treating physicians do not form an opinion on causation during treatment was confirmed by my conversation with a neurosurgeon who said:

> In my opinion and in my practice, I don't necessarily form an opinion on causation except as it may relate to diagnosis and treatment. Prognosis however is important since it may help the patient and me decide on treatment options.

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135. Wong et al., *supra* note 2, at 703–04.

136. Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, *in* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 633, 676 (3d ed. 2011).

137. Wong et al., *supra* note 2, at 692–93; *see also* Ellison v. United States, 753 F. Supp. 2d 468, 488 (E.D. Pa. 2010) (neurologist did not perform further testing to determine cause of stroke because patient was receiving the only available therapy and the testing would have no bearing on treatment).

138. Wong et al., *supra* note 2, at 694.

139. David L. Faigman, *Judges as "Amateur Scientists"*, 86 B.U. L. REV. 1207, 1222 (2006).

140. Wong et al., *supra* note 2, at 694.

> Let me give an example: it doesn't really matter if a disc herniation is from a fall, lifting at work, MVA [motor vehicle accident] or was spontaneous. What matters to me is what are the patient's symptoms and physical findings NOW and how do they relate to the radiological findings. Then I can make a clinically relevant diagnosis and estimations of prognosis and discuss treatment options with the patient.[141]

Many other physicians have admitted they typically focus only on diagnosis and treatment of their patients, and that an opinion on causation is "more driven by the legal aspects of the case than by the medicine."[142] Unfortunately, most courts have not consulted physicians or other medical resources to reach the correct conclusion on this issue.

To attempt to resolve what opinions a physician normally forms during treatment, some courts limit a treating physician to testifying only to those issues identified in his medical records.[143] When the contemporaneous medical records do not reflect that a physician reached a particular opinion during treatment, the physician will be precluded from testifying on that topic unless he prepared a written report.[144] Other courts have rejected this focus solely on the expert's contemporaneous records and allow an expert to give an opinion without preparation of a written report as long as

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141. E-mail from John W. Hutchison, M.D., to author (Aug. 22, 2012) (on file with author).

142. Perkins v. United States, 626 F. Supp. 2d 587, 593 n.8 (E.D. Va. 2009); *see also* Myers v. Ill. Cent. R.R., 629 F.3d 639, 645 (7th Cir. 2010) (noting that treating physicians focus on diagnosis and treatment, not on determining causation); Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1206 (8th Cir. 2000) (restating a witness's answer that it is not part of a treating physician's "job definition" to determine causation of injury); Cooper v. Carl A. Nelson & Co., 211 F.3d 1008, 1019 (7th Cir. 2000) (describing how a treating physician "explained that the cause of [plaintiff's] trauma was irrelevant to him in prescribing a course of treatment.").

143. Samaan v. St. Joseph Hosp., 274 F.R.D. 41, 47 (D. Me. 2011); Robbins v. Ryan's Family Steak Houses E., Inc., 223 F.R.D. 448, 453 (S.D. Miss. 2004).

144. *Samaan*, 274 F.R.D. at 47; *Robbins*, 223 F.R.D. at 453.

the expert was neither retained nor specially employed and the opinion is based on personal knowledge formed during the course of treatment.[145]

2. Opinions Not Formed During Treatment

Despite disagreement on exactly what opinions a treating physician forms during the course of treatment, treating physicians are often asked to give opinions at trial that they did not form during treatment, especially opinions on causation.[146] Prior to the 2010 amendment to Rule 26, many courts held that, when a treating physician proposes to testify to an opinion not formed during treatment, he must prepare a written report.[147] For example, in *Meyers v. National Railroad Passenger Corp.*, Meyers brought a claim for occupational injuries against Amtrak and submitted reports from two of his treating physicians to establish the causation of his injuries.[148] The district court struck the opinions because the expert reports did not include the basis and reasons for the physicians' conclusions on causation.[149] The Seventh Circuit affirmed the exclusion of the treating physicians' testimony because the physicians did not consider or determine the cause of Meyers' injuries during the course of treatment and only reached an opinion as to causation at the request of Meyers' attorney specifically for the

145. *See, e.g.*, Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 6–7 (1st Cir. 2011) (finding that the "common-sense manner" the words "retained or specially employed" are used would only apply to experts brought in for the purpose of litigation).

146. *See, e.g.*, Musser v. Gentiva Health Servs., 356 F.3d 751, 758 (7th Cir. 2004) (holding that treating physicians and treating nurses must be designated as experts, and thus comply with Rule 26, if they are to provide expert testimony as to causation); Krischel v. Hennessy, 533 F.Supp.2d 790, 795 (N.D. Ill. 2008) (holding that when a treating physician's testimony goes the beyond scope of treatment and into the area of general expert testimony, a Rule 26 report may be required).

147. *See, e.g.*, Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 733–35 (7th Cir. 2010) (holding that treating physicians who testify as to causation, but who did not form that opinion during treatment, should be considered expert witnesses and thus be required to submit an expert report in accordance with Rule 26).

148. *Id.* at 731–32.

149. *Id.* at 732–33.

purpose of litigation.[150] The Seventh Circuit concluded that a treating physician who will offer expert testimony on an issue not determined during the course of treatment is deemed to be "retained or specially employed to provide expert testimony" on that issue and must submit an expert report.[151] Many other courts have reached similar conclusions.[152]

3. Materials Not Reviewed During Treatment

Similarly, many cases decided prior to the 2010 amendment to Rule 26 hold that a treating physician must prepare a written report if the physician reviews materials he did not review during the course of treatment.[153] In *Goodman v. Staples The Office*

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150. *Id.* at 735.

151. *Id.* (internal quotation marks omitted).

152. *See* Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 825–26 (9th Cir. 2011) (stating that the Eighth Circuit goes further than the Seventh Circuit, "requiring disclosure of a written report any time a party seeks to have a treating physician testify as to the *causation* of a medical condition, as opposed to merely the existence of the condition.") (citing Brooks v. Union Pac. R.R., 620 F.3d 896, 900 (8th Cir. 2010)); Fielden v. CSX Transp., Inc., 482 F.3d 866, 870–71 (6th Cir. 2007) (listing a number of cases that have "concluded that when the nature and scope of the treating physician's testimony strays from the core of the physician's treatment, Rule 26(a)(2)(B) requires the filing of an expert report from the treating physician"); *see also* Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 6–7 (1st Cir. 2011) (citations omitted) (holding that "retained or specifically employed" should be given a common-sense interpretation, and here the expert was not employed in connection with litigation and did not require a report); Kirkham v. Société Air France, 236 F.R.D. 9, 12–13 (D.D.C. 2006) (citations omitted) (surveying cases that discuss the factors necessary to determine whether an expert report is required); Elgas v. Colo. Belle Corp., 179 F.R.D. 296, 299–300 (D. Nev. 1998) (holding that a supervising doctor who had no direct interaction with the patient qualifies as a treating physician and is not subject to 26(a)(2)(b); however, the doctor could only testify as to knowledge he acquired during his limited treatment of the patient); Sullivan v. Glock, Inc., 175 F.R.D. 497, 500–01 (D. Md. 1997) (explaining that "[t]he failure to appreciate the distinction between a hybrid witness and retained expert can be a trap for the unwary").

153. *See, e.g.*, *Fielden*, 482 F.3d at 870–71 (listing pre-2010 cases requiring physicians to file an expert report when testimony "strays from the core of the physician's treatment").

Superstore, LLC, Goodman was injured while shopping at a Staples store and brought suit to recover for her injuries.[154] Goodman contacted her treating physicians, provided them with medical records and other documents they had not reviewed during treatment, and asked some of them to develop opinions on issues beyond the scope of the treatment they rendered.[155] Goodman identified her treating physicians as potential witnesses but did not produce written reports from them, arguing that treating physicians were never required to prepare a written report and had, essentially, no limits on the scope of their testimony.[156] Staples moved to preclude the treating physicians from testifying, asserting that treating physicians had to produce written reports when they gave opinions beyond the scope of their treatment.[157]

The Ninth Circuit recognized that it had not previously considered when, if ever, a treating physician is transformed for Rule 26 report purposes into an expert offering testimony on matters beyond the scope of treatment rendered.[158] The court held that a treating physician is exempt from Rule 26's written report requirement only to the extent that his opinions were formed during the course of treatment.[159] When a treating physician reviews materials that he or she did not review during the course of treatment, the treating physician no longer testifies as a percipient witness of the treatment he rendered.[160] Accordingly, a treating physician who "morphs" into a witness hired to render expert opinions that go beyond the usual scope of a treating doctor's testimony must prepare a written report.[161]

154. 644 F.3d at 820.
155. *Id.* at 826.
156. *Id.* at 820–21, 824–25.
157. *Id.* at 824–25.
158. *Id.* at 824.
159. *Id.* at 825.
160. *Goodman*, 644 F.3d at 826.
161. *Id.* at 819–20. Because the law on this issue was unsettled, the court applied the rule prospectively and ordered that Goodman be allowed to rectify her error by disclosing reports from her treating physicians. *Id.* at 826.

Other courts have reached the same conclusion.[162] The Sixth Circuit has precluded treating physicians from giving opinions based on materials not reviewed at the time of treatment without preparation of a written report.[163] The court observed that a treating physician who relies on medical records and other materials he did not review during treatment of the patient no longer testifies based on his personal observations, but is instead acting like a retained expert and must file a written report.[164]

Courts are suspicious when treating physicians change their medical opinions shortly before trial. For example, in a recent case from New Hampshire, the plaintiff injured her shoulder in a bicycling accident and was treated by an orthopedic surgeon from April through December 2009.[165] At the conclusion of the treatment the physician neither recommended surgical treatment nor expected that the plaintiff would have significant residual symptoms.[166] However, in June 2011, the physician wrote a letter to plaintiff's counsel recommending possible surgery and giving the plaintiff a permanent partial disability rating.[167] In evaluating the defendant's motion to preclude this testimony, the court held that while treating physicians are not required to prepare a written report when their opinions are based on the treatment they provided, they cannot

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162. *See, e.g.*, Mohney v. USA Hockey, Inc., 138 Fed. App'x 804, 810–11 (6th Cir. 2005) (holding that it was not an abuse of discretion for a judge to exclude testimony offered by a treating physician based on his review of videos of the injury, not treatment of the plaintiff, because the plaintiff did not designate the physician as an expert); Fielden v. CSX Transp., Inc., 482 F.3d 866, 871–72 (6th Cir. 2007) (holding a physician testifying beyond the scope of treatment is an expert witness and is subject to 26(a)(2)(b)).

163. *Fielden*, 482 F.3d at 871–72.

164. *Id.* at 866, 871–72; *see also Mohney*, 138 F. App'x at 810–11 (holding that the district court did not abuse its discretion when it held that a doctor was subject to Rule 26 requirements when he based his opinion on a video and not his personal observations when treating his patient); *In re* Aredia & Zometa Prods. Liab. Litig., 754 F. Supp. 2d 934, 937 (M.D. Tenn. 2010) (excluding portions of doctor's testimony not based on information received from his treatment of the patient).

165. Westerdahl v. Williams, 276 F.R.D. 405, 406–07 (D.N.H. 2011).

166. *Id.* at 409.

167. *Id.* at 407.

testify to opinions based on information not learned during treatment.[168] Because the contemporaneous medical records did not indicate that the physician reached his opinions on surgery and disability during the course of treatment, the court concluded that those opinions must be based on information learned after treatment and that an expert report was required for the physician to give those opinions.[169]

C. *Summary Disclosure of Treating Physician Testimony*

Rule 26 was amended in December 2010 to add subsection (a)(2)(C), which requires summary disclosures.[170] Under Rule 26(a)(2)(C), an expert who is not retained or specially employed to provide expert testimony need not prepare a detailed written report; instead, the party calling the expert must prepare a report that discloses "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify."[171] The requirement for summary disclosures makes two important changes to expert discovery. First, the party calling the expert prepares the disclosure instead of the expert.[172] Second, the disclosure required is less extensive than for a written report and courts are cautioned "against requiring undue detail."[173] According to the Advisory Committee, the summary disclosure provision in Rule 26(a)(2)(C) is intended to resolve a "tension" that sometimes prompted courts to require a written report from witnesses who are exempt from the report requirement.[174] The Committee note identifies physicians and other health care professionals as examples of witnesses who may testify as both fact and expert witnesses and who are not required to provide a written report, but the party calling them must identify them as experts and provide Rule 26(a)(2)(C) summary disclosures.[175]

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168. *Id.* at 408.
169. *Id.* at 409.
170. FED. R. CIV. P. 26 advisory committee's notes (2010 amendments).
171. FED. R. CIV. P. 26(a)(2)(C).
172. *Compare* FED. R. CIV. P. 26(a)(2)(B), *with* FED. R. CIV. P. 26(a)(2)(C).
173. FED. R. CIV. P. 26 advisory committee's notes (2010 amendments).
174. *Id.*
175. *Id.*

The 2010 Advisory Committee note suffers the same type of defect as the 1993 Advisory Committee note: It fails to delineate the proper scope of testimony from a treating physician who is subject to the summary disclosure requirement.[176] It also fails to specify what "tension" the amendment is said to resolve.[177] A review of the Civil Rules Advisory Committee meeting minutes indicates that the Committee intended to resolve the disagreement about the scope of the opinions a treating physician forms during treatment.[178] The Committee met to discuss changes to Rule 26 shortly after the D.C. district court's decision in *Kirkham v. Société Air France*.[179] A report prepared for a meeting of the Discovery Subcommittee of the Advisory Committee quoted *Kirkham*'s statement that courts have struggled with treating physician testimony because it "often departs from its traditional scope – the physician's personal observations, diagnosis and treatment of a patient – and addresses causation and predictions about the permanency of a plaintiff's injuries, matters that cross the line into classic expert testimony."[180] The report also quoted *Kirkham's* statement that the primary area of dispute "is whether a treating physician may offer opinion testimony on causation, prognosis, and permanency, even if she bases her opinions solely on the information she obtained from her treatment of plaintiff."[181] At its meeting in April 2007, the Committee recognized the ambiguities that arise during treating physician testimony and

176. *See id.* (asserting that the disclosure is "considerably less extensive" and cautioning courts from requiring "undue detail" but failing to explain what is still required to be in summary disclosure reports).

177. *See id.* (referring to a tension that causes courts to require reports from witnesses who should be exempt without explaining what causes the tension).

178. Advisory Committee Minutes, *supra* note 95, at 17.

179. *Kirkham* was decided April 13, 2006. Kirkham v. Société Air France, 236 F.R.D. 9 (D.D.C. 2006). The Committee met April 7–8, 2008. Advisory Committee Minutes, *supra* note 95, at 1.

180. Memorandum from Rick Marcus, Special Reporter, Advisory Comm. on Civil Rules, to Participants in Jan. 13, 2007, Discussion of Discovery and Disclosure Regarding Expert Witnesses (Dec. 11, 2006), *in* ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, BROOKLYN, NY 328, 341 (Apr. 19–20, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2007-04.pdf (quoting *Kirkham*, 236 F.R.D. at 11).

181. *Id.* (quoting *Kirkham*, 236 F.R.D. at 11).

identified the issue as "whether a report should be required when the [physician's] testimony will offer an opinion that goes beyond diagnosis or treatment."[182] This framing of the issue indicates that the "tension" the Committee intended to resolve was the dispute about what opinions a treating physician reaches during treatment. The Committee further stated that lawyers want disclosure of expected testimony from physicians who are exempt from written report requirements to prevent surprise and to help them determine whether to depose the physician.[183] Thus, it appears that the Committee added subsection (a)(2)(C) to require summary disclosures when a party proposes to have a physician testify to any opinion formed during treatment.[184]

Summary disclosures may be most important in smaller cases. Plaintiff's lawyers face economic realities with their cases, and may not be able to afford to retain a physician in cases with smaller potential damage claims.[185] On the other hand, defendants often attempt to cut costs in smaller cases by not deposing the treating physician, especially where his medical records seem complete.[186] Where the medical records are ambiguous or incomplete, summary disclosures will clarify the expected testimony

182. Advisory Committee Minutes, *supra* note 95, at 30.

183. *Id.*

184. This conclusion is buttressed by the fact that the Advisory Committee approved adding the summary disclosure requirement to Rule 26 well before *Meyers* and *Goodman* were decided, so the Committee could not have considered these opinions in crafting subparagraph (a)(2)(C). *See id.* at 30 (stating that the "disclosure will solve the problem of surprise"); *see also* Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 825 (9th Cir. 2011) (holding that a written expert report is unnecessary when a physician testifies to an opinion formed during the course of treatment); Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 734–35 (7th Cir. 2010) (distinguishing *Fielden* because the court could not determine that the doctors in the case before it had formed their opinions during the course of treatment).

185. *See, e.g.*, Bartnick v. CSX Transp., Inc., No. 1:11-CV-1120 (GLS/RFT), 2013 WL 1113991, at *4 (N.D.N.Y. Mar. 18, 2013) (rejecting the plaintiff's argument that an expert report should be waived if not economically feasible).

186. E-mail from Stephen Simone to author (Feb. 13, 2013) (on file with author).

from a treating physician.[187] Summary disclosures will allow treating physicians to continue to be involved in their patients' litigation; they will also notify defendants if the treating physician will give testimony not reflected in the treating physician's records, allowing defendants to depose the physician on these topics if they wish.

1. Post-Amendment Decisions Regarding Scope of Treating Physician Testimony

As discussed earlier, courts have had difficulties drawing a line that identifies the point at which a treating physician is considered to be a retained expert and required to provide a written report.[188] Some courts allow a treating physician who does not prepare a written report to testify to only his observations, diagnosis, and treatment of the patient, while other courts allow a treating physician testifying without a report to address issues such as causation, prognosis, or permanency if he reached those opinions during treatment.[189] Other courts have drawn the line where a treating physician offers opinions he did not form during treatment or considers materials he did not consider during treatment and require a written report in these situations.[190]

The few cases decided after the amendment that have considered these issues have reached divergent results. Some cases have held that, when a treating physician testifies to opinions formed after treatment concluded, the physician need not prepare a written report and the party calling him need only provide a summary

187. *See* Ballinger v. Casey's Gen. Store, Inc., No. 1:10-cv-1439-JMS-TAB, 2012 WL 1099823, at *5 (S.D. Ind. Mar. 29, 2012) (recognizing summary disclosure as important because it clarified the expert's testimony and bases for conclusions).

188. *See supra* Part III(B).

189. *See supra* Part III(D)(1).

190. *See supra* Part III(D)(2)–(3).

disclosure of his testimony.[191] For example, in *Coleman v. American Family Mutual Insurance Co.*, the plaintiff identified his treating physicians as expert witnesses on all issues, including causation of his injuries.[192] The district court recognized that the Seventh Circuit's decision in *Meyers* held that a treating physician who offers expert testimony on causation or on an issue not determined during treatment is deemed to be a retained physician who must file an expert report.[193] Because Rule 26 was amended to provide summary disclosures after *Meyers*, the district court concluded that Rule 26(a)(2)(C) superseded the Seventh Circuit's holding in *Meyers*.[194] The court emphasized that "nothing in the record suggests that the treating physicians were sought for any purpose except treatment."[195] Thus, a party may submit summary disclosures for a treating physician, who will be able to testify to opinions formed during treatment and opinions formed after treatment was concluded.[196]

Other cases have reached the opposite conclusion. Three cases have found that Rule 26(a)(2)(C) did not alter prior case law regarding when treating physicians must prepare written reports and simply created a new disclosure requirement for treating physicians

191. *See* Coleman v. Am. Family Mut. Ins. Co., 274 F.R.D. 641, 644–45 (N.D. Ind. 2011) (holding that a physician who is first sought for treatment and not trial preparation does not have to submit a written report); Crabbs v. Wal-Mart Stores, Inc., No. 4:09-cv-00519-RAW, 2011 WL 499141, at *1 (S.D. Iowa Feb. 4, 2011) (holding that the written report requirement does not apply to a physician that is not retained for the purposes of giving expert testimony).

192. *Coleman*, 274 F.R.D. at 645.

193. *Id.* at 644–45 (citing Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 734–35 (7th Cir. 2010)).

194. *Id.* at 645.

195. *Id.*

196. *Id.*

who are not required to prepare a written report.[197] Thus, these cases hold that treating physicians who offer opinions on causation or prognosis, answer hypothetical questions when they testify, or offer opinions that extend beyond their personal knowledge must prepare a written report; summary disclosures will not suffice.[198] And commentators have concluded that the case law that preceded the 2010 amendment to Rule 26 is still good law.[199]

One case discusses in some detail whether summary disclosures are appropriate when a treating physician reviews medical records from another health care provider.[200] The plaintiff claimed that the defendant improperly denied his claim for benefits, and he identified two experts, a chiropractor and a neurologist, as "non-retained" experts and submitted summary disclosures for them.[201] The defendant claimed that written reports were required for both of the physicians because they had reviewed medical

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197. Kondragunta v. Ace Doran Hauling & Rigging Co., Civ. A. No. 1:11-cv-01094-JEC, 2013 WL 1189493, at *12 (N.D. Ga. Mar. 21, 2013) ("While the amended rule may have created a new type of disclosure for experts who were not required to file a written report, it did not alter the criterion for identifying those experts who do have to submit a report."); Southard v. State Farm Fire & Cas. Co., No. 4:11-cv-243, 2013 WL 209224, at *4 (S.D. Ga. Jan. 17, 2013) ("Exemption from Rule 26(a)(2)(B)'s written report requirement does not excuse the Southards from their duty to timely disclose the identity of any [expert] witness [they] may use at trial.") (internal quotation marks omitted); Valentine v. CSX Transp., Inc., No. 1:09-cv-01432-JMS-MJD, 2011 WL 7784120, at *4–5 (S.D. Ind. May 10, 2011) (discussing the recent amendment to Rule 26 and the new disclosure rules).

198. *See Kondragunta*, 2013 WL 1189493, at *12 (finding witnesses were properly designated as non-retained-treating physicians); ; *Valentine*, 2011 WL 7784120, at *4–5 (holding that no written report was required under Rule 26(a)(2)(B) because the treating physician formed his opinions in the course of providing treatment and not in anticipation of litigation).

199. *See, e.g.*, Steven S. Gensler, *Rule 26. Duty to Disclose; General Provisions Governing Discovery*, *in* 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY 12 (2013) ("[T]here is no reason to conclude that Rule 26(a)(2)(C) was intended to allow treating physicians to give expert opinions that go beyond the scope of treatment and diagnosis without having to prepare a report with respect to those further opinions.").

200. Hermann v. Hartford Cas. Ins. Co., Civ. A. No. 11-cv-03188-REB-MEH, 2012 WL 5569769 (D. Colo. Nov. 15, 2012).

201. *Id.* at *1.

records from other health care providers and their testimony would exceed the scope of testimony from a non-retained expert.[202] The court recognized that a physician may be considered to be retained under Rule 26(a)(2)(B) if the physician is asked to review medical records from another physician to formulate an opinion based upon that review.[203] The critical issue, according to the court, is whether the review of records was done in anticipation of litigation.[204] For the chiropractor, it was undisputed that plaintiff's counsel had furnished records to him for the purpose of giving an opinion on them; this triggered preparation of a written report under Rule 26(a)(2)(B).[205] In contrast, there was no indication that the neurologist reviewed the records at the request of counsel, and it appeared that she reviewed the records during the course of her treatment of plaintiff.[206] Under these circumstances, summary disclosures were appropriate.[207]

2. Necessary Components of Summary Disclosures

Rule 26(a)(2)(C) requires that summary disclosures must provide not only the subject matter of the physician's testimony, but also a summary of the facts and opinions to which the physician is expected to testify.[208] Courts have begun to grapple with what constitutes an adequate summary disclosure of treating physician

202. *Id.*

203. *Id.* at *5 & n.3.

204. *Id.* at *5–6; *see also* Order Granting Defendant's Motion to Strike at 7–10, Frietze v. Safeco Ins. Co. of Am., No. 2:12-cv-584-SMV-CG (D.N.M. Apr. 8, 2013), ECF No. 83 (holding that Rule 26(a)(2)(B) "requires an expert report from a treating physician who offers opinion testimony based on information that has been provided to him for purposes of the lawsuit, as opposed to opinions based on personal knowledge obtained through his treatment of the plaintiff").

205. *Hermann*, 2012 WL 5569769, at *5 & n.3.

206. *Id.* at *6.

207. *Id.*

208. FED. R. CIV. P. 26(a)(2)(C).

testimony.[209] In a number of cases, the plaintiff's summary disclosure stated only that the treating physician would testify about diagnosis, treatment provided, causation, prognosis, or disability based on his treatment of the plaintiff.[210] While this level of disclosure properly identifies the subject matter on which the physician will testify, it does not state the physician's opinions or summarize the facts to which the physician would testify.[211] For example, the statement "Dr. Jones will testify that plaintiff has a 12% impairment to his right shoulder as a result of injuries received in the June 12, 2013 motor vehicle accident" would properly state the physician's opinions on causation and permanency; the statement

209. *See, e.g.*, Puglisi v. Town of Hempstead Sanitary Dist. No. 2, No. 11-CV-0445 PKC, 2013 WL 4046263, at *5–6 (E.D.N.Y. Aug. 8, 2013) (holding as insufficient a five-paragraph letter that plainly did not satisfy Rule 26(a)(2)(C)); A.R. by Pacetti v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, No. 12-CV-02197-RM-KLM, 2013 WL 5462277, at *2–4 (D. Colo. Sept. 30, 2013) (holding as insufficient to satisfy Rule 26(a)(2)(C) a disclosure that "rel[ied] entirely on [the treating physician's] treatment records to delineate the facts and opinions to which he is expected to testify.").

210. *See, e.g.*, Kondragunta v. Ace Doran Hauling & Rigging Co., No. 1:11-cv-01094-JEC, 2013 WL 1189493, at *4–5 (N.D. Ga. Mar. 21, 2013) (detailing the scope of the physicians' testimony included in plaintiff's disclosures); Cooke v. Town of Colorado City, No. CV 10-08105-PCT-JAT, 2013 WL 551508, at *2 (D. Ariz. Feb. 13, 2013) (acknowledging that the physician's final investigative report discussed the plaintiff's disabilities and special needs); Pineda v. City & Cnty. of San Francisco, 280 F.R.D. 517, 522–23 (N.D. Cal. 2012) (noting that plaintiffs disclose only what the physicians will testify to at trial).

211. *See Kondragunta*, 2013 WL 1189493, at *6 (ruling that the plaintiff did not comply with Rule 26 by disclosing only the subject matter and not the facts and opinions because the reader of the disclosure has "no idea what opinion the doctor will offer or on what facts the doctor will base that opinion"); *Cooke*, 2013 WL 551508, at *4 (holding the plaintiff failed to meet the requirements of Rule 26(a)(2)(C), because "at no time in their disclosures did [the plaintiff] attempt to state the facts and opinions to which [the doctor] was expected to testify); *Pineda*, 280 F.R.D. at 523 (determining the plaintiff's supplemental disclosure did not comply with Rule 26(a)(2)(C), because it did not "contain a summary of the facts and opinions to which each witness will testify . . . .").

"Dr. Jones will testify to plaintiff's causation and prognosis" would not.[212]

In most of these cases, the plaintiff simply referred to the physicians' medical records that had been produced during discovery for the facts and opinions that would be the substance of the physicians' testimony.[213] This approach has been summarily rejected.[214] Medical records may not provide an accurate or complete summary of the expected testimony, especially if the

212. *Compare* Kristensen v. Spotnitz, No. 3:09-CV-00084, 2011 WL 5320686, at *2 (W.D. Va. June 3, 2011) (finding that a letter from plaintiff's doctor satisfied the standard by indicating that Dr. Poehailos treated Alex and Susan for psychiatric problems, and that the Dr. Poehailos would testify to Alex's emotional and psychological impacts as a result of mold problems, the temporal relationship between the Mother and child's problems, and the problems in the home), *with* Faile v. Dillard's Inc., No. 5:11–cv–41–RS–CJK, 2011 WL 7641239, at *1 (N.D. Fla. Nov. 4, 2011) (identifying treating physicians and stating they "may be expert[s] to . . . causation and damages" did not satisfy 26(a)(2)(C) disclosure requirements).

213. *See, e.g.*, *Kondragunta*, 2013 WL 1189493, at 4–5 (allowing medical records to be submitted "in lieu of a summary would invite a party to dump voluminous medical records on the opposing party, contrary to the rule's attempt to extract a summary") (quoting Ballinger v. Casey's Gen. Store, Inc., No. 1:10-CV-1439-JMS-TAB, 2012 WL 1099823, at *4 (S.D. Ind. Mar. 29, 2012)); Schultz v. Ability Ins. Co., No. C11-1020, 2012 WL 5285777, at *5 (N.D. Iowa Oct. 25, 2012) (rejecting the plaintiffs' argument that the medical records adequately provided the defendants with the subject matter, facts, and opinions of the treating physicians); *see also* Brown v. Providence Med. Ctr., No. 8:10CV230, 2011 WL 4498824, at *1 (D. Neb. Sept. 27, 2011) (holding similarly); *Kristensen*, 2011 WL 5320686, at *2 (holding similarly).

214. *See Schultz*, 2012 WL 5285777, at *5 (rejecting plaintiff's argument that the disclosure requirement was satisfied because the medical records adequately provided defendants with the subject matter, facts, and opinions of the treating physician); *Brown*, 2011 WL 4498824, at *1 (holding that the court will not "place the burden on Defendants to sift through medical records in an attempt to figure out what each expert may testify to" and that plaintiffs have an obligation to provide information regarding the expected testimony of their expert witnesses in a coherent manner); *Kristensen*, 2011 WL 5430686, at *1 ("[W]hatever the precise meaning of the requirement, a summary" is ordinarily understood to be an "abstract, abridgment, or compendium . . . it follows that plaintiffs cannot comply with the rule by disclosing the complete records of the treating physicians in issue.").

physician will testify to matters not determined during treatment.[215] Further, the burden is not on the opposing party to sift through the medical records in an effort to discern the facts and opinions to which he may testify; rather, the burden is on the party calling the physician.[216] For the same reasons, a party may not state that the treating physician's testimony "will be consistent with their deposition testimony."[217] Further, a party may not simply list a number of treating physicians and generally describe the subject matter, facts, and opinions to which they will testify; instead, the party must indicate separately the subject matter, facts, and opinions to which each physician will testify.[218] This requirement allows the party receiving the disclosure to assess on a witness-by-witness basis whether it needs to retain its own witness to rebut the treating physician's testimony.[219]

As with failure to provide a written report when required under Rule 26(a)(2)(B), courts can impose a variety of sanctions for failure to provide an acceptable summary disclosure under Rule

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215. *See* Ballinger v. Casey's Gen. Store, Inc., No. 1:10-cv-1439-JMS-TAB, 2012 WL 1099823, at *4 (S.D. Ind. Mar. 29, 2012) ("Moreover, while the medical records touch on the subject matter of a treating physician's testimony, the records do not necessarily provide an accurate or complete summary of expected testimony since medical records are not typically created in anticipation that those records would be used as a witness disclosure"; therefore, absent a report, plaintiff is limited to personal observations, diagnoses, and treatment during course of treatment).

216. *Brown*, 2011 WL 4498824, at *1.

217. Martinez v. Garcia, No. 08 C 2601, 2012 U.S. Dist. LEXIS 158220, at *4–5 (N.D. Ill. Nov. 5, 2012).

218. *See* Cooke v. Town of Colo. City, No. CV 10-08105-PCT-JAT, 2013 WL 551508, at *4 (D. Ariz. Feb. 13, 2013) (holding that it is not enough to simply list the subject matter that the witness will testify to, the party must also list the opinions of the witnesses); Saline River Props., LLC v. Johnson Controls, Inc., Civ. Action No. 10-10507, 2011 WL 6031943, at *10 (E.D. Mich. Dec. 5, 2011) (finding disclosure without a description of each physician's testimony to be "sufficient, but not clear" and ordering the disclosing party to provide this information).

219. *See Cooke*, 2013 WL 551508, at *4 (allowing defendant a time extension to acquire witnesses because plaintiff did not disclose his witness' opinions, thus prejudicing the defendant).

26(a)(2)(C)).[220] Courts may preclude physicians from testifying or opt to require amended summary disclosures for the witnesses and allow further discovery.[221]

3. Continuing Issues with Summary Disclosures and Proposed Amendment to Rule 26(a)(2)(c)

The issue then becomes whether a treating physician who forms an opinion after treatment is completed, or who reviews materials he did not review during treatment, is required to provide a written report or only a summary disclosure. An argument can be made that a written report is required any time a treating physician has brief contact with a lawyer and reaches an opinion not formed during treatment, even without reviewing additional materials, because the physician has stepped out of the role of treating the patient. However, as one lawyer observed, being a physician is a transcendent experience.[222] Physicians often continue to think about their patients after treatment has ended, so there is no reason to draw an arbitrary line at the conclusion of an office visit.[223] Further, there are only a limited number of topics a physician may address in his testimony (i.e., diagnosis, treatment, prognosis, causation, permanency, or disability), and these topics are not a surprise to any lawyer who litigates toxic tort or personal injury cases. The key issues are whether Rule 26(a)(2) should be construed to encourage treating-physician participation in litigation and how to provide appropriate notice of their testimony so that the other side is not prejudiced.

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220. *Id.* (imposing sanctions against the Plaintiff for prejudicing the Defendant because Plaintiff did not give adequate notice about their witnesses).

221. *Compare* Pineda v. City & Cnty. of S.F., 280 F.R.D. 517, 522–23 (N.D. Cal. 2012) (precluding ten of the plaintiff's witnesses from testifying but allowing for amended disclosures for three other witnesses), *and Martinez*, 2012 U.S. Dist. LEXIS 158220, at *5 (precluding testimony of witnesses for whom no summary disclosure was provided), *with Brown*, 2011 WL 4498824, at *1 (allowing amendment of summary disclosures), *and Saline River Props., LLC*, 2011 WL 6031943, at *10 (same).

222. E-mail from Schuster, *supra* note 4.

223. *Id.*

Requiring a physician to prepare a written report creates additional, unrecoverable costs,[224] which disproportionately impact cases with smaller claims for damages.[225] A summary report that discloses the subject matter on which and a summary of the facts and opinions to which the physician will testify should adequately disclose any new opinions formed after treatment to prevent surprise and enable the other party to depose the physician on the topics identified in the summary report.[226] Therefore, a physician who forms a new opinion without reviewing additional materials should not have to prepare a written report, but the party presenting the physician's testimony should prepare a summary disclosure under Rule 26(a)(2)(C).

A more difficult issue arises when a treating physician reviews materials he did not review during treatment. The materials could be medical records from hospital admissions or other treating or consulting physicians, imaging records (i.e., MRI or CT scans), or reports of diagnostic studies.[227] The materials could include materials prepared in anticipation of litigation, i.e., depositions or

224. *See* 28 U.S.C. § 1920 (2012) (failing to provide for reimbursement of costs for experts' written reports).

225. *See supra* notes 185–187 and accompanying text.

226. Valentine v. CSX Transp., Inc., No. 1:09-cv-01432-JMS-MJD, 2011 WL 7784120, at *3–4 (S.D. Ind. May 10, 2011).

227. *See, e.g.*, Scholl v. Pateder, Civ. A. No. 09-cv-02959, 2011 WL 2473284, at *4–5 (D. Colo. June 22, 2011) (limiting the testimony of physicians on medical records provided by the plaintiff's other health care providers, CT scans, and other diagnostic reports that the physicians did not review contemporaneously with treatment).

reports from Rule 35 independent medical examinations (IME).[228] The materials could also include video of the incident in question.[229]

How the physician makes use of the new materials may vary from case to case. The physician could review other medical records and reports to enhance his understanding of his patient's medical history and treatment to allow him form (or solidify) an opinion on causation, prognosis, or permanency of the injury.[230] The physician may review other medical records or Rule 35 IME reports to prepare to testify about treatment by other physicians or to rebut the opinion of an IME physician.[231] One lawyer suggested that the simple act of reviewing additional records should not automatically transform a treating physician into a retained expert.[232] Instead, it would depend upon whether the quantity and nature of the materials reviewed by the physician substantially altered the physician's information base so that his evaluation of the patient is "more dependent on the content of the additional materials rather than the information base he/she had from his/her interactions with the patient."[233]

These different scenarios may theoretically call for different results. When a physician reviews medical records and reports simply to expand his knowledge base so that he can form or confirm his own opinions about the patient, summary disclosure might be appropriate. In contrast, when a physician reviews materials

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228. *See, e.g.*, Order Granting Defendant's Motion to Strike at *6, Frietze v. Safeco Ins. Co. of America, 2:12-cv-584-SMV-CG (D.N.M. Apr. 8, 2013), ECF No. 83 (ruling that plaintiff's treating physician, who had reviewed materials beyond his own medical records and produced a report, was required to prepare an expert's report and therefore striking the report that had been created for not complying with Rule 26(a)(2)(B)); Noffsinger v. Valspar Corp., No. 09 C 916, 2011 WL 9795, at *6–7 (N.D. Ill. Jan. 3, 2011) (discussing physician's review of reports and other examinations created in preparation for litigation).

229. *See, e.g.*, Mohney v. USA Hockey, Inc., 138 F. App'x 804, 808 (6th Cir. 2005) (assessing the admissibility of a physician's testimony when it was based to some extent on his review of a videotape of the injury).

230. *See, e.g.*, *id.* (noting that the testifying treating physician stated in his affidavit, "I have had the opportunity to review the MiniDV tape of the accident. The accident is consistent with the history recorded in my records.").

231. *See, e.g.*, Order Granting Defendant's Motion to Strike at *6, *Frietze*, 2:12-cv-584-SMV-CG.

232. E-mail from Robert Schuster to author (June 14, 2013) (on file with author).

233. *Id.*

prepared in anticipation of litigation (i.e., depositions or IME reports) in order to testify about treatment by other physicians or to rebut the opinion of an IME physician, the physician is presenting classic expert testimony and normally would be required to prepare a written report. Given the realities of trial practice and the demands on busy district courts, I am reluctant to recommend that lawyers or courts decide whether a written report is required by reviewing the materials provided to a treating physician to determine whether his evaluation is based more on the content of the additional materials than the information learned during treatment.

In a case decided before Rule 26(a)(2)(C) was adopted, the Sixth Circuit recognized that when "a treating physician relies on tests, documents, books, videos, or other sources that the physician did not rely upon during his or her treatment of the patient . . . the treating physician is acting like the retained expert who normally reviews materials that the parties provide."[234] However, since the adoption of Rule 26(a)(2)(C), plaintiffs' lawyers have argued that summary disclosures are appropriate even when a treating physician reviews new materials because the summary disclosures will set forth the subject matter of and a summary of the facts and opinions related to the treating physician's testimony; the defense lawyer will have access to the plaintiff's medical records, and can depose the physician on these topics.[235] Plaintiffs' lawyers also assert that requiring a written report dissuades treating physicians from testifying because they will not agree to prepare the report.[236] Defense lawyers, on the other hand, are concerned about being ambushed by treating physicians whose testimony goes beyond the scope of treatment and the contents of their medical records.[237]

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234. Fielden v. CSX Transp., Inc., 482 F.3d 866, 872 (6th Cir. 2007).

235. *See* E-mail from Schuster, *supra* note 4; E-mail from Michael Shickich to author (Aug. 5, 2013) (on file with author).

236. *See* E-mail from Schuster, *supra* note 4; E-mail from Shickich, *supra* note 235.

237. *See* Sullivan, *supra* note 4; E-mail from Jonlyn Martinez to author (Feb. 13, 2013) (on file with author).

The expert discovery rules are designed to prevent surprise expert testimony.[238] Consider the result if a treating physician develops new opinions after reviewing medical records or materials prepared in anticipation of litigation but is not required to provide a written report. The party calling the physician will provide a summary disclosure that does not include the facts or data considered by the physician in forming the opinions, so that the opposing party would not know that the physician had considered new materials when formulating opinions.[239]

Rule 26(a)(2) needs to provide a single, clear approach to the preparation of written reports and summary disclosures for treating physicians that both trial lawyers and district courts can easily understand and implement. To resolve this issue, two changes should be made. First, Rule 26(a)(2)(C) should be amended to require that the summary disclosure include the facts or data considered by the physician in forming his opinions. This addition will not materially alter the nature of summary disclosures, but will alert the opposing party if the treating physician will testify beyond the scope of treatment and to matters not addressed in his medical records. Second, the Advisory Committee note should specifically state that summary disclosures are appropriate when a treating physician will testify to any opinions he reached during or after treatment, and when the physician considered materials not reviewed during treatment. These changes will take time to accomplish, however, and in the interim lawyers should protect their clients by filing discovery requests to determine whether treating physicians are "morphing" into all-purpose expert witnesses by forming new opinions or considering new materials. Sample discovery requests concerning expert testimony from treating physicians and the materials they have reviewed to provide such testimony, designed to

238. *See* FED. R. CIV. P. 26(a)(1) advisory committee's note (1993 amendments); *see also* Meyers v. Nat'l R.R. Passenger Corp., 619 F.3d 729, 734 (7th Cir. 2010) (citations omitted) (holding that an expert's report provides adequate notice of the substance of his testimony).

239. *Compare* FED. R. CIV. P. 26(a)(2)(B), *with* FED. R. CIV. P. 26(a)(1) (1993 amendments).

be served early during the discovery process, are attached as Appendices A, B and C to this article.[240]

IV. *DAUBERT* CHALLENGES TO TREATING PHYSICIAN TESTIMONY ON CAUSATION

Causation of the plaintiff's injury or condition is a critical issue in most cases.[241] When the jury can readily understand what caused an injury, expert testimony on causation is not necessary.[242] For example, when a plaintiff suffers a broken leg when hit by a vehicle, he does not need to present expert testimony to establish causation.[243] But when an injury has multiple potential causes, causation would not be obvious to a lay juror, and expert testimony is required to establish the causal connection.[244] A district court's ruling on the admissibility of expert testimony is reviewed under an abuse-of-discretion standard, even though the ruling may, with

240. It is easy to prepare detailed interrogatories for both retained and treating physicians; it is more difficult to draft interrogatories that fit comfortably within Rule 33(a)'s limit of twenty-five written interrogatories, which includes discrete subparts, and which will not draw an objection that the information will be produced according to deadlines set by the court. Appendix A provides a condensed set of interrogatories, Appendix B provides a more expansive set of interrogatories, and Appendix C provides a request for production concerning expert witnesses.

241. *See, e.g.*, Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 824 (9th Cir. 2011) ("Under Arizona law, causation is an essential element of a negligence claim."); Blameuser v. Hasenfang, 345 F. App'x 184, 185 (7th Cir. 2009) (finding that the "cause of [Plaintiff's] injuries was the critical issue at trial" in an excessive force case).

242. *See* Brooks v. Union Pac. R.R., 620 F.3d 896, 899–900 (8th Cir. 2010) (holding that expert testimony is required when the causal connection is not clear).

243. *Id.*

244. *See id.* (holding that expert testimony is required when the causal connection is not clear); Wills v. Amerada Hess Corp., 379 F.3d 32, 46 (2d Cir. 2004) (stating that expert evidence is often required to establish the causal connection between the accident and some item of physical or mental injury).

respect to causation, be outcome determinative and result in summary judgment.[245]

As a result of the Supreme Court's decision in *Daubert* and Federal Rule of Evidence 702, judges must serve as gatekeepers and keep scientific and other expert testimony that is not reliable and relevant out of the courtroom.[246] When a treating physician testifies on causation, that opinion is subject to the same standards of reliability that apply to expert opinions given by retained physicians.[247] In evaluating all medical testimony on causation, trial courts must assess whether: (1) the physician is sufficiently qualified to testify on the issue of causation; (2) the methodology by which the physician reaches his conclusions about causation is sufficiently reliable under *Daubert* and Rule 702; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand a disputed issue of material fact—causation.[248] First, I will analyze the admission of medical testimony on causation in general under *Daubert* and Rule 702, with reference to the three-prong test applied by trial courts. Then I will briefly discuss specific issues that may arise when treating physicians testify about causation.

A. Is the Physician Qualified to Give an Opinion on Causation?

Some courts skip the first step in the analysis and proceed directly to the other steps because the parties agree that the physician

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245. McDowell v. Brown, 392 F.3d 1283, 1294 (11th Cir. 2004) (citations omitted). While both plaintiff and defense experts are subject to challenge, there is a "notable lack of symmetry" in the results of such challenges: defendants succeed about two-thirds of the time when they challenge plaintiff experts, but plaintiffs succeed less than half the time when they challenge defense experts. Faigman, *supra* note 13, at 717.

246. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596–97 (1993). The admissibility of expert testimony on causation is a matter of federal law. *McDowell*, 392 F.3d at 1294–95.

247. Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000); O'Connor v. Commonwealth Edison Co., 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).

248. Guinn v. Astrazeneca Pharm. LP, 602 F.3d 1245, 1252 (11th Cir. 2010) (citing FED. R. EVID. 702; United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)); Ervin v. Johnson & Johnson, Inc., 492 F.3d 901, 904 (7th Cir. 2007) (citations omitted); *McDowell*, 392 F.3d at 1298.

is competent to give an opinion on causation.[249] Where the parties do not agree that the physician is properly qualified, the question is not whether the physician is competent in general to give opinion testimony, but rather, whether the physician is competent to give an opinion regarding the particular matter at issue in the case—causation.[250]

Gayton v. McCoy is a good example of the fact-intensive nature of this inquiry. In *Gayton*, the administrator of an inmate's estate brought a Section 1983 action against certain jail officials and nurses, claiming that they violated the inmate's due process rights by failing to provide adequate medical care.[251] The medical experts for both sides agreed that the inmate died of heart failure.[252] However, the plaintiff's expert testified that: (1) the death could have been avoided if the inmate had been given her medications while in jail; (2) the combination of the inmate's vomiting and diuretic medications could have caused electrolyte imbalances which could have led to tachycardia, then heart failure; and (3) prison medical officials departed from accepted standards of prison medical care in their treatment of the inmate.[253] The district court precluded the plaintiff's expert from testifying on the ground that he was not qualified to give these opinions.[254]

In reviewing the district court's decision, the Seventh Circuit recognized that whether an expert is qualified to give an opinion

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249. *See, e.g.*, *Guinn*, 602 F.3d at 1252 (stating "neither the district court nor the parties in this case dispute that [the physician] is qualified to testify as an expert on diabetes causation"); Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 200 (4th Cir. 2001) (assuming, without deciding, that the plaintiff's expert was qualified to testify on causation); Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1363, 1368 (M.D. Ga. 2007) (proceeding to consideration of *Daubert* factors where the defendant did not challenge the qualifications of plaintiff's expert).

250. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 154–55 (1999) (holding "the specific issue before the court was not the reasonableness *in general*" of the expert's analytical approach, but "the reasonableness of using such an approach . . . to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*").

251. Gayton v. McCoy, 593 F.3d 610, 612 (7th Cir. 2010).

252. *Id.* at 615.

253. *Id.*

254. *Id.* at 615–16.

"can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony."[255] When making this comparison, the court should consider the full range of the expert's experience and training in the proposed subject matter of the expert's testimony.[256] The Seventh Circuit disagreed with the district court's assumption that the plaintiff's expert needed to have specific cardiac training to testify as an expert in the case.[257] Although merely possessing a medical degree does not make a physician an expert on all medical subjects, courts often impose no requirement that a physician be a specialist in a given field and allow general practice physicians to testify in specialty areas if they are qualified to address the issue before the court.[258] The court evaluated each of the physician's conclusions individually to see if he had sufficient expertise in each area to reach them.[259] The court affirmed the district court's exclusion of the first opinion because the physician did not have specialized cardiac or pharmacological knowledge upon which to base his conclusion that the inmate would not have died if given her cardiac medications.[260] In making this determination, the court found that the physician did not have specific knowledge about how the drugs functioned, whether they functioned as well in the short term as in the long term, how they prevented congestive heart failure from reaching a critical stage, and what their effect would be since the inmate had a history of not taking them as prescribed.[261] The court reversed the district court's exclusion of the physician's opinion on the effects of vomiting on electrolyte balances in the body, holding that this opinion was not based on specialized knowledge only a cardiologist would have, but was "knowledge that any competent physician would typically possess."[262] The circuit court also found that the opinion on acceptable standards of prison

255. *Id.* at 616 (quoting Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir. 1990) (internal quotation marks omitted)).
256. *Id.*
257. *Id.* at 617.
258. *Id.*
259. *Id.* at 617–19.
260. *Id.*
261. *Id.*
262. *Id.* at 618.

medicine was admissible because it was undisputed that the plaintiff's physician was an expert in prison health care.[263]

Numerous other cases analyze whether a proposed medical expert is sufficiently qualified to testify on the issue of causation, and whether the testimony is admitted[264] or excluded[265] is dictated by the particular facts in each case.

B. Is the Physician's Methodology Sufficiently Reliable?

Daubert offers four factors that a court may consider in evaluating the reliability of scientific testimony: (1) whether the technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential error rate of the technique or theory when applied; and (4) whether the technique or theory has been generally accepted in the scientific community.[266] When evaluating the reliability of scientific testimony, the court should focus on the principles and methodology the expert uses, not on the conclusions the methodology generates.[267] In *General Electric Co. v. Joiner*, the Supreme Court recognized that the methodology used and the conclusions reached are not entirely distinct from each other; thus, a

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263. *Id.*

264. *See, e.g.*, Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion, 345 F.3d 15, 24–25 (1st Cir. 2003) (permitting testimony from a physician on alleged negligent abortion even though the physician was not a gynecologist or obstetrician); Madden v. A.I. DuPont Hosp. for Children of the Nemours Found., 264 F.R.D. 209, 214–15 (E.D. Pa. 2010) (allowing a surgeon to testify as to alleged negligence resulting from a surgical procedure with which he was familiar).

265. *See, e.g.*, Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 967 (10th Cir. 2001) (ruling that an orthopedic surgeon was not qualified to give an opinion on intramedullary nailing); Clarke v. Schofield, 632 F. Supp. 2d 1350, 1357–60 (M.D. Ga. 2009) (finding that an emergency room physician was not qualified to give an opinion on deep venous thrombosis); Neal-Lomax v. Las Vegas Metro. Police Dept., 574 F. Supp. 2d 1193, 1203–04 (D. Nev. 2008) (concluding that a forensic pathologist was not qualified to opine that the use of a Taser contributed to an arrestee's death).

266. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593–94 (1993).

267. *Id.* at 595.

court may exclude testimony if it determines that there "is simply too great an analytical gap between the data and the opinion offered."[268]

Kumho Tire Co. v. Carmichael held that the *Daubert* framework applies not only to scientific testimony, but to all expert testimony.[269] Recognizing that "there are many different kinds of experts, and many kinds of expertise," *Kumho Tire* emphasized that the *Daubert* factors are not a definitive checklist or test and that some factors may not be pertinent to assessing the reliability of non-scientific experts.[270] The Advisory Committee notes to Rule 702 offer five additional factors that courts may consider in determining whether expert testimony is sufficiently reliable: (1) whether the expert is proposing to testify to matters growing naturally and directly out of research he has conducted independent of the litigation, or whether he has developed his opinion expressly for purposes of testifying; (2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (3) whether the expert has adequately accounted for obvious alternative explanations; (4) whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[271] Like the four *Daubert* factors, these factors are not definitive, and other factors may be relevant in determining the reliability of expert testimony.[272]

How do these rulings affect the reliability requirements for testimony from treating physicians? Specifically, how do these holdings impact the reliability analysis of a treating physician's testimony on causation? The following sections consider the ways in which courts have wrestled with these questions.

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268. 522 U.S. 136, 146 (1997).

269. 526 U.S. 137, 147 (1999).

270. *Id.* at 150.

271. FED. R. EVID. 702 advisory committee's note (2000 amendments) (internal quotation marks omitted).

272. *Id.*

1. Testimony From Treating Physicians is Based on Specialized, Not Scientific, Knowledge

As the Court recognized in *Kumho Tire*, there is no clear line that divides scientific knowledge from technical or other specialized knowledge.[273] An interesting but little-explored question is whether physicians are testifying based on scientific knowledge or technical or other specialized knowledge. The vast majority of cases never directly address this issue and simply apply the *Daubert* factors—or some combination of the *Daubert* factors plus other factors selected by the court—without considering the basis for the physician's testimony.[274] A few cases have summarily concluded that testimony from physicians is not based on scientific knowledge.[275]

A series of cases from the Fifth Circuit sheds considerable light on this issue.[276] In *Moore v. Ashland Chemical, Inc.*, the court considered whether the district court erred when it excluded testimony on causation from one of the plaintiff's physicians.[277] In a decision handed down before *Joiner* and *Kumho Tire*, a divided

273. *Kumho Tire*, 526 U.S. at 148.

274. *See, e.g.*, Wilson v. Taser Int'l, Inc., 303 F. App'x. 708, 714 (11th Cir. 2008) (affirming the lower court's decision to exclude a physician's testimony when the physician did not meet any of the *Daubert* factors); McDowell v. Brown, 392 F.3d 1283, 1299–1301 (11th Cir. 2004) (observing that "other factors that a court may consider in the *Daubert* analysis are 'reliance on anecdotal evidence (as in case reports), temporal proximity, and improper extrapolation'") (quoting Alison v. McGhan Med. Corp., 184 F.3d 1300, 1312 (11th Cir. 1999)); Cooper v. Carl A. Nelson & Co., 211 F.3d 1008, 1019–21 (7th Cir. 2000) (rejecting the district court's four additional issues for resolution before admitting a witness as an expert as "overly demanding gatekeeping" under *Daubert*).

275. *See* Smith v. BNSF Ry. Co., No. CIV-08-1203-D, 2011 WL 4054858, at *2 (W.D. Okla. Sept. 12, 2011) (determining that testimony from an orthopedic surgeon was "not purely scientific"); Aumand v. Dartmouth Hitchcock Med. Ctr., 611 F. Supp. 2d 78, 88–89 (D.N.H. 2009) (holding that a treating physician's testimony about "diagnosis, prognosis, or other conclusions as to the patient's condition" is based on "specialized knowledge").

276. Moore v. Ashland Chem., Inc., 126 F.3d 679, 688–89 (5th Cir. 1997), *vacated*, 151 F.3d 269 (5th Cir. 1998) (en banc); General Elec. Co. v. Joiner, 151 F.3d 269, 275–76 (5th Cir. 1998); Black v. Food Lion, Inc., 171 F.3d 308, 310–11 (5th Cir. 1999); Pipitone v. Biomatrix, Inc., 288 F.3d 239, 245–47 (5th Cir. 2002).

277. *Moore*, 126 F.3d 679.

panel of the Fifth Circuit reversed the district court's decision to exclude the testimony.[278] Accurately predicting the Supreme Court's decision in *Kumho Tire*, the Fifth Circuit first held that *Daubert*'s reliability analysis applied to expert opinions based on technical or other specialized knowledge.[279] The court then examined whether clinical medicine, as opposed to research or laboratory medical science, should be evaluated under the *Daubert* factors that assess testimony based on scientific knowledge.[280] The majority concluded that clinical medicine should not be evaluated under the *Daubert* factors because "the objectives, functions, subject matter[,] and methodology of hard science vary significantly from those of the discipline of clinical medicine . . . ."[281] The court noted specifically that the goals of clinical medicine and hard science are different, the subject matter and conditions of study for clinical medicine are different, and the methodologies used by clinical medicine and hard science are markedly different.[282] Instead of using the four *Daubert* factors, the Fifth Circuit said that the district courts, "as gatekeeper[s,] should determine whether the doctor's proposed testimony as a clinical physician is soundly grounded in the principles and methodology of his field of clinical medicine."[283]

On rehearing *en banc*, in a decision issued after the Supreme Court's decision in *General Electric Co. v. Joiner*, the Fifth Circuit reversed the panel's decision.[284] The court concluded that the district court did not abuse its discretion in finding that there was too large an "analytical gap" between the physician's causation opinion and the scientific knowledge and data supporting that opinion.[285] The court specifically disagreed with the panel majority's conclusion

278. *Id.* at 709–10.

279. *Id.* at 686–87 (holding *Daubert*'s reliability analysis "must be applicable to technical, or other specialized knowledge, as well as to scientific testimony") (internal quotation marks omitted).

280. *Id.* at 688.

281. *Id.* at 688–89.

282. *Id.* at 688.

283. *Id.* at 689–90.

284. Moore v. Ashland Chem. Inc., 151 F.3d 269, 272 (5th Cir. 1998).

285. *Id.* at 279.

that clinical medicine was not predicated on hard science and should not be evaluated using the *Daubert* factors.[286]

The circuit returned to this issue the next year in *Black v. Food Lion, Inc.*[287] The plaintiff claimed that she slipped and fell at a Food Lion grocery store, and she presented testimony from her physician that the fall caused her to develop fibromyalgia.[288] The circuit recognized that the district court did not have the benefit of *Kumho Tire* or the *en banc* decision in *Moore* when it admitted the physician's testimony.[289] The circuit reversed the district court's decision to permit the physician's testimony, explaining that *Kumho Tire* "refines in a common-sense way, but does not undermine, the use of the specific *Daubert* factors as a reference point for gauging the reliability" of expert testimony.[290] According to the circuit court, "[i]n the vast majority of cases" the district court should consider whether the testimony meets the *Daubert* factors before considering whether other factors are relevant to evaluating the testimony.[291] Had the district court properly applied the *Daubert* factors, "the utter lack of any medical reliability of [the physician's] opinion would have been quickly exposed."[292]

The Fifth Circuit's use of *Daubert* factors to analyze testimony from treating physicians in *Moore* and *Food Lion* was mistaken. The purpose of the *Daubert* gatekeeping function is not to measure every expert by the same inflexible set of criteria.[293] The Supreme Court made clear in *Kumho Tire* that the inquiry is "a flexible one" that must be "tied to the facts" of a particular case.[294]

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286. *See id.* at 275 n.6 (acknowledging that the circuit had already rejected the position that "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely on experience or training.").

287. 171 F.3d 308, 309 (5th Cir. 1999).

288. *Id.*

289. *Id.* at 312.

290. *Id.* at 310–11.

291. *Id.* at 311–12.

292. *Id.* at 314.

293. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150–51 (1999) (explaining that "much depends upon the particular circumstances of the . . . case at issue" and that the *Daubert* factors were meant "to be helpful, not definitive").

294. *Id.* at 150 (citing *Daubert*, 509 U.S. at 594).

In fact, in *Pipitone v. Biomatrix, Inc.*, a case decided only three years after *Food Lion*, the Fifth Circuit reversed the district court's decision to exclude testimony on causation from a physician who specialized in infectious diseases despite the fact that his testimony did not meet any of the *Daubert* factors.[295] Backing gently away from *Food Lion's* insistence that the vast majority of cases involving physician testimony should be evaluated first using the *Daubert* factors, the court recognized that the reliability of the physician's testimony should be evaluated using factors other than those listed in *Daubert*.[296] The Fifth Circuit held that, where the physician's testimony is based on his personal observations, professional experience, education, and training, the reliability of those bases should be evaluated to determine whether the testimony should be admitted.[297] The court considered those factors, specifically the physician's expertise in infectious diseases and the fact that he methodically eliminated alternative sources of an infection as viable possible causes, and concluded that they provided a sufficiently reliable basis to admit his testimony.[298]

Scientific knowledge implies a "grounding in the methods and procedures of science . . . [and] connotes more than subjective belief or unsupported speculation."[299] Science is distinguished from other fields of human inquiry by its methodology, which is "based on generating hypotheses and testing them to see if they can be falsified."[300] The importance of the scientific method of hypothesis generation and testing cannot be overstated: "The history of science is replete with examples of experience and observation – over decades and even centuries – that have been demonstrated wrong when subjected to systematic and careful test."[301]

Physicians do not claim that their testimony is based on scientific knowledge. A classic medical school text explains that

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295. 288 F.3d 239, 245–47 (5th Cir. 2002) (holding "it is appropriate for the trial court to consider factors other than those listed in *Daubert* to evaluate the reliability of the expert's testimony").

296. *Id.* at 247.

297. *Id.* at 247–48.

298. *Id.* at 247–49.

299. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993) (internal quotation marks omitted).

300. *Id.* at 593 (citation omitted).

301. Faigman, *supra* note 13, at 714.

"medicine is not a science but a learned profession, deeply rooted in a number of sciences."[302] It also defines medicine as "a mutable body of knowledge, skills and traditions applicable to the preservation of health, the cure of disease, and the ameliorations of suffering [. . . whose boundaries] blend into psychology, sociology, economics, and even into cultural heritage."[303] Another medical school text puts it this way:

> [M]uch of medical decision-making relies on judgment—a process that is difficult to quantify or even to assess qualitatively. Especially when a relevant experience base is unavailable, physicians must use their knowledge and experience as a basis for weighing known factors along with the inevitable uncertainties to mak[e] a sound judgment.[304]

Another indication that medicine is not a science is the fact that mainstream Western medicine is only one healthcare approach for specific conditions and overall well-being.[305] The National Institute of Health recognizes that other medical systems—including homeopathic medicine, naturopathic medicine, traditional Chinese medicine, and Ayurvedic medicine in India—are built upon contrasting systems of medical theory and practice.[306] Further, there are numerous complementary or alternative health care practices that are not built upon complete systems of theory and practice, including the use of natural products as dietary supplements, acupuncture, massage therapy, meditation techniques, and spinal manipulation.[307]

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302. RUSSELL L. CECIL ET AL., CECIL TEXTBOOK OF MEDICINE 1 (James B. Wyngaaerden & Lloyd H. Smith, Jr., eds., 17th ed. 1985).

303. *Id.*

304. DENNIS L. KASPER & TINSLEY RANDOLPH HARRISON, HARRISON'S PRINCIPLES OF INTERNAL MED. 3 (Dennis L. Kasper et al. eds., 16th ed. 2005).

305. *Complementary, Alternative, or Integrative Health: What's In a Name?*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., http://nccam.nih.gov/health/whatiscam (last updated May 2013).

306. *Id.*

307. *Id.*; *Complementary and Alternative Medicine and Therapies*, AM. MED. ASS'N, http://www.ama-assn.org/resources/doc/med-ed-products/comp02-acupuncturist.pdf (last visited July 30, 2013).

Medical knowledge and practice is not static, "[a]nd the boundaries between complementary medicine and conventional medicine overlap and change with time."[308] For example, guided imagery, massage, acupuncture, and meditation, once considered approaches outside mainstream Western medicine, are now used regularly to help patients manage their symptoms and the side effects of conventional medicine.[309]

Physicians may occasionally present testimony on scientific topics, such as the epidemiological data concerning Bendectin at issue in *Daubert*.[310] Medicine has become more scientific over the years, based in part on medical research, randomized controlled clinical trials, and an approach called "evidence-based medicine."[311] In fact, careful research and study have shown recently that certain well-accepted medical theories were completely wrong, including hormone replacement therapy for menopausal women, radical mastectomies for breast cancer, and antiarrhythmic drugs to prevent sudden death from cardiac causes.[312] However, to a large extent, clinical medicine still consists of the experience and wisdom of medical tradition, not scientific evidence.[313] Thus, testimony from treating physicians generally should not be scrutinized using the *Daubert* factors for analysis of scientific testimony; instead, their

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308. *Complementary, Alternative or Integrative Health: What's In a Name?*, *supra* note 305.

309. *Id.*

310. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 582 (1993), *remanded to* 43 F.3d 1311, 1322 (9th Cir. 1995) (determining "the strongest inference to be drawn for plaintiffs based on the epidemiological evidence is that Bendectin could *possibly* have caused plaintiffs' injuries").

311. FAIGMAN ET AL., *supra* note 16, § 21:17; Wong, *supra* note 2, at 722–23.

312. KAYE ET AL., *supra* note 29, § 7.7.2.

313. FAIGMAN ET AL., *supra* note 16, § 21:17; CECIL TEXTBOOK OF MEDICINE, *supra* note 302, at 1. *See* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 304, at 3 (discussing practices to simplify and improve the patient admissions process).

testimony should be considered to be based on their specialized knowledge and experience.[314]

2. Differential Etiology in Determining Causation

A number of courts have held that medical opinions about causation, which are based on proper differential diagnoses, are sufficiently reliable to satisfy *Daubert* and Rule 702.[315] These courts have reasoned that differential diagnosis is a tested methodology that has widespread acceptance in the medical community, has been subjected to peer review and publication, and does not frequently lead to incorrect results.[316]

Care must be used when considering the term *differential diagnosis*, however, because its meaning differs in the legal and medical contexts.[317] Physicians use the term to describe the process of reasoning they use to identify a patient's condition.[318] When a

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314. *See* Neal-Lomax v. Las Vegas Metro. Police Dep't, 574 F. Supp. 2d 1193, 1207 (D. Nev. 2008) (holding that the *Daubert* factors are not particularly relevant for determining the reliability of a physician's opinions because the opinions are based on his experience, training, education, and review of literature). Further, because treating physicians typically do not determine causation during treatment, *see supra* notes 116–123 and accompanying text, courts need not analyze whether a treating physician forming an opinion on causation "is as careful as he would be in his regular professional work." FED. R. EVID. 702 advisory committee's notes (2000 amendments).

315. *See* Myers v. Ill. Cent. R.R., 629 F.3d 639, 644 (7th Cir. 2010) (holding that "[d]ifferential diagnosis is an accepted and valid methodology for an expert to render an opinion," but testimony that simply opined that working conditions caused the ailment was "properly characterized as a hunch or an informed guess"); Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000) (stating "most circuits have held that a reliable differential diagnosis satisfies *Daubert*"); Westberry v. Gislaved Gummi AB, 178 F.3d 257, 262 (4th Cir. 1999) ("Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem."); Heller v. Shaw Indus., Inc., 167 F.3d 146, 156–57 (3d Cir. 1999) (holding that there was sufficient evidence in the record for the doctor to have "good grounds" for reaching his conclusion).

316. *Turner*, 229 F.3d at 1208; *Westberry*, 178 F.3d at 262.

317. Wong et al., *supra* note 2, at 689–91.

318. *Id.* at 691; *Turner*, 229 F.3d at 1208.

physician tries to identify a patient's condition, he systematically compares and contrasts the patient's clinical findings to determine which of two or more diseases with similar symptoms is the one from which the patient is suffering.[319] *Etiology* refers to the science and study of the causes of a condition, and *differential etiology* is the more precise term for determining which of several possible causes is the most likely cause of the plaintiff's injuries.[320] For example, a patient may complain of shortness of breath or other lung problems, and the physician would use differential diagnosis to determine the cause of the lung problems. If the physician diagnoses the patient with lung cancer (the internal cause of the lung problems), the physician could then use differential etiology to determine the external cause of the lung cancer: whether the cause was exposure to asbestos in the workplace, a long history of smoking, exposure to second-hand smoke, or some other cause.[321]

In determining whether a physician's methodology on causation is sufficiently reliable, it is helpful to distinguish between cases where the issue of causation is complicated or not well understood, such as toxic tort or product liability cases, and cases

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319. *See* Hendrix *ex rel.* G.P. v. Evenflo Co., 609 F.3d 1183, 1194 n.5 (11th Cir. 2010) (discussing the difference between "differential diagnosis" and "differential etiology").

320. *See id.* (explaining the court's preference for "[t]he more precise but rarely used term" *differential etiology*) (quoting McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1253 (11th Cir. 2005)); *see also* Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 674 (6th Cir. 2010) ("This court's opinions have used 'differential diagnosis' broadly to include what might better be called 'differential etiology.'"); David L. Faigman, *Evidentiary Incommensurability: A Preliminary Exploration of the Problem of Reasoning from General Scientific Data to Individualized Legal Decision-Making*, 75 BROOK. L. REV. 1115, 1130–31 (2010) (explaining both differential diagnosis and differential etiology); Edward J. Imwinkelried, *The Admissibility and Legal Sufficiency of Testimony About Differential Diagnosis (Etiology): Of Under—and Over—Estimation*, 56 BAYLOR L. REV. 391, 402–03 (2004) (noting that "differential diagnosis" and "differential etiology" use the same process-of-elimination reasons, but differential etiology determines the cause of the patient's illness).

321. Faigman, *supra* note 320, at 1130–31. Professor Faigman has questioned the accuracy of the differential etiology process, concluding that experts' differential etiology conclusions "appear to be based largely on an admixture of an unknown combination of knowledge of the subject, experience over the years, commitment to the client or cause, intuition, and blind faith. Science it is not." *Id.*

where the general mechanism of injury is fairly well understood, such as personal injury cases with abrupt physical injury that coincides with a discrete and specific event.[322] Toxic tort cases can present complicated causal issues, including many possible causes of the injury; long latency periods; complicated biological explanations for the injury; and the lack of a single, sharp exposure event, all of which are likely to make alternative causes of the injury seem both probable and difficult to exclude.[323] To recover in these cases, the plaintiff must prove both general causation (whether exposure to a substance can cause harm to anyone) and specific causation (whether exposure to a substance caused a particular plaintiff's injury) for his injuries, and courts rigorously examine medical testimony on these issues.[324] In contrast, general causation is obvious in some personal injury cases. That an occupant of a car involved in a high-speed accident, or a customer of a store who slips and falls to the ground, may suffer injuries is a matter of common knowledge. When the injury that occurs is the type of injury that normally occurs from such an incident, courts tend to apply less rigorous scrutiny to the issue of causation.[325]

In cases where the issue of causation is complicated or not well understood, courts have developed a two-step process for

322. FAIGMAN ET AL., *supra* note 16, § 21:2 n.1; Note, *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science*, 113 HARV. L REV. 1467, 1472–73 (2000) [hereinafter *Navigating Uncertainty*]; *see* Joseph Sanders, *Applying* Daubert *Inconsistently? Proof of Individual Causation in Toxic Tort and Forensic Cases*, 75 BROOK. L. REV. 1367, 1374–78 (2010) (discussing the effect of the "*Daubert* revolution" in toxic tort cases).

323. *Navigating Uncertainty*, *supra* note 322, at 1480.

324. *See* FAIGMAN ET AL., *supra* note 16, § 21:2 (outlining the two-part "cause-in-fact" requirement of toxic tort cases and explaining how medical testimony and other evidence may be offered to meet it).

325. *Id.* at § 21:2 n.1; *see also Navigating Uncertainty*, *supra* note 322, at 1473 (recognizing that "courts have customarily . . . felt comfortable admitting causation testimony that lacks scientific rigor" in slip and fall cases).

evaluating the admissibility of medical testimony on causation.[326] First, the physician must "rule in" one or more causes of the injury using a valid methodology.[327] The physician must compile a comprehensive list of possible causes that are generally capable of causing the patient's symptoms.[328] For each possible cause that the expert "rules in," the expert's theory must be derived from a valid methodology because "a fundamental assumption underlying [differential etiology] is that the final suspected 'cause' . . . must actually be capable of causing the injury."[329] Second, the physician engages in "standard diagnostic techniques by which doctors normally rule out alternative causes" to reach a conclusion as to which cause is most likely.[330] While the physician need not definitively rule out all possible alternative causes, he must consider other factors that could have been the sole cause of the plaintiff's condition and provide a reasonable explanation for rejecting the alternative hypothesis using reliable methods and procedures.[331]

Several recent cases illustrate the issues that courts face when evaluating a physician's testimony about causation. In *Best v. Lowe's Home Centers, Inc.*, the plaintiff claimed that he suffered from permanent anosmia—the loss of his sense of smell—as a result of a pool chemical that spilled on him when he lifted its container from a shelf.[332] The plaintiff offered the testimony of Dr. Francisco Moreno, an ear, nose, and throat doctor, to establish a causal link between the chemical spill and his injuries, but the district court excluded the testimony as unreliable.[333] On appeal, the Sixth Circuit analyzed Dr. Moreno's testimony and reversed the district court's

326. Hendrix *ex rel.* G.P. v. Evenflo Co., 609 F.3d 1183, 1195 (11th Cir. 2010); *see, e.g.*, Myers v. Ill. Cent. R. Co., 629 F.3d 639, 644 (7th Cir. 2010) (setting out the two-step process requiring the doctor to rule in potential causes and then rule out inapplicable causes); Hollander v. Sandoz Pharm. Corp., 289 F.3d 1193, 1209 (10th Cir. 2002) (discussing two methods of causation analysis).

327. *Hendrix*, 609 F.3d at 1195.

328. *Id.*

329. *Id.* (quoting McClain v. Metabolite Int'l, Inc., 401 F.3d 1233, 1253 (11th Cir. 2005)) (internal quotation marks omitted).

330. Best v. Lowe's Home Ctrs., Inc., 563 F.3d 171, 179 (6th Cir. 2009) (quoting *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 760 (3d Cir. 1994)).

331. *Hendrix*, 609 F.3d at 1197.

332. 563 F.3d at 173–74.

333. *See id.* (summarizing the district court's holding that the method was "unscientific speculation").

opinion, finding that the testimony was sufficiently reliable.[334] The Sixth Circuit first addressed whether Dr. Moreno employed a valid methodology to "rule in" the pool chemical as a potential cause of the injury.[335] Dr. Moreno listed the possible causes for the anosmia, including a virus, an accident, a brain tumor, brain surgery, exposure to chemicals, use of medications, or an idiopathic (unknown) cause.[336] In ruling in the pool chemical as a potential cause, Dr. Moreno considered information from a Material Safety Data Sheet (MSDS) for the pool chemical that warned that the chemical may irritate an individual's mucous membrane and upper respiratory tract and may be harmful if inhaled.[337] Lowe's argued that Dr. Moreno's opinion was not valid because he could not cite any published material that confirmed that inhalation of the pool chemical could cause anosmia.[338] The court rejected this argument and found that Dr. Moreno properly "ruled in" the pool chemical as a possible cause based on the information on the MSDS and his own knowledge and personal experience with other patients.[339]

Next, the court evaluated whether Dr. Moreno engaged in standard diagnostic techniques to "rule out" the other causes of the anosmia.[340] Dr. Moreno found no evidence that a virus, an accident, a brain tumor, or brain surgery were possible causes of the plaintiff's anosmia, so he analyzed whether chemicals or medications were the cause, or whether the cause was idiopathic.[341] He eliminated the idiopathic cause based on his experience that it would not appear over such a short period of time, and he also eliminated nine of the plaintiff's ten medications as potential causes of the anosmia.[342]

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334. *Id.* at 180. The Sixth Circuit adds a third step to the test, mandating that the physician objectively ascertain the nature of the patient's injury. *Id.* at 179. Dr. Moreno did so by giving Best a standardized test to confirm his complaint that he could not smell. *Id.* at 180.

335. *Id.* at 180–81.

336. *Id.* at 181.

337. *Id.* at 175.

338. *Id.* at 180.

339. *Id.* at 181.

340. *Id.* at 181–82.

341. *Id.* at 181.

342. *Id.*

Lowe's argued that Dr. Moreno's methodology was not reliable because he failed to eliminate one medicine as a possible cause, but the court held that physicians need not rule out every possible cause for their causation opinion to be admissible.[343] Further, the court noted that Lowe's failed to present any evidence that the other medication could cause anosmia.[344] The court concluded that Dr. Moreno engaged in a proper methodology to "rule out" the other potential causes and that any weaknesses in his methodology would affect the weight his testimony would be given at trial but not its admissibility.[345]

In *Hendrix ex rel. G.P. v. Evenflo Co.*, the Eleventh Circuit focused on the first step of the process, assessing whether a physician properly "ruled in" traumatic brain injury as a cause of the autism spectrum disorder that the plaintiff's child developed after a car accident.[346] The parties did not dispute that the child suffered a closed-head injury as a result of the accident, but they disputed the severity of the injury and whether the child suffered brain damage.[347] The plaintiff did not dispute that the medical community generally does not recognize traumatic brain injury as a cause of autism.[348] However, the plaintiff's physician testified that traumatic brain injury can cause autism, relying upon certain medical textbooks and epidemiological studies to support his theory but offering no other scientifically reliable basis for his opinion.[349] The district court reviewed the textbooks and studies and found that they did not support the physician's theory.[350] The Eleventh Circuit also reviewed the textbooks and studies before affirming the exclusion of the physician's testimony because the physician failed to present

343. *Id.* (citing Westberry v. Gislaved Gummi AB, 178 F.3d 257, 266 (4th Cir. 1999)).

344. *Id.*

345. *Id.* at 181–82.

346. 609 F.3d 1183, 1198–1202 (11th Cir. 2010).

347. *Id.* at 1187.

348. *Id.* at 1196.

349. *See id.* at 1198–99 (noting that none of the literature discussed by the plaintiff's physician provides a causal link between traumatic head injuries and autistic disorders).

350. *Id.* at 1198–1202.

scientifically reliable evidence to "rule in" traumatic brain injury as a cause of autism.[351]

Whether a physician properly "ruled out" other possible causes of the plaintiff's diabetes was the focus of the court's inquiry in *Guinn v. Astrazeneca Pharmaceuticals LP*.[352] Linda Guinn sued Astrazeneca, claiming that she developed diabetes as a result of taking Astrazeneca's prescription drug Seroquel.[353] Guinn's medical expert, Dr. Jennifer Marks, testified that she based her causation opinion on medical literature showing that Seroquel can cause weight gain and on the temporal proximity of Guinn's use of the medication to her development of diabetes.[354] However, Dr. Marks admitted not only that Guinn had a number of factors that put her at increased risk for developing diabetes but also that certain events in Guinn's life during the time she took Seroquel could have caused her to gain weight.[355] The district court excluded Dr. Marks' testimony because it was unreliable, and the Eleventh Circuit affirmed.[356] The court held that while Dr. Marks was not required to conclusively rule out all alternative causes of Guinn's weight gain, she was required to provide a reasonable explanation of how she concluded that, based on reasonable medical probability, the other possible causes were not the sole cause of the weight gain.[357] Dr. Marks was unable to do this, and, given the other alternative causes, simply noting the temporal proximity between Guinn's ingestion of Seroquel and her subsequent development of diabetes was not sufficient.[358] Thus, because Dr. Marks failed to "rule out" other potential causes of Guinn's diabetes, she did not have a reliable basis for her opinion on causation and her testimony was properly excluded.[359]

By contrast, in some cases the issue of general causation is fairly well understood. We know from common experience that

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351. *Id.* at 1202.
352. 602 F.3d 1245, 1254–55 (11th Cir. 2010) (per curiam).
353. *Id.* at 1248.
354. *Id.* at 1249.
355. *Id.* at 1251.
356. *Id.* at 1251–52, 1256.
357. *Id.* at 1255.
358. *Id.*
359. *Id.* at 1256.

people can be injured in motor vehicle accidents or falls. A note in the *Harvard Law Review* refers to the "slip and fall" paradigm: "a case of abrupt physical injury that nearly coincides with a discrete and dramatic external event."[360] Some courts have referred to these as cases "where the plaintiff has sustained a common injury in a way that it commonly occurs."[361] Although temporal proximity between the incident and injury is generally not considered to be a reliable indicator of causation in toxic tort cases, temporal proximity is a much more important factor in cases where the general mechanism of injury is fairly well understood.[362] In paradigmatic "slip and fall" cases, courts tend to apply less rigorous scrutiny to the issue of causation.[363] Also, in certain cases, a plaintiff may prove causation without the necessity of expert evidence, or a physician may base his opinion on causation primarily on the patient's history of receiving an injury during the incident.[364]

For example, in *Cooper v. Carl A. Nelson & Co.*, the plaintiff claimed that he slipped and fell at his work site, and his physician testified that the fall caused his chronic pain syndrome.[365] The plaintiff told his physician that he began experiencing pain immediately after the fall and that he had been pain-free before the fall.[366] The physician testified that the cause of the fall was irrelevant to the treatment he prescribed and that he relied solely on the plaintiff's self-reported history for his opinion on causation.[367]

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360. *Navigating Uncertainty*, *supra* note 322, at 1472–73.

361. Wilson v. Taser Int'l, Inc., 303 F. App'x 708, 714 (11th Cir. 2008) (per curiam) ("[A] doctor usually may primarily base his opinion as to the cause of a plaintiff's injuries on his history where the plaintiff 'has sustained a common injury in a way that it commonly occurs . . . .'" (quoting Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1354 (M.D. Ga. 2007)).

362. *See* Guinn, 602 F.3d at 1254 ("Temporal proximity is generally not a reliable indicator of a causal relationship."); *Navigating Uncertainty*, *supra* note 322, at 1484 ("The significance of differential diagnosis and temporal proximity is inherently contextual . . . .").

363. *Wilson*, 303 F. App'x at 714.

364. *Id.*; *see, e.g.*, Ridpath v. Pederson, 407 F.3d 934, 935 (8th Cir. 2005) (considering Missouri's "sudden onset" doctrine, which applies where obvious symptoms of injury follow the trauma immediately or shortly thereafter and the injury is the type that is normally sustained in the kind of trauma at issue).

365. 211 F.3d 1008, 1019 (7th Cir. 2000).

366. *Id.*

367. *Id.* at 1019–20.

The defendant disputed the history that plaintiff gave to the physician, contending both that the plaintiff was not truthful about the fall and that the plaintiff was not pain-free before the incident.[368] The defendant also argued that the physician did not properly rule out other possible causes and that the physician could not consider the temporal relationship between the fall and the injuries because the mechanism of the plaintiff's injury was not understood.[369] The district court excluded the testimony, finding that the physician had no scientific basis for his conclusion because he relied on the plaintiff's statements.[370] The Seventh Circuit reversed the district court's ruling, holding that "the district court assumed an overly aggressive role as 'gatekeeper.'"[371] The court held that, under the circumstances, the physician's methodology was acceptable, and his opinion on causation should not have been excluded because it was based solely on the plaintiff's history.[372] The possibility that the plaintiff's chronic pain syndrome was caused by some other factor, as well as the accuracy and truthfulness of the plaintiff's medical history, were subjects the defendant could explore on cross-examination and ultimately were issues for the jury to evaluate, and they did not bar admission of the physician's testimony.[373]

Testimony about causation will be an important issue in most cases. When treating physicians testify about causation, their testimony should not be evaluated using the *Daubert* factors; instead, the court must determine whether the physician performed a proper

368. *Id.*
369. *Id.*
370. *Id.* at 1019.
371. *Id.*
372. *Id.* at 1021.
373. *Compare id.* (holding that a physician's testimony "should not have been excluded under *Daubert* solely on the ground that his causation diagnosis was based only on his patient's self-reported history"), *with* Perkins v. United States, 626 F. Supp. 2d 587, 592–95 (E.D. Va. 2009) (holding that the physician could not base his opinion on causation solely on the plaintiff's self-report of injury from the accident because doing so lacked the intellectual rigor of his regular professional work). The court in *Perkins* also held the physician's opinion was unreliable because he failed to consider alternative causes for the injuries. *Id.* at 594–95.

differential etiology. The implications of this analysis are discussed in greater detail in Part IV(D).

C. *Will the Testimony Assist the Trier of Fact?*

Rule 702's requirement that the testimony assist the trier of fact "goes primarily to relevance."[374] A district court must ensure not only that expert testimony rests on a reliable foundation but also that it is "relevant to the task at hand."[375] Thus, the expert's testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."[376] The Court in *Daubert* described this consideration as one of "fit," observing both that fit is not always obvious and that "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[377] As an example, the *Daubert* Court explained that testimony about the phases of the moon could assist the trier of fact if darkness is an issue of fact in a case, but it would not assist the trier of fact to determine whether an individual acted irrationally that night.[378]

The Court returned to this issue briefly in *Joiner*.[379] In response to the plaintiff's complaint that the district court focused on the conclusions that his experts formed instead of the principles and methodology they used, the Court observed that district courts are not required to admit evidence just because an expert claims his method is accurate.[380] The Court explained that a "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[381]

The issue of "fit" was the determinative factor in *McDowell v. Brown*, a case in which the plaintiff claimed that a delay in his transport from the jail to the hospital caused or worsened his back

374. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993).
375. *Id.* at 597.
376. *Id.* at 591 (quoting U.S. v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)).
377. *Id.*
378. *Id.*
379. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).
380. *Id.*
381. *Id.*

problems and led to partial paralysis.[382] The plaintiff presented testimony from three neurosurgeons to support his theory of causation.[383] The physicians based their opinion on the "medical logic" that earlier treatment is preferable to delayed treatment, and one of the physicians relied upon a study that analyzed the effects of forty-eight-hour delays in treatment.[384] The Eleventh Circuit held that "the earlier, the better" treatment theory was too vague to assist the trier of fact.[385] The court also found that the study, which dealt with a delay of forty-eight hours, did not support the physician's testimony because that was more than twice the delay experienced by the plaintiff.[386] Because of the "considerable gap" between a twenty-four-hour delay and a forty-eight-hour delay, the physician's testimony ran afoul of the "admonition that a theory should not 'leap' from an accepted scientific premise to an unsupported one."[387] The court then held that the testimony was inadmissible because there was too great a gap between the study and the physician's conclusions.[388]

D. Issues with Causation Testimony by Treating Physicians

The preceding sections address general principles governing the admission of medical testimony on causation. In this final section, I will discuss issues that may arise when treating physicians testify on causation.

When considering a treating physician's opinion testimony on causation, the court should begin by examining the physician's qualifications to give the opinion.[389] Many treating physicians face

382. 392 F.3d 1283, 1289, 1299 (11th Cir. 2004).

383. *Id.* at 1299–1301.

384. *Id.*

385. *Id.* at 1299–1300.

386. *Id.* at 1300.

387. *Id.* (citing Allison v. McGhan Med. Corp., 184 F.3d 1300, 1314 (11th Cir. 1999)).

388 *See id* (noting that too great a gap exists when the only connection between the conclusion and the existing data is the expert's own assertions).

389. FED. R. EVID. 702.

no challenges to their qualifications.[390] Retained physicians may face fewer challenges to their qualifications to give an opinion on causation because there are many well-qualified physicians available to testify as an expert witness.[391] However, some physicians may be pressed to give opinions outside their area of expertise, and such testimony will be excluded if the physician is not sufficiently qualified to give an opinion on the issue.[392]

As discussed previously, physicians often do not form an opinion on causation during treatment.[393] Courts are beginning to recognize the fundamental distinction between a physician's ability to diagnose a medical condition based on clinical experience and the

390. *See, e.g.*, Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 (3d Cir. 1999) (noting that the defendant did not challenge the plaintiff's physician's qualifications); Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1363 (M.D. Ga. 2007) (same); Ellison v. United States, 753 F. Supp. 2d 468, 479, 487 (E.D. Pa. 2010) (acknowledging that the United States was not challenging the doctor's credentials).

391. *See About Us*, THE TASA GROUP, http://www.tasanet.com/about.aspx (last updated 2012) (providing the service of expert testimony to attorneys, including independent medical experts in more than 900 specialties for plaintiffs and defense).

392. *See, e.g.*, Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969–70 (10th Cir. 2001) (excluding an orthopedic surgeon's testimony because the surgeon was not qualified to give an opinion on intramedullary nailing); Cooley v. Lincoln Elec. Co., 693 F. Supp. 2d 767, 781 (N.D. Ga. 2010) (finding a family practice physician was not qualified to testify to the cause of plaintiff's neurological condition); Lassiegne v. Taco Bell Corp., 202 F. Supp. 2d 512, 518 (E.D. La. 2002) (observing that a urologist admitted that she was not qualified to give an opinion on the existence of a neural lesion or on the amount of oxygen deprivation necessary to cause anoxic brain damage).

393. *See supra* notes 132–142 and accompanying text.

physician's ability to determine the cause of that condition.[394] Physicians receive more formal training in differential diagnosis than in determining causation.[395] They also have more experience with diagnosis because the cause of the patient's condition is not relevant to the treatment in most cases.[396] As one court stated, "[T]he ability to diagnose medical conditions is not remotely the same . . . as the ability to deduce, delineate, and describe, in a scientifically reliable manner, the causes of those medical conditions."[397] In toxic tort cases, even specialist and subspecialist physicians with additional training, knowledge, and experience diagnosing and treating their patients' conditions may "have little training in chemical toxicology and lack an understanding of exposure assessment and dose-response relationships."[398]

Once the court has concluded that the physician is properly qualified to testify on causation, the court must consider whether the

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394. FAIGMAN ET AL., *supra* note 16, § 21:1; *see* Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 673–74 (6th Cir. 2010) ("The ability to diagnose medical conditions is not remotely the same . . . as the ability to deduce . . . in a scientifically reliable manner, the causes of those medical conditions.") (quoting Gass v. Marriott Hotel Servs., Inc., 501 F.Supp.2d 1011, 1019 (W.D. Mich. 2007), *rev'd on other grounds*, 558 F.3d 419 (6th Cir. 2009)); Bland v. Verizon Wireless, (VAW) L.L.C., 538 F.3d 893, 897–99 (8th Cir. 2008) (holding that the district court did not err in its conclusion that the physician's diagnostic procedures did not satisfy the differential diagnosis standards); Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1207–08 (8th Cir. 2000) (outlining the four factors distinguishing differential diagnosis from differential etiology); Imwinkelried, *supra* note 320, at 405 (highlighting that differential diagnosis addresses the nature of the illness, while differential etiology involves the cause of the illness).

395. *See* FAIGMAN ET AL., *supra* note 16, § 21.1 (describing physicians' formal training with respect to diagnosis); Imwinkelried, *supra* note 320, at 405 (speaking to physicians' level of experience as to different diagnostics and relevant treatment factors).

396. Imwinkelried, *supra* note 320, at 405; *see also* United States v. Henderson, 409 F.3d 1293, 1300 (11th Cir. 2005) (noting that a treating physician did not need to determine how a patient was injured in order to treat fractured jaw); Henricksen v. ConocoPhillips Co., 605 F. Supp. 2d 1142, 1159 (E.D. Wash. 2009) (observing a treating physician's admission that the cause of the plaintiff's disease played no role in the plaintiff's diagnosis, treatment, or prognosis).

397. Gass v. Marriott Hotel Servs., Inc., 558 F.3d 419, 426 (6th Cir. 2009) (citation omitted).

398. Goldstein & Henifin, *supra* note 136, at 676.

physician's methodology and conclusions are sufficiently reliable and relevant to the case.[399] Causation opinions in clinical practice may be based upon inferential or intuitive leaps that allow the physician to provide immediate medical care but do not meet *Daubert* standards.[400] Further, when treating physicians consider causation in a clinical setting, they may think about it in a different way than they think about diagnosis.[401] Formulating the correct diagnosis is essential for a treating physician because an incorrect diagnosis can lead to unnecessary treatment for the patient at best and death at worst, to say nothing of a possible malpractice lawsuit.[402] But with causation, a physician may follow a precautionary principle: "If a particular factor *might* cause a disease, and the factor is readily avoidable, why not advise the patient to avoid it? Such advice—telling a welder, say, to use a respirator—can do little harm, and might do a lot of good."[403] This lower standard for causation may work well in the clinic, but it does not work in the courtroom.[404]

Treating physicians may seize upon coincidental occurrences and random events and may erroneously conclude that temporal

399. *See supra* Part IV(B)–(C).

400. *See* Wong, *supra* note 2, at 714–15 (discussing the use of causal reasoning by physicians in contrast to the higher standard used by courts); FAIGMAN ET AL., *supra* note 16, § 21:28 (introducing clinical judgments as containing a significant measure of invaluable insight); Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 670–72 (6th Cir. 2010) (analyzing a string of speculations in expert testimony diagnosing manganese-induced Parkinson's); McDowell v. Brown, 392 F.3d 1283, 1299–1302 (11th Cir. 2004) (analyzing the inferences made by three doctors to deduce causation and finding the innovative leaps unconvincing).

401. *See Tamraz*, 620 F.3d at 673 (discussing the different considerations for determining diagnosis and etiology).

402. *Id.* (citation omitted).

403. *Id.* (citation omitted).

404. *See id.* (concluding that physician's testimony about causation was insufficient to meet the legal standard).

proximity equals causation.[405] Defendants often complain that treating physicians simply accept as true statements their patients make about causation without any independent investigation or verification.[406] The physician may not have access to records of other possible sources of trauma, or may fail to consider alternative explanations for the cause of the condition.[407] Generally, when a patient's self-reported history is inaccurate, inconsistencies are explored through cross-examination; they do not provide grounds to preclude the physician from testifying.[408] Once the treating physician offers a reasonable explanation as to why they were not

405. *See* Guinn v. AstraZeneca Pharm. LP, 602 F.3d 1245, 1254 (11th Cir. 2010) ("Temporal proximity is generally not a reliable indicator of causal relationship."); Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1205–06 (8th Cir. 2000) (noting that the plaintiff's treating physician reached an erroneous causation conclusion based in part on the temporal relationship between the alleged cause and the onset of symptoms); Siharath v. Sandoz Pharm. Corp., 131 F. Supp. 2d 1347, 1372 (N.D. Ga. 2001) (explaining doctors "are programmed by human nature . . . to conclude that temporal association equals causation . . . ."); HARRISON'S PRINCIPLES, *supra* note 304, at 3 ("Even the most experienced physicians can be influenced by recent experiences with selected patients, unless they are attuned to the importance of using stronger, more objective studies for making decisions.").

406. *See* Martinez v. Garcia, No. 08 C 2601, 2012 U.S. Dist. LEXIS 158220, at *4–5 (N.D. Ill. Nov. 5, 2012) (barring testimony of defendant's medical witness because he had accepted the defendant's version of events without independently verifying it); Ferris v. Pa. Fed. Bhd. of Maint. of Way Emps., 153 F. Supp. 2d 736, 744 n.4 (E.D. Pa. 2001) (noting that a physician's reliance solely on her patient's statements does not resolve reliability concerns).

407. *See, e.g.*, *Guinn*, 602 F.3d at 1249 (describing how a physician was not aware of the plaintiff's additional medical history until her deposition); Perkins v. United States, 626 F. Supp. 2d 587, 592–95 (E.D. Va. 2009) (observing that a physician failed to develop and consider his patient's complete medical history); Bowers v. Norfolk S. Corp., 537 F. Supp. 2d 1343, 1365 (M.D. Ga. 2007) (finding that a physician failed to adequately account for alternative explanations of the plaintiff's medical condition); *Ferris*, 153 F. Supp. 2d at 744 n.4 (same).

408. *See* Myers v. Ill. Cent. R.R., 629 F.3d 639, 645 (7th Cir. 2010) (recognizing that if a physician relied on a plaintiff's inaccurate self-reported medical history, usually courts should allow those inaccuracies to be brought out on cross-examination); Cooper v. Carl A. Nelson & Co., 211 F.3d 1008, 1021 (7th Cir. 2000) ("The proper method of attacking evidence that is admissible but subject to doubt is to cross-examine vigorously . . . .").

the sole cause, the alternative causes affect the weight the jury should give to that testimony, not its admissibility.[409] However, a physician will be precluded from testifying if he cannot provide a reasonable explanation for ruling out alternative possible causes or if his testimony "leaps" from an accepted premise to an unsupported one.[410]

When considering *Daubert* challenges to causation testimony, courts must be careful to maintain the proper balance between the court's role as gatekeeper and the jury's role as the ultimate fact finder.[411] Courts should remember that the district court's gatekeeper role is not intended to supplant the role of the jury.[412] When a court excludes the plaintiff's testimony on causation, summary judgment for the defendant is the inevitable result.[413] To present evidence to the jury on causation, a plaintiff need not prove that his experts are indisputably correct or that their theories are "generally accepted" in the relevant community.[414] Instead, a plaintiff must establish that the methods employed by his experts in reaching their conclusions are based on reliable methodologies and that their opinions are based on facts sufficiently tied to the case.[415] When expert testimony meets the *Daubert* standard, the expert may testify, and the jury decides how much

409. *See* Heller v. Shaw Indus., Inc., 167 F.3d 146, 157 (3d Cir. 1999) ("[A] defendant's suggested alternative causes (once adequately addressed by plaintiff's expert) affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony.").

410. *See supra* Part IV(B)–(C).

411. *See* McDowell v. Brown, 392 F.3d 1283, 1299–1300 (11th Cir. 2004) (citations omitted) (discussing the differences between a court's legal gatekeeper functions under *Daubert* with the jury's responsibility to determine the facts).

412. *See id.* ("The Supreme Court did not intend . . . the gatekeeper role 'supplant the adversary system or the role of the jury . . . .'").

413. *See, e.g.*, Hendrix *ex rel.* G.P. v. Evenflo Co., 609 F.3d 1183, 1203–04 (11th Cir. 2010) (affirming summary judgment for the defendant after holding exclusion of plaintiff's expert to be proper); Guinn v. AstraZeneca Pharm. LP, 602 F.3d 1245, 1257 (11th Cir. 2010) (same).

414. Dodge v. Cotter Corp., 328 F.3d 1212, 1222 (10th Cir. 2003) (quoting Mitchell v. Gencorp Inc., 165 F.3d 778, 781 (10th Cir. 1999)).

415. *Id.* (citing *Mitchell*, 165 F.3d at 781).

weight, if any, to give to that testimony.[416] Given the capabilities of jurors and the liberal thrust of the rules of evidence, any doubts regarding the admissibility of expert evidence should be resolved in favor of admission rather than exclusion.[417] Shaky but admissible evidence is to be attacked by "[v]igorous cross-examination, presentation of contrary evidence, . . . and careful instruction on the burden of proof,"[418] together with a motion for judgment as a matter of law at the conclusion of the plaintiff's case. As Judge Posner recognized, "Trials would be very short if only perfect evidence were admissible."[419]

V. CONCLUSION

Testimony from treating physicians has presented a number of challenges for courts, but careful analysis of case law and medical literature resolves many of them. Courts need no longer struggle with the question of whether treating physicians may present opinion testimony as lay witnesses. The 2000 amendment to Federal Rule of Evidence 701 conclusively settles this issue and confirms the intuition that physicians are expert witnesses because of their education, training, and experience in the medical field and because their testimony consists of opinions based on specialized knowledge within the scope of Rule 702.

Courts have also struggled with the proper scope of testimony from treating physicians at trial and what disclosures must be made about their testimony during discovery. Treating physicians are excused from preparing Federal Rule of Civil Procedure 26

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416. *See* Zuchowicz v. United States, 140 F.3d 381, 387 (2d Cir. 1998) (recognizing that once properly admitted as an expert, any dispute as to the expert's credentials or methodology go to the weight of his testimony, not its admissibility).

417. *See* Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997) (holding the Federal Rules of Evidence embody a "liberal policy of admissibility").

418. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993).

419. Indianapolis Colts v. Metro. Balt. Football Club, 34 F.3d 410, 416 (7th Cir. 1994).

written reports because they generally are not retained to provide expert testimony, but are experts testifying as percipient witnesses of the treatment they rendered and may testify to opinions developed in that pursuit. The Advisory Committee missed an opportunity to resolve this issue when it added the summary disclosure requirement in Rule 26(a)(2)(C) in 2010. The committee failed to specifically address the proper scope of expert testimony from treating physicians subject to the new summary disclosure requirement. To ensure that parties are not unfairly surprised, the rule should be amended to require that summary disclosures include the facts or data considered by a treating physician in reaching his conclusions. To help resolve the divergent views reflected in the case law, the Advisory Committee note should specifically state that summary disclosures are appropriate when a treating physician will testify to any opinions he reached during or after treatment, and that such opinions may be based upon consideration of new materials. Until this occurs, lawyers must file discovery requests to guard against treating physicians transforming into expert witnesses who offer opinions formed after treatment was concluded or that are based on consideration of materials that were reviewed after treatment was completed.

Causation is a critical issue in most cases. Treating physicians may seem cloaked in credibility to the jury because of their education, training, professional experience, and treatment relationship with the plaintiff, but their testimony on causation must be critically analyzed. Although treating physicians often do not determine causation during treatment, they may testify on causation if they are properly qualified to address the issue and if the methodology they use is both reliable and relevant. Testimony from treating physicians should not be excluded because of an inflexible application of the *Daubert* factors that assess testimony based on scientific knowledge. Instead, courts must examine the physician's specialized knowledge and experience and must determine whether the physician used a proper differential etiology process to determine causation. Where the issue of causation is complicated or not well understood, courts rigorously examine whether the physician properly "ruled in" one or more causes of the injury, and then "ruled out" alternative causes, to reach a conclusion on the likely cause. Courts apply a less rigorous analysis of causation when the mechanism of injury is fairly well understood.

Testimony from treating physicians is fraught with the difficult issues discussed in this article. However, an even greater danger is presented by testimony from retained physicians who will, for a sufficient fee, testify favorably for the party who retained them. Thus, when courts resolve disputes about Rule 26 written reports and disclosures as well as challenges to causation testimony from treating physicians, they should remember both that the civil justice system benefits from treating physicians continuing to testify in cases involving their patients and that cases should not degenerate exclusively into shoot-outs between each side's "hired guns."

APPENDIX A

Interrogatory No. 1: Please state the name, address, and specialty of each doctor, health care provider, or other professional person you have seen with respect to the injury or condition alleged in your Complaint, and describe the treatment or services they have rendered.

Interrogatory No. 2: For each expert witness who you believe is not required to provide a Rule 26(a)(2)(B) written report, please state: whether you will submit a Rule 26(a)(2)(C) disclosure for the witness; the subject matter on which the witness is expected to present evidence; and all documents, facts, data, or assumptions that were provided to the witness.

Interrogatory No. 3: For each expert witness who will testify about causation, please state: all opinions on causation the witness will express and the basis and reasons for them; all documents, facts, data, or assumptions provided to the witness; and whether the witness will testify about causation based only on information learned during treatment.

APPENDIX B

Interrogatory No. 1: Please state the name, address, and specialty of each doctor, health care provider, or other professional person you have seen with respect to the injury or condition alleged in your Complaint, and for each such provider, please state:

a. The dates of each visit with the provider;
b. Whether you had seen the provider before the injury/condition alleged in your Complaint;
c. The treatment or services they have rendered;
d. The charges incurred for such treatment or services.

Interrogatory No. 2: Please list the name and current address of each expert witness retained or specially employed to provide expert testimony in this case, and as to each expert, please state:

a. Whether you will submit a Rule 26(a)(2)(B) report for the witness;
b. The subject matter on which the witness is expected to present evidence;
c. The compensation to be paid to the witness for the witness's study or testimony in the case;
d. All documents, facts, data or assumptions that were provided to the witness and that the witness considered in forming opinions to be expressed in this case.

Interrogatory No. 3: For each expert witness who you believe is not required to provide a Rule 26(a)(2)(B) written report, please state:

a. Whether you will submit a Rule 26(a)(2)(C) disclosure for the witness;
b. The subject matter on which the witness is expected to present evidence;
c. All documents, facts, data or assumptions that were provided to the expert;
d. The compensation to be paid to the witness for the witness's study or testimony in the case;
e. The substance of all communications you have had with the witness.

Interrogatory No. 4: For each expert witness who will testify about causation, please state:

a. All opinions on causation the witness will express and the basis and reasons for them;
b. All documents, facts, data or assumptions considered by the witness in forming the opinions;
c. Whether the expert will testify about causation based only on information learned during treatment;
d. When the expert formed his/her opinions on causation.

APPENDIX C

Request for Production No. 1: Please provide the following documents or materials for any expert witness you may call to testify at trial:

a. All documents, facts, data, or assumptions provided to the expert;
b. All medical records or reports that the expert has reviewed;
c. Any medical journal, text or document of any sort that the expert has relied on to formulate opinions in this case;
d. All exhibits to be used during the expert's testimony;
e. A current resume or curriculum vitae, and a list of all publications authored in the previous ten years;
f. A list of cases in which the expert has testified as a witness in the last four years;
g. All records regarding any compensation paid to or to be paid to the expert.

Homage to *Filártiga*

Perry S. Bechky*

> "If the Supreme Court barred federal courts from hearing suits about foreign atrocities under the [Alien Tort Statute], it would be making a sad mistake. . . . [It] would embrace the retrograde proposition that distant genocides are not the business of the United States . . . ."[1]

Soon after Judge Leval published these words, the Supreme Court made the "sad mistake" he warned against. In its decision last term in *Kiobel v. Royal Dutch Petroleum Co.*,[2] the Court held that the Alien Tort Statute (ATS) could not be invoked against foreign defendants for atrocities committed outside the United States.

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1. Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 FOREIGN AFFAIRS 16, 21 (2013). Judge Leval wrote an emphatic separate opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149–96 (2d Cir. 2010).

2. 133 S. Ct. 1659, 1669 (2013).

Kiobel gravely injured *Filártiga v. Peña-Irala*, the Second Circuit's canonical human rights case.[3] *Kiobel* largely closed the door, first opened by *Filártiga*, to human rights litigation under the ATS. Although the *Kiobel* majority never mentions *Filártiga*, its presence is keenly felt: *Filártiga* started the line of cases that led to *Kiobel*, it was discussed at length in the *Kiobel* briefs and oral argument,[4] and it figures prominently in Justice Breyer's concurring opinion.[5]

Kiobel put me in a wistful mood. But *Filártiga* lives. This Article is homage, not eulogy: I come to praise *Filártiga*, not to bury it.

This Article draws from my experience teaching *Filártiga* and its progeny, up through the Supreme Court's consideration of *Kiobel*. It is often said that the best way to learn is to teach. As I taught these cases, I learned about *Filártiga* and came to appreciate it all the more. Teaching *Filártiga* helped me to work out my thoughts—indeed, my feelings—about it.

In honoring *Filártiga*, this Article also offers a *Filártiga*-based critique of *Kiobel*, a case that deserves criticism from a full range of perspectives.

Part I briefly introduces the cases and demonstrates the doctrinal limits of *Kiobel* vis-à-vis *Filártiga*. The Article then highlights four aspects of *Filártiga* worth celebrating, none of them extinguished by *Kiobel*: (1) its approach to sources of international law, (2) its conclusion, (3) its vision, and (4) its hope. *Filártiga*, and much of the good it has done, lives.

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3. 630 F.2d 876 (2d Cir. 1980).

4. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 4–5, 10–13, 18–21, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter Supplemental Brief for the United States]. At oral argument in *Kiobel*, *Filártiga* was mentioned thirty-two times. Transcript of Oral Argument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Notably, Justice Ginsburg twice asked respondents' counsel for her position on *Filártiga* and both times Justice Kennedy stressed the importance of Justice Ginsburg's question. *Id.* at 23–24, 36–37.

5. *Kiobel*, 133 S. Ct. at 1671, 1675, 1677 (Breyer, J., concurring). Justice Breyer cites *Filártiga* five times, and its influence is seen elsewhere as well. Justice Breyer's opinion is discussed further below.

I. BACKGROUND

The First Congress enacted the ATS as part of the Judiciary Act of 1789. As currently worded, it provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6]

A. Filártiga

In 1976, a Paraguayan teenager named Joelito Filártiga was kidnapped and tortured to death at the home of Americo Peña-Irala, a senior police official in Asunción, Paraguay.[7] Police brought Joelito's sister, Dolly, to the home and showed her the body. When she fled, Peña-Irala shouted at her, "Here you have what you have been looking for for so long and what you deserve. Now shut up."[8] Joelito was tortured and murdered to intimidate his father Joel, who had opposed Paraguay's government.

Dolly moved to Washington, D.C., where she was granted asylum.[9] While in Washington, she learned that Peña-Irala had moved to Brooklyn.[10] Dolly and her father Joel served Peña-Irala with process to start a civil lawsuit in federal district court in Brooklyn for Joelito's torture and murder.[11]

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6. 28 U.S.C. § 1350. The original wording in 1789 read: "[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

7. *Filártiga*, 630 F.2d at 878. This discussion treats the facts as proven, rather than as allegations, because the Filártigas ultimately prevailed. Filártiga v. Peña-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984). For more about the factual background of the case, see Harold Hongju Koh, Filártiga v. Peña-Irala: *Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 40–76 (John E. Noyes et al. eds. 2007).

8. *Filártiga*, 630 F.2d at 878.

9. *Id.*

10. *Id.* at 878–79.

11. *Id.*

The Filártigas' main claim was that Joelito's torture and killing violated international law and, thus, gave rise to a cause of action under the ATS.[12] Although the law was then nearly 200 years old, only a handful of plaintiffs had ever filed a claim under it.[13] The district court dismissed the Filártigas' claim.[14] The Second Circuit reversed, holding that torture had become so universally condemned in international law as to constitute a tort in violation of the law of nations actionable under the ATS.[15] On remand, the Filártigas won a judgment of $10,385,364 against Peña-Irala.[16] Apparently, however, they have never been able to collect any of this judgment.[17]

B. From *Filártiga* to *Kiobel*

Filártiga launched modern ATS litigation. Other cases followed, alleging that, like torture and extrajudicial killing, a variety of other government sins also deserved to be actionable under the ATS.[18] This section highlights three developments in ATS case law relevant to the themes of this Article.

First, in 1992, Congress enacted the Torture Victim Protection Act (TVPA).[19] The TVPA allows victims of torture and the heirs of victims of extrajudicial killing to sue the responsible

12. *Id.* at 879.

13. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832 n.6 (2006) (listing two earlier cases where ATS jurisdiction was upheld and "a dozen or so" where it was denied).

14. *Filártiga*, 630 F.2d at 880.

15. *Id.* at 880, 890.

16. Filártiga v. Peña-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

17. Koh, *supra* note 7, at 60.

18. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 251 (2d Cir. 2009) (alleging genocide, torture, war crimes, and crimes against humanity); Flores v. S. Peru Copper Corp., 414 F.3d 233, 233 (2d Cir. 2003) (alleging that excessive pollution harmed "human life, health, and development").

19. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

individuals in certain circumstances.[20] Although generally narrower than the ATS, the TVPA expands it in one significant respect: TVPA cases are open to both U.S. and foreign plaintiffs.

The TVPA confirms *Filártiga*'s reading of the ATS. The House Judiciary Committee's report makes the nexus explicit: it quotes *Filártiga*'s conclusion, summarizes its history, and discusses its holding.[21] The report asserts that *Filártiga* was "met with general approval," explaining that legislation was needed to create an "unambiguous and modern basis" for suits against torturers that avoids the doubt that had been cast by Judge Bork.[22] The report also argues that the ATS "should remain intact" to address violations of other international legal norms "that already exist or may ripen in the future."[23] The Supreme Court has observed, accordingly, that Congress responded to *Filártiga* by "supplementing [it] in some detail."[24]

Second, in the mid-1990s, plaintiffs started bringing ATS cases against corporate defendants. These cases had higher financial and political stakes than in *Filártiga* and its early progeny. In one prominent case, ninety-one individuals and a group representing 32,700 more survivors of apartheid-related violence in South Africa sued "approximately fifty corporate defendants and hundreds of 'corporate Does,'" claiming that the defendants had abetted the apartheid government's wrongdoing.[25] Without commenting on the individual merits of these cases, I think it is fair to say that they prompted legal and political backlash against ATS litigation that reverberates still.

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20. *Id.* § 2. The limits include: (a) the acts must be under the actual or apparent authority, or color of law, of a foreign nation; (b) the plaintiff must have exhausted "adequate and available remedies" in the country where the acts occurred; and (c) suit must be filed within ten years. *Id.*

21. 1 H.R. REP. NO. 102-367, at 4 (1991).

22. *Id.* (discussing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (DC Cir. 1984) (Bork, J., concurring)).

23. 1 H.R. REP. NO. 102-367 at 2–4 (1991).

24. Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004).

25. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 254 n.1, 258, 260 (2d Cir. 2007).

Third, in 2004, the Supreme Court decided its first modern ATS case, *Sosa v. Alvarez-Machain*.[26] That case stemmed from an incident in 1985, when a Mexican drug gang brutally murdered an undercover Drug Enforcement Administration (DEA) agent in Mexico.[27] The DEA suspected that Humberto Alvarez-Machain, a Mexican doctor, had helped to prolong the victim's suffering.[28] The DEA arranged for a group of Mexican nationals, including Jose Sosa, to abduct Alvarez-Machain in Mexico and deliver him to the United States for trial.[29] In 1992, the Supreme Court allowed the trial to proceed even though Alvarez-Machain's presence was procured by abduction.[30] At trial, he was acquitted.[31] Alvarez-Machain then sued Sosa (and others) under the ATS, claiming that his abduction violated the law of nations.[32]

In *Sosa*, the Supreme Court rejected Alvarez-Machain's ATS claim. Justice Scalia's concurrence criticizes *Filártiga* as "nonsense upon stilts" and contends that *Filártiga* started the judiciary down a path toward confrontation with the political branches by "usurping [Congress's] lawmaking power by converting what [judges] regard as norms of international law into American law."[33] Justice Scalia concluded that "American law . . . does not recognize a category of activity that is so universally disapproved by other nations that it . . . automatically gives rise to a private action for money damages in federal court."[34]

The Court did not share Justice Scalia's antipathy to *Filártiga*. Quite the contrary. *Sosa* largely adopts *Filártiga*. It stresses "great caution" more forcefully than *Filártiga*, but agrees that torture claims deserve to overcome "vigilant doorkeeping" to pass through an "ajar" door, along with a "narrow class" of other

26. 542 U.S. 692 (2004).
27. *Id.* at 697.
28 *Id.*
29. *Id.* at 698.
30. United States v. Alvarez-Machain, 504 U.S. 655 (1992).
31. Sosa, 542 U.S. at 698.
32. *Id.* at 697–99.
33. *Id.* at 743, 748–51 (Scalia, J., concurring). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's opinion. *Id.* at 739.
34. *Id.* at 751.

cases.[35] Ultimately, the Court applied what has been called a "modified-*Filártiga* approach"[36] to Alvarez-Machain's claim and distinguished *Filártiga* on the facts: unlike torture, "a single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy."[37]

C. Kiobel

Shell Petroleum Development Company (SPDC), a Nigerian subsidiary of the Anglo-Dutch oil major, operates in the Ogoniland region of Nigeria.[38] According to the *Kiobel* complaint, when Ogoni residents protested SPDC's environmental practices, SPDC and its parent companies "enlisted the Nigerian Government to violently suppress the burgeoning demonstrations" and abetted atrocities the Nigerian military and police committed when responding to the defendants' request, including "beating, raping, killing, and arresting residents and destroying or looting property."[39]

Ogoni residents, who had been granted asylum in the United States, sued SPDC and its parent companies in federal district court in Manhattan, where the parent companies had offices in connection with their listings on the New York Stock Exchange.[40] The plaintiffs sued under the ATS.[41]

The defendants moved to dismiss on various grounds.[42] The district court dismissed several counts, but not all,[43] and authorized

35. *Id.* at 728–29.

36. Koh, *supra* note 7, at 61.

37. *Sosa,* 542 U.S. at 738.

38. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

39. *Id.*

40. *Id.* at 1633, 1678. The district court dismissed the claims against SPDC for lack of personal jurisdiction. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 457, 464–65, 468 (S.D.N.Y. 2006).

41. *Kiobel*, 133 S. Ct. at 1662.

42. *See Kiobel*, 456 F. Supp. 2d at 459 (listing the act of state doctrine, international comity, and failure to state a claim on which relief can be granted).

43. *See id.* at 464–68 (denying the defendants' motion with respect to crimes against humanity; arbitrary arrest and detention; torture; and cruel, inhuman, and degrading treatment).

an immediate appeal of its entire order.[44] The Second Circuit held that the ATS does not allow suits against corporate defendants.[45] As a result, the Second Circuit ordered dismissal of plaintiffs' entire case.[46]

The Supreme Court granted certiorari to settle the question of corporate liability decided by the Second Circuit.[47] At oral argument, however, several Justices displayed interest in a different question: whether the ATS applies to torts that occurred in another country.[48] Days after oral argument, the Court ordered supplemental briefing on this new question.[49] Ultimately, the Court ruled on its own question, leaving the corporate-liability issue for another day.[50]

The Supreme Court unanimously affirmed the dismissal of the plaintiffs' entire case, but the Court split five-four on the reasoning.[51] The majority opinion, by Chief Justice Roberts, applies a modified version of the presumption against extraterritoriality.[52] It closes with this ambiguous dicta:

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44. *Id.* at 468.

45. *Kiobel*, 621 F.3d at 145.

46. *Id.* at 124–45. Judge Leval passionately attacked the majority's holding on corporate liability, while concurring in the judgment on other grounds. *Id.* at 149–54.

47. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

48. Justice Kennedy injected extraterritoriality into the conversation moments after argument began, and the issue recurred throughout the hour. Transcript of Oral Argument at 3–4, 7–8, 11–12, 41, 54, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

49. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) ("The parties are directed to file supplemental briefs addressing the following question: 'Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'").

50. *Kiobel*, 133 S. Ct. at 1663.

51. *Id.* at 1664.

52. The Court shifted the presumption in at least two key respects to pertain here. First, it extended a presumption "typically appl[ied]" to statutes "regulating conduct" to a statute that is "strictly jurisdictional" and "does not directly regulate conduct or afford relief." *Id.* at 1664. Second, the Court applied the presumption despite conceding both that the "Court has generally treated the high seas the same as foreign soil for purposes of the presumption" and that there is strong support for applying the ATS to piracy on the high seas. *Id.* at 1667.

> [E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.[53]

This dicta points to a fault line that divided the majority and prompted two opposing concurrences. Justice Kennedy approved the Court's "careful" approach of "leav[ing] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," because "[o]ther cases may arise" that are not covered "by the reasoning and holding of today's case," in which case "the presumption against extraterritorial application may require some further elaboration and explanation."[54] Justice Alito took the opposite tack. He lamented the Court's "narrow approach" and advocated a "broader standard" in which contacts with the United States will not overcome the presumption "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."[55] Given this split, *Kiobel* ought not be the final word on the number and nature of U.S. contacts that will suffice to allow an ATS claim to survive.

Justice Breyer concurred only in the judgment, rejecting the majority's analysis.[56] He criticized the majority's use of the presumption against extraterritoriality.[57] Instead, Justice Breyer proposed an approach "guided by" the international law of prescriptive jurisdiction.[58] That approach would allow ATS cases

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53. *Id.* at 1669 (internal citation omitted).

54. *Id.* (Kennedy, J., concurring).

55. *Id.* at 1669–70 (Alito, J., concurring). Justice Thomas joined Justice Alito's opinion. *Id.* at 1669.

56. *Id.* at 1670–71 (Breyer, J., concurring). Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's opinion. *Id.* at 1670.

57. *Id.* at 1670.

58. *Id.*

where:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.[59]

In the end, Justice Breyer concurred with the dismissal of Kiobel's claim because it lacked any of these connections to the United States.[60]

D. Filártiga after Kiobel

This Article celebrates four aspects of *Filártiga* that survive *Kiobel*. But first, this section notes several other, more doctrinal points about *Filártiga*'s survival.

First, Justice Kennedy's concurrence raises questions about how far *Kiobel*'s holding extends. He noted that the Court "le[ft] open a number of significant questions" to be decided when "[o]ther cases may arise."[61] We can predict confidently that ATS plaintiffs will strive to fit their cases within the door that Justice Kennedy has left ajar.[62] Defendants will not only try to close that door, but will also renew their efforts to prevent plaintiffs from even reaching it by interposing other defenses, such as personal jurisdiction and forum

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59. *Id.*

60. *Id.*

61. *Id.* at 1669 (Kennedy, J., concurring).

62. *See, e.g.*, Press Release, Ctr. for Constitutional Rights, Kiobel v. Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad (Apr. 17, 2013) (quoting Paul Hoffman, lead counsel for the *Kiobel* plaintiffs, who said that "[t]he Court has left open the issue of whether U.S. corporations and many other defendants can be sued under the [ATS] for human rights violations abroad. We will continue to litigate those cases . . . .").

non conveniens.[63] Also, given that the *Kiobel* Court split five-four along its typical ideological lines, we may speculate that the width of the remaining opening may well be determined by the next balance-shifting nomination to the Court, perhaps upon Justice Kennedy's eventual retirement.[64]

Second, *Filártiga* allowed U.S. courts to adjudicate torture claims even in circumstances that have come to be called "foreign-cubed"—where a foreign plaintiff sues a foreign defendant for conduct that happened in a foreign country.[65] *Kiobel*'s resort to the presumption against extraterritoriality extinguishes foreign-cubed ATS cases, at least where *all* of the relevant conduct occurs outside the United States, even when the perpetrator later moves to the United States. However, *Kiobel* does not extend to foreign-cubed torture: a case raising *Filártiga*'s exact facts would proceed today under the TVPA, regardless of *Kiobel*'s construction of the ATS.

Third, as Congress has done already in the TVPA, Congress may do again. Congress can and should provide access to federal courts for victims of torts in violation of international law. As with

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63. *Cf. Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring) (questioning the propriety of personal jurisdiction and suggesting that "doctrines such as comity, exhaustion, and forum non conveniens" can exclude inappropriate ATS cases). Days after deciding *Kiobel*, the Court granted certiorari to decide a personal jurisdiction issue presented by another ATS case. DaimlerChrysler AG v. Bauman, 133 S. Ct. 1995, 1995 (2013).

64. One might note here the likely significance of Justice O'Connor's retirement: she joined the *Sosa* majority, while Justice Alito joined the *Kiobel* majority. More generally, Justice O'Connor's retirement clearly shifted the Court's balance to the right. *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 n.29, 1449–50 (2013) (ranking Justice Alito first and Justice O'Connor twelfth in support for business among all Justices since 1946). Justice Kennedy was the only justice in both the *Sosa* and *Kiobel* majorities, a fact that fits with the Epstein-Landes-Posner conclusion that "after the appointment of Roberts and Alito, the other three conservative Justices on the Court became more favorable to business" and also provides fodder for their "conjecture that the three may . . . [have] decided to go along with [Roberts and Alito] to forge a more solid conservative majority across a broad range of issues." *Id.* at 1473.

65. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2894 n.11 (2010) (Stevens, J., concurring) (applying the "foreign-cubed" rubric to securities claims).

the TVPA, Congress should extend this access to both alien plaintiffs and U.S. citizens who suffer such harms. This access should be constrained by both constitutional and international law,[66] generally limiting foreign-cubed cases to a few heinous offenses subject to universal jurisdiction, such as crimes against humanity, genocide, piracy, slavery, war crimes, and—as already provided in the TVPA—torture.[67]

II. FILÁRTIGA'S SOURCES

As required by the ATS, *Filártiga* considers whether torture is a "tort . . . committed in violation of the law of nations." The opinion examines a wonderful array of evidence to determine whether torture was forbidden by "'a settled rule of international law' by 'the general assent of civilized nations.'"[68] This evidence includes:

- the human rights aspirations of the U.N. Charter;
- the Universal Declaration of Human Rights, approved by the U.N. General Assembly in 1948;
- the Declaration on the Protection of All Persons from Being Subjected to Torture, approved by the U.N. General Assembly in 1975;
- three treaties that outlaw torture (notwithstanding that the United States was not then a party to any of those treaties);

66. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring that assertions of personal jurisdiction comport with "fair play and substantial justice"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–33 (1987) (describing the international law concerning national assertions of jurisdiction).

67. *See generally* THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001) (proposing principles applicable to national assertions of jurisdiction over matters of universal concern).

68. Filártiga v. Peña-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980) (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).

- the prohibition of torture, "expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay";
- the views of four leading U.S. scholars of international law;
- a decision of the European Court of Human Rights; and
- the position of the Executive Branch.[69]

Filártiga is a superb teaching case. It provides an accessible entrée into the otherwise difficult subject of the sources of international law.[70] It touches a variety of subjects and themes visited throughout an international law course.[71] And it generates lively, rich class discussion:

- Does the U.N. Charter create any binding human rights obligations? If so, what do those obligations require? If not, what significance, if any, should be given to the Charter's human rights provisions?[72]
- What kinds of state actions count as state practice for the purpose of creating customary law? Does voting for a

69. *Id.* at 879 n.4, 881–84. Koh describes the events leading to the Carter Administration's amicus brief in support of the plaintiffs. Koh, *supra* note 7, at 51, 53–58. He quotes the law clerk who drafted *Filártiga* as saying that the court gave "dispositive weight" to the Administration's brief, *id.* at 53. To see the similarities of the brief and the opinion, compare Brief for the United States as Amicus Curiae at 22–23, *Filártiga*, 630 F.2d 876 (No. 79-6090) and *Filártiga*, 630 F.2d at 884.

70. Several leading casebooks excerpt *Filártiga* in chapters on sources or related topics like the domestic legal status of custom. *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 267 (5th ed. 2009); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 572 (3d ed. 2009); BARRY E. CARTER ET AL., INTERNATIONAL LAW 242 (5th ed. 2007).

71. One leading casebook spotlights *Filártiga* as one of two cases in its opening chapter, noting that it "introduce[s] several of the central issues about the rules, processes, actors, and domains of international law, topics that occupy us throughout the book." MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 3, 17 (4th ed. 2011).

72. U.N. Charter pmbl., art. 1, para. 3, art. 55, para. c, art. 56.

General Assembly resolution condemning torture count as evidence for a customary norm banning torture? Does engaging in torture count as evidence against?

- When does entering a treaty serve not only to create a treaty obligation but also to contribute to the development of a customary obligation? What concerns are raised by allowing the parties to a treaty to develop customary obligations binding on nonparties?
- Why doesn't the *Filártiga* court explicitly address whether the state practice it deemed relevant was "accepted as law" or done "from a sense of legal obligation"?[73]
- What is the legal status of General Assembly resolutions? If some resolutions are entitled to more legal weight than others, what criteria set them apart? Should states that did not exist in 1948 be bound by the Universal Declaration of Human Rights?[74]
- When is the domestic law of the United States and other countries relevant to the determination of international law? What are "general principles of law recognized by civilized nations," how can they be ascertained, and how do they relate to other sources of international law?[75]

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73. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter I.C.J. Statute]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

74. For a sense of the magnitude of this problem, see Lauren Walsh, *A Conversation with Oscar Schachter,* 91 AM. SOC'Y INT'L L. PROC. 343, 344 (1997) ("In 1948, . . . the architects planning the future headquarters asked me how many seats they should make in the General Assembly. . . . An international lawyer would be expected to know how many sovereign states existed and were potential members. I confidently answered the architects . . . that they could safely add twenty seats to the fifty-one [members at that time]. It did not take long for my estimate to be mistaken and for costly renovations to be needed."). The UN has 193 members today. Growth in United Nations Membership, 1945-present, UNITED NATIONS, http://www.un.org/en/members/growth.shtml (last visited Mar. 5, 2014).

75. I.C.J. Statute, *supra* note 73, art. 38(1)(c).

- Is it legitimate for a court to look to the statements of scholars—"the most highly qualified publicists"—as evidence of international law, even as "subsidiary" evidence? What risks are presented when relying on scholars and how should a court address those risks? How can a court determine who are "the most highly qualified publicists"? Should it insist on hearing the views of not only U.S. scholars, but of scholars "of the various nations"?[76]
- How much weight should a U.S. court give to the views of the Administration? What risks are presented by giving too little or too much deference? Should any distinction be drawn between the Administration's description of international law and of U.S. national interests?
- What matters are of "mutual, and not merely several, concern" among states?[77] Does a state's torture of its own nationals in its own territory raise "mutual concern" among states?
- Does the court's opinion support the view that the prohibition against torture is a "peremptory norm" of the international community?[78] Does it matter?

Filártiga's treatment of sources is also a pleasure to read. The Second Circuit takes a moment to note that its treatment of sources is "confirm[ed]" by the Statute of the International Court of Justice.[79] Its treatment is internationalist and sophisticated: it does not reflexively dismiss as irrelevant General Assembly resolutions or treaties to which the United States was not a party, but instead

76. *Id.* art. 38(1)(d).

77. *Filártiga*, 630 F.2d at 888.

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k, reporters' note 6.

79. *Filártiga*, 630 F.2d at 881, 881 n.8.

accepts them as evidence of norms, principles, and practices.[80] And the court is not distracted by the tragedy of torture's persistence from observing the formation of a legal rule outlawing it.[81]

Kiobel has nothing to say about the sources of international law. They are simply not relevant to its analysis. *Kiobel* addresses only the question, based on U.S. rules of statutory construction, of whether the ATS applies to torts occurring outside the United States.[82] Thus, *Kiobel* may be seen as a case about U.S. foreign relations law rather than international law.[83]

Oddly, *Kiobel* only makes one glancing reference to the brief submitted by the Executive Branch.[84] The Administration argued that the presumption against extraterritoriality did not apply and urged the Court to reject a "categorical" approach based on that presumption.[85] Moreover, the Administration specifically cited *Filártiga* as an example where applying that presumption could harm "the foreign relations interests of the United States, including the promotion of respect for human rights"[86] and the interest not to be "perceived as harboring the perpetrator."[87] The Administration also

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80. *Id.* at 882–84 (rejecting "the dichotomy of binding treaty against non-binding pronouncement") (internal punctuation omitted). *But see* Sosa v. Alvarez-Machain, 542 U.S. 692, 734–35 (2004) (failing to consider the Universal Declaration as evidence of custom).

81. *Filártiga*, 630 F.2d at 884, 884 n.15; *see also Sosa*, 542 U.S. at 738 n.29 (citing *Filártiga* with approval).

82. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).

83. *Cf.* Supplemental Brief for the United States, *supra* note 4, at 14 n.3 ("The United States does not suggest that an extraterritorial private cause of action would violate international law in this case . . . . The issue in this case . . . is instead solely one of the allocation of responsibility among the Branches . . . under U.S. law.").

84. *Kiobel*, 133 S. Ct. at 1668 (noting, essentially, that the Obama Administration had abandoned the Bush Administration's reading of Attorney General Bradford's 1795 opinion about the ATS).

85. *See, e.g.*, Supplemental Brief for the United States, *supra* note 4, at 3–4, 21 n.11.

86. *Id.* at 4–5, 13. The United States also quoted its earlier brief in *Filártiga*: "'[A] refusal to recognize a private cause of action in these circumstances' could 'seriously damage the credibility of our nation's commitment to the protection of human rights.'" *Id.* at 19.

87. *Id.* at 4.

noted that Congress appears to support the extraterritorial application of the ATS in circumstances like those in *Filártiga*.[88] Accordingly, the Administration encouraged the Court to reject the plaintiffs' claims on narrow grounds, while allowing the ATS to apply extraterritorially in cases like *Filártiga*, with the details to be determined in later cases.[89] Yet, the Court dismissed the approach advocated by the Administration without even explaining its refusal to defer to the Administration's assessment of "the foreign relations interests of the United States." The Court did so despite claiming that its rationale assures that the courts "defer[]" to the foreign policy decisions of the political branches![90] *Kiobel* thus fails to offer any guidance about how courts should treat Executive Branch views in cases affecting international relations—except by way of negative example.

III. FILÁRTIGA'S CONCLUSION

Having asked whether torture is a "tort . . . committed in violation of the law of nations," *Filártiga* answers with a resounding yes: "[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[91] The court adds, with more rhetorical force, "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture.

88. *Id.* at 10–11.

89. *See generally id.* at 13–27 ("The Court need not decide whether a cause of action should be created in other circumstances. . . ."). At oral argument, the Solicitor General went so far as to describe *Filártiga* as the "paradigm . . . where we think . . . ATS causes of action should be recognized." Transcript of Oral Argument, *supra* note 4, at 43.

90. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) ("The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.").

91. Filártiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

Indeed, . . . the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[92]

This is a powerful conclusion, powerfully expressed: a torturer is "an enemy of all mankind." *Filártiga*'s conclusion helped to distill and propagate the norm against "the dastardly and totally inhuman act of torture."[93] It has been followed, praised, endorsed, or quoted approvingly by Congress, the Executive Branch, U.S. courts, the House of Lords, the English Court of Appeals, India's National Commission on Human Rights, the International Criminal Tribunal for the former Yugoslavia, and U.N. agencies.[94] Dolly Filártiga said her case "remains a symbol [in Paraguay] of the injustice of the Stroessner dictatorship, and [her] brother is considered a martyr for human rights."[95] Moreover, according to Harold Koh, "*Filártiga* inspired a movement . . . that eventually helped persuade the Executive Branch to ratify the U.N. Convention Against Torture and Congress to enact the Torture Victim Protection Act" and it "opened the door . . . for the activist work of new human rights clinics" at U.S. law schools.[96] *Filártiga*'s condemnation of torture inspires pride: pride in our courts, in our laws, in our government, and in our country.[97] Its condemnation is absolute, tolerating neither exceptions nor limitations. It declares torture unacceptable wherever

92. *Id.* at 890.

93. *Id.* at 883.

94. *See* Koh, *supra* note 7, at 60–73 (discussing authorities). *Filártiga* therefore evidences what Koh terms "transnational legal process," through which "[t]ransnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again" as it is "ma[d]e, interpret[ed], enforce[d], and, ultimately, internalize[d]." Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

95. Dolly Filártiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21 [hereinafter *American Courts*].

96. Koh, *supra* note 7, at 67–68, 73.

97. As Dolly Filártiga herself said after becoming a U.S. citizen, "I am proud to live in a country where human rights are respected, where there is a way to bring to justice people who have committed horrible atrocities." *American Courts*, *supra* note 95.

committed, by whomever, against whomever, for whatever reason.[98] *Filártiga* lit a beacon to the world spotlighting the United States' determination to end torture.

How tragic that our government later came to torture prisoners captured after 9/11.[99] This tragedy cannot be minimized as the acts of rogues or juniors: it was authorized at the highest levels of government,[100] and blessed by the "blatantly wrong," "embarrassingly weak," and ultimately retracted opinions of the

98. *Cf.* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2.2, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.") [hereinafter U.N. Convention Against Torture].

It should be noted that opinion polls suggest that about half of the American public favors torture in one circumstance: to obtain information needed to stop an act of terrorism. For example, a recent Associated Press poll found that 18% of respondents believed "torture against suspected terrorists to obtain information" can "often be justified," while 32% said "sometimes," 22% "rarely," and 25% "never." *Balancing Act: The Public's Take on Civil Liberties and Security*, ASSOCIATED PRESS-NATIONAL OPINION RESEARCH COUNCIL (Sept. 10, 2013), surveys.ap.org (follow "September 10 AP-NORC Poll: civil liberties and security" hyperlink). *But see* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005) (criticizing strongly the view that torture is acceptable to stop an imminent terrorist attack).

99. The day before the *Kiobel* decision, a distinguished task force issued the most definitive report to date on the mistreatment of detainees since 9/11. The report concludes, "[I]t is indisputable that the United States engaged in the practice of torture." THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 3, 9, 17 (2013) ("U.S. forces in many instances used interrogation techniques on detainees that constitute torture . . . . U.S. officials involved with detention in the black sites committed acts of torture. . . .").

100. *See id.* at 9 ("The nation's most senior officials . . . bear ultimate responsibility. . . .").

Justice Department.[101] According to Arthur Schlesinger, Jr., "No position taken has done more damage to the American reputation in the world—ever."[102] If only our government had heeded the lesson of *Filártiga*! As Harold Koh said of this tragedy, "[T]hrough it all, . . . *Filártiga* has remained the leading statement by a U.S. governmental institution unambiguously condemning the use of torture."[103]

Among the many indecencies of the Justice Department's infamous "torture memos" is an attack on *Filártiga*'s conclusion. One memorandum questioned this conclusion, both by stating begrudgingly that "it *may be* the case that customary international law prohibits torture" and by premising an argument about the supposed irrelevance of custom with the words "*even if*" there is a customary norm against torture.[104] The memorandum even suggested that *Filártiga* illegitimately failed to give due regard to the continued existence of torture:

> It is also unclear how universal and uniform state practice must be in order to crystallize into a norm of customary international law. Indeed scholars will even argue that a norm has entered into customary international law, such as the prohibition on torture, while admitting that many states practice torture on

101. Harold Koh called one memorandum "blatantly wrong" and "just erroneous legal analysis." *Id.* at 159 (citing Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FINANCIAL TIMES, June 10, 2004). Cass Sunstein called it "egregiously bad" and "embarrassingly weak, just short of reckless." *Id.* (citing Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 24, 2004, at A14). The Constitution Project's task force found that "[l]awyers in the Justice Department's Office of Legal Counsel . . . repeatedly gave erroneous legal sanction to certain activities that amounted to torture . . . ." *Id.* at 14.

102. *Id.* at 158.

103. Koh, *supra* note 7, at 75.

104. Memorandum from John C. Yoo, Deputy Assistant Attorney General, to William J. Haynes II, General Counsel of the Department of Defense 71–72 (Mar. 14, 2003) (emphasis added) [hereinafter "Yoo Memo"], *available at* https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf.

> their own citizens. *See, e.g., Filártiga v. Pena-Irala* . . . .[105]

Had the Justice Department approached this question with competence and integrity, it would have noted that *Filártiga*'s treatment of this point is expressly based on the position submitted to the court by *the Justice Department*.[106]

This shameful memorandum had a short, unhappy life. After just nine months, the Justice Department placed it under official review and advised the Defense Department that "it should not be relied on for any purpose."[107] The Justice Department formally withdrew it fifteen months later.[108] Even before the memorandum's final demise, the Justice Department undercut the attack on *Filártiga*'s conclusion by declaring that "universal repudiation of torture is reflected in . . . *customary international law* . . . and the longstanding policy of the United States, repeatedly and recently

105. *Id.* at 72.

106. *Filártiga* actually quotes the United States' amicus brief on this very point. The Justice Department argued that the fact that "some nations still practice torture" does not affect the legal conclusion that "[i]nternational custom" prohibits torture, a conclusion the brief ultimately called "inescapable." Brief of the United States as Amicus Curiae, *supra* note 69, at 16, 20. The court accepted this position. *Filártiga*, 630 F.2d at 884 (quoting Brief of the United States as Amicus Curiae, *supra* note 69, at 16 n.34 and DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 SUBMITTED TO H. COMM. ON FOREIGN AFFAIRS AND S. COMM. ON FOREIGN RELATIONS 1 (1980)).

107. Letter from Daniel Levin, Acting Assistant Attorney General, to William J. Haynes II, General Counsel of the Department of Defense (Feb. 4, 2005), *available at* http://www.justice.gov/olc/docs/aclu-ii-020405.pdf.

108. *Id.*

reaffirmed by . . . President [Bush]."[109] Not content to stop there, on his third day in office, President Obama signed an executive order banning torture and forbidding reliance on any of the "torture memos."[110] In the end, both the Bush and Obama Administrations definitively rejected the Justice Department's disgraceful attack on *Filártiga*'s conclusion that torture offends customary law—and thus created further state practice in support of that very conclusion.

Nothing in *Kiobel* detracts from *Filártiga*'s denunciation of torture as illegal. The legal status of torture is irrelevant to the majority's analysis.[111] Meanwhile, Justice Breyer's concurrence bolsters *Filártiga*'s conclusion by quoting it, drawing on its rhetorical force, and stressing the need to prevent the United States from becoming a safe harbor for torturers and other enemies of mankind.[112]

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109. Memorandum Opinion, Daniel Levin, Acting Assistant Attorney General, to the Deputy Attorney General 1 (Dec. 30, 2004) (emphasis added) (superseding the "torture memo" of August 1, 2002) [hereinafter Levin Memo]. In support of the statement that customary international law prohibits torture, the Levin Memo states:

> It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

Id. at 1 n.2. The Levin Memo takes these authorities at face value, without any comment or criticism. Although the Levin Memo itself does not expressly mention *Filártiga*, all three of the authorities cited in the preceding excerpt rely on *Filártiga*.

110. Exec. Order No. 13491, 74 Fed. Reg. 4893–94 (Jan. 22, 2009).

111. *See supra* Part I.C.

112. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671, 1674, 1678 (2013) (Breyer, J., concurring).

IV. FILÁRTIGA'S VISION[113]

Filártiga concludes that "official torture is *now* prohibited by the law of nations."[114] It adds, with ringing rhetoric, "[T]he torturer *has become* . . . an enemy of all mankind."[115] This is the vocabulary of dynamism. It reveals that the court applies "international law not as it was in 1789, but as it has *evolved* and exists among the nations of the world *today*."[116] The court also refers to the *modern age* and developments in the *twentieth century*.[117] Most dramatically, in *Filártiga*, the Second Circuit rejects its own dictum from just four years earlier on the ground that it "is clearly out of tune with the *current* usage and practice of international law."[118]

This dynamism is important in itself. The ATS supplements ordinary alienage jurisdiction, assuring aliens access to federal court to bring claims that they suffered torts in violation of the law of nations.[119] The First Congress thought this access necessary, in keeping with the Founders' concern that any failure by a state court to treat an alien properly would give rise to national responsibility

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113. Portions of Part IV are adapted from Perry S. Bechky, *Lemkin's Situation: Toward a Rhetorical Understanding of Genocide*, 77 BROOK. L. REV. 551 (2012).

114. Filártiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (emphasis added).

115. *Id.* at 890 (emphasis added).

116. *Id.* at 881 (emphasis added).

117. *Id.* at 890 (emphasis added).

118. *Id.* at 881, 884, 890 (emphasis added) (discussing Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir. 1976)).

119. The First Congress created the federal district courts and gave them jurisdiction over, *inter alia*, (a) any civil case in which "an alien is a party" and the amount in dispute exceeded $500, and (b) ATS cases brought by an alien without any minimum dollar threshold. Judiciary Act of 1789, ch. 20 §§ 9, 11, 1 Stat. 76–77. This suggests Congress saw ATS cases as particularly sensitive, and wished to ensure access to federal courts for these cases even when less money was at stake than was necessary to trigger federal jurisdiction for ordinary alienage (and many other) cases. This distinction continues today, with the dollar threshold now set at $75,000 for ordinary alienage jurisdiction (which also excludes alien-alien cases). 28 U.S.C. § 1332(a)(2) (2012).

for the United States under international law.[120] When new torts emerge, the same considerations that gave rise to the ATS also support having access to federal court for those newer torts. It is not reasonable to suppose that Congress would want a static interpretation of the ATS that put national responsibility at risk by forcing aliens suffering newer torts into state court.

To be sure, there is an important distinction between dynamism and adventurism. *Filártiga* stays on the safe side of this divide by stressing the clear, universal consensus against torture. Accordingly, *Filártiga*'s dynamism has been endorsed by Congress[121] and fits comfortably within *Sosa*'s later caution that courts should only recognize new ATS causes of action when they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[122] Indeed, *Sosa* acknowledges that *Filártiga* passes this test.[123]

Far more significant than the general idea of dynamism is the particular development at *Filártiga*'s heart. *Filártiga* rests on, underscores, and confirms the defining feature of modern international law: the emergence of human rights as a constraint on each government's treatment of its own citizens.

René Cassin, the main drafter of the Universal Declaration of Human Rights, once offered this argument in support of the declaration: "[W]e do not want a repetition of what happened in

120. *See, e.g.*, THE FEDERALIST No. 80, at 446 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."); JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94 (2002) ("Th[e] penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III . . . .").

121. *See* 1 H.R. REP. 102-367, at 2–4 (1991) (stating the ATS "should remain intact" for violations of other international legal norms, which "already exist or *may ripen in the future*") (emphasis added).

122. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

123. *Id.* at 732 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.") (citing *Filártiga*, 630 F.2d at 890).

1933, where Germany began to massacre its own nationals, and everybody . . . bowed, saying 'Thou art sovereign and master in thine own home.'"[124] The war and the Holocaust made plain that the absolutist conception of sovereignty, which had been dominant before the war, could not stand. Public revulsion created an opportunity to build a new international legal order committed to human rights. As *Filártiga* observes in its magnificent last paragraph:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights . . . . Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.[125]

This passage nicely summarizes the cause (cataclysm), the political consequences (including a fundamental reassessment of states' interests), and the legal response (human rights law, a real achievement notwithstanding the elusiveness of other aspirations).

The nations of the world moved quickly after the war to bound sovereignty with human rights law through a series of dramatic events: the Nuremberg trials, the 1946 resolution affirming that "genocide is a crime under international law," the Genocide

124. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 76 (2002).

125. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

Convention, and the Universal Declaration of Human Rights.[126] They have continued this effort through an ever-thickening network of human rights treaties, customary norms, principles, practices, and institutions. Every state in the world, save one,[127] has agreed to at least one human rights treaty imposing limits on how it treats its own citizens in its own territory.

Before the war, it might have been said that states agreed to "a form of *quid pro quo* . . . to mind their own business. What went on within the borders of a sovereign State was a matter that concerned nobody but the State itself."[128] Today, that "retrograde"—dare I say, antebellum—position is untenable.[129] The states of the world have made "a state's treatment of its own citizens . . . a matter of international concern"; they "have made it their

126. *See* Bechky, *supra* note 113, at 581, 606 (discussing the post-war rise of human rights law as a constraint on sovereignty).

127. At this writing, the fledgling nation of South Sudan, which just became independent in 2011, has not yet ratified any major human rights treaty. It has, however, ratified seven of the International Labor Organization's eight "fundamental conventions," such as the Abolition of Forced Labor Convention, thus accepting the same principle that its domestic treatment of its citizens is subject to international obligations. *Ratifications for South Sudan*, INT'L LABOUR ORG., http://www.ilo.org/ (follow "Labour standards" hyperlink; follow "Country Profiles" hyperlink; then follow "South Sudan" hyperlink) (last visited Mar. 5, 2014). South Sudan has also promised to join the major human rights treaties. *See UN Human Rights Chief "Heartened" South Sudan Will Ratify Major Treaties*, UNITED NATIONS (May 1, 2012), http://www.unmultimedia.org/radio/english/2012/05/un-human-rights-chief-heartened-south-sudan-will-ratify-major-treaties/.

128. WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 2 (2d ed. 2009).

129. Leval, *supra* note 1, at 21.

business . . . to be concerned with domestic human rights violations" like torture.[130]

Human rights law changed the conversation among states. It empowers and structures a conversation about domestic misconduct. It makes it easier to raise these concerns and harder to dismiss them. It often obliges the accused state to deny the factual allegations or their characterization as illegal.[131] Accordingly, *Filártiga* quotes the United States' amicus brief:

> [I]t has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.[132]

By changing the conversation in this way, human rights law remade international law. Human rights law did not merely add new topics to the diplomatic agenda; it reconceived the agenda and radically reworked its priorities. Humans had been mere "objects" of international law; we became "subjects." The state-centric system gave way to the human-centric. Sovereignty ceased to be the end of

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130. *Filártiga,* 630 F.2d at 881, 888. Thus, I cannot accept Justice Scalia's assertion that "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment *of its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates." Sosa v. Alvarez-Machain, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring) (emphasis in original). The rise of human rights law is firmly grounded in state action and consent. It is not some mere figment of the professorial imagination. As the *Sosa* Court said, "modern international law is very much concerned with just such questions" about "a limit on the power of foreign governments over their own citizens." *Id.* at 727.

131. *See* Bechky, *supra* note 113, at 623 (discussing JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW xi, 95–96 (1985)).

132. *Filártiga*, 630 F.2d at 884 (quoting Brief of the United States as Amicus Curiae, *supra* note 69, at 16 n.34).

the international legal order and became instead a human-serving means—a construct that is desirable when it enables a government to protect its people and dangerous when it shelters a government that oppresses its people.[133]

The human rights revolution in international law is necessary and proper. It both reflects a genuine change in state practice and accords with the basic principle that governments are instituted among us to secure our rights and safety.

Filártiga's vision, then, is that courts performing their traditional role of statutory construction in the context of a statute that expressly incorporates international law may also contribute to the identification, distillation, and propagation of international norms.[134] This vision exemplifies Owen Fiss's idea of courts as governmental actors charged with defining public values and moving society toward those values.[135] It also, as Koh has observed, fits squarely with Abram Chayes's conception of "public law litigation."[136] Chayes has said that judicial participation in the "process of making, implementing, and modifying law" is necessarily "rather tentative" – tentative in proposing norms to other public actors, who may endorse or reject them.[137] *Filártiga* achieved perhaps its most meaningful endorsement in Congress' enactment of the TVPA. Even so, in the case of decisions about international law, the relevant Chayesian actors include not only domestic audiences

133. *See* Bechky, *supra* note 113, at 605–07, 623 (describing the impact of the Genocide Convention on the nature of international law and discourse).

134. As *Filártiga*'s author put it a few months later, "[t]he enunciation of humane norms of behavior by the global community and the articulation of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order." Irving Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44.

135. *See generally* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Foreword*]; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

136. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347, 2366–73, 2397–98 (1991).

137. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315–16 (1976).

but also courts, governments, and publics the world over.[138] It bears emphasis, accordingly, that *Filártiga*'s vision comports with international law,[139] just as its conclusion has won broad acceptance at home and abroad.[140]

Chayes concluded that "the ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy."[141] *Filártiga* aces this test. For three decades, *Filártiga* has sustained itself in public dialogue and generated widespread assent.

Tellingly, the *Kiobel* majority passed up the opportunity to criticize *Filártiga*—the work, after all, of a lower court—let alone to offer any reasons why its approach is better. This failure is glaring, given that both the Executive Branch and Justice Breyer relied on *Filártiga* and construed the ATS to uphold it. In the face of its silence, we are left to presume that the majority had no good reasons for departing from the approaches advocated by the Executive Branch and Justice Breyer.[142] We may predict, therefore, that *Kiobel* will fare far worse than *Filártiga* in sustaining itself in public dialogue for the long haul.

Kiobel narrows the occasions when U.S. courts may follow *Filártiga*'s vision, but it does not diminish the vision itself, possibly

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138. *Cf.* Koh, *supra* note 136, at 2397 (describing cases like *Filártiga* as, "in [Robert] Cover's term, 'jurisgenerative,' because they both create law and initiate a dialogue with foreign and international courts that engenders further norm-declaration").

139. *See* I.C.J. Statute, *supra* note 73, art. 38, para. (1)(d) (treating domestic judicial decisions as "subsidiary" evidence of international law).

140. *See supra* Part III.

141. Chayes, *supra* note 137, at 1316.

142. *Cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959) ("The virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . ."); Fiss, *Foreword*, *supra* note 135, at 13 ("Judges must . . . justify their decisions.").

because *Sosa* had already affirmed it.[143] U.S. courts will and should continue, in ATS and other appropriate cases, to participate with other courts and political actors in the global dialogue about the meaning and evolution of international law. Moreover, as international tribunals proliferate and their dockets multiply, there are more opportunities than ever for adjudicative dialogue about international law.

V. *FILÁRTIGA*'S HOPE

After condemning the torturer as the "enemy of all mankind," *Filártiga* ends with one final sentence: "Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[144] *Filártiga*'s hope is that law can help make real a better world, a world without torture and other official brutality. In this spirit, on remand, the district court awarded the Filártigas $10,000,000 in punitive damages "to reflect adherence to the world community's proscription of torture and to attempt to deter its practice."[145]

Filártiga and its progeny have given hope and a valuable measure of justice to victims of state brutality. Thanks to these cases, some victims have been able to haul their former oppressors into court, to testify against them, and even to win judgments condemning their heinous acts.[146] The value of giving someone "a day in court" ought never be underestimated. And some victims

143. Justice Scalia, as mentioned in the text accompanying note 33, had denounced *Filártiga*'s identification of new international torts as illegitimate usurpation of a political function—a view plainly rejected by the six Justices in the *Sosa* majority. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731–32, 738 n.29 (2004) (approving *Filártiga* and holding that courts may identify new international torts in certain limited circumstances).

144. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

145. Filártiga v. Peña-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

146. *Cf.* Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 281 (2011) ("[F]or us, the widows, it is clear that money is not everything.") (quoting Paola Martínez). For more on the goals of victims in international human rights adjudication, see *id.* at 282–84.

have won valuable satisfaction by securing judgments labeling their oppressors as "enem[ies] of mankind."[147]

Still, more is needed to create an effective deterrent to gross violations of human rights. Only rarely do plaintiffs collect on judgments in ATS and TVPA cases,[148] or secure money in out-of-court settlements.[149]

For now, *Filártiga* seems to afford the *possibility* of effective deterrence, but not yet the reliable achievement of that goal. In my view, this is not a criticism of *Filártiga*. The Second Circuit knew it was taking only a "small . . . step" towards the better world to which *Filártiga* aspires.[150] Many more steps must be taken by many other people. It is ever thus: to adapt the words of Martin Luther King, Jr., "The arc of the moral universe . . . bends toward justice," but it "is

147. *Filártiga*, 630 F.2d at 890.

148. The Center for Justice and Accountability, for example, has won eight judgments totaling $199 million, of which it has collected only $580,000 for one client; this was collected only because the defendant won the Florida lottery. *Cases*, CENTER FOR JUSTICE AND ACCOUNTABILITY, http://cja.org/section.php?id=5 (last visited Mar. 19, 2014). To be sure, these cases may contribute to other difficulties for the defendants, such as deportation, inability to travel to the United States, "naming and shaming," and even, in one instance, the prosecution and sentencing in an unrelated mortgage fraud case. *See Criminal Mortgage Fraud Case against Emmanuel "Toto" Constant,* CENTER FOR JUSTICE AND ACCOUNTABILITY, http://cja.org/article.php?list=type&type=314 (last visited Dec. 11, 2013) (describing Constant's criminal conviction); *The Alien Tort Statute*, CENTER FOR JUSTICE AND ACCOUNTABILITY, http://cja.org/article.php?id=435 (last visited Mar. 19, 2014) (describing other effects of ATS litigation).

149. Notably, Unocal settled an ATS case for an undisclosed sum in 2004 and Shell settled an ATS case for $15.5 million in 2009. Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, at B1. One effort to catalog ATS settlements concluded that "[t]here have been maybe a dozen settlements reached in ATS cases against corporate defendants; many of these settlements are confidential . . . ." *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2, http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ (updated Mar. 2013).

150. *Filártiga*, 630 F.2d at 890.

long."[151] The work of fulfilling *Filártiga*'s hope is not for *Filártiga* itself, but for all of us.

In truth, real progress has been made since *Filártiga* towards fulfilling its hope. The following list focuses on progress made against torture in particular, but it could readily be extended to such other grotesqueries as crimes against humanity, extrajudicial killings, genocide, slavery, and war crimes:

- In 1984, the U.N. General Assembly approved the U.N. Convention Against Torture. The Convention went into effect in 1987, and today it has 154 parties.[152] The Convention requires every party to both criminalize "all acts of torture" with penalties appropriate to the "grave nature" of the offense and provide civil redress for victims, including "an enforceable right to fair and adequate compensation."[153] In addition, the U.N. Committee Against Torture monitors compliance with the convention and, if the accused state has consented, can receive and examine complaints submitted by individuals who have suffered torture.[154]
- In 1993, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia.[155] Its jurisdiction includes torture as a war

151. Rev. Dr. Martin Luther King, Jr., Sermon at the Temple Israel of Hollywood: Keep Moving From This Mountain (Feb. 25, 1965).

152. *Status: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en (last visited Mar. 15, 2014).

153. U.N. Convention Against Torture, *supra* note 98, arts. 4, 14.1.

154. *See id.* arts. 19–22; 1 OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, SELECTED DECISIONS OF THE COMM. AGAINST TORTURE 1–2 (2008) (reporting that, with sixty-four states consenting to this procedure, the Committee received 332 individual complaints, reached 145 "views," and found forty-seven violations).

155. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993).

crime and a crime against humanity.[156] The tribunal has indicted, tried, convicted, and imprisoned defendants for this crime.[157]

- In 1994, the U.N. Security Council created another ad hoc tribunal to prosecute those responsible for the genocide in Rwanda.[158] Again, the tribunal has jurisdiction over torture as a crime against humanity or a war crime,[159] and it has used this jurisdiction to convict and imprison torturers.[160]
- In 1998, the Council of Europe invigorated the European Court of Human Rights by empowering individuals to bring cases directly against states.[161] This sea change caused a fifty-fold jump in activity, from about twenty cases per year in the system's first forty years to about 1,000 cases per year since 1998.[162] The court has

156. Statute of the Int'l Criminal Tribunal for the Former Yugoslavia arts. 2(b), 5(f), May 25, 1993 (adopted in S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) with subsequent amendments).

157. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment of the Appeals Chamber, ¶¶ 155–63 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (affirming conviction on Count 13); Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment of the Appeals Chamber, 306–07 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (affirming conviction on several counts of torture, while dismissing other counts as unduly cumulative).

158. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

159. Statute of the Int'l Criminal Tribunal for Rwanda arts. 3(f), 4(a), Nov. 8, 1994 (adopted in S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) with subsequent amendments).

160. *See, e.g.*, Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment of the Appeals Chamber, 130 (Int'l Crim. Trib. for Rwanda May 20, 2005) (affirming conviction on Count 11).

161. Protocol No. 11 to the Convention for the Prot. of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 34, May 11, 1994, E.T.S. No. 155.

162. EUROPEAN COURT OF HUMAN RIGHTS, OVERVIEW 1959–2011, at 4 (2012) [hereinafter "ECHR OVERVIEW"]. Another important factor was the expansion of the Council of Europe after the Cold War: Russia alone accounted for 22% of cases pending on December 31, 2012, while seven of the top ten "high case-count states" had been Communist. EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2012, at 8 (2013).

jurisdiction over allegations of torture,[163] and it has found eighty-four torture violations—plus another 1,007 instances of degrading or inhuman treatment.[164]

- In 2002, the Rome Statute went into effect and established the International Criminal Court as a standing court, again with jurisdiction over torture as a crime against humanity or war crime.[165] Some defendants have been charged with torture.[166]
- In addition, the Inter-American Court of Human Rights was founded contemporaneously with Filártiga.[167] The Court has jurisdiction over torture allegations when complaints are brought by other state parties or by the Inter-American Commission on Human Rights.[168] The Court has a notably broad, "victim-centered" approach to remedies.[169] For example, in one case where the Court found extensive torture at a Peruvian prison, the Court ordered Peru to "effectively investigate the facts" and identify and "punish those responsible"; preserve police documents; identify remains of deceased victims and deliver them to next of kin at public expense; pay burial

163. European Convention for the Prot. of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5.

164. ECHR OVERVIEW, *supra* note 162, at 6–7.

165. Rome Statute of the International Criminal Court arts. 5, 7(1)(f), 8(2)(a)(ii), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998).

166. *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, 7–8 (Mar. 4, 2009) (finding reasonable grounds to charge Al Bashir with, *inter alia*, torture). In the Court's only conviction to date, the prosecutor did not charge torture, although thirty victims reported suffering or seeing it. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 16 & n.54 (Mar. 14, 2012).

167. Statute of the Inter-American Court on Human Rights, Jan. 1, 1980, O.A.S. Res. 448 (IX-0/79).

168. Organization of American States, American Convention on Human Rights, arts. 5(2), 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67.

169. *See* Antkowiak, *supra* note 146, at 288–92 (describing the Inter-American Court's "victim-centered" approach).

> costs for deceased victims; apologize and accept responsibility for the misconduct "in a public ceremony with the presence of high State authorities"; offer specialized "medical and psychological treatment" for the victims and their next of kin at public expense; "design and implement . . . human rights education programs" for the police; publish and broadcast specified parts of the Judgment; pay both pecuniary and non-pecuniary damages; and submit a compliance report to the Court within eighteen months to allow the Court to monitor compliance until the Judgment is fully implemented.[170]

All told, this amounts to a remarkable new architecture of rules and institutions aimed at eradicating torture.[171]

A world without torture may be an unreachable star, but in the years since *Filártiga*, the international community has made striking efforts to reach toward it. And the world is better for this.

The Second Circuit did not see itself acting alone in *Filártiga*, but as part of a shared effort toward a common goal. In the context of *Filártiga*'s magnificent last paragraph, its closing self-description as "a small but important step in the fulfillment of [an] ageless dream" can be seen as an invitation to others, especially to

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170. Case of the Miguel Castro-Castro Prison v. Peru, Judgment, 2006 Inter-Am. Ct. H.R. ¶¶ 262–350, 470(8–24) (Nov. 25, 2006).

171. In limited circumstances, the powerful mechanism of investor–state arbitration may even supplement the standard anti-torture architecture. In 2008, an arbitral tribunal ordered Yemen to pay moral damages for the "physical duress" of a business executive. Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶¶ 284–91 (Feb. 6, 2008). The tribunal set the damages at $1,000,000, a level meant to be "more than symbolic." *Id.* ¶ 290. Now, a Turkish investor has started an arbitration seeking damages from Turkmenistan, after the UN Human Rights Committee found that Turkmenistan had imprisoned him inhumanely and stated that Turkmenistan is "under an obligation" to compensate him, prosecute those responsible, and prevent recurrences. Jarrod Hepburn & Luke Eric Peterson, *After Claims of Human Rights Violation are Borne Out, Businessman Pursues Ad-Hoc Investment Treaty Arbitration against Turkmenistan*, INVESTMENT ARB. REP. (Apr. 3, 2013); Bozbey v. Turkmenistan, Communication No. 1530/2006, U.N. Doc. CCPR/C/100/D/1530/2006, ¶¶ 5, 7.3, 9 (2010).

other courts, to band together, with hope and an enlightened appreciation of their individual and collective interests, to reach together toward this dream. *Filártiga* thus echoes John Lennon: "You may say I'm a dreamer, but I'm not the only one. I hope someday you'll join us. And the world will live as one."[172]

I wish I could say that *Kiobel* has no effect at all on *Filártiga*'s hope for a global project against grave abuses of human rights. Technically, the effect is limited because the TVPA now covers claims like those brought by the Filártigas and *Kiobel* does not reach the TVPA. But hope is not measured in technicalities. And, anyways, *Filártiga*'s hope extends beyond torture and extrajudicial killings to other horrors not addressed by the TVPA.

In *Filártiga*, the Second Circuit subjected to tort liability a torturer who had moved to the United States. Justice Breyer wished to ensconce that "no safe harbor" principle into ATS law, but the *Kiobel* majority silently rejected that approach.[173] *Filártiga* invites other courts to join in a global project of cooperation against those whose violence has made them enemies of all mankind. *Filártiga* sees more litigation as part of the solution to the horrific problem of official brutality. *Kiobel*, by contrast, speaks not to the problem of inhumanity, but to the problem of litigation. *Kiobel* worries that litigation in U.S. courts invites foreign courts to entertain copycat suits.[174] *Filártiga*'s hope is *Kiobel*'s fear.

Thus, we have to admit that *Filártiga*'s hope shines less brightly today. Fortunately, hope is stubborn. Hope is resilient. If need be, hope is a phoenix. And hope is empowering. All the new international architecture shows that other courts and institutions are trying to harness law to make real a better world. Other courts are following *Filártiga*'s path. Other courts are carrying forward *Filártiga*'s hope.

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172. JOHN LENNON, *Imagine*, *on* IMAGINE (Apple Records 1971).

173. *See supra* Part I.C.

174. *See Kiobel*, 133 S. Ct. at 1669 ("[A]ccepting petitioners' view would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.").

VI. CONCLUSION

"We'll always have Paris." – Casablanca[175]

With these immortal words, Rick (Humphrey Bogart) sent off to safety Ilsa (Ingrid Bergman), his lover from happier pre-war days. The couple will be separated, and yet also bound together. Thus, when Ilsa replied, "I said I would never leave you," Rick answered, "And you never will."[176]

Likewise, we'll always have *Filártiga*. Not as a memory, but as a living presence and a beacon for the future. Its sources, conclusion, vision, and hope all still shine. *Filártiga* has not left us and never will. Here's looking at you, kid.

175. CASABLANCA (Warner Bros. 1942).

176. *Id.* Bob Dylan expresses the same emotion: "And though our separation, it pierced me to the heart / She still lives inside of me, we've never been apart." BOB DYLAN, *If You See Her, Say Hello*, *on* BLOOD ON THE TRACKS (Columbia Records 1975).

Hyde in Plain Sight – Back to Basics with the Hyde Amendment

Amanda K. Branch*

Six months after being arrested at his Miami office, being placed under house arrest, and enduring an investigation marred by prosecutorial misconduct, Doctor Ali Shaygan found himself acquitted of all charges.[1] Beyond the damage to his reputation, medical practice, and emotional well-being, one large problem remained: he owed over six hundred thousand dollars of attorneys' fees.[2]

In 1997, Congress passed the Hyde Amendment, which allows acquitted criminal defendants to recoup attorneys' fees if they can demonstrate prosecutorial misconduct. The Hyde Amendment states:

> [T]he court, in any criminal case . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United

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1. *See* United States v. Shaygan, 652 F.3d 1297, 1301, 1308 (11th Cir. 2011) *cert. denied*, 133 S. Ct. 609 (2012) (discussing the degree of prosecutorial misconduct).

2. *Id.* at 1301.

> States was *vexatious, frivolous, or in bad faith*, unless the court finds that special circumstances make such an award unjust.[3]

Although Congress enacted this seemingly straightforward statute to provide relief to those wronged by tainted prosecutions, the Hyde Amendment has been rendered ineffective by the federal courts.[4] In one national study, researchers found only thirteen successful claims between 1998 and 2010.[5] By contorting the definitions of the Amendment's terms, refusing to pay the appropriate deference to trial courts, and shifting the focus to prosecutors rather than the parties seeking attorneys' fees, courts have hollowed the Hyde Amendment.

This Note uses *U.S. v. Shaygan* to examine the ambiguities created by the Hyde Amendment and problems with its treatment in federal courts during the fifteen years following its passage. The Hyde Amendment can be redeemed, but that will require courts to go back to basics and recall that it is not only a tool for curbing prosecutorial misconduct, but also for providing a small measure of relief to an acquitted defendant.

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3. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997) (codified as a statutory note to 18 U.S.C. § 3006A) (emphasis added).

4. For example, in the Eleventh Circuit, where Dr. Shaygan was tried, only four other attempts to recover fees under the Hyde Amendment have received appellate review on the merits. *See* United States v. Pease, 137 Fed. Appx. 220 (11th Cir. 2005) (affirming the district court's denial of attorneys' fees); United States v. Aisenberg, 358 F.3d 1327 (11th Cir. 2004) (reversing and vacating in part to reduce the attorneys' fees awarded); United States v. Adkinson, 247 F.3d 1289 (11th Cir. 2001) (reversing and remanding the district court's award of attorneys' fees and other litigation expenses); United States v. Gilbert, 198 F.3d 1293 (11th Cir. 1999) (affirming that defendant could not recover attorneys' fees);

5. Kevin McCoy & Brad Heath, *Not Guilty, but Stuck with Big Bills, Damaged Career*, USA TODAY (Sept. 28, 2010), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-27-hyde-federal-prosecutors_N.htm. The study "found only 13 cases [out of ninety-two] in which the government paid anything toward defendants' legal bills." *Id.*

I. HISTORY OF THE HYDE AMENDMENT

The Hyde Amendment was offered on the floor of the House as a rider to the Department of Justice budget for 1998.[6] In the strictest sense, it was not an amendment at all, but rather a new proposal to permit the recovery of attorneys' fees in criminal cases.

The Amendment takes its name from former Republican Congressman Henry Hyde of Illinois.[7] Educated as an attorney, Rep. Hyde was a staunch conservative who served on the House Judiciary Committee for his entire thirty-two year tenure.[8] A respected voice on legal and judicial matters, Rep. Hyde was serving as chair of the Committee when he offered the Amendment.[9] Rep. Hyde offered the Amendment during debate over the final passage of the appropriations bill, instead of in committee or during earlier debate, which limits the context to explain the Amendment's enactment. The legislative history consists only of the Amendment as originally offered, floor statements by Rep. Hyde and two other representatives, and one sentence from the bill's conference committee.

Unfortunately for those harmed by prosecutorial misconduct, the terms *vexatious*, *frivolous*, and *bad faith* are not defined in the Amendment. With little else to use as guidance, courts often examine the limited legislative history in interpreting the Amendment. Perhaps the best place to begin in understanding its purpose is by turning to Rep. Hyde's statements, delivered on the floor of the House.

Rep. Hyde's statements verify that curbing prosecutorial misconduct motivated him to offer the Amendment. Rep. Hyde stated, "I learned that people in government, exercising government power are human beings, like anybody else, and they are capable of error, they are capable of hubris, they are capable of overreaching, and yes, on very

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6. 143 CONG. REC. H7786-04 (daily ed. Sept 24, 1997).

7. Lawrence J. Welle, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 335 (1999).

8. Adam Clymer, *Henry J. Hyde, A Power in the House of Representatives, Dies at 83*, N.Y. TIMES (Nov. 30, 2007), http://www.nytimes.com/2007/11/30/washington/30hyde.html?_r=0. While this obituary makes reference to a different Hyde Amendment that dealt with federal funding restrictions for abortion, Representative Henry J. Hyde is responsible for both Hyde Amendments.

9. *Id.*

infrequent occasions they are capable of pushing people around."[10] Rep. Hyde recognized that the federal government is not immune from egregious instances of prosecutorial misconduct.

Beyond curbing prosecutorial misconduct, Rep. Hyde was also cognizant of the toll a wrongful prosecution could take on a citizen. Rep. Hyde was moved by the devastating financial and emotional toll protracted criminal investigations had on a few of his congressional colleagues.[11] Recognizing these effects would likely be more pronounced for the average citizen, Rep. Hyde stated that the Amendment was also intended to help "repair the wound, the economic wound."[12]

Rep. Hyde took a pragmatic approach with the Amendment. He stated, "[T]he Constitution protects you, but it will not pay your bills. That Constitution you carry in your pocket, the landlord will not take that and your lawyer will not take that. They want to get paid with cash."[13] Thus, the Hyde Amendment serves two purposes: (1) deterring future instances of prosecutorial misconduct and (2) helping those who have suffered from it to recover monetary losses.[14]

The ability to recoup attorneys' fees from the federal government was not a novel concept. The version of the Hyde Amendment offered on the floor was closely modeled after the Equal Access to Justice Act (EAJA).[15] Enacted in 1980, the EAJA authorizes claims for attorneys' fees from the government in civil cases.[16] The EAJA allows prevailing parties in any civil action, except tort cases, to recover "fees and other expenses" unless the court determines that the

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10. 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

11. For example, one colleague in the House was ultimately acquitted of all charges after enduring an eight-year investigation. Rebecca K. Stewart, *Outing—and Ousting—the "Hidden" Hyde: Toward Repeal and Replacement of the Hyde Amendment*, 64 RUTGERS L. REV. 165, 208–09 (2011).

12. 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

13. *Id.*

14. The Amendment passed with significant bipartisan support, a final vote of 340-84. Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION (March 1998), http://www.nacdl.org/champion/articles/98mar04.htm.

15. *See* 28 U.S.C.A. § 2412 (West 2013) (containing the text of the Equal Access to Justice Act).

16. *Id.*

United States' position in pursuing the action "was substantially justified or that special circumstances make an award unjust."[17]

The text originally offered by Rep. Hyde, which mimicked the EAJA, was not what was ultimately enacted.[18] The bill underwent review by a conference committee, and this added step allowed the DOJ to mount a strong opposition to the Amendment.[19] A memorandum circulated during this time stated the DOJ's stance was that "defending against a criminal prosecution has always been deemed to be one of the costs of American citizenship."[20] Similarly, DOJ officials went on record with concerns that the Hyde Amendment could be used as a tool by defense attorneys to increase litigation, ultimately resulting in taxpayers' money being paid to "America's Most Wanted."[21] The DOJ opposition proved persuasive, and the committee changed the provision's language.[22] The final version of the Hyde Amendment was substantially less advantageous to acquitted defendants than the original version.[23]

A comparison of the EAJA and the codified Hyde Amendment clarifies these changes.[24] Under the EAJA, the government must prove that its position in a civil case was "substantially justified."[25] However, under the Hyde Amendment, prevailing parties in a criminal case must prove that the position of the federal prosecutors was "vexatious, frivolous, or in bad faith."[26] The changed language added a high threshold for recovery, which makes succeeding on a Hyde Amendment claim a difficult task.

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17. *Id.*

18. Welle, *supra* note 7, at 335–36.

19. Welle, *supra* note 7, at 336.

20. Abramowitz & Scher, *supra* note 14 (alterations omitted).

21. *Id.*

22. United States v. Gardner, 23 F. Supp. 2d 1283, 1288 (N.D. Okla. 1998) ("There is little history to explain the transformation of Representative Hyde's original proposed amendment into its present form.").

23. Welle, *supra* note 7.

24. Though now materially different, the EAJA is still relevant to the Hyde Amendment, as the latter incorporates the "procedures and limitations" from the EAJA. 18 U.S.C.A. § 3006A (West 2013).

25. 28 U.S.C.A. § 2412 (West 2013) (EAJA).

26. 18 U.S.C.A. § 3006A (West 2013) (Hyde Amendment).

II. THE ROLE OF PROSECUTORIAL MISCONDUCT IN THE HYDE AMENDMENT

The Department of Justice is responsible for prosecuting all federal crimes. As the Supreme Court has stated, the prosecutor's goal "in a criminal prosecution is not that it shall win a case, but that justice shall be done."[27] A government attorney "may prosecute with earnestness and vigor . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones."[28] Individual prosecutors are given wide discretion in conducting their cases.[29] As a U.S. Attorney General once noted, individual federal prosecutors have "more control over life, liberty, and reputation than any other person in America."[30] As a result, the integrity of each office is dependent on the professionalism of the individual attorneys in that office.[31]

However, "[b]ecause the federal system is run by human beings, it is not immune to excessive zeal, personal ambition or political malice. Unfair or unprofessional prosecutions are the exception, but their number and severity are on the rise."[32] Thus, unfortunately, instances of misconduct by individual federal prosecutors are inevitable.

The Hyde Amendment is an important tool for deterring prosecutorial misconduct because of its ability to pierce the immunity granted to federal attorneys. In *Imbler v. Pachtman*, prosecutors were granted absolute immunity from civil suits for mistakes made while

27. Berger v. United States, 295 U.S. 78, 88 (1935).

28. *Id.*

29. "Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law." Department of Justice Manual: Principles of Federal Prosecution §9-27.000, §9-27.110 Purpose (2013) [hereinafter DOJ Manual].

30. Brief of Former Federal Judges, et al. as Amici Curiae in Support of Petitioner, Shaygan v. United States, 133 S. Ct. 609 (2012) (No. 12-44), 2012 WL 3308215, *4 [hereinafter Former Federal Judges] (quoting Robert Jackson, Attorney General in 1940).

31. DOJ Manual, *supra* note 29, §9-27.001.

32. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIABILITIES 9 (1996).

acting within the scope of their official duties.[33] The Supreme Court recognized that granting immunity would leave the "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative . . . would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[34]

This landmark decision shielded prosecutors from personal liability for any misconduct. The Court specifically noted that the decision was not intended to remove all oversight of federal prosecutors, stating that the decision "does not leave the public powerless to deter misconduct or to punish that which occurs."[35] There are other tools for deterring misconduct, but they are largely ineffective.[36] The Hyde Amendment was intended to fill these existing gaps, and was seen as an important new tool to curb prosecutorial misconduct.[37]

III. HYDE AMENDMENT AND THE COURTS

The courts' initial response to the Hyde Amendment appeared promising; they quickly recognized the Amendment's goal of curbing

33. Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976). In that case, Imbler was convicted of murder, yet Pachtman, the prosecutor, later revealed "newly discovered" evidence that exonerated the defendant. After receiving his release through a federal habeas corpus filing, Imbler filed a civil suit against Pachtman under 18 U.S.C. § 1983, alleging deprivation of constitutional rights and seeking damages. The Court held prosecutors were immune from such suits.

34. *Id.*

35. *Id.*

36. For example, all attorneys are subject to disciplinary action by their state bar association; however, "other tools to address prosecutorial misconduct during the course of the prosecution are largely ineffective." Former Federal Judges, *supra* note 30, at *16 (citing *Imbler*, 424 U.S. at 428).

37. "Also for the first time, the government bears some accountability for abusive prosecution, beyond its own often-criticized internal disciplinary procedures." Robert S. Litt & Evelina J. Norwinski, *Hyde and Seek: Getting the Prosecution to Pay Your Fees in a Criminal Case*, A.B.A. SEC. LITIG, Summer 2001, at 19.

prosecutorial misconduct.[38] As the Eleventh Circuit noted soon after the Amendment's passage, "[e]ven in its earliest form, the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake."[39] And, "[t]he Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of prosecutorial misconduct."[40] Unfortunately, this goal soon became the courts' only focus, at the literal expense of acquitted defendants. While district courts are willing to award fees, the federal circuit courts seem reluctant to reign in prosecutorial misconduct, regardless of its effect on an acquitted defendant. The recent case of Dr. Shaygan shows how the circuit courts have lost sight of the dual goals of the Hyde Amendment and emphasizes why courts should go back to basics in interpreting the Hyde Amendment.

A. Defining the Standards Prior to Shaygan

The Eleventh Circuit's opinion in *Shaygan* reflects fifteen years of confusion as to the standards of the Hyde Amendment. As noted above, in order to prevail, one must demonstrate the government's conduct was vexatious, frivolous, or in bad faith.[41] Yet, because the Hyde Amendment lacks definitions for its three key terms, courts have drawn their own interpretations. This process has led to inconsistency among the circuits.[42] Examining initial definitions of the three terms put forth by the circuits will demonstrate how *Shaygan* distorted the terms far from their original meanings.

After enactment in 1998, federal circuit courts slowly began hearing appeals of Hyde Amendment claims. The cases show that most circuits turned to *Black's Law Dictionary* when interpreting the key

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38. *See* Michael E. Clark, *Nothing to Hyde? The Flood of Wrongful Recovery Suits Has Not Materialized*, 14 CRIM. JUST., Spring 1999, at 12–15 (collecting early cases in which district courts applied the Hyde Amendment). This Note focuses on the federal circuit courts' treatment of the Hyde Amendment.

39. United States v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999).

40. United States v. Skeddle, 45 Fed. Appx. 443, 446 (6th Cir. 2002) (internal quotation marks omitted).

41. *See supra* note 3 and accompanying text (quoting the language of the Hyde Amendment).

42. "Unfortunately, these decisions do not establish a clear, workable definition. Instead, the opinions reiterate the same set of abstract words, as if trying to conjure up a meaningful and definite standard by incantation." Welle, *supra* note 7, at 372.

terms.[43] The Eleventh Circuit took this approach in *Gilbert*, one of the first appellate opinions on the Amendment, and the precedent initially relied upon for definitions in *Shaygan*.[44]

With nowhere else to begin, the Eleventh Circuit in *Gilbert* focused on the plain meaning of the terms and defined all three using *Black's Law Dictionary*.[45] First, *vexatious* was defined as "without reasonable or probable cause or excuse."[46] The court stopped short, however, of the full definition of *vexatious*; the entry in Black's continues with a semicolon and the terms "harassing; annoying."[47] Continuing to look to the legal dictionary, the court defined "frivolous action" as one that is "[g]roundless . . . with little prospect of success."[48]

The court then examined the next term, *bad faith*, which is preceded by the disjunctive *or*. The Eleventh Circuit again referenced the dictionary, determining that *bad faith* "is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will."[49]

Recognizing the differences between its terms is critical to understanding the Hyde Amendment. The dictionary definitions of the terms *vexatious* and *frivolous* instruct courts to focus on the foundation for or the basis of the initial prosecution. While there is similarity between the terms, discussions of the term *bad faith* move in a cognizably different direction. With *bad faith*, the focus is on motivations and intent; the definition specifically references state of mind. This shift is also supported by the plain text of the statute; the term *bad faith* is preceded by the disjunctive *or* in the Hyde Amendment.[50] Recognizing this distinction, evident solely from the

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43. *Gilbert*, 198 F.3d at 1304; *see In re* 1997 Grand Jury, 215 F.3d 430, 436 (4th Cir. 2000) (adopting *Gilbert*'s definitions); *see also* United States v. Knott, 256 F.3d 20, 28–29 (1st Cir. 2001) (same).

44. *Gilbert*, 198 F.3d at 1304.

45. Even this initial inquiry was not straightforward, however, as it took the court two different editions of the dictionary to reach the desired result. *Id.* at 1299 (citing the sixth and seventh editions of Black's Law Dictionary).

46. *Id.* at 1298.

47. *See Knott*, 256 F.3d at 28 (citing the same edition as *Gilbert*, yet including the full definition).

48. *Gilbert*, 198 F.3d at 1299.

49. *Id.*

50. 18 U.S.C.A. § 3006A (West 2013).

definitions of the terms, is important to understanding the courts' errors in creating their own interpretations.

The initial definitions announced by the Eleventh Circuit in *Gilbert* set the standard; they were examined and adopted by other circuits as more Hyde Amendment challenges began to percolate. The majority of circuits adopted the Eleventh Circuit's definition of *bad faith* from *Gilbert*, but other circuits refused to explicitly adopt any specific definition of the three key terms.[51] Although *Black's Law Dictionary* and *Gilbert* were the starting point for many opinions, few of the circuits were fully satisfied with the definitions of all three terms.[52] Many circuits, including the Eleventh Circuit in *Shaygan*, altered and adjusted the definitions.[53] The result is a patchwork of definitions and inconsistent standards across the federal circuits.

In particular, the term *vexatious* has become a legal chameleon, taking its color from different judges in different circuits.[54] The term has proven especially susceptible to competing definitions. A comparison of the definitions adopted by the Ninth and First Circuits, as opposed to the Eleventh Circuit's in *Gilbert*, demonstrates the differing interpretations of *vexatious*.

The Ninth Circuit in *Sherburne* created a two-part test for a finding of vexatiousness.[55] The court acknowledged *Gilbert's* definition, but expanded its research and referred to another entry from *Black's Law Dictionary*.[56] The court cited the definition for "vexatious suit" as a "lawsuit instituted maliciously and without good cause."[57] The court also looked to general dictionary definitions, such as

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51. The Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have adopted a definition for *bad faith*. The First, Second, Seventh, and Eighth Circuits have chosen not to adopt specific definitions of *bad faith*. *See* Stewart, *supra* note 11, at 208–09 (discussing the varying definitions across the circuits).

52. *See, e.g.*, *In re* 1997 Grand Jury, 215 F.3d at 436; *Knott*, 256 F.3d at 28; United States v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001), United States v. True, 250 F.3d 410, 423 (6th Cir. 2001); *Shaygan*, 652 F.3d at 1311–17.

53. *See, e.g.*, *In re* 1997 Grand Jury, 215 F.3d at 436; *Knott*, 256 F.3d at 28; *Sherburne*, 249 F.3d at 1126; *True*, 250 F.3d at 423.

54. Stewart, *supra* note 11, at 208 (noting that the competing definitions of the term *vexatious* alone make it "clear that the statute is not being uniformly applied").

55. *Sherburne*, 249 F.3d at 1126.

56. *Id.*

57. *Id.*

Webster's.[58] The court determined that all the definitions of *vexatious* had two common characteristics: "First, each includes an element of maliciousness, or an intent to harass. Second, each definition contemplates a suit that is objectively deficient."[59] The court considered these as subjective and objective prongs of the term *vexatious*.[60]

Next, the First Circuit in *Knott* charted a middle ground for its definition of *vexatious*.[61] The court took the opportunity to examine the definitions from *Gilbert* and *Sherburne*, but it did not agree completely with either one.[62] The court also began with the dictionary definitions, but used them as bases to develop its own test for vexatious prosecutions.[63] By doing so, the First Circuit held that a vexatious prosecution "requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy."[64] The court attempted to justify this departure from ordinary meaning by claiming this interpretation was most in line with the goal of lessening prosecutorial misconduct without curbing prosecutorial zeal.[65]

These three opinions demonstrate the progression of the Hyde Amendment; they also highlight much of the surrounding confusion. Of the circuits that have chosen to define the terms, all adopted either the *Gilbert*, *Sherburne*, or *Knott* standards for vexatious prosecutions—at least until *Shaygan*. The Eleventh Circuit created new definitions in *Shaygan* which depart even further from the intended purposes of the Hyde Amendment.[66]

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58. *Id.* (citing the definition of *vexatious* in WEBSTER'S THIRD NEW INT'L DICTIONARY 2548 (3d ed. 1961)).

59. *Id.*

60. *Id.* at 1126–27.

61. United States v. Knott, 256 F.3d 20, 29 (1st Cir. 2001).

62. *Id.*

63. *Id.*

64. *Id.*

65. *See id.* (stating that this reading of *vexatious* best comports with Congress's intent to balance protections against prosecutorial misconduct with promoting prosecutorial zeal).

66. United States v. Shaygan, 652 F.3d 1297, 1312 (11th Cir. 2011)

IV. ANALYSIS OF *U.S. V. SHAYGAN*

Shaygan was one of the most recent Hyde Amendment claims to reach a federal circuit court. Although the record shows extensive misconduct on the part of prosecutors, which the district court found sufficient to award fees, the Eleventh Circuit reversed.[67]

The federal criminal investigation of Dr. Shaygan began when a patient died after ingesting a mixture of drugs, including methadone from a prescription written by Dr. Shaygan, and cocaine.[68] An autopsy indicated that the amount of methadone alone ingested by the patient could have been fatal.[69]

After being alerted to the high levels of methadone in the patient, the Drug Enforcement Agency began an investigation of Dr. Shaygan, utilizing two undercover agents.[70] Two DEA agents visited Dr. Shaygan, requesting prescriptions for controlled substances.[71] Each agent was provided with a prescription after no apparent review of their medical records and a "minimal physical evaluation."[72] The record does not indicate how long Dr. Shaygan spoke with each agent. Using just these two instances, Assistant U.S. Attorney Sean Cronin obtained a twenty-three count grand jury indictment.[73]

Three days after the indictment, DEA agents arrested Dr. Shaygan; he was subsequently placed under house arrest.[74] In May 2008, Dr. Shaygan filed a motion to suppress his post-arrest statements.[75] AUSA Cronin repeatedly challenged defense counsel about the merits of this motion.[76]

At a hearing by a magistrate judge on the suppression motion, defense counsel reported that he was informed by Cronin that if Dr. Shaygan continued to pursue the motion and "went after the

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67. *Id.* at 1319.
68. *Id.* at 1302.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. The prosecution was handled by the USAO of the Southern District of Florida. As acknowledged by the government, at this point in the investigation, the agents had not discovered any additional patients. *Id.*
74. *Shaygan*, 652 F.3d at 1302, 1325 n.15.
75. *Id.* at 1302.
76. *Id.*

government's witnesses . . . there would be a seismic shift in the way [Cronin] would prosecute the case."[77] Defense counsel also reported Cronin threatened that if "Dr. Shaygan were to litigate these issues, there was going to be no more plea discussions."[78] The magistrate found credible evidence that Dr. Shaygan had been improperly denied his right to an attorney, and granted the motion to suppress, which the district court later affirmed.[79]

Following this contentious hearing, Cronin filed a superseding indictment in September 2008. It included 118 new counts, bringing the total to 141.[80] The district court later questioned the timing and necessity of this dramatic increase, noting, "patients that were included in the Superseding Indictment were known to the Government long before the motion to suppress was litigated, yet no Superseding Indictment was sought at an earlier time."[81]

The DEA continued their investigation by conducting interviews with Dr. Shaygan's patients. Based on a single conversation with a former patient,[82] Cronin decided to pursue an investigation into witness tampering by defense counsel. In authorizing and pursuing the collateral investigation, the prosecutor made a tactical error. The U.S. Attorney General's internal policy requires approval from the district's United States Attorney prior to investigating actively engaged defense counsel. Cronin never sought or received this approval, and yet proceeded with the collateral investigation.

The DEA also identified two former patients who agreed to work with the prosecution. The government had these two former patients facilitate their witness tampering investigation by secretly recording phone calls with the defense team. By trial, Cronin knew which former patients were participating in the collateral investigation, and that at least one call with the defense team had been recorded.

The week before Dr. Shaygan's trial, the district court held a status conference and directed the prosecution to present all DEA reports to the court. The court needed to determine if there was any

77. *Id.* at 1303.
78. *Id.*
79. *Id.*
80. *Id.*
81. United States v. Shaygan, 661 F. Supp. 2d 1289, 1298 (S.D. Fla. 2009).
82. The patient had called a defense investigator to complain that the DEA had put a "negative spin" on her statements, and also expressed reluctance to testify after she was subpoenaed as a government witness.

exculpatory material, required to be released to the defense team under *Brady v. Maryland*.[83] Cronin filed the reports two days later, but failed to include any material pertaining to the collateral investigation.[84] He also did not inform the district court that this investigation had occurred.

At trial in February 2009, the prosecution called one of the participants in the collateral investigation.[85] During cross-examination two days into trial, the witness denied an allegation by defense counsel and stated, "I got it on recording at my house."[86] This was the first indication to defense counsel and the court that a collateral investigation had taken place, months after it occurred. The court considered this a violation of *Brady*.[87] Ultimately, Dr. Shaygan was acquitted on all 141 counts.[88]

After the verdict, the trial judge suggested the defense could file for sanctions.[89] Remarkably, the government admitted errors in its handling of the case.[90] The government offered to pay the portion of Dr. Shaygan's attorneys' fees and costs that were associated with the collateral investigation.[91]

On the Hyde Amendment claim, the district court ultimately concluded that:

> the *position* taken by Cronin in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure

83. 373 U.S. 83, 86 (1963).

84. *Shaygan*, 652 F.3d at 1305.

85. *Id.*

86. *Id.* at 1307.

87. Though the district court chose not to declare a mistrial, the judge did issue a special jury instruction, which explained that "[the court] concluded that the United States has acted improperly in not turning over the necessary discovery materials and also by allowing recordings to occur in the first place." *Id.* at 1308.

88. *Id.*

89. "The [trial] court stated that it would 'hear alternative requests for sanctions,' including whether a sanction in the form of attorneys' fees and costs should be awarded under the Hyde Amendment." *Shaygan*, 652 F.3d at 1308.

90. *Id.* at 1309. The Eleventh Circuit specifically noted this admission in its opinion. *Id.*

91. *Id.*

> evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the Defendant, constitute bad faith. These were conscious and deliberate wrongs that arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held.[92]

The district court thus found the prosecution engaged in misconduct throughout the case and awarded Dr. Shaygan his attorneys' fees.[93] Notably, this was exactly the kind of prosecutorial misconduct Rep. Hyde had in mind when offering his Amendment. During the floor debate he stated:

> What if Uncle Sam sues you, charges you with a criminal violation . . . [and] they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. . . . They can do anything.[94]

Shaygan seemed like an easy case for the Eleventh Circuit to use to revive the Hyde Amendment, as the facts show multiple incidents of misconduct by the prosecutor. Yet the Eleventh Circuit overturned the award, further complicating judicial interpretation of the Hyde Amendment.

A. The Definitions in Shaygan

In *Shaygan*, the Eleventh Circuit dramatically altered the standards of the Hyde Amendment by contorting the definitions of its

92. *Shaygan*, 661 F. Supp. 2d at 1321 (emphasis added).

93. *Id.* at 1321–22 .

94. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

terms and eliminating consideration of the prosecutor's intent in examining the bad faith standard.[95]

First, the court created a new definition of *bad faith*. Without clarifying why the widely adopted definition from *Gilbert* was insufficient, the court announced, "[b]ad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim."[96] This new standard relies on another key term, *frivolous*, to define *bad faith*. But as discussed above, each term has a different focus.[97] Based on this new definition, any claim of bad faith now requires an objective showing that underlying prosecution was pursued frivolously.

Further, the new definition of *bad faith* severely restricts considerations of prosecutors' motives or intent. The court added, "a finding of bad faith under the Hyde Amendment cannot rest on evidence of displeasure or subjective ill-will alone."[98] By changing the definition of *bad faith*, the Eleventh Circuit dramatically alters how Hyde Amendment claims can be proven.

This new definition dramatically alters *Gilbert* and increases the confusion as to the proper interpretation of the Hyde Amendment. In *Gilbert*, just twelve years before, the Eleventh Circuit had defined *bad faith* based on the dictionary definition, with specific reference to "state of mind."[99] There was no mention of the grounds for the claim, much less a need to prove them objectively, in this original definition. The *Gilbert* decision is one of the seminal opinions on the Hyde Amendment, and has been cited by every federal circuit court.[100] The

95. The Eleventh Circuit justified its new interpretation by noting the district court "failed to understand the narrow scope of the Hyde Amendment." *Shaygan*, 652 F.3d at 1311.

96. *Id.* at 1312 (citing Peer v. Lewis, 606 F.3d 1306, 1314 (11th Cir. 2010)).

97. *Supra* Part III.A.

98. *Shaygan*, 652 F.3d at 1313.

99. *Gilbert*, 198 F.3d at 1299.

100. United States v. Knott, 256 F.3d 20, 28 (1st Cir. 2001); United States v. Schneider, 395 F.3d 78, 85 (2d Cir. 2005); United States v. Manzo, 712 F.3d 805, 809 (3d Cir. 2013); *In re* 1997 Grand Jury, 215 F.3d 430, 436 (4th Cir. 2000); United States v. Truesdale, 211 F.3d 898, 907 (5th Cir. 2000); United States v. Heavrin, 330 F.3d 723, 728 (6th Cir. 2003); United States v. Lawrence, 217 Fed. App'x. 553, 554 (7th Cir. 2007); United States v. Monson, 636 F.3d 435, 439 (8th Cir. 2011); United States v. Manchester Farming P'ship, 315 F.3d 1176, 1185 (9th Cir. 2003); United States v. Lain, 640 F.3d 1134, 1137 (10th Cir. 2011); United States v. Wade, 255 F.3d 833, 837 (D.C. Cir. 2001).

Gilbert definition of *bad faith* was the only definition that had been explicitly adopted and used by the federal circuits. Thus, changing the definitions used in *Gilbert* undermines this extensive reliance.

The new definition of *bad faith* in *Shaygan* is not a mere difference in semantics; it is a major departure from *Gilbert.* The longstanding prior definition held that the term *bad faith* meant "conscious doing of a wrong" or a prosecution motivated by "ill-will."[101] This indicated that a finding of bad faith could rest on a prosecutor's subjective intent alone. *Gilbert* also plainly rejected any connection of bad faith to the merits of the underlying prosecution. Specifically, *Gilbert* referred to a Supreme Court opinion discussing an award of attorneys' fees, which defined a vexatious prosecution as "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[102] Unlike the *Gilbert* definition, now under *Shaygan* the prosecution must be deemed objectively unreasonable *before* any consideration of subjective motivations may be taken into account.[103] This directly conflicts with *Gilbert.*

Not only did the Eleventh Circuit alter its own precedent, it also further conflicts with other circuits' interpretations. The citations following the new definition in *Shaygan* refer to the opinions of the First Circuit in *Knott* and the Ninth Circuit in *Sherburne*, but for those circuits' definitions of *vexatious,* not *bad faith.*[104] Yet neither the First nor Ninth Circuit imposes an objective requirement for a determination of *bad faith*, as the Eleventh Circuit does in *Shaygan.*[105]

The Eleventh Circuit's new definition of *bad faith* in *Shaygan* also violates the Supreme Court's principles of statutory construction. The Supreme Court has held that "[i]t is a cardinal principle of statutory

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101. *Gilbert*, 198 F.3d at 1299.

102. *Id.* (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)).

103. "The starting point for a potential award of attorneys' fees and costs under the Hyde Amendment is an objectively wrongful prosecution." *Shaygan*, 652 F.3d at 1317.

104. *Id.* at 1312.

105. Neither *Knott* nor *Sherburne* specifically define *bad faith*, but *Knott* is the only First Circuit opinion on Hyde. The Ninth Circuit later adopted the original *Gilbert* definition of *bad faith*. "*Gilbert*'s definition is in line with our previous application of the doctrine; therefore, we adopt the Eleventh Circuit's definition of bad faith." United States v. Manchester Farming P'ship, 315 F.3d 1176, 1185 (9th Cir. 2003).

construction that a statute" should be interpreted such that "no clause, sentence, or word shall be superfluous, void, or insignificant."[106] The Supreme Court considers it a court's "*duty* to give effect, if possible, to every clause and word of a statute."[107] Applying these principles to the Hyde Amendment shows it is intended to provide three *separate* grounds for a claim, based on the statute's use of the word "or."[108] By defining *bad faith* using the term *frivolous*, the Eleventh Circuit violated these principles and undermined *bad faith* as an independent ground for relief under the Hyde Amendment.

The dissent in *Shaygan* identifies this error, but the majority's response only adds confusion. The court's opinion states: "We have explained that a prosecution brought in bad faith is one where wrongful motives are joined to a prosecution that is either baseless or exceeds constitutional restraints; a bad faith prosecution is not necessarily vexatious or frivolous."[109] But just a few lines before, the court defined *bad faith* as "pursing a frivolous claim."[110] Also as the dissent clarifies, a synonym for *baseless* is *groundless*, which is the majority's definition of *frivolous*.[111] The court refuses to admit that the definition of bad faith is being altered, instead offering a circular explanation of its new requirements.

The Eleventh Circuit in *Shaygan* dramatically alters the way a Hyde Amendment claim can be proven by replacing the widely adopted definition of *bad faith* from *Gilbert* with a circular new standard.

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106. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotation marks omitted). The Eleventh Circuit has previously applied this principal. *See, e.g.*, Pugliese v. Pukka Dev., Inc., 550 F.3d 1299, 1303 (11th Cir. 2008); Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1360 (11th Cir. 2008).

107. United States v. Menasche, 348 U.S. 528, 538–39 (1955) (emphasis added).

108. United States v. Isaiah, 434 F.3d 513, 519 (6th Cir. 2006) ("The defendant bears the burden of meeting any one of the three grounds under the statute."); *see also United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) ("Through its use of disjunctive language, the statute establishes three separate grounds upon which attorneys' fees may be awarded: for conduct that is vexatious, frivolous, or in bad faith.").

109. *Shaygan*, 652 F.3d at 1316.

110. *Id.*

111. *Id.* at 1320. (Edmondson, J., dissenting).

1. The New "Bad Faith" Requirement and a Prosecutor's Intent

The Eleventh Circuit's new definition of *bad faith* significantly limits the ability to recover under the Hyde Amendment by severely restricting a court's inquiry into the prosecutor's motives and intent. The Eleventh Circuit is alone in holding that subjective ill-will is not sufficient to support a finding of bad faith.[112] While not all circuits have explored the role of subjective motivations,[113] those circuits that have adopted a definition of *bad faith* use the *Gilbert* version.[114] As noted, this definition plainly contemplates considerations of an individual's subjective motivations.[115]

How to take into account the mental attitudes of prosecutors is the most significant source of confusion surrounding the Hyde Amendment.[116] As has been shown, the difficulty of this inquiry split the circuits over how to define a vexatious prosecution.[117] Because the Eleventh Circuit has been established as an authority on interpreting the Hyde Amendment,[118] the court's new holding that ill-will is insufficient for a finding of *bad faith* is likely to influence courts in the future. The continued uncertainty over how to consider a prosecutor's motive and intent shows the necessity of Supreme Court intervention.

As a goal of the Hyde Amendment is to punish past misconduct, many advocate for an explicit subjective bad faith standard.[119] Rep. Hyde also seemed to support a subjective bad faith standard, as he explained the Amendment was intended to apply to prosecutions that

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112. The Eleventh Circuit offers no citations in support of this rule. There is also no authority for the new rule in Brief on Behalf of the United States in Opposition, Shaygan v. United States, 133 S. Ct. 609 (2012) (No. 12-44), 2012 WL 6947822.

113. United States v. Knott, 256 F.3d 20, 31 n.7 (1st Cir. 2001) ("We do not address whether the 'bad faith' test requires a subjective inquiry"); *see also* Stewart, *supra* note 11, at 208–09, (discussing the circuits that have examined the *bad faith* standard).

114. Stewart, *supra* note 11, at 208–09 n.44.

115. United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999).

116. *See* Stewart, *supra* note 11, at 207 n.232 (noting this confusion).

117. *Id.* at 208–09.

118. As noted, *Gilbert* was one of the first Hyde Amendment claims heard by a federal circuit court, and it has been cited by every federal circuit. *See supra* note 100 (listing federal circuit cases citing *Gilbert*).

119. *See* Welle, *supra* note 7, at 335.

are "malicious" or "willfully wrong."[120] The bad faith prong is the most appropriate to use to accomplish this objective. As the Amici Curiae of Former Judges noted, "[i]f anything, a finding of subjective bad faith makes sanctions *more* appropriate, for in such cases prosecutors have not merely overreached; they have manifestly abused their position of power and trust."[121]

Regardless of whether it is called a subjective or objective test, a court's task should be to examine whether improper motives or ill-will so tainted the prosecution that it may be deemed to have been in bad faith. In *Shaygan*, the Eleventh Circuit failed to accomplish this task, and the Supreme Court should have granted certiorari to remedy this error.

B. Mischaracterization of the "Position" Requirement

The next critical error in the Eleventh Circuit's interpretation of the Hyde Amendment was its mischaracterization of the "position" requirement. The court draws a temporal line that is not supported by the text or purposes of the Amendment. This line, when joined with the court's contorted interpretation of *bad faith*, "collapses the Hyde Amendment inquiry into only a single question: were the charges against the defendant baseless?"[122]

The court further undermines its own precedent in *Gilbert* by creating a new temporal rule to impose on the position requirement. The court initially repeats the standard from *Gilbert*, noting that the prevailing party must establish that the "legal position of the United States amounts to prosecutorial misconduct."[123] But from here, the opinion goes off course. Specifically, the court announces that because "the charges against Shaygan were not objectively *filed* in bad faith," then the position of the government could not be in bad faith.[124] This is the court's invented temporal rule: if the charges at the time they are filed are not vexatious, frivolous, or in bad faith, then there can be no recovery under the Hyde Amendment.

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120. 143 CONG. REC. H7786-04 (1997) (statement of Rep. Hyde).

121. Former Federal Judges, *supra* note 30, at *6.

122. United States v. Shaygan, 676 F.3d 1237, 1250 (11th Cir. 2012) (Martin, J., dissenting to denial of rehearing en banc).

123. United States v. Shaygan, 652 F.3d 1297, 1310 (11th Cir. 2011).

124. *Id.* at 1313 (emphasis added).

Next, the court misses an important basis for the district court's finding. The court rejects the district court's characterization of "position," even though it relied on Supreme Court precedent to support that determination.[125] The Supreme Court opinion explicitly states, "[i]t is clear, however, that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the *conduct of the litigation*."[126] The court dismisses this standard solely because it was not elucidated in a Hyde Amendment case.[127]

Further, the court's interpretation of the position requirement is not compatible with how the federal prosecutorial system operates. The court announced that, "we read [the] phrase—'position of the United States'—to refer to the legal position of the government, not the mental attitude of its prosecutor."[128] Yet as noted, discretion in criminal cases belongs to the individual prosecutor.[129] Here, the district court's discussion of misconduct focused on acts and choices of AUSA Cronin.[130] The primary representative for the government throughout Dr. Shaygan's case was the individual prosecutor, AUSA Cronin. Any consideration of the position of the United States, in a system bestowing such discretion to a prosecutor, must focus on that individual.

The court attempts to disguise its new temporal rule by equating it to standards in other circuits. The court cites the Sixth Circuit's opinion in *Heavrin* for its discussion of the position requirement.[131] The *Shaygan* opinion explains:

> The Sixth Circuit reasoned that "a count-by-count analysis" was inconsistent with the Hyde Amendment because its plain language refers to the "position" of the United States in the singular . . . . "[W]hen assessing [a Hyde Amendment claim] the district court should make

125. United States v. Shaygan, 661 F. Supp. 2d 1289, 1321 (S.D. Fla. 2009).

126. *Id.* (citing Hall v. Cole, 412 U.S. 1, 15 (1973) (emphasis added)).

127. *Shaygan*, 652 F.3d at 1317.

128. *Id.*

129. *Supra* Part II.

130. It was also possible that Cronin's supervisor might not have been consulted had the prosecutors not discussed Dr. Shaygan's case at an afterhours social event. *Shaygan*, 661 F. Supp. 2d at 1315.

131. *Shaygan*, 652 F.3d at 1316.

> only one finding, which should be based on the case as an inclusive whole."[132]

But the Sixth Circuit's opinion weighs against the new temporal rule. The Sixth Circuit advocates a full examination of the *entire* prosecution, which is inconsistent with the new *Shaygan* standard that says the position of the prosecution can only be determined at the time of filing. Assessing the case as a whole would mean considering the actions of the prosecutors throughout the investigation and trial, rather than just the counts of the initial indictment.

The legislative history of the Hyde Amendment also contradicts the new temporal rule.[133] The court missed a critical quote from the bill's conference committee,[134] the body ultimately responsible for the final version of the Amendment. The conference committee elucidated a clear rule: "The conferees understand that a grand jury finding of probable cause to support an indictment does *not* preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith."[135] The conference committee specifically rejected the idea that the position of the government may only be assessed at the time an indictment is filed.

1. The Result of the New Position Requirement

The Eleventh Circuit was given a chance to clarify its initial decision in *Shaygan* after it denied a rehearing en banc.[136] As to the position requirement, the majority noted that "Congress expected a court to assess the overall prosecution of a defendant and not base an award of fees only on discrete actions that took place during that prosecution."[137] The court explained further that the position requirement only "referred to instances where an entire prosecution is

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132. *Id.* (quoting United States v. Heavrin, 330 F.3d 723, 730 (6th Cir. 2003)).

133. The Eleventh Circuit examined the legislative history extensively in *United States v. Gilbert*, 198 F.3d 1293, 1299–303 (11th Cir. 1999).

134. Welle, *supra* note 7, at 335.

135. Stewart, *supra* note 11, at 178.

136. Though normally issued without opinion, justices chose to write a dissent, motivating the majority to respond. United States v. Shaygan, 676 F.3d 1237, 1237 (11th Cir. 2012).

137. *Id.* at 1239.

wrong, not instances where a prosecutor commits *only* a discovery violation or *only* dislikes a defendant."[138]

However, in *Shaygan,* both of these types of errors were demonstrated, along with many more. And though it is conceded the original indictment had at least a minimal basis in fact, there still remains a laundry list of problems that the court deems insufficient to constitute bad faith. As summarized by the Amici Curiae of Former Judges,

> When, as here, an acquitted defendant demonstrates to a district court's satisfaction that prosecutors acted in bad faith – including by stacking 118 additional counts into a superseding indictment for the purpose of prolonging petitioner's trial and period of house arrest, by conducting a covert collateral investigation for the purpose of disqualifying petitioner's attorneys on the eve of trial, and by refusing to turn over materials expressly covered by a court order – there is no reason to withhold sanctions.[139]

The court's refusal to find that the position of the United States was in bad faith, given this compelling set of facts, begs the question: if this is not enough to prevail under the Hyde Amendment, then what is?

C. *The Lack of Deference by Circuit Courts*

Another critical error the Eleventh Circuit made in *Shaygan* was not accurately applying the abuse of discretion standard of review. In holding that Dr. Shaygan was not entitled to the award of attorneys' fees, the Eleventh Circuit determined that the district court—the same judge who presided over discovery hearings, the trial, and the subsequent Hyde claim—abused his discretion. This finding by the Eleventh Circuit did not give the appropriate amount of deference to the decision below, and is a usurpation of the authority of the district court.

Abuse of discretion is the accepted standard of review for Hyde Amendment claims. As the Third Circuit noted, "all of the Courts of

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138. *Id.* at 1244 (emphasis added).

139. Former Federal Judges, *supra* note 30, at *20.

Appeals that have considered the issue have concluded that review is for abuse of discretion."[140] This standard applies to a district court's decision to grant fees under the Hyde Amendment, or to its denial of them.[141]

In *Gilbert*, the Eleventh Circuit adopted this standard of review, and explained its operation: "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award [or a denial] upon findings of fact that are clearly erroneous."[142]

In *Shaygan*, the Eleventh Circuit found the district judge abused his discretion, but did so by applying a rule the court created in its opinion.[143] The district court had determined that the filing of the superseding indictment, the pursuit of an improper collateral investigation, and the *Brady* violations all supported a finding of bad faith. Yet these findings did not comport with the Eleventh Circuit's new temporal rule, requiring bad faith from the outset of the prosecution. Thus the Eleventh Circuit reprimanded the district court for violating a rule that it could not have known existed—because the rule had not yet been articulated by that circuit, or any other one, and is not supported by the language of the Hyde Amendment.

Further, the court does not give sufficient consideration to the district court's extensive, detailed findings explaining the Hyde Amendment award. For example, the district court made specific, minute-by-minute references to the trial transcript in support of its conclusions.[144] The district court's opinion shows it did not base its award of fees on only one petty instance of misconduct, nor did the

140. United States v. Manzo, 712 F.3d 805, 809 (3d Cir. 2013) (including a citation of all the circuits which have applied the abuse of discretion standard).

141. *See, e.g.*, United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999) ("Accordingly, we will review a district court's denial of Hyde Amendment fees and costs only for an abuse of discretion.").

142. *Id.* (quoting ACLU of Ga. v. Barnes, 168 F.3d 423, 427 (11th Cir. 1999)).

143. "The district court abused its discretion when it imposed sanctions against the United States for a prosecution that was objectively reasonable." United States v. Shaygan, 652 F.3d 1297, 1301 (11th Cir. 2011).

144. For example, the district court noted: "[N]or would such disclosure have been likely if Clendening did not 'blurt out' something about a recording. [Tr. Mar. 17, 117:4–11]," United States v. Shaygan, 661 F. Supp. 2d 1289, 1310 (S.D. Fla. 2009) (emphasis omitted). Similar references to the record can be found throughout the opinion.

district court award fees based on subjective intent or discovery violations alone.[145] Rather, the district court found "substantial abuses" by the prosecutor.[146] When a thorough review of the case reveals the many errors made during the prosecution, it is hard to see how the district court can be deemed to have abused its discretion.

Refusing to accurately apply the standard of review not only diminishes an important tool in curbing prosecutorial misconduct, it also nullifies a tool for judges in controlling their courtrooms. As noted by the Amici Curiae of Former Judges, "[C]ontrol is substantially eroded if prosecutors are authorized to act in bad faith to disregard explicit orders by the court and fail to provide the court with information necessary to the proper functioning of a trial."[147] In this case, not only did the prosecutor keep evidence from defense counsel, he also hid it from the presiding judge. As the Amici Curiae noted, these are the instances when an award of fees is most needed: "[B]ecause we understand the real risk of tyranny inherent in prosecutorial discretion, and we understand the need to deter future violations. Permitting sanctions when prosecutors act in bad faith is not only consistent with this greater vision of justice, but essential to it."[148] In instances like *Shaygan*, judges should be able to grant Hyde Amendment awards to reinforce their authority in the courtroom, and also to ensure that prosecutors are pursuing justice rather than merely a conviction.

V. CONCLUSION

By compounding the existing confusion over the Hyde Amendment in the strikingly fractured federal circuit courts, *U.S. v. Shaygan* could signal the death of the Hyde Amendment. Though the Hyde Amendment can be revived, it will require a return to the original dictionary definitions embraced in *Gilbert* and guidance from the Supreme Court.

The Eleventh Circuit did not adequately explain why the widely adopted definitions in *Gilbert* were no longer sufficient. The *Gilbert*

145. *See id.* at 1289.
146. *Id.* at 1292.
147. Former Federal Judges, *supra* note 30, at *13.
148. *Id,* at *11.

definitions were derived from an authoritative legal source, and they supported the dual purposes of the Hyde Amendment. The Supreme Court should instruct the circuits to return to the original dictionary definitions because they accurately reflect the goals of the Amendment and would promote consistency throughout the courts.

In going back to basics with the Hyde Amendment, courts should also consider the second purpose of the Amendment: to help acquitted parties begin to heal from the torment of a tainted prosecution. The opening lines of the Eleventh Circuit's opinion in *Shaygan* state: "The stakes in this appeal are high: they involve the sovereign immunity of the United States, the constitutional separation of powers, and the civil rights and professional reputations of two federal prosecutors."[149] Regrettably, the passage shows no concern for, or even mention of, the plight of the acquitted party; a party whose rights were not respected and who has suffered through a failed prosecution to reach this appeal.

If Rep. Hyde had only concerned himself with changing the means for deterring prosecutorial misconduct, he would not have been so emphatic about the effects on the acquitted party's checkbook.[150] Yet the circuit courts rarely seem to show concern for *this* portion of the legislative history, though the inquiry is incomplete without it.

Suggesting that the problems with the Hyde Amendment are solely the fault of Congress is misguided; the chaos surrounding the interpretation of the Hyde Amendment is court created. While Congress could have added definitions or given more guidance, there is enough substance in the Hyde Amendment as enacted that debate over its meaning should not be ongoing fifteen years after its passage.

The Supreme Court missed a critical opportunity in *U.S. v. Shaygan* to correct the problems with the Hyde Amendment and ensure that this vital tool for deterring prosecutorial misconduct and restoring acquitted defendants is accomplishing its goals. With guidance from the Supreme Court demanding that the circuit courts go back to basics with the text, the Hyde Amendment can be revived to fulfill its important goals.

149. *United Sttes v. Shaygan*, 652 F.3d 1297, 1301 (11th Cir. 2011).
150. 143 CONG. REC. H7786-04 (1997).

Unenforceable Copyrights: The Plight of the Music Industry in a P2P File-Sharing World

Brionna N. Ned*

I. INTRODUCTION

The advent of the Internet and digital music allowed for the reproduction and distribution of music without any loss in quality. The creation of peer-to-peer (P2P) software facilitated free sharing of digital music on the Internet. Consequently, the Internet and the rise of digital music threaten to turn music into a public good.[1]

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1. Sanjay Goel et al., *The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry*, 52 CAL. MGMT. REV., no. 4, 2010, at 6, 9 (2010), *available at* http://www.jjpro.net/wp-content/uploads/2013/02/ImpactofIllegalP2P.pdf.

Today, the consumption of music online by one person does not reduce the availability of that same music to others.[2] In addition, it is difficult—if not impossible—to prevent anyone from consuming music on the Internet free of charge.[3] Though actual losses in terms of revenue from music sales have been difficult to quantify, the steady decline in music sales has coincided with a sharp increase in P2P file sharing.[4]

In an effort to curb this threat, the music industry, led by the Recording Industry Association of America (RIAA), launched a full-scale litigation campaign against both P2P providers and individual file sharers. Yet, in a little more than a decade, the music industry has failed to make any real progress in its attempt to stop illegal file sharing. Early successes against the creators of P2P file-sharing programs in the *Napster* and *Grotsker* cases did little to halt or even slow the creation of additional P2P providers.[5] Similarly, the RIAA's relentless campaign to hold individual users of P2P programs liable for infringement has failed to serve as an adequate deterrent to illegal file sharing.[6]

Newer strategies that involve bringing mass lawsuits through joinder and reverse class actions will do little to solve the problem. In theory, these actions allow the copyright owner to bring suit against many defendants at one time and thereby achieve greater judicial efficiency. However, in practice, plaintiffs face a number of procedural problems, including identification of infringers,

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2. *Id.*

3. *Id.*

4. *Id.* at 6–7.

5. *See* A&M Records, Inc. v. Napster, Inc., 239 F. Supp. 3d 1004, 1029 (9th Cir. 2001) (holding Napster liable for contributory infringement); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 948 (2005) (holding Grotsker and StreamCast liable on a theory of active inducement).

6. *See* Capital Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1048 (D. Minn. 2010) (finding the individual defendant liable for $1.5 million in statutory damages from illegal file sharing activities); Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 89 (D. Mass. 2010) (upholding liability of the individual plaintiff for infringement, but reducing damages from $675,000 to $67,500); REBECCA GIBLIN, CODE WARS: 10 YYEARS OF P2P SOFTWARE LITIGATION 2–3 (2011) (pointing out that illegal file sharing actually increased despite the music industry's ability to obtain settlements and statutory damages from individual defendants).

jurisdictional issues, and requirements for joinder and class actions.[7] Additionally, mass lawsuits and litigation against individuals generally have and will continue to result in high reputational costs for the music industry. Finally, even in cases where copyright owners successfully maintain a joinder suit or a class action against alleged infringers,[8] the likelihood that the suit will actually deter illegal file sharing by users other than those that are party to the suit is slim. The reality is that there are millions of infringers throughout the world spanning a multitude of jurisdictions.[9] Therefore, a lawsuit against hundreds—or even thousands—of infringers is unlikely to have a strong impact on online infringement.

This Note traces the music industry's litigation campaign, led by the RIAA against P2P providers and individual users, to end illegal file sharing. In doing so, this Note illustrates the inability of copyright litigation to properly enforce infringement on the Internet. Because it is practically impossible to deter illegal downloading, the music industry must now focus on ways to monetize online music consumption. Widespread Internet access, file sharing, and social media have changed the ways in which people discover and enjoy music. To reclaim a market share of its reproduction and distribution rights, the music industry must consider increased licensing to online music providers. Using the American Society of Composers, Authors & Publishers (ASCAP) and Broadcast Music, Inc. (BMI) as examples, this Note calls for the creation of a similar collective action entity to negotiate blanket licenses with Internet Service

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7. *See* 17 U.S.C. § 512(h) (2006) (allowing content owners to subpoena IP providers for identification of an alleged infringer); FED. R. CIV. P. 12(b)(2) (stating that lack of personal jurisdiction is a defense to any claim for relief); FED. R. CIV. P. 20, 23 (requiring a question of law or fact common to all defendants).

8. *See, e.g.*, Openmind Solutions, Inc. v. Does 1-39, No. C 11-3311 MEJ, 2011 WL 4715200, at *8 (N.D. Cal. Oct. 7, 2011) (allowing joinder of alleged infringers); Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 345 (D.D.C. 2011) (allowing permissive joinder where plaintiff would not be able to continue suits to protect its copyright if forced to proceed against each defendant individually); Liberty Media Holdings, LLC v. Does 1-62, No. 11-cv-575-MMA, 2012 WL 628309, at *7 (allowing permissive joinder based on the current point in the proceedings, but acknowledging that "joinder may prove inappropriate at a later stage in the litigation" if it is "impractical or will cause unnecessary delay").

9. Goel et al., *supra* note 1, at 8.

Providers (ISPs) for online file sharing. Blanket licenses would help the music industry recapture some of the music sales market by guaranteeing royalty payments for online downloads.

Part I discusses the music industry's lawsuits against P2P companies, beginning with *Napster* and ending with *Grotsker* and its aftermath. This section focuses on why traditional practices of suing gatekeepers on theories of secondary or indirect liability proved unsuccessful in the context of P2P file sharing.

Part II focuses on litigation against individual file sharers by both copyright owners and copyright trolls.[10] Though this strategy generated a number of favorable settlements and trial outcomes, it failed to deter file sharing as a whole because the litigation only reached a small percentage of users. Thus, many users continued to engage in illegal file sharing without fear of legal action.

Part III discusses newer mass litigation strategies employed by both the music and film industries. These strategies, though more cost effective than suing individuals, often involve jurisdictional and other procedural issues related to joining multiple parties in one suit.[11] Furthermore, plaintiffs in these cases must subpoena ISPs to obtain the identities of the Doe defendants.[12] Even though mass litigation allows copyright owners to sue hundreds, or even thousands, of individuals at one time, it is not an effective deterrent to illegal file sharing. The individuals sued in these cases represent a small percentage of online file sharers. Therefore, the impact of the litigation is not large enough to make a substantial difference in illegal file-sharing activity.

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10. For an introduction to copyright trolling, see Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013) ("A copyright troll refers to an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest. Much like a patent troll, a copyright troll is generally a nonperforming entity, in the sense that it is not a creator, distributor, or indeed user of creative expression.") (citing Jeremiah Chan & Matthew Fawcett, *Footsteps of the Patent Troll*, 10 INTELL. PROP. L. BULL. 1, 1 (2005)).

11. *See* FED. R. CIV. P. 12(b)(2) (stating that lack of personal jurisdiction is a defense to any claim for relief); FED. R. CIV. P. 20, 23 (requiring a question of law or fact common to all defendants).

12. *See* 17 U.S.C. § 512(h) (allowing content owners to subpoena ISP providers for identification of alleged infringers).

Part IV details recent developments in the music industry's licensing and copyright enforcement efforts. It also seeks to understand how technology has changed the music industry's business model. Most importantly, this section suggests how the music industry should respond to these changing conditions. It proposes the creation of a private collective-action entity to negotiate blanket licenses with ISPs. This proposal includes a discussion of the advantages of licensing with ISPs as opposed to P2P providers. First, ISPs have a statutory obligation to cooperate with copyright owners to police the distribution of infringing material on the Internet.[13] Second, ISPs have a special incentive to enter into licensing agreements with the music industry because they face potential liability for failure to assist in policing online infringement under the Digital Millennium Copyright Act (DMCA).[14]

II. LITIGATION AGAINST P2P PROVIDERS

Traditionally, copyright owners sought to hold gatekeepers, or third parties who in some way enabled direct infringement by others, liable when the gatekeepers had the right and ability to control the direct infringement.[15] The music industry was successful in expanding theories of indirect liability applicable to gatekeepers to hold P2P file sharing providers liable.[16] However, the music industry failed to understand the nature of computer programming and the ease with which source code could be altered to create P2P software that fell outside the purview of the law. As a result, the music industry's efforts to curb online file sharing by suing P2P providers proved futile.

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13. *See* 17 U.S.C. § 512 (detailing the duties of ISPs to remove infringing materials upon notice in a timely manner as well as requiring ISPs to provide copyright owners with the identity of alleged infringers).

14. *Id.*

15. Wan Ke Steven, *Monopolistic Gatekeepers' Vicarious Liability for Copyright Infringement*, 23 REGENT U. L. REV. 65, 67 (2011).

16. *See* Sony Corp. of Am. v. Universal Studios, 464 U.S. 417, 435 (1984) (stating that third parties can be liable on a theory of contributory infringement and adopting the staple article of commerce doctrine from patent law); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 942 (2005) (adopting the active inducement theory from patent law to hold defendants liable).

A. Secondary Liability Prior to P2P Litigation

Prior to the *Napster* case, the Supreme Court decided *Sony Corporation of America v. Universal Studios, Inc.*[17] In *Sony*, the Court held that third parties could be liable for the direct infringement of others if the party had "constructive knowledge of the fact that their customers [used] that equipment to make unauthorized copies of copyrighted material."[18] The Court also adopted the staple article of commerce doctrine from patent law for use in copyright law.[19] Now known as the "Sony safe harbor," the doctrine states that contributory liability does not apply to situations in which the product or service is capable of substantial non-infringing uses.[20]

B. Napster, Grotsker, and Doctrines of Secondary Liability

Relying on *Sony*, the music industry succeeded on a theory of contributory liability in its first major case against P2P software providers. Although the Ninth Circuit narrowed the theory of contributory liability to require actual, rather than constructive, knowledge, it upheld the district court's order granting plaintiffs a preliminary injunction.[21] The court found that Napster materially contributed to direct infringement.[22] Fatal to Napster was the fact that it had the right and ability to supervise the use of its software.[23] Because Napster had reserved the "right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material," the court held Napster could be found contributorily or vicariously liable for infringement.[24]

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17. *Sony*, 464 U.S. at 417.
18. *Id.* at 439.
19. *Id.* at 440.
20. *Id.* 440–442 (analogizing to contribution infringement in the Patent Code, which is confined to the knowing sale of a component especially made for use in connection with a patent).
21. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001).
22. *Id.* at 1022.
23. *Id.* at 1023.
24. *Id.*

Although the *Napster* case was a victory for the music industry, it also provided a roadmap for future programmers to avoid liability.[25] So long as software developers created a P2P system that eliminated their ability to control or police user activity, liability would not be found.[26] In retrospect, this point seems obvious, but at the time, courts knew little about new technology and assumed that traditional notions of third-party liability for infringement would apply equally well in the context of online file sharing.[27] Inherent in the Ninth Circuit's reasoning was the assumption that future programs like Napster would require centralized control over the software to facilitate the file sharing.[28] This assumption enabled P2P providers to program software with the same functionality as Napster without centralized control, thereby avoiding secondary liability.[29]

Shortly after Napster's downfall, new P2P software arose to take Napster's place in the market. First, Aimster, a program run in conjunction with AOL Instant Messenger, was created. Although this technology eliminated centralized control and knowledge of direct infringement, the music industry still succeeded in holding Aimster liable for contributory infringement.[30] Following Aimster, new P2P providers StreamCast and Grotsker arrived on the market. These technologies were decentralized, and providers had no control over the networks.[31] While the Supreme Court found that these technologies would likely escape contributory liability for lack of the requisite control, the Court adopted the theory of "active inducement" to impose liability on Grotsker and StreamCast in 2005.[32] Because Grotsker and StreamCast marketed their services to

25. GIBLIN, *supra* note 6, at 42.

26. *Id.*

27. *Id.* at 44–45.

28. *Id.*

29. *Id.* at 45.

30. *See In re* Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) (holding Aimster liable for contributory infringement on the ground that willful blindness to infringement is the legal equivalent of actual knowledge).

31. GIBLIN, *supra* note 6, at 64.

32. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005) ("[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

previous Napster users, failed to develop filters to diminish infringing activity, and profited from advertisements on their websites, the Court found that the two software providers could be liable for active inducement.[33]

Despite yet another victory against P2P providers, the music industry's efforts proved unsuccessful in eliminating P2P providers. Other providers, such as Limewire and BitTorrent, simply arose to take to the place of previous ones. The nature of software is such that it can be easily created at little to no financial cost.[34] In addition, software development is viewed as a collaborative effort, in which developers build on and make improvements to existing programs to create new ones.[35] Thus, for every major P2P provider the music industry sues, there are literally thousands of lesser-known providers with the same illegal file sharing capabilities available to users.[36] Even if the purpose of such software was not to actively induce infringement, users could nonetheless use the software to accomplish illegal file sharing.[37]

In waging its battle against P2P providers, the music industry sought to eliminate file-sharing capabilities. This strategy was based on the mistaken belief that P2P software was difficult to create and change, making successful litigation against a few entities an effective deterrent to those considering entering the market. Unfortunately, the music industry's strategy only prompted developers to create new programs outside the purview of the law. After years of litigation against P2P providers, the music industry was no closer to ending illegal file sharing.[38]

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33. *Id.* at 939–40.

34. GIBLIN, *supra* note 6, at 142–43.

35. *Id.* at 146.

36. *Id.*

37. *Id.* at 165.

38 *Scope of the Problem*, RECORDING INDUS. ASSOC. OF AM., http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited Nov. 20, 2013) (reporting that from 2004 to 2009, approximately 30 billion songs were illegally downloaded on file-sharing networks and that in 2009 only 37% of music acquired by U.S. consumers was paid for).

III. DETERRING ILLEGAL FILE SHARING BY TARGETING DIRECT INFRINGERS

In addition to suing P2P providers, the music industry also brought legal action against individuals who used P2P software for illegal file sharing. As early as 2003, the music industry, led by the RIAA, began suing individuals, who were also the music industry's would-be customers, for unlawful distribution of copyrighted materials.[39] Prior to filing suit, the RIAA used software that tracked illegal file-sharing activity to obtain the IP addresses of alleged infringers. The RIAA then used its subpoena power under the DMCA to obtain the identity of the alleged infringers from ISPs.[40] This practice continued until a D.C. Circuit ruling limited the circumstances in which a copyright holder could subpoena ISPs under the DMCA.[41] The D.C. Circuit's ruling, along with pressure from members of Congress, ultimately led the RIAA to abandon the practice of subpoenaing ISPs without first filing a lawsuit.[42] Nevertheless, the RIAA continued to file thousands of lawsuits against individuals.[43]

In suing individual infringers, the RIAA hoped to make an example out of a few of them in an effort to deter others from engaging in illegal file-sharing activities online.[44] Much like its lawsuits against P2P providers, the RIAA was successful in holding infringers liable and, thereby, making users aware of the fact that

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39. *See RIAA v. The People: Five Years Later*, ELEC. FRONTIER FOUND., (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later (discussing the music industry's litigation strategies used in its 2003 litigation against 261 P2P software users) [hereinafter ELEC. FRONTIER FOUND.].

40. *Id.* (citing 17 U.S.C. § 512(h) (2006)). Under the DMCA, a copyright owner can request the clerk of a federal district court to issue a subpoena to an ISP to discover the identity of an alleged infringer. The copyright owner must submit a sworn declaration that the information will only be used to protect his rights under the Copyright Act. 17 U.S.C. § 512(h) (2006).

41. *See* RIAA v. Verizon, 351 F.3d 1229, 1233 (D.C. Cir. 2003) (granting Verizon's motion to quash on the grounds that §512(h) of the DMCA only allows a subpoena to be issued to ISPs who have infringing material stored on its servers).

42. ELEC. FRONTIER FOUND., *supra* note 39.

43. *Id.*

44. *Id.*

they were not immune to liability.[45] However, because many of these suits targeted teenagers or college students, along with their families, the strategy received an outburst of criticism from legislators and nonprofit groups like the Electronic Frontier Foundation (EFF).[46] A brief discussion of two well-publicized cases illustrates the harsh outcomes in suits against individuals and the resulting public criticism of the music industry.

In a 2012 case, the Eighth Circuit ruled that holding Jammie Thomas-Rasset, a single mother of four, liable for $220,000 in statutory damages for the illegal distribution of twenty-four sound recordings was not a violation of due process.[47] In response, Thomas-Rasset filed a petition for writ of certiorari asking the Supreme Court to decide whether there is a constitutional limit to statutory damages for downloading music online.[48] In another case, the First Circuit reinstated a jury award against defendant Joel Tenenbaum of $675,000 for distributing thirty copyrighted works to other users.[49] The court rejected Tenenbaum's arguments that the

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45. Rob Kasunic, *Solving the P2P "Problem"– An Innovative Marketplace Solution by Rob Kasunic*, STANFORD COPYRIGHT & FAIR USE BLOG (Mar. 11, 2004), http://fairuse.stanford.edu/commentary_and_analysis/2004_03_kasunic.html (stating that lawsuits against individuals "made people aware that the perceived veil of anonymity on the Internet could be pierced, particularly when anonymity was being abused to protect unlawful activity.").

46. *See, e.g.*, *12-Year-Old Settles Music Swap Lawsuit*, CNN (Feb. 18, 2004, 1:09 AM), http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement/ (detailing a $2,000 settlement between twelve-year-old Brianna LaHara and RIAA after LaHara was sued for offering to distributed over 1,000 songs on Kazaa); *see* ELEC. FRONT. FOUND., *supra* note 39 (describing settlements between college students at various universities and RIAA in the range of $12,000 to $17,500 and the resulting outcry from both students and university officials).

47. Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 908 (8th Cir. 2012).

48. Mike Mesnick, *Jammie Thomas Asks Supreme Court: How Much Is Too Much For Copyright Infringement?*, TECHDIRT, (Dec. 12, 2012, 7:04 AM), http://www.techdirt.com/articles/20121211/16440021353/jammie-thomas-asks-supreme-court-how-much-is-too-much-copyright-infringement.shtml (discussing Petition for Writ of Certiorari, Thomas-Rasset v. Capitol Records, Inc., No. 12-715, 2012 WL 6206575 (8th Cir. Dec. 10, 2012)).

49. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 509 (1st Cir. 2011).

Copyright Act is unconstitutional and that statutory damages under the Act are available only if there is a showing of actual harm.[50]

A survey of commentary regarding the cases against Thomas-Rasset and Tenenbaum illustrates the reputational disadvantages of the RIAA's litigation strategy. For example, Tenenbaum and his legal team created a website entitled "Joel Fights Back," where Tenenbaum and his team posted updates about his life as a graduate student and the developments in his case with the RIAA.[51] Additionally, the website asked for donations from Joel's supporters to help him afford legal representation.[52] Supporters of Tenenbaum post comments in response to his updates, including one comment that stated "I am disgusted by this abuse of power," telling Tenenbuam "[d]on't ever give up Joel [*sic*]. Humiliate the bastards and make sure you win."[53] In response to a Techdirt article discussing Thomas-Rasset's petition to the Supreme Court, a commenter said, "The corporate elite have no trace of compassion for their fellow man; they don't care how many lives they step on and ruin, only that they get their way."[54] Although these comments represent a small (and well-tempered) sample of a collection of mixed opinions, they demonstrate the presence of a group of people who are missing the motivating factor behind the RIAA's litigation: copyright infringement is illegal, and when you break the law, you are liable. Instead, the public views the music industry, particularly record labels, as villains who will do anything to turn a profit. Thus, bringing lawsuits against individuals may only serve to further isolate the music industry from its customers.

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50. *Id.* at 515.

51. *See* JOEL FIGHTS BACK, http://web.archive.org/web/20120329161023/http://joelfightsback.com/#/http://web.archive.org (last visited Oct. 14, 2013) (describing details about Tenenbaum's recent defense of his thesis as well as updates and next steps for his lawsuit with the RIAA) (accessed by searching for "Joelfightsback.com" in the Internet Archive index).

52. *Id.*

53. Joel Tenenbaum, *Myths and Facts: The Latest Update in Joel's Case*, JOEL FIGHTS BACK (Sept. 3, 2012), http://web.archive.org/web/20130115050107/http://joelfightsback.com/ (accessed by searching for "Joelfightsback.com" in the Internet Archive index).

54. Mesnick, *supra* note 48, at comment 11.

The cases against Thomas-Rasset and Tenenbaum illustrate how suits against individuals can result in harsh judgments and cause the public to speak out against the music industry. In fact, damage to the music industry's reputation was one of the reasons why the RIAA announced the end of its campaign in late 2008.[55] However, the RIAA did reserve the right to sue infringers who are "heavy file sharers" and also stated that it would continue to litigate outstanding lawsuits.[56]

The question that remained was how the RIAA and other copyright owners should pursue lawsuits against individuals engaged in illegal file sharing in future lawsuits. In addition to an increase in unwanted criticism and bad publicity, lawsuits against individuals were expensive and generated low returns.[57] Each case involves high attorneys' fees, filing fees, and other litigation expenses, including as expert witnesses. Many individuals were ill-equipped to access the resources needed to litigate these lawsuits, so the RIAA was able to avoid some of these costs.[58] To combat these inefficiencies, some copyright owners have turned to mass litigation strategies to reduce costs and increase returns.

IV. COST-EFFICIENT LEGAL STRATEGIES AGAINST INDIVIDUAL INFRINGERS

The RIAA's suits against individual infringers quickly became a "money pit," as the entity was spending significantly more money on litigation than it was actually making in settlements and

55. *See, e.g.*, Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), http://online.wsj.com/article/SB122966038836021137.html (discussing the "public relations disaster" caused by the recording industry's litigation tactics and the shift towards "more effective ways to combat online music piracy").

56. *Id.*

57. *See* James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 85 (2012) (stating that the RIAA spent roughly $90 million in legal fees over a five year period and recovered only $2.5 million).

58. *See* ELEC. FRONTIER FOUND., *supra* note 39 (stating that defendants frequently settled lawsuits because they could not afford high attorneys' fees).

damage awards.[59] In deciding how to litigate outstanding and future lawsuits, some have argued that the music industry should consider using mass litigation strategies through joinder or reverse class actions, similar to the film industry.[60]

This section outlines how mass litigation could work in the context of P2P file sharing. In doing so, this Note explains plaintiffs' incentives to use mass litigation to extract early settlements from defendants. It then discusses both the procedural problems in bringing mass lawsuits and some of the benefits that could flow from mass litigation, should a case actually proceeded to trial. Ultimately, mass litigation does little to solve the problems the music industry faced in suing individual infringers. Quick settlements may result in small payoffs in the short term, but mass litigation is unlikely to deter continued, widespread, illegal file sharing. Thus, even if the music industry seriously pursued a mass litigation strategy, it would still be without a long-term solution for deterring illegal file sharing.

A. The Mass Litigation Model

Mass litigation strategy is thought to be useful in P2P file sharing cases because it allows a plaintiff to file one case against multiple defendants and then move for expedited discovery to obtain the identity of the alleged infringers through the § 512(h) subpoena power of the DMCA.[61] Once the plaintiff obtains the identity of the alleged infringers, it can try to elicit a quick settlement from individuals who do not want to go to court because they lack the requisite resources to litigate the case.[62] This is particularly true in cases where the copyrighted material at issue is pornography and the defendants want to avoid the embarrassment of being a named

59. DeBriyn, *supra* note 57, at 85.

60. *See, e.g.*, Brian Noh, *Fair Copyright Litigation: The Reverse Class Action Lawsuit*, 9 HASTINGS BUS. L.J. 123, 125–26 (2012) (acknowledging that defendant class actions have rarely been used in copyright suits while arguing in favor of their use).

61. *See* 17 U.S.C. § 512(h) (2006) (allowing copyright owners to subpoena ISPs for the identity of alleged infringers).

62. *See* DeBriyn, *supra* note 57, at 99 (discussing copyright holders using defendants' lack of resources to elicit a quick settlement).

defendant.[63] Thus, the usual goal of mass litigation is to obtain early settlements from alleged infringers without bearing the costs of actually trying the cases. Because the pursuit of an early settlement is a more cost-effective business model, plaintiffs are less likely to engage in mass litigation that would provide the defendants with the opportunity of having a trial on the merits.[64] In reality, plaintiffs have no incentive to pressure a defendant to remain a party to the litigation because settling quickly will minimize litigation costs and increase revenues.[65]

Using mass litigation strategies in the music industry would solve many of the problems that the RIAA faced in its five-year litigation campaign against users. First, the copyright owner need only file one lawsuit for a fee of $350, as opposed to $350 per suit against each individual.[66] Secondly, this strategy would allow copyright holders in the music industry to reach significantly more infringers. In five years, the RIAA sued 35,000 individuals.[67] By contrast, the film industry sued over 100,000 P2P file sharers in thirteen months using mass litigation.[68] This type of litigation is not only a more effective deterrent, in that it reaches more users, but it also grants copyright owners the ability to recapture a more substantial portion of the market share for reproduction and distribution.

But mass litigation of these claims has its downsides. It fails to offer a long-term solution to illegal file sharing, and it still results in reputational costs for copyright holders. Even though mass litigation enables plaintiffs to sue thousands of defendants at once, it

63. *See* Malibu Media, LLC v. Does 1 through 13, No. 2:12-CV-01513 MCE KJN, 2012 WL 2800123 at *6 (E.D. Cal. July 9, 2012) ("Plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff.").

64. *See* DeBriyn, *supra* note 57, at 127–28 (arguing that a reverse class action gives defendants an opportunity to combine their resources and therefore go to trial to determine cases on the merits).

65. *See id.* at 137–38 (arguing that plaintiffs can threaten use of aggressive litigation tactics and contempt proceedings to prevent defendants from opting out in a reverse class action).

66. *Id.* at 95 (discussing filing fees under 28 U.S.C. § 1914(a) (2006)).

67. *Id.* at 91.

68. *Id.*

is unlikely to effectively deter illegal file sharing.[69] Moreover, mass litigation invites many of the same public criticisms from interest groups, legislators, and the courts.

B. Procedural Road Bumps to Mass Litigation Strategies

Though the music industry has an incentive to use mass litigation strategies for outstanding and future lawsuits, there are procedural hurdles that may inhibit the effective use of mass joinder or reverse class action suits.

Once a mass joinder or reverse class action suit is actually filed, the plaintiff will need to file an ex parte application to request leave to take expedited discovery in order to identify any unnamed defendants.[70] In considering whether to grant expedited discovery, courts within the Ninth Circuit use a good cause standard: expedited discovery should only be granted when the need for the discovery "outweighs the prejudice to the responding party."[71] To determine good cause, courts must consider the following:

> whether: (1) the plaintiff can identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the

69. *See supra* Part I (explaining that there are millions of file sharers across numerous jurisdictions and national boundaries).

70. *See* FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules, by stipulation, or by court order.").

71. OpenMind Solutions, Inc. v. Does 1-39, No. C 11-3311 MEJ, 2011 WL 3740714, at *1 (N.D. Cal. Aug. 23, 2011) (citing Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002)); *see also* Jesse N. Panoff, *Rescuing Expedited Discovery from the Commodity Future Tradings Commission & Returning It to Fed. R. Civ. P. 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 42 GOLDEN GATE U. L. REV. 393, 413–19 (2012) (discussing the variation in standards required for granting expedited discovery).

> defendant through discovery such that service of process would be possible.[72]

Even if the plaintiff shows good cause for expedited discovery, it still must show that joinder or a reverse class action is proper. This is a crucial procedural step because if a court finds that the joinder or the class action is not proper, then the plaintiff only has the right to seek expedited discovery for *Doe 1*, and the plaintiff's claims against the other Does are severed.[73]

1. Proper Joinder of Parties

Rule 20 of the Federal Rules of Civil Procedure governs permissive joinder of parties.[74] Although there is not a clear standard as to what constitutes proper joinder of parties in a P2P file-sharing case,[75] district court decisions in the context of the film industry are helpful for identifying the type of factual situation for which joinder would be proper. For example, in a film industry plaintiff's first request for expedited discovery in *OpenMind Solutions*, the court found that joinder of defendants was not proper.[76] The plaintiff successfully showed that infringers who used BitTorrent downloaded files in a single swarm,[77] which fell "within

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72. *Id.* at *1–2 (citing Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999)).

73. *Id.* at *5.

74. FED. R. CIV. P. 20(a)(2) states that a defendant may be properly joined if:

> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction occurrence or series of transactions or occurrences; and
> (B) any question of law or fact common to all defendants will arise in the action.

75. Media Prods., Inc. v. John Does 1-26, Nos. 12 Civ. 3719 (HB), 12 Civ. 3630 (HB), 12 Civ. 2962 (HB), 2012 WL 3866492, at *1–2 (S.D.N.Y. Sept. 4, 2012) (severing and dismissing the claims against all defendants except John Doe 1, but not foreclosing "the possibility that joinder of peers who constitute a swarm may be appropriate in certain circumstances.").

76. *OpenMind Solutions*, 2011 WL 3740714, at *5.

77. Patrick Collins, Inc. v. John Does 1-21, 282 F.R.D. 161, 162 (E.D. Mich. 2012).

the definition of 'same transaction, occurrence, or series of transactions or occurrences'" under FRCP 20(a)(2)(A).[78] However, because the plaintiff failed to allege facts showing that defendants were part of the same swarm, the court found that "defendants' conduct was too attenuated to support joinder."[79] In making its decision, the court focused on the dates and times during which the alleged infringers accessed the copyright material. Since plaintiff could not offer any legitimate justification to connect defendants' otherwise "sporadic activity" on BitTorrent, the court ruled that joinder was improper.[80]

Even if a plaintiff can show defendants were part of the same swarm, district courts still are split as to whether this is sufficient to meet the same transaction or occurrence requirement under Rule 20(a)(2).[81] For example, the same court that originally denied joinder of the thirty-nine does in the *OpenMind Solutions* later granted joinder after the plaintiff, in its amended complaint, alleged facts showing defendants were in fact part of the same swarm on BitTorrent.[82] In contrast, plaintiffs in *Media Products* succeeded in showing that twenty-six defendants were part of the same swarm, but the judge still declined to allow joinder of defendants based on his authority to "exercise [his] discretion pursuant to Rules 20(b), 21,

78. *OpenMind Solutions*, 2011 WL 3740714, at *4.

79. *Id.* at *5.

80. *Id.*

81. *See* Media Prods., Inc. v. John Does 1-26, Nos. 12 Civ. 3719 (HB), 12 Civ. 3630 (HB), 12 Civ. 2962 (HB), 2012 WL 3866492 at *2 (S.D.N.Y. Sept. 4, 2012) (acknowledging a split among district courts regarding whether joinder of peers who constitute a swarm is proper).

82. *See OpenMind Solutions*, 2011 WL 3740714, at *3–4. (finding that joinder of Doe defendants was proper because plaintiff provided enough facts to determine that defendants were part of the same swarm).

and 42(b)."[83] The district court found that Doe defendants had already asserted a variety of defenses that turned on different questions of law and fact, which would work against judicial efficiency—one of joinder's primary purposes.[84]

2. Proper Class Certification

For plaintiffs to successfully bring a reverse class action, they must demonstrate that the class meets all four elements under Rule 23(a).[85] Elements two and three will be the most problematic for plaintiffs, as they must show that "there are questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[86] Thus, plaintiffs who bring reverse class action suits will have the same problem as plaintiffs who attempt to bring mass joinder suits.[87] Although the requirement of a common question of

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83. *Media Prods., Inc.*, 2012 WL 3866492, at *2. FED. R. CIV. P.20(b) provides that "[t]he court may issue protective orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party." FED. R. CIV. P. 21 allows that a court on its own "may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." FED. R. CIV. P. 42(b) states that "the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third-party claims."

84. *Media Prods.*, 2012 WL 3866492, at *2.

85. FED. R. CIV. P. 23:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class;
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) The representative parties will fairly and adequately protect the interests of the class.

86. *Id.*

87. *Supra* Part II.B.1.

law or fact may be lower for class actions than for joinder,[88] defendants are likely to assert a variety of defenses that may prove too difficult to manage in a class action. To solve this problem, a judge may divide the defendants into subclasses under Rule 20(c)(5).[89] However, defendants' defenses may include improper venue, lack of personal jurisdiction, and misidentified defendants, as well as substantive defenses such as copyright misuse, fair use, and any constitutional challenges.[90] Because defendants have both procedural and substantive defenses available, a judge may find that dividing defendants into proper subclasses will prove too difficult to maintain the action.

Plaintiffs that successfully meet the prerequisites under Rule 23(a) must seek certification under one of the 23(b) classes. The music industry's best chance for certification would be a 23(b)(3) damages class action.[91] In this case, the plaintiff could argue that a class action is a fair and efficient way to adjudicate the lawsuit because defendants can pool their resources to acquire representation to defend the case.[92] Theoretically, plaintiffs should be able to meet

88. *See* Noh, *supra* note 60, at 131 (citing United States v. Trucking Emp'rs, Inc., 75 F.R.D. 682, 688 (D.D.C. 1977) (arguing that the commonality requirement for class actions is a relatively low standard).

89. In this case, a judge could theoretically divide the defendants into subclasses based on their respective defenses. This means a judge would have to manage only a few issues per subclass rather than a multitude of potentially unrelated issues for the entire class. FED. R. CIV. P. 23 ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").

90. *See* Media Prods., Inc. v. John Does 1-26, Nos. 12 Civ. 3719 (HB), 12 Civ. 3630 (HB), 12 Civ. 2962 (HB), 2012 WL 3866492, at *2 (S.D.N.Y. Sept. 4, 2012) (stating the various procedural defenses alleged by Doe defendants that made joinder improper); Noh, *supra* note 60, at 134 (arguing that defendants' substantive defenses can be easily divided into subclasses).

91. FED. R. CIV. P. 23(b)(3) provides two additional requirements to certify a 23(b)(3) damages class action. Known as the "predominance" and "superiority" requirements, they require that (1) "questions of law or fact common to class members *predominate* over any questions affecting only individual members" and (2) "a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." *Id.* (emphasis added).

92. *See* Plaintiff's Complaint at 2, OpenMind Solutions, Inc. v. Does 1-39, 2011 WL 4715200 (Oct. 7, 2011) (No. C-11-3311 MEJ), at *6–8 (arguing that a class action allows defendants to obtain better representation to defend their case on the merits).

23(b) the standards because a class action would allow defendants to go to trial on the merits rather than being pressured into settling their cases to avoid individual litigation.[93] However, because the film industry has been using reverse class actions and other mass litigation strategies to obtain the identity of individuals to force early settlements, courts are on notice and likely to be skeptical of a plaintiff's proclaimed intent to try the case on the merits.[94]

As a result, plaintiffs who might succeed in bringing class actions may nevertheless have difficulty gaining approval for expedited discovery. In fact, some judges presiding over cases involving pornographic materials have required adversarial proceedings to protect privilege or privacy claims of defendants, and some have even invited public interest groups such as the EFF to protect defendants' rights.[95] Other courts have granted protective orders, which allow Doe defendants to remain anonymous while filing motions to quash or asserting other defenses in order to protect defendants from coercive tactics levied by plaintiffs for the purpose of extracting quick settlements.[96]

Even if copyright owners in the music industry are actually interested in trying cases, rather than extracting early settlements from defendants, these requirements present significant hurdles to eventually trying a case on the merits. However, because the requirements for joinder and class actions may prevent copyright owners from identifying Doe defendants, mass joinder and reverse class actions are far from ideal for extracting early settlements.

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93. Noh, *supra* note 60, at 137 (concluding that the Rule 23(b)(3) superiority and predominance elements are met through certification of defendant classes).

94. *See* Mike Masnick, *Judge Not Impressed By Reverse Class Action Attempt in Mass P2P File Sharing Case*, TECHDIRT (Mar. 16, 2011, 3:00 AM), http://www.techdirt.com/articles/20110314/20075413493/judge-not-impressed-reverse-class-action-attempt-mass-p2p-file-sharing-cases.html (discussing the fact that judges presiding over P2P reverse class actions are concerned about plaintiffs using Rule 23 as a "fishing expedition" to identify infringers and force early settlements).

95. Nate Anderson, *Judge: P2P Class-Action Suit Looks Like a "Fishing Expedition,"* ARS TECHNICA (Mar. 10, 2011, 11:43 AM), http://arstechnica.com/tech-policy/2011/03/judge-p2p-class-action-suit-looks-like-a-fishing-expedition/.

96. *See, e.g.*, OpenMind Solutions, Inc. v. Does 1-39, No. C 11-3311 MEJ, 2011 WL 3740714, at *1 (N.D. Cal. Aug. 23, 2011) (allowing Does 1–39 to remain anonymous during pre-discovery matters).

3. Defenses Available to Defendants

Even if plaintiffs successfully bring a suit through joinder or a reverse class action and obtain approval for expedited discovery, they still face additional challenges regarding personal jurisdiction and venue. Once defendants receive notice of the suit, they have the opportunity to assert various procedural defenses, including lack of personal jurisdiction,[97] improper venue,[98] motions to quash the subpoena,[99] and misidentification. Because plaintiffs only have the IP addresses of Doe defendants prior to expedited discovery, it is difficult for plaintiffs to determine the location of the defendants. Those defendants who do not reside in the state in which suit was brought can seek a motion to dismiss for lack of personal jurisdiction or venue. In addition, because ISPs may assign users different IP addresses, one person's infringing uses can be accidentally imputed to an innocent user, and malicious users can cloak or falsely report their IP addresses when uploading illegal files.[100] If the court finds the variety of defenses too difficult to manage, then it may, in its discretion,[101] either sever the joinder of Doe defendants, deny the class certification, or alter the class certification.[102]

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97. FED. R. CIV. P.12(b)(2).

98. 28 U.S.C. § 1391 (2006).

99. FED. R. CIV. P. 45(c)(3).

100. DeBriyn, *supra* note 57, at 101.

101. FED. R. CIV. P. 20(b) provides that "the court may issue protective orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party." FED. R. CIV. P. 21 allows that a court on its own "may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." FED. R. CIV. P. 42(b) states that "the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third-party claims."

102. FED. R. CIV. P. 23(c)(1):

> (A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.
>
> [. . .]

C. *Possible Benefits of Mass Litigation Strategies*

In the event that a mass joinder or reverse class action proceeded to trial, defendants would likely benefit. This is particularly true in a reverse class action, although joinder suits may be more appropriate in situations where a plaintiff seeks to bring suit against a swarm of infringers.

As previously mentioned, defendants in a mass litigation suit can pool their resources to not only afford legal representation, but also to satisfy judgments in the event defendants are found jointly and severally liable. However, one problem with this perceived benefit is that wealthier defendants have an incentive to settle before trial or otherwise risk a free-rider problem. To the extent that defendants belong to various wealth classes, wealthier defendants who do not settle risk bearing the brunt of legal fees—or worse—satisfying a majority of the monetary judgment for statutory damages.[103] Thus, wealthier defendants may have an incentive to reach an early settlement agreement with the plaintiff.[104] However, pooling resources likely still stands to benefit those defendants who decide to remain in the case.

For plaintiffs, mass litigation will prove to be far more cost-efficient than suing each defendant individually. First, the plaintiff will save a significant amount in filing fees, as the filing fee is $350 per case.[105] Mass litigation also allows the plaintiff to obtain a remedy for illegal file sharing from a large group of individuals all at once. This creates consistent results for similar infringers and may also reduce the plaintiff's discovery costs and attorneys' fees. In the

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(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

103. *See* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 85–86 (2010) (recognizing the difficulty of finding resources among defendants in a class and the lack of an incentive to litigate for defendants who will suffer the free-riding problem).

104. *See* Thomas G. Pasternak, *Making Joint Defense Agreements Work*, 34 LITIG. 26, 27 (2008) (discussing the inevitability of a defendant benefiting from settlement, regardless of whether it helps or pays, and the likelihood of other defendants settling).

105. DeBriyn, *supra* note 57, at 95.

event that the plaintiff receives an award for monetary damages, the plaintiff may have a better chance of actually recovering those damages. However, this factor is highly dependent on the wealth of the individual defendants and whether the defendants are held liable severally or jointly and severally.

In the case of reverse class actions, increased judicial oversight is perhaps the greatest benefit, particularly to defendants. If the court issues a certification order, it must approve any voluntary dismissals, settlements, or compromises under 23(e).[106] Under the procedures for court approval, "the parties seeking approval must file a statement identifying any agreement made in connection with the proposal."[107] This requirement helps to prevent defendants from being subjected to coercive settlement tactics and also ensures that settlements are fair to both plaintiffs and defendants.

In order to obtain the benefits of mass litigation, plaintiffs must actually intend to try their cases on the merits. As noted, courts tend to be skeptical of plaintiffs' strategies in filing a mass lawsuit.[108] In addition, the misuse of copyright law in both individual suits and mass litigation has led some proponents to call for proof of actual harm.[109] Some commentators even go so far as to recommend the elimination of the statutory damages scheme altogether.[110] Any judicial decisions or legislation altering the statutory damages scheme to require proof of actual harm would be highly unfavorable to the music industry, as well as copyright holders in general. However, mass litigation suits have received an outburst of criticism, and judges suspicious of a plaintiff's intent

106. FED. R. CIV. P. 23(e).

107. FED. R. CIV. P. 23(e)(3).

108. *See supra* Part II.A. (discussing the inappropriate monetization of copyright claims as a means for extracting settlements or obtaining statutory damages).

109. *See* DeBriyn, *supra* note 57, at 105 (arguing that courts should require copyright trolls to show evidence of actual harm as a precondition for discovery to realign litigation incentives).

110. *See id.* at 108–09 (advocating that statutory damages should be eliminated and that actual damages could be calculated by holding the infringer liable for the market value of each sale lost by the plaintiff).

may resort to more creative solutions to avoid finding defendants liable when plaintiffs abuse the power of the courts.[111]

For these reasons, the music industry should be wary of the litigation tactics it employs against infringers in suits naming both individuals and groups as defendants. Such tactics may create unfavorable precedent that could bar future recovery. Since mass litigation does not offer a long-term solution to file sharing, a better approach would be to adopt a business model that provides for a steady stream of revenue from online file sharing. This Note proposes such an option in the next section.

V. THE STATE OF THE MUSIC INDUSTRY AND P2P FILE SHARING AND POSSIBLE SOLUTIONS

Today, after years of aggressive litigation against P2P providers and their users, the music industry is no closer to ending illegal file sharing. In the course of its multi-phased litigation campaign, the industry has spent millions of dollars in legal fees[112] and has yet to find a meaningful way to recapture lost revenue from its inability to control the distribution of music online. Using mass litigation strategies as a source of revenue to extract quick settlements or to obtain statutory damages may aid copyright owners in obtaining some lost revenue, but such a strategy comes with high publicity costs.[113] Most importantly, litigation alone is not enough to curb the effects of online piracy. For this reason, it is important for the music industry and the entertainment business as a whole to move toward offering equally attractive legal options for consumers to enjoy music. The music industry took its first step when the RIAA announced the end of its litigation campaign against

111. *See* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 741 (2013) (explaining that many copyright holders expressed concern over a few courts' expansive interpretation of the fair use doctrine in cases brought by copyright trolls to avoid a finding of liability for defendants).

112. *See* DeBriyn, *supra* note 57, at 85 (stating the RIAA spent roughly $90 million in legal fees over a five year period).

113. *See supra* Part IV.A. (discussing the reputational harm that flows from mass litigation strategies).

individuals in 2008 and vowed to look toward better market solutions in addition to working with ISPs to police illegal file sharing.[114] This section discusses the current state of the music distribution market and proposes possible market solutions for obtaining new revenue.

The advent of new technologies and the rise of social media have greatly altered the way consumers both discover and share music. Online radio provided by Pandora and Sirius XM and interactive streaming offered by Spotify and Rhapsody enable users to discover and listen to music.[115] The music industry no longer enjoys a monopoly in marketing artists to the public by paying radio stations to play certain songs to popularize an artist's music.[116] In addition, digital copies of songs enable consumers to buy singles rather than being forced to buy an entire album.[117] Because new artists can promote their music online through YouTube, Spotify, and P2P providers like BitTorrent,[118] the power to choose which artists will have their next big break is now in the hands of consumers. The music industry, now more than ever, is about

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114. *See* ELEC. FRONTIER FOUND., *supra* note 39 (exploring the record industry's focus on making authorized music services more attractive, rather than relying on lawsuit campaigns to deter illegal file sharing).

115. Allison McCann, *Why No One Knows How Much Money Musicians Are Making Now*, BUZZFEED (Oct. 22, 2012, 12:24 PM), http://www.buzzfeed.com/atmccann/why-no-one-knows-how-much-money-musicians-are-maki.

116. *See* Goel, *supra* note 1, at 9 (describing how the old music industry model had high barriers to entry for new artists, which enabled major record labels to choose which artists to promote).

117. *Id.*

118. *See* Anthony Ha, *BitTorrent's Matt Mason On Rethinking The Music Industry Business Model: 'The Hustle Is Changing'*, TECHCRUNCH (Nov. 25, 2012), http://techcrunch.com/2012/11/25/bittorrent-matt-mason-interview/ (describing BitTorrent's recent "one-off experiments" where the company partnered with artists to promote the artist's work); Jason Kincaid, *YouTube Extends Revenue Sharing Program To Anyone With a Viral Video*, TECHCRUNCH (Aug. 25, 2009), http://techcrunch.com/2009/08/25/youtube-extends-revenue-sharing-program-to-anyone-with-a-viral-video/ (recounting YouTube's program that shares advertisement revenue with content providers who post videos on the website).

relationship building.[119] Record labels and artists need to focus on building a brand to form a relationship with consumers.[120] Ideally, that relationship will lead to buying digital downloads, merchandise, and concert tickets.[121]

It is in this new marketplace that the music industry must seek to obtain revenues. To do so, the music industry should form a private collective-action entity similar to ASCAP to issue blanket licenses to ISPs. This solution is a cost-effective way to monetize online file sharing that also enhances the music industry's ability to deter illegal activity.

A. Private Collective Action Entity

In calling for the creation of a performance-rights organization, it is helpful to consider ASCAP and BMI as models for how blanket licenses could be issued and royalties could be collected. ASCAP was founded in 1913 by a group of copyright holders to issue blanket licenses granting the right to perform the group's representative copyrighted works.[122] Members grant ASCAP the right to enforce copyrights and collect revenues from the copyrighted works; they also give ASCAP a non-exclusive right to license the performance of the works.[123] ASCAP then monitors the performances of each work and issues royalties to each copyright holder in the group based on the demand for its work.[124] ASCAP and BMI issue licenses to radio stations, filmmakers, and retail stores.[125] These two entities primarily use the revenue from issuing

119. *See* Ha, *supra* note 118 (tracing the evolution of marketing in the music industry from promoting a "fast-moving consumer good" to a "relationship-based" approach).

120. *See id.* (discussing the growth of a more "relationship-based" music industry).

121. *See id.* (commenting that musicians need to focus on relationship building to develop long-standing ties to fans).

122. Michael B. Rutner, *The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV. 1061, 1073 (1998).

123. *Id.* at 1075.

124. *Id.* at 1073.

125. *Id.* at 1074.

licenses to both fund monitoring and litigation efforts and pay royalties to their members.[126]

This model could be replicated to facilitate licensing between the music industry and ISPs. Once an ASCAP-type organization grants licenses to ISPs, the organization can use Internet downloading activity provided by ISPs to determine royalty payments for each member.[127] An ISP could either give all of its users the right to share music without fear of legal action, or it could offer the users the option to buy a bundle service enabling users to share and download music legally. As a result, licensing with ISPs offers a more cost-effective alternative for licensing to file-sharing users. It also saves the music industry from the nearly impossible task of locating and identifying all users. The licensing agreement offers users a legal way to share and download music while also guaranteeing royalty payments to copyright owners. Finally, and most importantly, this solution would not require current users to change anything about their current online activities. At most, depending on how the ISP decides to pass on the cost of the license, customers may be required to opt in to the license agreement and pay a higher bill to their ISP.

In short, ASCAP and BMI provide a relatively cost-efficient method to enforce members' public performance rights. A similar model could be adopted to enter into blanket licensing agreements with ISPs to enforce the music industry's distribution rights online.

B. Licensing with ISPs as Opposed to P2P Providers

The music industry should seek to issue blanket licenses to ISPs rather than P2P providers. Licensing with ISPs is likely to result in more efficient licensing and copyright enforcement.

ISPs have a statutory duty under the DMCA to cooperate with copyright owners in policing online infringement.[128] Therefore, ISPs have an incentive to enter blanket licensing agreements to avoid

126. *Id.*
127. *Id.* at 1082.
128. 17 U.S.C. § 512 (2006).

potential liability.[129] As mentioned, P2P providers can easily program around the law to avoid liability for infringement.[130] Current P2P software lacks the requisite control over users needed to succeed on theories of contributory or vicarious liability, and so long as P2P providers do not actively solicit users to infringe, there is only a small threat of litigation.[131] Because ISPs are bound by law to assist in enforcing copyrights, the music industry may have more bargaining power in negotiations with ISPs than with P2P providers in issuing license agreements.

In addition to having a legal duty to enforce copyrights, ISPs also operate in a competitive market and may see blanket licensing with the music industry as an opportunity to offer bundle services to customers.[132] A blanket license could allow both the music industry and ISPs to participate in the file sharing market. It also may prove more feasible for ISPs to pass on the price of the license to its customers since P2P providers often earn revenue solely from advertisements. In addition, the music industry may be able to negotiate a more favorable agreement because the license would afford ISPs the ability to create additional revenue. Conversely, licensing with P2P providers would essentially require those providers to give up a share of the market to the music industry. This would likely make for tougher negotiations between P2P providers and the music industry. In fact, the chief marketing officer of BitTorrent recently stated that the music industry's terms for possibly partnering with BitTorrent "just don't make sense."[133] As a

129. *See* Rutner, *supra* note 122, at 1081–82 (arguing that blanket licensing can allow ISPs and users to avoid exposure to liability more effectively than other options).

130. *See supra* Part II.A. (discussing P2P providers' ability to modify source code so that software would fall outside of the law's purview).

131. *See* GIBLIN, *supra* note 6, at 158 (arguing that P2P providers can use court rulings as a roadmap for escaping liability and delete their software at the first threat of litigation); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005) (holding that a party can be held liable for infringement by a third party if the party actively induced, via marketing or other means, the third party to infringe).

132. Rutner, *supra* note 122, at 1081–82.

133. Ha, *supra* note 118.

result, the music industry might be forced to accept less favorable terms with a P2P provider in order to reach an agreement.

ISPs also allow for relatively simple determinations of royalties and license pricing in general. As mentioned above, ISPs could pass on the cost of the license to their customers, so determining the price would be less of an issue for ISPs than it would be for P2P providers. This is because many P2P providers offer their software to users for free and make money from advertisements.[134] The question for P2P providers then would be focused on who would bear the cost of the license. In addition, would royalties be paid as a percentage of advertising revenues or as a flat fee? The structure of the P2P model makes it difficult to determine how royalties should be paid and also how to determine a fair price for the license. Conversely, an ISP operates in a competitive market where users pay for the service. This allows for less complicated negotiations regarding the price of the license as well as the distribution of royalties.

One of the more critical reasons for licensing with an ISP is that an ISP has the combined ability to prevent infringement and to monetize file sharing. ISPs provide Internet connections to their users through user computers.[135] Thus, ISPs have access to users' Internet traffic and maintain the centralized control needed to enforce the right of copyright owners on one hand and to monetize the use of file sharing services on the other.[136] If a copyright owner detects unlawful infringement, the owner can provide the address to the ISP, who could offer a bundled service that allows the infringer to legally share the files or use the address to notify the user of possible legal action.

Lastly, so long as the blanket licensing agreement with an ISP is nonexclusive, artists and record labels would still be free to enter into separate licensing agreements with P2P providers. For example, an artist or record label could agree to a short-term project where the copyright owner agrees to release new content through the P2P provider in exchange for payment directly from the P2P

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134. *See* BITTORRENT, http://www.bittorrent.com/ (last visited Oct. 13, 2013) (offering the latest version of their software to users for free).

135. Rutner, *supra* note 122, at 1081–82.

136. *Id.*

provider or an agreement to share in advertising profits from the deal.[137] However, these types of projects are in the experimental stages; neither P2P providers nor the music industry have determined an ideal model for promoting copyrighted works through P2P providers.[138] Consequently, these types of projects tend to be relatively risky as P2P providers continue to work to find an ideal solution. If the music industry already had a steady stream of royalties from blanket licensing with ISPs, then the risk involved in one-off projects with P2P providers would become less of an issue because copyright owners would have a steady, alternative revenue source from online file sharing. The stability provided by licensing with ISPs would provide the music industry the flexibility needed to explore opportunities to generate new revenue via P2P providers or other Internet-based sources.

VI. CONCLUSION

Over the past decade, the music industry has tried and failed to enforce copyright ownership through various litigation tactics. P2P file sharing in connection with the Internet and the creation of digital music downloads made it virtually impossible for copyright owners to enforce their rights against both P2P providers and individuals. P2P providers could simply program their way out of liability or delete their program to avoid liability. Though the music industry succeeded in holding some individuals liable for infringement, the harsh judgments that resulted from these cases generated a substantial amount of bad publicity. In addition, the litigation did little to deter other users from engaging in illegal file sharing. Mass litigation strategies may prove to be more profitable than suits against individuals, but these strategies have a variety of procedural hurdles that may be difficult to overcome. Courts have also expressed a strong distaste for mass litigation strategies to the extent that they use litigation as a business model rather than as a

137. BitTorrent has been engaging in one-off projects like this with individual artists. *See* Ha, *supra* note 118 (describing BitTorrent's recent partnerships with artists to help them promote their content).

138. *See id.* (noting that BitTorrent has not found the "one true solution to monetizing music yet").

remedy for losses from illegal use of copyrighted materials. Finally, mass litigation strategies are likely to subject copyright owners in the music industry to additional public criticisms.

Litigation, therefore, is an inadequate remedy for enforcing copyright ownership in the new digital age. Instead, the music industry should turn its focus to offering legal options that are equally attractive to file sharing on the Internet. Issuing blanket licenses to ISPs is one such solution. Both the music industry and ISPs stand to gain revenue from blanket licensing agreements. Such an agreement would not only allow users to download and share music legally, but it would also bolster the music industry's ability to enforce copyright ownership online through ISPs. Finally, engaging in licensing with ISPs would provide the music industry a steady source of income, which would allow record labels and artists to experiment with file-sharing technologies in an attempt to find additional sources of revenue for the future.

The "Take" Trifecta: Balancing the Challenges of Endangered Species, Private Property Interests, and State Management Authority in Texas Water Planning

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I. INTRODUCTION

The State of Texas is currently undergoing unprecedented population growth even as the limitations of its water resources are made clear by the ongoing drought. Texas is facing the challenges of continuous rapid population growth,[1] increased water demands,[2] changing weather patterns,[3] and lingering drought.[4] The 2012 State Water Plan[5] put it bluntly: "In serious drought conditions, Texas

1. Since the 1950s Drought of Record, the population of the state has grown from about 7 million people to about 25 million people. TEX. STATE LIBRARY & ARCHIVES COMM'N, UNITED STATES AND TEXAS POPULATIONS 1850–2012, *available at* https://www.tsl.state.tx.us/ref/abouttx/census.html (last visited Nov. 12, 2013). The population is expected to increase 82% from 2010 to 2060, growing from 25.4 million to 46.3 million people. TEX. WATER DEV. BD., 2012 STATE WATER PLAN at 129, *available at* https://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf (last visited Nov. 12, 2013).

2. Water demand is projected to increase by 22% from 2010 to 2060. Existing water supplies are projected to decrease about 10% over that same period. TEX. WATER DEV. BD., 2012 STATE WATER PLAN, *supra* note 1, at 136.

3. The Texas State Climatologist reports that global temperatures will likely "continue to increase, causing Texas droughts to be warmer and more strongly affected by evaporation." John W. Nielsen-Gammon, *The 2011 Texas Drought: A Briefing Packet for the Texas State Legislature*, OFFICE OF THE STATE CLIMATOLOGIST 3 (Oct. 31, 2011), http:// climatexas.tamu.edu/files/osc_pubs/2011_drought.pdf [hereinafter *State Climatologist*].

4. *See, e.g.*, Terrence Henry, *As Drought Continues, Texas Reservoirs Could Hit All-Time Lows*, STATE IMPACT TEX. (Sept. 11, 2013, 6:00 AM), http://stateimpact.npr.org/texas/2013/09/11/as-drought-continues-texas-reservoirs-could-hit-all-time-lows/.

5. "The [Texas Water Development Board] is charged with planning for the state's future water needs based on population projections. The planning statutes require that a state water plan be created based on approved regional plans from major regions of Texas. The regional planning groups and TWDB use a 50-year planning horizon and a 5-year planning cycle. The plan is strategically based off of the Drought of Record of the 1950s." H. Comm. on Natural Res., Tex. H.R., Interim Report 2012, at 33 (Jan. 2013) *available at* http://www.house.state.tx.us/_media/pdf/committees/reports/82interim/House-Committee-on-Natural-Resources-Interim-Report.pdf.

does not and will not have enough water to meet the needs of its people, its businesses, and its agricultural enterprises."[6]

Texas experienced the most intense one-year drought in the state's recorded history in 2011, and the ongoing drought is at least among the worst five overall.[7] Discussion of drought has become commonplace,[8] and it is well accepted that water will be a limiting factor affecting the growth of the state.[9] The current drought has been felt in every region of the state, and Governor Perry even went so far as to look to the heavens for relief, issuing a proclamation for days of prayer for rain.[10]

Texas is already facing substantial challenges in the management of its water resources for human needs, and it is becoming increasingly clear that the Endangered Species Act (ESA) could exacerbate the already dire situation, greatly impacting the State's water management and allocation. The ESA currently protects fifty-three endangered animal species found in Texas, and fourteen more could be granted protected status within the next five

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6. TEX. WATER DEV. BD., 2012 STATE WATER PLAN, *supra* note 1, at 3. The executive summary goes on to say that "[a]s the state continues to experience rapid growth and declining water supplies, implementation of the [water] plan is crucial to ensure . . . economic development in the state." TEX. WATER DEV. BD., 2012 STATE WATER PLAN, *supra* note 1, at 3.

7. *State Climatologist*, *supra* note 3, at 3.

8. *See generally The Last Drop*, TEX. MONTHLY, July 2012 (dedicating a full issue to water and drought in Texas).

9. *See* TEX. WATER DEV. BD., 2012 STATE WATER PLAN *supra* note 1, at 175 (warning of curtailment of economic activity in industries heavily reliant on water, job loss, monetary loss to local and state economies, and the biasing of corporate decision-makers against locating their businesses in Texas if the projected shortages of water occur). Texas voters passed a constitutional amendment—by a three-to-one ratio—to fund the State Water Plan in November 2013. Drew Joseph, *Water Proposal Gets Big OK*, SAN ANTONIO EXPRESS NEWS, Nov. 6, 2013, http://www.mysanantonio.com/news/politics/article/Water-proposal-gets-a-big-OK-4958512.php; *see also* S. J. Res. 1, 83d Leg., Reg. Sess. (Tex. 2013) (providing the text of the amendment).

10. *Gov. Perry Issues Proclamation for Days of Prayer for Rain in Texas*, OFFICE OF THE GOVERNOR (April 21, 2011), http://governor.state.tx.us/news/proclamation/16038/ (presenting the full text of the proclamation); Timothy Egan, *Rick Perry's Unanswered Prayers*, N.Y. TIMES (Aug. 11, 2011), http://opinionator.blogs.nytimes.com/2011/08/11/rick-perrys-unanswered-prayers/.

years.[11] Drought conditions, when combined with the strict requirements of the ESA that prohibit a "take" of an endangered species, make endangered species and environmental flows[12] important issues that Texas water planning must address. The challenge of compliance will only increase as additional species are listed. The current planning, management, and permitting systems in place are failing to ensure that listed species receive the environmental flows essential to their survival.

It is critical that the State's multiple entities that manage water develop a collaborative process to provide the environmental flows that are required to comply with the Endangered Species Act.[13] This Note argues that Texas' unique, spring-fed rivers and streams—in addition to the multiple species that rely on spring flow itself, stream flows, and inflows into coastal estuaries all within the same river system—make it essential that planning for environmental flows is not only undertaken on a basin-wide scale but also includes both groundwater and surface water. Joint management of groundwater and surface water resources for the purpose of compliance with the ESA is a hydrological necessity for Texas, and it could produce meaningful changes in Texas water management more broadly.

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11. *Listings and occurrences for Texas*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=TX&s8fid=112761032792&s8fid=112762573902 (last visited April 24, 2014); *Species Proposed for Listing in Texas based on published population data*, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/tess_public/pub/stateListingIndividual.jsp?state=TX&status=proposed (last visited April 24, 2014); *Candidate Species in Texas based on published population data*, U.S. FISH & WILDLIFE SERV.,, http://ecos.fws.gov/tess_public/pub/stateListingIndividual.jsp?state=TX&status=candidate (last visited April 24, 2014).

12. Environmental flows or "e-flows" are defined by statute. *See* TEX. WATER CODE ANN. § 11.02(16) (West 2013) ("'Environmental flow regime' means a schedule of flow quantities that reflects seasonal and yearly fluctuations that typically would vary geographically, by specific location in a watershed, and that are shown to be adequate to support a sound ecological environment and to maintain the productivity, extent, and persistence of key aquatic habitats in and along the affected water bodies.").

13. As a practical matter, the ESA is a federal law and must be complied with, but other competing considerations always exist in situations where this law applies. This Note does not intend to suggest that the ESA should trump all other considerations in every situation; rather, it focuses on the active role that the ESA can play in moving Texas toward conjunctive management of its water resources.

Texas must confront the challenge of managing endangered species, private property interests in water, and collaborative water planning in order to retain water management authority in the State rather than ceding that authority to the federal courts as a result of species-based litigation. Ideally, the challenges posed by the ESA will compel a more comprehensive consideration of water resources than Texas law traditionally provides, result in more cohesive management of surface and groundwater, and potentially act as an impetus for change in water management outside of the endangered species context.

This Note is divided into five major sections. The first provides an overview of the Endangered Species Act. The second addresses current surface water management as it pertains to protection of environmental flows and endangered species. The third section addresses groundwater management in the same manner. The fourth section considers litigation from both the surface and groundwater regimes that deals with the clash between endangered species, water management, and private property rights. The final section discusses ways in which the State may alter its water management going forward.

II. THE ENDANGERED SPECIES ACT AND THE PROHIBITION ON TAKE

Enacted in 1973, the ESA is one of the most influential environmental laws in the United States.[14] Its purpose was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species."[15] Significantly, Congress specifically "declared [it] to be the policy of Congress that Federal agencies shall

14. The U.S. Supreme Court has also deemed the ESA to be "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

15. 16 U.S.C. § 1531(b) (2013).

cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species."[16]

A. *Requirements of the Act*

The ESA requires the Secretary of the Interior (Secretary) to promulgate regulations listing species determined to be endangered or threatened, and concurrent with that listing, to designate critical habitat for each species "to the maximum extent prudent and determinable."[17] Listing determinations are to be made "solely on the basis of the best scientific and commercial data available."[18] The only place in the ESA where economic impacts are taken into account is in the designation of critical habitat, which is defined as "specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection."[19]

Section 9 of the ESA makes it "unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States."[20] "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[21] The Fish and Wildlife Service (FWS) defines "harm" as "an act which actually kills or injures wildlife," and "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[22] The FWS defines

16. *Id.* § 1531(c)(2).

17. *Id.* § 1533(a).

18. *Id.* § 1533(b)(1)(A).

19. *Id.* §§ 1533(b)(2), 1532(5). "The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* § 1533(b)(2).

20. *Id.* § 1538(a)(1)(B).

21. *Id.* § 1532(19).

22. 50 C.F.R. § 17.3(c) (2013); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) (upholding the FWS's broad definition of "harm").

"harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering."[23] The ordinary requirements of proximate causation and foreseeability apply to the finding of whether an endangered species is "harmed."[24]

Section 9 prohibits incidental as well as deliberate takes.[25] "Incidental taking" is defined as "any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[26] Section 10 allows the FWS to issue discretionary incidental take permits (ITPs) if a person or governmental entity participating in an otherwise-lawful activity submits an application in conjunction with a comprehensive habitat conservation plan (HCP).[27] An HCP, which must be approved by the FWS, includes conservation measures designed to "minimize and mitigate" the impacts of the taking and show that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[28]

While the ESA prohibits any "person" from taking a member of an endangered species, the term "person" is defined to include "any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State."[29] Case law has made clear that the take prohibition applies to actions by state regulatory agencies where third-party actions that contribute to

23. 50 C.F.R. § 17.3(c) (2013).
24. *Sweet Home*, 515 U.S. at 700 n.13.
25. *Id.*
26. 50 C.F.R. § 17.3(c)(3).
27. 16 U.S.C. § 1539(a) (2013). The ITP and HCP process was added to the ESA by congressional amendment in 1982 after it became clear that many legally permissible development projects and industrial activities may result in an unintentional take of an endangered species.
28. *Id.* § 1539(a)(2)(B)(iv).
29. *Id.* § 1532(13).

causing a take are approved by the agency.[30] Therefore, a state agency's management of water—through the allocation of water rights to third parties—may result in an incidental take of a protected species.

In addition to regulating private activity, the ESA in Section 7 imposes an affirmative duty on federal agencies to ensure that their "actions" are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[31] Federal regulations define agency "actions" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," which include "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid" to private parties.[32] An agency action triggers the consultation requirement under Section 7, requiring the agency to consult with the FWS.[33] In the initial consultation, the agency determines whether an endangered or threatened species, or critical habitat for such species, is present in the area of the proposed action.[34] If no such species or critical habitat is present, no further consultation is required; however, if they might be present, then a "biological assessment" must be conducted to determine the effects of the proposed action.[35]

The Section 7 consultation requirement imposes a broad, affirmative duty to avoid adverse habitat modification.[36] This duty goes beyond that found in the Section 9 take prohibition, because the Section 7 duty is not limited to habitat modification that actually kills or injures wildlife. However, Section 7 is more limited in its force because it only prohibits actions that are likely to jeopardize

30. *See* Animal Welfare Inst. v. Martin, 623 F.3d 19 (1st Cir. 2010) (allowing citizens to challenge Maine's authorization of foothold traps that harmed lynx); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (addressing Massachusetts' licensing of gillnet and lobster pot fishing causing harm to northern right whale); Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231 (11th Cir. 1998) (holding that the ESA applies to citizen's challenge of county's refusal to ban beach driving during turtles' nesting season).

31. 16 U.S.C. § 1536(a)(2) (2013).

32. 50 C.F.R. § 402.02 (2013).

33. 16 U.S.C. § 1536(a)(2).

34. 50 C.F.R. § 402.13 (2013).

35. 16 U.S.C. § 1536(c)(1).

36. 16 U.S.C. § 1536(a)(2).

the continued existence of the species as a whole and only prohibits modifications of habitat that has been designated by the FWS as "critical."[37]

The ESA can be enforced by the federal government[38] or a citizen suit.[39] The federal government can initiate a civil action to obtain either an injunction against the activity that may result in the take or civil penalties for a past take.[40] It may also seek criminal penalties if the take prohibition is "knowingly" violated.[41] Civil penalties range from up to $500 for each individual take to up to $25,000 for each take that is a knowing violation.[42] Citizens may commence a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation" of the ESA or regulations issued under it.[43] Citizen suits may also be filed to compel the Secretary to enforce the ESA or, alternatively, for failure of the Secretary to perform certain non-discretionary duties.[44] The federal district courts have jurisdiction over all ESA cases.[45]

B. Economic Impacts of the Act

The potential for the ESA to exact considerable economic costs became clear in the famous Tellico Dam case. There, the discovery of an endangered species threatened to halt a multi-million dollar dam project.[46] The U.S. Supreme Court famously stated that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[47] It is well accepted that the ESA has broad impacts on land use, development, industry, and economic growth. However, data

37. *Id.*
38. *Id.* § 1540(a)–(b).
39. *Id.* § 1540(g).
40. *Id.* § 1540(a).
41. *Id.* § 1540(b).
42. *Id.* § 1540(a)(1).
43. *Id.* § 1540(g)(1)(A).
44. *Id.* § 1540(g)(1)(B)–(C).
45. *Id.* § 1540(c).
46. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 166 (1978).
47. *Id.* at 184.

quantifying the economic costs of the ESA is not readily available. While the opportunity costs associated with species protection have not been broadly quantified, they have been estimated for a few regional, high-profile ESA conflicts.[48] These estimates can range from millions to billions of dollars.[49] However, no national cost estimate exists.[50]

The FWS publishes an annual report and cost analysis of expenditures made for the conservation of endangered and threatened species that year.[51] FWS expenditures for the 2011 fiscal year totaled $1.59 billion, with federal agencies reporting $1.53 million of that total and the States reporting the remaining $58 million.[52]

C. *Endangered Species in Texas*

Texas is currently home to sixty-five federally listed species of animals, twelve of which are threatened and fifty-three of which are endangered.[53] An unprecedented number of candidate species are presently under consideration for listing within the next five years.[54] This is a result of a court-approved settlement between the

48. Gardner M. Brown Jr. & Jason F. Shogren, *Economics of the Endangered Species Act*, 12 J. ECON. PERSPECTIVES 3, 13, 10–14 (1998).

49. *Id.* at 13–14 (reporting opportunity costs associated with species protection and habitat designation as well as transaction costs and public resources devoted to endangered species).

50. *Id.* at 15.

51. *Laws and Policies*, U.S. FISH & WILDLIFE SERV.: ENDANGERED SPECIES, http://www.fws.gov/endangered/laws-policies/regulations-and-policies.html (last visited Oct. 21, 2013).

52. *Federal and State Endangered and Threatened Species Expenditures 2011*, U.S. FISH & WILDLIFE SERV., *available at* http://www.fws.gov/endangered/esa-library/pdf/2011.EXP.final.pdf (last visited Jan. 10, 2014).

53. *Species Reports: Listings and occurrences for Texas*, U.S. FISH & WILDLIFE SERV., *available at* http://www.fws.gov/ecos/ajax/tess_public/pub/stateOccurrenceIndividual.jsp?state=TX (last visited April 24, 2014).

54. Michael Wines, *Endangered or Not, but at Least No Longer Waiting*, N.Y. TIMES, Mar. 7, 2013, at A12, http://www.nytimes.com/2013/03/07/science/earth/long-delayed-rulings-on-endangered-species-are-coming.html. Some species covered by the settlement had been on the candidate list for over two decades. *Id.* Candidate species are species that are under threats but are currently precluded from protection due to limited resources. *See Candidate Species, Section 4 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Mar. 2011), http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf.

FWS and conservation groups who had challenged the FWS on its failure to make final listing decisions regarding candidate species.[55] Under the settlement, which was finalized in September 2011, the FWS agreed to issue final listing decisions for roughly 250 candidate species by the end of the 2018 fiscal year, and over twenty of those species are found in Texas.[56]

Many of the state's endangered species are familiar names due to their ongoing presence in the press and the public battles they have sparked involving industries, developers, and private landowners. The endangered fountain darter, as many Texans are aware, was the impetus for the formation of the Edwards Aquifer Authority and the ensuing years of litigation.[57] The Barton Springs salamander and its reliance on spring flow are well known in Austin, and the golden-cheeked warbler and black-capped vireo are common hurdles to development in rapidly growing Central Texas.[58] The iconic whooping crane returned to the public eye in force with the *Aransas Project v. Shaw* decision in 2013.[59]

Four species of salamanders and the lesser prairie chicken were candidate species considered in this current wave of listing and

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55. Wines, *supra* note 53.

56. Wines, *supra* note 53; Kate Galbraith, *More of State's Species May Be Endangered*, N.Y. TIMES, Jan. 6, 2012 at A21, http://www.nytimes.com/2012/01/06/science/earth/dozens-of-texas-species-in-line-to-be-studied-as-endangered.html; *see also Nongame and Rare Species Program: Federal Candidate Species in Texas*, TEX. PARKS AND WILDLIFE, http://www.tpwd.state.tx.us/huntwild/wild/wildlife_diversity/texas_rare_species/petition/candidates.phtml/ (last visited Nov. 12, 2013) (listing designated candidate species in Texas and the year each was listed as such); *Improving ESA Implementation*, U.S. FISH & WILDLIFE SERV. ENDANGERED SPECIES PROGRAM, http://www.fws.gov/endangered/improving_ESA/listing_workplan_FY13-18.html (last updated Aug. 29, 2013) (delineating the agency's "listing workplan" for fiscal years 2013 through 2018).

57. *See generally* Sierra Club v. Lujan, No. MO–91–CA–069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993); Todd. H. Votteler, *The Little Fish That Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVTL. L. 845 (1998).

58. *See, e.g.*, *Development Guidance Concerning Endangered Species*, TRAVIS COUNTY, http://www.co.travis.tx.us/tnr/bccp/endangered_species.asp (last visited May 12, 2013) (providing guidance for Travis County landowners regarding local endangered species).

59. 930 F.Supp.2d 716 (S.D. Tex. 2013).

raised significant alarm with citizens[60] and the energy industry.[61] The lesser prairie chicken was recently listed as threatened, although the FWS issued a final special rule under Section 4(d) of the ESA that allows the five states already engaged in a regional habitat conservation plan to continue managing the species in accordance with that plan and avoid further regulation of certain energy-related activities.[62] In a recent industry victory, the dunes sagebrush lizard—which had been a candidate species until it was recently removed from the list by the FWS after public outcry by oil companies and ranchers in West Texas—will not be listed because the Texas Conservation Plan was deemed by the FWS to be sufficiently protective.[63] The conservation plan consists of voluntary conservation measures by private landowners and industry, and the FWS determined that the lizard is not in danger of extinction.[64]

Private landowners and industries are concerned about new species listings because of the constraints the ESA places on land use and industrial activity as well as the substantial economic costs often

60. Mose Buchele, *Why the Fight Over Salamanders in Texas is Only Just the Beginning*, STATE IMPACT TEX., (Sept. 10, 2012, 10:53 AM), http://stateimpact.npr.org/texas/2012/09/10/why-the-fight-over-salamanders-in-texas-is-only-just-beginning/ (describing a public hearing attended by hundreds, most of whom opposed the listing of four salamanders).

61. Kate Galbraith, *Lesser Prairie Chicken Has Energy Industry Worried*, STATE IMPACT TEX., (Jan. 14, 2013, 10:49 AM), http://stateimpact.npr.org/texas/2013/01/14/lesser-prairie-chicken-has-energy-industry-worried/ (recognizing that listing the prairie chicken "could have serious repercussions for wind farms, as well as oil and gas drilling, conceivably halting activity in some areas" and describing the energy industry's efforts to keep the species off the list).

62. *U.S. Fish and Wildlife Service Lists Lesser Prairie-Chicken as Threatened Species and Finalizes Special Rule Endorsing Landmark State Conservation Plan*, U.S. FISH & WILDLIFE SERV. (Mar. 27, 2014), http://www.fws.gov/news/ShowNews.cfm?ID=04F68986-AE41-6EEE-5B07E1154C2FB2E7.

63. Sheyda Aboii, *Dunes Sagebrush Lizard Not Endangered*, STATE IMPACT TEX. (June 13, 2012, 2:47 PM), http://stateimpact.npr.org/texas/2012/06/13/dunes-sagebrush-lizard-not-endangered/.

64. *Id.*

associated with compliance.[65] New listings signal an increased potential for take, additional critical habitat designations, more administrative hurdles, and impediments to federal actions—including infrastructure projects—that would destroy or adversely modify critical habitat.

Of particular interest for water planning is the candidate status of five species of freshwater mussels.[66] Along with the iconic whooping crane, many listed and candidate species are ecologically dependent upon spring flow and surface water flows. Because of this dependency, the ESA has an inextricable relationship with water planning and allocation, and the influence of the ESA will only intensify with this latest round of listing.[67] The question now is how Texas water management will respond to the growing pressure exerted by the ESA.

III. SURFACE WATER MANAGEMENT IN TEXAS

Water law in the State of Texas has its foundation in history rather than science. It has been said that:

> The science of water management has always outpaced the legal treatment of the water resource. It is now generally conceded that the hydrological cycle links all water in important ways. The legal regimes that treat groundwater and surface water as distinct resources are based on primitive understandings of the water cycle, but they unfortunately have created a

65. *See, e.g.*, Dave Fehling, *Why Texas Water Planners Worry about Mussels*, STATE IMPACT TEX., (Apr. 10, 2012, 6:00 AM), http://stateimpact.npr.org/texas/2012/04/10/why-texas-water-planners-worry-about-mussels/ (quoting members of Texas Water Development Board, Guadalupe Blanco River Authority, and Brazos River Authority who expressed concern over the potential impacts of an endangered designation).

66. *See id.* (noting water authorities' concern that listing and "legal challenges could threaten the state's ability to meet the demand for water," including impeding the building of reservoirs).

67. *See id.* (indicating that a decision as to whether Texas mussels are scarce enough to be labeled an endangered species could come in 2016).

> web of legal entitlements and expectations that are difficult to unravel.[68]

As in many western states, surface water and groundwater arose separately under different legal regimes and continue to be separately managed. Because of this bifurcation in the statutory and management methods for the two types of water resources, they will be addressed individually prior to joint discussion.

A. The Shift from Riparianism to Permitted Prior Appropriation

Spanish and Mexican land grants are the original sources of surface water rights in Texas, and under this law a landowner only had a right to use water if the land grant expressly provided the right.[69] After gaining independence, the Republic of Texas adopted by statute the English common law riparian system for the allocation of surface waters.[70] Under riparianism, landowners adjacent to streams had a right to use so much of the water on those riparian lands as was reasonable under the circumstances, and therefore the water rights were defined in association with the ownership of riparian land.[71] As with many states west of the one hundredth meridian, in the face of scarcity, riparianism was later replaced with a system of prior appropriation.[72]

The Irrigation Acts of 1889 and 1895 incorporated the established riparian rights, but allowed for appropriative water rights to be acquired by diverting water and applying it to a beneficial use.[73] In times of drought or water shortage, the maxim "first in time, first in right" applies, meaning that senior water appropriators have priority of right over more junior appropriators.[74] The problematic coexistence of Spanish, Mexican, riparian, and appropriative water rights led the Texas Legislature to enact the

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68. Gerald Torres, *Liquid Assets: Groundwater in Texas*, 122 YALE L.J. ONLINE 143, 147 (2012), http://yalelawjournal.org/2012/12/4/torres.html.

69. City of Marshall v. City of Uncertain, 206 S.W.3d 97, 101 (Tex. 2006).

70. *Id.*

71. *Id.* at 101–02.

72. *Id.* at 102.

73. *Id.*

74. *Id.*; TEX. WATER CODE ANN. § 11.027 (West 2013).

Water Rights Adjudication Act of 1967 in order to merge the state's water rights systems and move to a system of regulated, permitted prior appropriation.[75] Interestingly, the Act based the adjudication on, in addition to the historical date of first use, the amount of water put to beneficial use by each rights-holder during a historical use period from 1963 to 1967.[76] At the end of the adjudication process, many of Texas' rivers and streams were over-appropriated, and there had been no consideration of the environmental impacts of water allocation through the permitting process.[77]

Central to the State's ability to transform the nature of established surface water rights, while avoiding liability for any diminution in value of that right, was the assertion that surface waters in rivers and streams are "waters of the state."[78] Because surface waters are "state waters," "the rights that are conveyed through a system of prior appropriation are both secure and subject to the regulatory reach of the state as conditions dictate, including prohibitions on use."[79] The classification of surface waters as state waters is of central importance when determining the permissible degree of state resource regulation and valuing the water right.[80] The classification underpins the understanding that appropriative water rights are usufructuary in nature, allowing use of the resource while ownership rights remain with the state.[81]

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75. *City of Marshall*, 206 S.W.3d at 102.

76. *Id.*

77. *Id.* at 103.

78. Torres, *supra* note 68, at 149–50. This assertion of state power was achieved through the Conservation Amendment to the Texas Constitution. TEX. CONST. art. XVI., § 59. A more detailed declaration of surface waters as waters of the state is codified at Section 11.021 of the Texas Water Code.

79. Torres, *supra* note 68, at 150.

80. *Id.*

81. "[A]ppropriative water rights have always been less firm and more subject to adjustment than their characterization of absolute property rights assumes." A. Dan Tarlock, *The Future of Prior Appropriation in the West*, 41 NAT. RESOURCES J. 769, 786 (2001). "The law of western water rights . . . has always been a *risk allocation* scheme rather than a system of relatively absolute property rights." *Id.* at 785.

B. *Resource Management and Planning Authority Regarding Environmental Flows*

The Texas Commission on Environmental Quality (TCEQ) holds plenary authority over surface water management and allocation in the state.[82] The statutory provisions most pertinent to instream flows upon which endangered species depend are Senate Bill 2 (SB 2) and Senate Bill 3 (SB 3), as well as Section 11.053 of the Texas Water Code.[83]

1. Senate Bill 2 and the Texas Instream Flow Program

Senate Bill 2, passed in 2001, called for data collection, evaluation, and sharing between state agencies regarding instream flows.[84] The Legislature directed the TCEQ, Texas Parks and Wildlife Department (TPWD), and the Texas Water Development Board (TWDB), "in cooperation with other appropriate governmental agencies," to "jointly establish and continuously maintain an instream flow data collection and evaluation program."[85]

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82. TEX. WATER CODE ANN. § 5.013(a)(1) (West 2013). *See also About Water Availability and Water Rights Permitting in Texas*, TEX. COMM'N ON ENVTL. QUALITY, http://www.tceq.texas.gov/permitting/water_rights/permits.html (last visited Nov. 12, 2013) (providing a basic overview of water rights permitting in Texas).

83. Section 11.147 of the Texas Water Code (entitled "Effects of Permit on Bays and Estuaries and Instream Uses") requires the TCEQ, in considering a permit application, to assess the effects of its issuance on the bays and estuaries of the Texas when the diversion point is less than 200 miles from the coast. The TCEQ may include permit conditions that are determined to be necessary to protect fish and wildlife habitats. However, because Section 11.148 provides for emergency suspension of these permit conditions and gives the TCEQ authority to make the water that had been set aside for environmental flows available in times of drought, the pair of statutes taken together do not substantially add to statutes discussed at more length in this Note.

84. *Instream Flows in Texas*, TEX. PARKS AND WILDLIFE, http://www.tpwd.state.tx.us/landwater/water/conservation/fwresources/instream.phtml (last visited Nov. 20, 2013) [hereinafter *Instream Flows*]. "Instream flow" is defined as the flow regime, including both the quantity and timing of flow, "that is adequate to maintain an ecologically sound environment," including fish and wildlife as well as the riparian and floodplain ecosystems. *Id.*

85. TEX. WATER CODE ANN. § 16.059 (West 2013).

The agencies were required to "conduct studies and analyses to determine appropriate methodologies for determining flow conditions in the State's rivers and streams necessary to support a sound ecological environment."[86] However, the results of these studies are only required to be *considered* by the TCEQ in its review of any management plan, water right, or interbasin transfer.[87] Nevertheless, this legislation was passed in recognition of the necessity of balancing human and environmental water needs. The collaborative Texas Instream Flow Program provides data that is essential to water planning, permitting, and species conservation.[88] A separate but related program, the Texas Freshwater Inflow Program, conducts data collection and evaluation to determine the amount of freshwater inflows required to maintain the health of the state's bays and estuaries.[89]

2. Senate Bill 3 and Environmental Flows

SB 3 followed in 2007, establishing the Environmental Flows Allocation Process.[90] The process was intended to provide a mechanism by which the TCEQ could protect instream flows deemed necessary to protect the environment.[91] The statute requires the TCEQ to:

> (1) adopt appropriate environmental flow standards for each river basin and bay system in this state that are adequate to support a sound ecological environment, to the maximum extent reasonable considering other public interests and other relevant factors;

86. *Id.* § 16.059(a).

87. *Id.* § 16.059(e).

88. *Instream Flows*, *supra* note 84.

89. *Freshwater Inflow Needs of Texas Estuaries*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/surfacewater/flows/freshwater/ (last visited May 12, 2013).

90. TEX. WATER CODE ANN. § 11.1471 (West 2013).

91. Environmental flows (also called "e-flows") are generally understood to mean the amount of water needed in rivers, streams, and coastal bays and estuaries to support fish and wildlife populations. *See id.* § 11.02(16).

> (2) establish an amount of unappropriated water, if available, to be set aside to satisfy the environmental flow standards to the maximum extent reasonable when considering human water needs; and
> (3) establish procedures for implementing an adjustment of the conditions included in a permit or an amended water right.[92]

SB 3 divides the planning into eleven regions based on the state's river basins.[93] A staggered timeline was set for each region to develop environmental flow recommendations from which the TCEQ can set standards.[94] Seven of the eleven river basins have either completed or are in the process of developing instream flow and freshwater inflow recommendations.[95] Basins containing an estuary were deemed to be priority basins, and recommendations for those basins are either completed or in progress.[96]

For each river basin, a scientific advisory group and a basin-specific stakeholder committee offer recommendations to the TCEQ regarding environmental flow standards.[97] The TCEQ is required to take these recommendations into consideration when adopting environmental flow standards, but the TCEQ is required to take numerous other factors into consideration as well, including economic factors and "human and other competing water needs in the basin and bay system."[98] Any environmental flow set-aside

92. *Id.* § 11.1471(a).

93. *Statewide Environmental Flows (SB 3)*, TEX. WATER DEV. BD., http://www.twdb.texas.gov/surfacewater/flows/environmental/index.asp (last visited Nov. 20, 2013) [hereinafter *Statewide Environmental Flows*].

94. Colette B. Bradsby, *The Environmental Flow Allocation Process*, Presentation to Texas Water Law Institute (Dec. 9–11, 2009), *available at* http://www.tceq.state.tx.us/assets/public/permitting/watersupply/water_rights/eflows/barron_eflowsarticle2009november.pdf (diagramming the eleven regions and indicating where each river basin falls on the staggered timeline).

95. *Statewide Environmental Flows*, *supra* note 93.

96. *Id.*

97. TEX. WATER CODE ANN. § 11.1471(b) (West 2013).

98. *Id.*

established by the TCEQ is required to be assigned a priority date and included in the water availability models for the basin.[99]

The SB 3 process only has prospective effects and does not retroactively affect any water permits already granted at the time of the legislation's passage. Any set-aside of environmental flows effectively alters the determination of whether water is available to be appropriated through a new water right or the expansion of an existing water right. The TCEQ "may not issue a permit for a new appropriation or an amendment to an existing water right that increases the amount of water authorized to be stored, taken, or diverted if the issuance of the permit or amendment would impair an environmental flow set-aside. . . ."[100] Any new permit or permit amendment that is granted because it is determined *not* to impair the set-aside "must contain appropriate conditions to ensure protection of the environmental flow set-aside."[101] Notably, the legislation provides no specific enforcement mechanism for the environmental flow allocation process beyond the traditional legal challenges to agency action or inaction.

3. Texas Water Code § 11.053

The most recent example of the Texas Legislature's reaction to a drought episode is the 2011 addition of § 11.053 of the Texas Water Code, entitled "Emergency Order Concerning Water Rights." The statute provides that:

> (a) During a period of drought or other emergency shortage of water, as defined by commission rule, the executive director by order may, in accordance with the priority of water rights established by Section 11.027:
>
> (1) temporarily suspend the right of any person who holds a water right to use the water; and

99. *Id.* § 11.1471(e). The middle and lower Rio Grande is the exception to this rule. *Id.*

100. *Id.* § 11.1471(d).

101. *Id.*

(2) temporarily adjust the diversions of water by water rights holders.

(b) The executive director in ordering a suspension or adjustment under this section shall ensure that an action taken:

(1) maximizes the beneficial use of water;

(2) minimizes the impact on water rights holders;

(3) prevents the waste of water;

(4) takes into consideration the efforts of the affected water rights holders to develop and implement the water conservation plans and drought contingency plans required by this chapter;

(5) to the greatest extent practicable, conforms to the order of preferences established by Section 11.024; and

(6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.[102]

The TCEQ was directed to adopt rules to implement this section, including defining the terms "drought" and "emergency shortage of water," delineating the conditions under which an order can be issued, and specifying the maximum duration of a temporary suspension or adjustment of rights.[103]

While § 11.053 expressly gives the TCEQ the authority to suspend or adjust water diversions in times of drought, there are significant limitations on TCEQ's authority that affect its ability to protect instream environmental flows. First, the provision clearly states that any adjustment must be in accordance with the priority of rights. Therefore, any environmental flows "set aside" under the SB 3 process, which have necessarily been assigned a junior priority

102. *Id.* § 11.053(a), (b).
103. *Id.* § 11.053(c).

date, would be among the first to be suspended or adjusted.[104] Additionally, the list of considerations that the Executive Director is to take into account under subsection (b) clearly favor the traditional understanding of beneficial use of water and water rights holders over any environmental flows that may have been "set aside."[105] When ordering suspension or adjustment of a water right, the statute requires the Executive Director to conform, "to the greatest extent practicable," with "the order of preferences established by Section 11.024." Under this prioritized list of uses, domestic, municipal, agricultural, industrial, mining, hydroelectric power, navigation, and recreational uses would all be prioritized over instream environmental flows. Therefore, even if an environmental flow is set aside using the SB 3 process, in a time of drought or low flows—when an environmental flow is ecologically needed the most—§ 11.053 allows curtailment or adjustment of that set-aside before any other water rights are adjusted.

IV. GROUNDWATER MANAGEMENT IN TEXAS

While surface waters in Texas are "waters of the state," the state holds no such claim over groundwater. This distinction not only creates a fundamental difference in the resources' ability to be acquired and regulated, but also has obvious implications for potential governmental takings under the Texas Constitution. "Because groundwater, unlike surface water, is not part of the

104. Judge Jack came to the opposite conclusion in *Aransas Project v. Shaw*, where she determined that under the emergency order provision, the threatening of an endangered species could constitute an "emergency" and the TCEQ is not constrained by the priority date of water rights in this context. 930 F. Supp. 2d 716, 741 (S.D. Tex. 2013).

105. "Beneficial uses" for which waters of the state may be appropriated are domestic, municipal, agricultural, industrial, mining and mineral recovery, hydroelectric power, navigation, recreation and pleasure, public parks, and game preserves. TEX. WATER CODE ANN. §§ 11.023, 11.024 (West 2013). Instream and environmental flows are not considered beneficial uses in Texas, and therefore permits for these uses are not available. *Id.*; *see also id.* § 11.1471(a)(2) (noting that water may be used for beneficial uses unless it has been set aside for environmental or instream uses).

'waters of the state,' the regulatory starting point is both different and more limited."[106] However, the 1917 Conservation Amendment to the Texas Constitution placed the duty to preserve Texas's natural resources, including both surface water and groundwater, on the state and the legislature.[107]

A. The Common Law Rule of Capture and Ownership in Place

Texas law defines "groundwater" as "water percolating below the surface of the earth," but does not include underground streams or the underflow of surface water streams.[108] These latter two categories are treated as waters of the state, and the surface water rules for allocation and use apply.[109] Therefore, the classification of water as either groundwater or surface water dictates the ownership interests of the rights holder and the extent of permissible regulation by the state.

Texas judicially adopted the English common law rule of capture for percolating groundwater in 1904.[110] The Texas Supreme Court expressly stated that the law recognized no correlative rights in

106. Torres, *supra* note 68, at 149.

107. TEX. CONST. art. XVI, § 59; Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999). The Conservation Amendment states that "[t]he conservation and development of all of the natural resources of this State are each and all hereby declared to be public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto." TEX. CONST. art. XVI, § 59(a).

108. TEX. WATER CODE ANN. § 36.001(5) (West 2013); 30 TEX. ADMIN. CODE ANN. § 297.1(21) (West 2013).

109. *See* TEX. WATER CODE ANN. § 11.021(a) (West 2013) (defining ordinary flow and underflow of streams as property of the state).

110. *See* Houston & T.C. Ry. v. East, 81 S.W. 279, 280 (Tex. 1904) (quoting the traditional statement of the English common law rule of capture, that "the person who owns the surface may dig therein and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor . . . cannot become the ground of an action").

groundwater between neighboring landowners;[111] however, a liability rule as against a neighbor for malice or wanton and willful waste is still available.[112] The rule of capture was reaffirmed by the Texas Supreme Court in 1999 in *Sipriano v. Great Spring Waters of America, Inc.*[113] The rule of capture is best understood as a tort rule that concerns liability to another, and the principle of ownership in place comprises the companion property rule.[114] In the seminal case of *Edwards Aquifer Authority v. Day*, the Texas Supreme Court held that a landowner has a compensable property interest in the groundwater in place beneath his or her land.[115] In support of its interpretation of the common law, the Court cited § 36.002 of the Water Code, which states that "[t]he legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."[116]

B. Resource Management and Planning Authority Through Groundwater Conservation Districts

Legislative authority under the Conservation Amendment eventually gave rise to Chapter 36 of the Water Code and the establishment of groundwater conservation districts.[117] Districts have "authority to regulate the spacing of water wells, the production

111. Correlative rights were not recognized by the court "[b]ecause the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible." *Id.* at 281. A more recent Texas Supreme Court stated that "[t]he rule of capture essentially allows, with some limited exceptions, a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells." *Sipriano*, 1 S.W.3d at 76.

112. City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798 at 805–06 (Tex. 1995) (Wilson, J., dissenting); *Sipriano*, 1 S.W.3d at 77.

113. *Sipriano*, 1 S.W.3d at 76.

114. Torres, *supra* note 68, at 145.

115. 369 S.W.3d 814, 832–33 (Tex. 2012).

116. *Id.* at 832.

117. *See* TEX. WATER CODE ANN. § 36.0015 (West 2013) (stating that groundwater conservation districts, created consistent with the Conservation Amendment, are "the state's preferred method of groundwater management").

from water wells, or both."[118] There are currently ninety-nine groundwater conservation districts in Texas,[119] but significant portions of the State that overlie aquifers are not included in a district.[120] Groundwater conservation districts have broad statutory authority,[121] are locally managed,[122] and are authorized to adopt rules tailored to the conservation and management of the district or specific aquifers.[123] Because of the autonomy of groundwater conservation districts in creating their own rules, no standard approach exists for dealing with endangered species or environmental water needs.

Each district is required to develop a groundwater management plan every five years that both addresses a long list of

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118. *Id.* § 36.001(a). *See also id.* § 36.101 (establishing the rulemaking power of groundwater conservation districts).

119. *Groundwater Conservation District Facts*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/groundwater/conservation_districts/facts.asp (last visited May 12, 2013).

120. *See Groundwater Conservation Districts*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/mapping/doc/maps/gcd_only_8x11.pdf (last visited May 12, 2013) (displaying a color-coded map of state groundwater districts and the "white areas" that do not have a district).

121. TEX. WATER CODE ANN. § 36.101(a) (West 2013) ("A district may make and enforce rules, including rules limiting groundwater production based on tract size or the spacing of wells, to provide for conserving, preserving, protecting, and recharging of the groundwater or of a groundwater reservoir or its subdivisions in order to control subsidence, prevent degradation of water quality, or prevent waste of groundwater and to carry out the powers and duties provided by this chapter."). A groundwater conservation district is therefore able to modify the rule of capture through regulation.

122. *Id.* §§ 36.051–36.059.

123. *Id.* § 36.116(d). The Water Code reads:

> "For better management of the groundwater resources located in a district or if a district determines that conditions in or use of an aquifer differ substantially from one geographic area of the district to another, the district may adopt different rules for:
>
> (1) each aquifer, subdivision of an aquifer, or geologic strata located in whole or in part within the boundaries of the district; or
> (2) each geographic area overlying an aquifer or subdivision of an aquifer located in whole or in part within the boundaries of the district.").

management goals and includes estimates of groundwater availability, annual use, annual recharge, annual spring flow, and water demand within the district.[124] Individual districts are also required to participate in joint planning within their designated groundwater management area.[125] Groundwater management areas encompass multiple groundwater conservation districts along with the "white areas" that do not fall within any groundwater conservation district.[126] Groundwater management areas are charged with planning on an aquifer basis rather than on a county basis, although groundwater conservation districts still retain all regulatory authority.[127]

Texas has sixteen groundwater management areas,[128] and these planning units are intended to align as closely as possible with the boundaries of the state's major aquifers.[129] Each groundwater conservation district is required to participate in joint planning for the groundwater management area and establish "desired future conditions" for the shared aquifers.[130] Based on these desired future conditions, the TWDB delivers "managed available groundwater" values to groundwater conservation districts—and also to regional water planning areas whose plans feed into the State Water Plan—

124. *Id.* §§ 36.1071, 36.1072(e).

125. *Id.* § 36.108.

126. *Groundwater Management Areas*, TEX. WATER DEV. BD., http://www.twdb.state.tx.us/ groundwater/management_areas/index.asp (last visited May 12, 2013).

127. *Id.*

128. *Id.* (displaying a map of the sixteen groundwater management areas).

129. TEX. WATER CODE ANN. § 35.004(a) (West 2013).

130. *Id.* § 36.108. Desired future conditions are defined as "a quantitative description . . . of the desired condition of the groundwater resources in a management area at one or more specified future times." *Id.* § 36.001(30). Desired future conditions are tied to "modeled available groundwater," which is defined as "the amount of water that . . . may be produced on an average annual basis to achieve a desired future condition." *Id.* § 36.001(25).

for inclusion in their plans.[131] Each groundwater conservation district is also required to share its groundwater management plan with other districts in the groundwater management area.[132]

The regionalization of water planning has only occurred within the past twenty years.[133] Senate Bill 1 in 1997, Senate Bill 2 in 2001, and House Bill 1793 in 2005 drastically altered the scale of water planning in the state, increasing communication between planning bodies and the sharing of information.[134] However, individual groundwater conservation districts still hold ultimate regulatory authority, and considerable deference is given to the individual groundwater conservation districts in their determination of desired future conditions.[135]

In regards to endangered species and groundwater management, no targeted legislation exists, as it does in the surface water context, to address drought or environmental flows. The statutory provisions pertinent to endangered species and environmental impacts of groundwater planning are minimal in practice. First, when developing groundwater management plans, groundwater conservation districts are required to "address the management goals" of "conjunctive surface water management issues," "natural resource issues," and "drought conditions."[136]

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131. *Water for Texas: Regional Water Planning in Texas*, TEX. WATER DEV. BD., *available at* http://www.twdb.state.tx.us/publications/shells/RegionalWaterPlanning.pdf (last visited Nov. 12, 2013). The sixteen regional water planning areas in the state are different from the sixteen groundwater management areas. Groundwater management areas are intended to coordinate planning efforts between groundwater conservation districts. *Id.* Regional water planning areas adopt a regional water plan encompassing both surface and groundwater resources, which the TWDB then compiles into the state water plan. *Id.*

132. *Id.*

133. *See* Robert E. Mace, et al., *A Streetcar Named Desired Future Conditions: The New Groundwater Availability for Texas*, STATE BAR OF TEX., The Changing Face of Water Rights in Texas, 13 (May 8–9, 2008), *available at* https://www.twdb.texas.gov/groundwater/docs/Streetcar.pdf (summarizing legislative history concerning groundwater management areas).

134. *See id.* (noting provisions of each bill that require the sharing of information).

135. "Groundwater conservation districts created as provided by this chapter are the state's preferred method of groundwater management through rules developed, adopted, and promulgated by a district in accordance with the provisions of this chapter." TEX. WATER CODE ANN. § 36.0015 (West 2013).

136. *Id.* § 36.1071(a).

Districts are also required to develop their plans "in coordination with surface management entities on a regional basis."[137] However, the Texas Supreme Court has recognized the reality that "[g]roundwater conservation districts have little supervision beyond the local level" and "their activities remain under the local electorate's supervision."[138]

Another statutory provision applicable to endangered species requires that, in establishing desired future conditions for a groundwater management area, districts are to consider "environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water."[139] However, along with the expected focus on hydrological conditions, impacts on private property rights are also to be considered.[140] Importantly, the recent decision in *Edwards Aquifer Authority v. Bragg* has again brought to districts' attention the risk that the limitations they place on groundwater withdrawals may constitute a compensable taking.[141] In practice, when left to the discretion of local groundwater conservation districts—or collections of local groundwater conservation districts in groundwater management areas—it is uncertain to what extent environmental impacts will influence groundwater planning, particularly in light of districts' legitimate fears of effecting a taking.

137. *Id.*

138. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 834 (Tex. 2012).

139. TEX. WATER CODE ANN. § 36.108(d) (West, 2013).

140. *Id.*

141. *See* Edwards Aquifer Auth. v. Bragg, No. 04-11-000180CV, 2013 WL 4535935, *17 (Tex. App.—San Antonio Aug. 28 2013) *opinion withdrawn and superseded on denial of reh'g,* No. 04-11-0018-CV, 2013 WL 5989430 (Tex. App.—San Antonio Nov. 13, no pet. h.) (holding that the Edwards Aquifer Authority's application of the Edwards Aquifer Act, which established a cap on overall aquifer withdrawals and allocated withdrawal rights based upon historic use, resulted in a compensable taking when the Braggs were only permitted to withdraw a portion of the groundwater applied for and needed to operate their pecan orchards).

V. CLASHES BETWEEN THE ENDANGERED SPECIES ACT, WATER MANAGEMENT SCHEMES, AND PRIVATE PROPERTY INTERESTS

Water-dependent endangered species in Texas are found everywhere from artesian spring flow, to streamflow, to coasts and estuaries. As a result, various species protected from take are dependent upon aquifer levels that drive specific artesian wells within the State, surface water flows throughout the course of the river, and freshwater flows into estuaries and coastal regions. For example, the health of a whooping crane at the mouth of the Guadalupe River is dependent upon surface water management throughout the run of the river as well as groundwater management of the Comal Springs and San Marcos Springs of the Edwards Aquifer that are the source of much of that surface water flow.[142] The Guadalupe Blanco River Authority (GBRA) has reported that:

> The average annual contribution of Comal & San Marcos Springs discharge to the Guadalupe River is 373,000 acft. The average discharge of the Guadalupe is 1.25 million acft. While the contribution of the springs during droughts decreases as surface water runoff is unavailable, it actually increases in terms of the proportion of the flow that is provided during droughts. For example, during portions of 1996 the springs accounted for 70% or more of the flow reaching Victoria and nearly 40% of what reached San Antonio Bay. There are seven endangered and one threatened species that live in Comal and San Marcos Springs. These aquatic species are protected by the federal Endangered Species Act.[143]

142. *See Edwards Aquifer and the Guadalupe River*, GUADALUPE BLANCO RIVER AUTHORITY, http://www.gbra.org/drought/edwardsaquifer.aspx (last visited May 12, 2013) ("Springs from the Edwards Aquifer are the sources of tributary rivers to the Guadalupe River. Water from the Edwards Aquifer flows from Comal Springs in New Braunfels into the Comal River. Water from the Edwards Aquifer flows from San Marcos Springs in San Marcos into the San Marcos River. The Comal and San Marcos Rivers are major tributaries to the Guadalupe River.").

143. *Id.*

Interestingly, the GBRA has been directly involved in—and on opposite sides of—two of the most contentious and news-worthy cases in Texas that deal with water management and the take of endangered species: the recent case *Aransas Project v. Shaw* and the historic case *Sierra Club v. Lujan*, the latter of which resulted in the formation of the Edwards Aquifer Authority by judicial mandate.[144] Both of these cases dealt directly with the issues of water management, drought, and the take of an endangered species while also functioning in the shadow of any adjustment of water rights potentially triggering a taking of private property. The major difference between these cases is that one case arises in the surface water regime and the other in the groundwater regime.

What these cases illustrate is that Texas law lacks the kind of comprehensive water management scheme that is necessary to prevent take of endangered species even in times of drought. It seems that the bifurcated surface water and groundwater management systems are too entrenched—and the property rights that have grown up around them are too long-established—to change. Nonetheless, these cases indicate that a collaborative process between the respective state regulatory bodies is necessary to prevent running afoul of the ESA and inviting federal courts to intrude upon state water management.

A. Groundwater: Sierra Club v. Lujan and the Edwards Aquifer

For over fifty years, management of the Edwards Aquifer has been a controversial and divisive issue between urban and rural interests as well as between pumpers and downstream appropriators dependent upon spring flows for their surface water.[145] The Edwards Aquifer is considered to be one of the most diverse aquifer ecosystems in the Southwest and perhaps the world.[146] At the time of the litigation, six endangered animal species were found at the

144. *See generally* Aransas Project v. Shaw, 930 F. Supp. 2d 716 (S.D. Tex. 2013) (noting that GBRA was a party to the lawsuit); Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993) (naming GBRA as a party to the lawsuit).

145. Votteler, *supra* note 57, at 846.

146. *Id.* at 851.

Comal Springs and San Marcos Springs.[147] The fountain darter, which was the subject of the ESA citizen suit, was one of only two endangered species listed at both Comal Springs and San Marcos Springs.[148]

The GBRA had previously filed suit in state court to have the Edwards Aquifer declared an underground river and therefore owned by the state and managed under the surface water regime, but this re-characterization ultimately failed.[149] The GBRA subsequently intervened in *Lujan*,[150] apparently as an alternative method of securing additional surface water for its customers.

In *Lujan*, the federal district court found that "[i]f current levels of withdrawals are allowed to continue without reduction, endangered and threatened species will be taken, damaged, or destroyed; their designated critical habitat destroyed or adversely modified; and their continued existence severely jeopardized during dry periods or relatively mild droughts."[151] The court also found that pumping from the Aquifer was essentially unregulated (despite the presence of two groundwater conservation districts), that the aquifer was overdrafted, and that the springs had the potential of drying up permanently.[152]

The court required the FWS to determine what spring flow was required to avoid a take or jeopardy, and the court set a deadline for the predecessor to the TCEQ to create a plan to limit pumping and protect spring flows.[153] The Legislature was also given a deadline by which to enact a regulatory plan.[154] If it did not do so, the plaintiffs could seek direct regulation by the FWS.[155] The Legislature responded with Senate Bill 1477, creating the Edwards Aquifer Authority.[156]

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147. *Id.*
148. *Id.*
149. *See* Votteler, *supra* note 57, at 857 (stating that "no consensus emerged" when the TWC appointed a professional mediator to resolve the various interests involved with the Aquifer).
150. Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993).
151. *Id.* at *6.
152. *Id.* at *4, 6, 7.
153. Votteler, *supra* note 57, at 858.
154. *Id.*
155. *Id.*
156. *Id.*

This case, of course, is only a part of a much longer-running controversy that recently led to the decision in *Edwards Aquifer v. Day* by the Texas Supreme Court.[157] That case established ownership of groundwater in place (at least as against the state with regard to the possibility of a compensable taking).[158] The 2012 *Day* decision—and its potential limitation on a groundwater district's ability to rely on a historic use period in allocating permits in order to meet withdrawal limits—only further complicates the groundwater management issue.

Also growing out of the Edwards Aquifer controversy is the approval this year of the Edwards Aquifer Recovery Implementation Program (EARIP) habitat conservation plan and the issuance of an incidental take permit for the Aquifer.[159] The EARIP was a "collaborative, consensus-based stakeholder process" that included "water utilities, cities, groundwater conservation districts, agricultural users, industrial users, environmental organizations, individuals, river authorities, downstream and coastal communities, and state and federal agencies."[160] The coordinator for the EARIP declared that "the habitat protection plan will help protect the region from litigation under the Endangered Species Act and will bring unprecedented certainty to Edwards groundwater rights for as long as the plan is in effect."[161] The plan provides for payment to farmers who voluntarily enter into an irrigation suspension program and places additional water in the San Antonio Water System Aquifer Storage and Recovery facility for delivery directly to customers in dry years.[162]

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157. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).

158. *Id.* at 832–33.

159. *Edwards Aquifer Recovery Implementation Program Permit Approved*, TEX. WATER RES. INST. (Feb. 2013), http://twri.tamu.edu/publications/conservation-matters/2013/february/earip-permit-approved/.

160. *Edwards Aquifer Plan Will Reconcile Endangered Species Protection With Stakeholder Needs*, TEX. WATER RES. INST. (Jan. 2012), http://twri.tamu.edu/publications/conservation-matters/2012/january/edwards-aquifer-plan/.

161. *Id.*

162. *Id.*

While the EARIP arose out of litigation that required the FWS to prepare a habitat conservation plan that placed a pumping cap on the aquifer, the Legislature has provided for a new process that is available to any groundwater conservation district. Texas legislation in 2011 gave the State Comptroller the authority to choose to "develop or coordinate the development of a habitat conservation plan" and "apply for and hold a federal permit issued in connection with a habitat conservation plan."[163] The purpose of the grant of authority was "[t]o promote compliance with federal law protecting endangered species and candidate species in a manner consistent with this state's economic development and fiscal stability."[164]

B. Surface Water: Aransas Project v. Shaw and the Whooping Crane

Aransas Project v. Shaw has received extensive publicity due to its surprising holding: the TCEQ is liable for a take of 23 whooping cranes under Section 9 of the ESA.[165] The federal district court ordered the TCEQ to seek an ITP and create a corresponding HCP, enjoining the TCEQ from granting any new water permits on the Guadalupe or San Antonio Rivers until the Court is satisfied that ESA compliance has been achieved.[166] The case starkly raises the issue of federal preemption of state water regulation where that regulation results in a violation of the federal ESA.[167]

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163. TEX. GOV'T CODE ANN. § 403.452(a)(1)–(2) (West 2013).

164. *Id.*

165. Aransas Project v. Shaw, 930 F. Supp. 2d 716, 787 (S.D. Tex. 2013). The GBRA was also a defendant in this suit.

166. *Id.*

167. Mose Buchele, *Ruling on Water Policy Could Be Felt Across the State*, STATE IMPACT TEX. (March 12, 2013, 6:11 PM), http://stateimpact.npr.org/texas/2013/03/12/ruling-on-water-policy-could-be-felt-across-the-state/ (quoting Andrew Sansom, an expert for the plaintiffs in the case and head of the Meadows Center for Water and the Environment, who said, "I think that what we've seen in this ruling is a warning that if we don't get serious about protecting the environmental flows in our rivers and streams, then we invite the federal government to become involved in the management of surface water in every basin where endangered species are present.").

Although the case has been stayed pending an expedited appeal,[168] it demonstrates the risks incurred by water management bodies—including the TCEQ, river authorities, and groundwater conservation districts—if they do not take endangered species into account in water allocation decisions. The case also both exposes the weaknesses in Texas water law's ability to ensure protection of the environmental flows upon which endangered species depend and reveals the recurrent theme of equivocation by the Texas Legislature in prioritizing ecosystem and species protection. By granting only permissive authority to agencies, without legislatively mandating firm environmental protections, the legislature leaves water permitters fearful of interfering with the rights of permit holders and exposing themselves to liability for a compensable taking of a private property right.

Notably, some statutes the court relied on did not exist at the time the lawsuit was filed in March 2010. Section 11.053 of the Texas Water Code, entitled "Emergency Order Concerning Water Rights," was only enacted in 2011.[169] Section 403.452 of the Government Code, providing a method for acquiring an HCP and ITP, was enacted the same year.[170] The Legislature seems to be responding to agency concerns in light of the current drought, but the district court correctly concluded that the existing statutory methods for prevention of a take were insufficient.

SB 3 and its much-touted "e-flows" set-aside process was the source of significant judicial ire:

> Although S.B.3 does establish a comprehensive framework for the State of Texas to ***determine*** the

168. Aransas Project v. Guadalupe-Blanco River Auth., No. 13-40317 (5th Cir. Mar. 26, 2013); *see also* Andrew Harris, *Texas Wins Stay in Whooping Cranes Case from U.S. Court*, BLOOMBERG (March 36, 2013 5:40 PM), http://www.bloomberg.com/news/2013-03-26/texas-wins-stay-in-whooping-cranes-case-from-u-s-court.html (providing concise background on the crane litigation and quoting a spokesperson for Texas Attorney General Greg Abbott on the impact of the Fifth Circuit's stay of the district court's injunction). Commentators suggest that the case has a high likelihood of being overturned on appeal.

169. TEX. WATER CODE ANN. § 11.053 (West 2013).

170. TEX. GOV'T CODE ANN. § 403.452 (West 2013).

> amount of freshwater inflows that need to remain instream to protect the overall health of the State's river system, it makes no attempt to ***ensure*** that such recommended amounts remain. Indeed, to the contrary, S.B.3 specifically excludes from consideration the inflow needs of the bays and estuaries in times of water shortages. In addition, S.B.3 fails to address existing permits and water usage. In short, S.B.3 does not address, concern, protect, or assist the endangered whooping cranes, and therefore, provides no grounds for abstention.[171]

Any environmental flow protections established under SB 3 would probably be the first water allocations to disappear in drought conditions, which is counterintuitive when considering that the environmental flows are determined as the minimum necessary flows to support ecosystem health. The SB 3 process expresses a clear legislative choice to protect human uses over environmental needs in times of drought, and inevitably this policy will clash with the ESA.

VI. PLANNING FOR THE FUTURE

While *Aransas v. Shaw* may not survive its appeal on causation or other grounds, the case and the saga of the Edwards Aquifer Authority lay bare the risks associated with neglecting to make endangered species a firm priority in water planning and permitting. The TCEQ and individual groundwater conservation districts are not currently required—in a mandatory, enforceable, meaningful way—to ensure the minimum environmental flows needed by endangered species in times of drought. Unlike the ESA, Texas water law provides no clear mandate for protecting endangered species in all circumstances, and this disconnect between state and federal law will only become increasingly problematic.

171. *Aransas Project,* 930 F. Supp. 2d at 735 (emphasis in original).

A. *Potential for the Endangered Species Act to Compel Change in Water Management Where Protected Species are at Risk*

Legislative efforts up to this point have attempted to address drought and environmental concerns within the established surface water and groundwater management regimes. While some collaboration between groundwater and surface water management entities is theoretically required by statute,[172] the influence of these requirements on tangible water planning outcomes is dubious because of both the lack of oversight and the deference given to reasonable determinations by state agencies. Additionally, the landmark institution of the SB 3 process for environmental flow set-asides of surface water has, at the very least, seemed to fail in the case of the whooping crane. In practice, when there is still water available in a river—even where that river is over-appropriated and the water is only present due to rights holders not using their full allocated amount—the TCEQ does not appear eager to set aside water for instream flows. In the groundwater context, the Legislature has taken a relatively hands-off approach—for management in general and for environmental needs in particular—and only requires that surface water, and thus spring flow and the associated dependent species, be taken into consideration by localized groundwater conservation districts.[173]

In order to retain state control over water resources and plan responsibly for a challenging future, the TCEQ, river authorities, and groundwater conservation districts must manage the water resource jointly to the extent required for aquifer levels, spring flow, and

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172. Statutes mandating collaboration include Texas Water Code § 36.1071(a) (requiring groundwater conservation districts to address the "management goals" of "conjunctive surface water management issues[,]" "natural resource issues[,]" and "drought conditions," and also requiring districts to develop the plan "in coordination with surface management entities on a regional basis") and Texas Water Code § 36.108(d) (requiring that in establishing desired future conditions for a groundwater management area, districts are to consider "environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water").

173. TEX. WATER CODE ANN. § 36.108 (West 2013).

stream flow to cohesively provide the environmental flows needed by endangered species. By establishing a truly joint management system within this environmental flow and endangered species context, ideally Texas water law could begin to move toward a more rational and cohesive management scheme for its scarce water resources. The ESA is poised to be an impetus for change in Texas water law, and both the legislature and state entities who manage the resource must act now to put the processes in place that will meet this resource management challenge.

B. Options Going Forward

Comprehensive consideration of the water resource—spanning aquifer levels, spring flows, and surface water—is a necessary recognition of hydrological reality and is the scientific foundation for state-wide compliance with the ESA. The laws governing groundwater and surface water in Texas have developed so independently, both in the nature of the water right and in the method of resource management, that it is unfeasible at this point to have truly unified management of the water resource.[174] However, more holistic management is achievable by uniting the existing systems through data sharing and real, mandatory collaboration for planning and allocation decisions. Whatever path the state chooses, it must deal with the conflict between state water rights and the mandates of the federal ESA in order to retain authority over water resource management. The current methods of water management in place risk continued interference by the federal courts, and this risk will continue so long as there are water-dependent protected species and so long as there is a water shortage. This issue will not disappear with the easing of the current drought, and the state needs to adjust its approach to ESA compliance in order to be prepared for

174. The costless transition in Texas from riparianism to prior appropriation doctrines for surface water cannot realistically now be replicated in the groundwater context. Both (1) the repeated failure of attempts to characterize particular aquifers as underground rivers, and therefore as waters of the state, and (2) the property right to groundwater in place—which has the firm support of the Texas Supreme Court after *Day*—seem to have closed off the possibility that the State could execute a similar re-characterization of rights in groundwater. Therefore, the property interest in groundwater rights is greater than the property right in surface water, and this disparity will necessarily influence joint management.

newly listed species, growing population and industrial demands, and changing climactic conditions. Comprehensive, collaborative management can be achieved through a combination of basin-wide collaborative solutions and legislative action.

1. Basin-wide Collaborative Solutions

Voluntary collaboration with the FWS may be the best way to ensure the presence of reliable environmental flows and to decisively retain control of water management in the state and affected local stakeholders. "The most viable method of reconciling the conflicts between federal and state interests probably lies in federal, state, and local cooperation."[175] Other jurisdictions have established "numerous existing or planned agreements [that] embrace whole-basin, multiple-user, cooperative approaches to species management; these agreements provide both precedent and instruction for fashioning similar systems capable of resolving the fundamental doctrinal inconsistencies between state water law and federal species conservation."[176]

The 2011 Texas legislation giving the Comptroller the authority to develop a habitat conservation plan was intended to promote compliance with the ESA in order to protect state economic interests.[177] This statutory tool could be utilized to develop basin-wide HCPs that result from a collaborative effort between the TCEQ, river authorities, groundwater conservation districts, and local stakeholders. Basin-wide planning would be able to address the full water resource and all associated endangered species.

The Edwards Aquifer Authority underwent a similar process in developing the EARIP, albeit by court order rather than

175. Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 757 (2000).

176. *Id.* at 757, 759–64 (summarizing four unique cooperative agreements between state entities, rights holders, and the FWS for surface water management on a basin-wide basis in order to achieve compliance with the ESA); *see also id.* at 765. ("[T]he crux of a successful, whole-basin, cooperative solution to [species] conservation lies in finding or creating new ways to spread risks and satisfy expectations while satisfying the mandates of the ESA.").

177. TEX. GOV'T CODE ANN. § 403.452 (West 2013).

voluntarily. The EARIP's "collaborative, consensus-based stakeholder process"—which included "water utilities, cities, groundwater conservation districts, agricultural users, industrial users, environmental organizations, individuals, river authorities, downstream and coastal communities, and state and federal agencies"[178]—could be an early example of the type of planning process that may become essential for water planning in the state. The significant impediments of cost and time are the main hurdles for this type of collaborative HCP development process, but the ESA may compel this type of planning irrespective of the costs or challenges if compliance cannot otherwise be accomplished.[179]

2. Achievable Legislative Action

Senate Bills 1, 2, and 3 do not go far enough toward protecting environmental flows and endangered species. Simple possession of environmental information or the permissive authority to act based upon scientifically determined instream needs is insufficient, as *Aransas Project v. Shaw* makes clear. The legislature needs to give the environmental flow statute (SB 3) real force, making protection of environmental flows mandatory in order to correspond with the mandatory nature of the ESA. Strengthening of the statute would place a firm duty on the TCEQ while also potentially shielding the TCEQ from some complaints or liabilities to rights-holders in doing what is required to meet the ESA mandate. Additionally, the environmental flows statute should be broadened to address spring flows, and therefore aquifer levels, in recognition of the interconnectedness of the water resource and out of necessity for its successful management.

Furthermore, rather than giving environmental flows a priority date and relegating them to junior status, the legislature should essentially change the baseline. This could be done either by

178. *Edwards Aquifer Plan Will Reconcile Endangered Species Protection with Stakeholder Needs*, TEX. WATER RES. INST. (Jan. 2012), http://twri.tamu.edu/publications/conservation-matters/2012/january/edwards-aquifer-plan/.

179. The Supreme Court famously declared that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

changing the definitions of "appropriable" and "available" to comport with modern understanding, or the change could even be made in recognition of background public trust values. A shift in the baseline would not require clear compensation of any one rights-holder because the cut-off would vary by year. This would mean that, at worst, the state would only be liable for a temporary taking. The baseline could also be shifted by requiring that permits include a specific baseline minimum flow that must remain instream.

Additionally, the emergency statute should be amended to give truly protected status to environmental flows that have been set aside. An effective change in the baseline, rather than assignment of a priority date, would help rectify some of the shortcomings of the statute.

Finally, the Texas Legislature needs to alter its fundamental approach to environmental flows. The legislature needs to unequivocally declare that environmental flows are required for ESA compliance, that they should be planned for and permitted around at all levels of state water management, and they should be a protected priority in times of drought. In a move beyond the typical grant of permissive authority on these issues, a firm legislative policy that permeates all applicable legislation is critical for ESA compliance and retention of state control over water management.

VII. CONCLUSION

Texas water law currently lacks the kind of comprehensive water management scheme that would be necessary to prevent take of endangered species even in times of drought. It is evident that our bifurcated surface water and groundwater management systems are entrenched and that the property rights that have grown up around them are too long-established to now legislatively change the basic nature of those rights without substantial cost. However, the TCEQ, river authorities, and groundwater conservation districts must manage their water jointly to the extent required for aquifer levels, spring flow, and stream flow to all contribute what is necessary to the environmental flows upon which endangered species rely. The unique, spring-fed river systems of Texas make this management vision a necessity as groundwater pumping, population growth, and

the number of listed species are all on the rise. The State of Texas needs to confront head-on the challenge of endangered species, private property interests in water, and collaborative water planning in order to comprehensively manage the water resource for the future and retain State water management authority.