TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

VOL. 15 NO. 2 SPRING 2010 PAGES 141 TO 265

A Journal Publication of The University of Texas School of Law and the Individual Rights and Responsibilities Section of the State Bar of Texas

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TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 15 Number 2 Spring 2010

TEXAS JOURNAL
ON CIVIL LIBERTIES & CIVIL RIGHTS

Volume 15, Number 2, Spring 2010

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Why March To A Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing

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I. INTRODUCTION

This Article fills a gap in current scholarship concerning the Federal Sentencing Guidelines ("Guidelines") by bringing together many sentencing concerns and refocusing them on the Guidelines themselves. Since *United States v. Booker*,[1] in which the Supreme Court demoted the Guidelines from mandatory to advisory status and imposed reasonableness as the appellate standard of review, several scholars have written about the new, advisory Guidelines scheme. Some have focused on the constitutional problems that *Booker* failed to settle.[2] Others have argued against a presumption of reasonableness for within-Guidelines sentences.[3] For some scholars, the biggest issues with the advisory Guidelines regime are the lack of any guiding punishment policy for sentencing courts, and the lack of emphasis on district courts' reasons for imposing a sentence.[4] While this Article draws on some of the ideas presented in prior scholarship, its main objective is to bring all of these concerns together by focusing on problems within the Guidelines, advisory or not.

Rather than focusing exclusively on how appellate courts should review sentences, or how district courts should impose sentences, this Article focuses on why courts on every level should be skeptical of the Guidelines and should, therefore, give less credence to them as providing proper sentencing "guidance." Some of these arguments were made when the Guidelines were first developed. Now, though, over twenty years later, there is data to back up these early concerns. For the purposes of this Article, the term "bias" means any factor outside of the sentencing statute that influences a judge's decision-making and leads to disparate sentencing. This can include characteristics of the defendant

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[1] 543 U.S. 220, 245 (2005).

[2] *See, e.g.*, James L. Fant, Comment, *Is Substantive Review Reasonable? An Analysis of Federal Sentencing In Light of Rita and Gall*, 4 SETON HALL CIR. REV. 447, 471 (2008) (explaining that "[t]he presumption of reasonableness insulates within-Guidelines sentences to create a de facto mandatory guidelines system"); David Holman, Note, *Death By A Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 271 (2008) (arguing that Supreme Court sentencing decisions perpetuated the Sentencing Guidelines' Sixth Amendment violations); John Playforth, *The Veil of Vagueness: Reasonableness Review in* Rita v. United States, *127 S. Ct. 2456 (2007)*, 31 HARV. J.L. & PUB. POL'Y 841, 851–53 (2008) (arguing that *Rita* failed to resolve the constitutional problem with the Guidelines and to uphold the legislative goal of sentencing uniformity).

[3] *See, e.g.*, Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 FED. SENT'G REP. 170, 170 (2006) (discussing several reasons why the presumption of reasonableness is problematic); Jason Hernandez, *Presumptions of Reasonableness For Guideline Sentences After* Booker, 18 FED. SENT'G REP. 252, 252–53 (2006) (arguing that the presumption of reasonableness undermines the holdings of both majority opinions in *Booker*).

[4] *See, e.g.*, Fant, *supra* note 2, at 477 (arguing that reliance on the Guidelines-centric system erroneously "assumes . . . Guidelines actually achieve the goals set forth by Congress under § 3553(a) and that sentencing judges independently determined sentences within Congress's framework."); Anna Elizabeth Papa, Note, *A New Era of Federal Sentencing: The Guidelines Provide District Court Judges a Cloak, But Is* Gall *Their Dagger?*, 43 GA. L. REV. 263, 266 (2008) (indicating that district judges lack guidance on how to weigh the factors of § 3553(a)).

(such as race, age, gender, and socioeconomic status) or characteristics of the sentencing judge (such as political ideology, mood, and sentencing philosophy). As this Article will discuss, the Guidelines are imbedded with biases that encourage—or at least do not adequately diminish—disparities and hide judges' reasons for imposing sentences.

The Supreme Court emphasizes uniformity as its reason for continuing to instruct district courts to begin their sentencing determination with a Guidelines calculation. Uniformity means that punishment is based on an offender's real conduct and that similar offenders who have committed similar conduct receive the same punishment.[5] However, as this Article demonstrates, the Supreme Court's singular focus on uniformity is neither based on statutory construction nor on Congress's own articulated sentencing policy, which includes honesty and proportionality as well.[6] Honesty refers to "avoiding the confusion and implicit deception that arose out of the [indeterminate] pre-guidelines sentencing system."[7] While a portion of the honesty goal was achieved with the abolition of federal parole, honesty also referred to being transparent about the sources and reasons dictating the sentences imposed.[8] Although honesty and proportionality can inform uniformity, each sentencing goal requires different considerations. The Supreme Court's approach obstructs any meaningful progress toward accomplishing the uniformity, honesty, and proportionality in sentencing that Congress charged the Sentencing Commission to achieve.

Part II of this Article gives a brief history of federal sentencing discretion. It moves through the pre-Guidelines era, to the mandatory

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[5] *Booker*, 543 U.S. at 250 ("Congress' basic statutory goal—a system that diminishes sentencing disparity-depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction."); *see* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2009) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.").

[6] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[7] *Id.*

[8] Memorandum from Attorney General John Ashcroft, to All Federal Prosecutors, 16 Fed. Sent. R. 12, (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (last visited April 11, 2010) ("[T]he Sentencing Reform Act and the Sentencing Guidelines sought to accomplish several important objectives: (1) to ensure honesty and transparency in federal sentencing; (2) to guide sentencing discretion, so as to narrow the disparity between sentences for similar offenses committed by similar offenders; and (3) to provide for the imposition of appropriately different punishments for offenses of differing severity"); *see also* Evan W. Bolla, *An Unwarranted Disparity: Granting Fast-Track Departures in Non-Fast-Track Districts*, 28 CARDOZO L. REV. 895, 910 (2006) ("These Sentencing Guidelines issued by the Commission attempt to narrow the disparity between sentences for similar offenses committed by similar offenders, while providing different punishments for offenses of different severity, in what they thought to be an honest and transparent manner."); Michael M. O'Hear, *Localization and Transparency in Sentencing: Reflections on the New Early Disposition Departures*, 27 HAMLINE L. REV. 357 (recognizing transparency as a goal of the Federal Sentencing Guidelines); Sandra Guerra Thompson, *The Booker Project: The Future of Federal Sentencing*, 43 HOUS. L. REV. 269, 270-71 (2006) ("They were originally intended to reduce disparity by creating a system of uniform sentences for like offenses, promote transparency and honesty in sentencing, and create a body of sentencing law that would provide for appellate review.").

Guidelines years, to the current advisory Guidelines period. In doing so, Part II reveals the longstanding concern with individualized sentencing as a basis for justice and fairness and the tension between that concern and the threat of judicial bias plaguing discretionary sentencing.

Part III focuses on the development of the Guidelines themselves by explaining the early criticism of the Guidelines and the concerns that continue to this day. The purpose of Part III is to reveal the imprudence of relying on the Guidelines as a sound resource based in studied sentencing policy. Instead, as Part III reveals, the Guidelines still have work to do in providing guidance toward reasonable sentences.

Part IV explains that instructing sentencing courts to begin their sentencing determination with a Guidelines calculation is not statutorily mandated and is, in fact, contrary to statutory construction. Part IV also investigates what is lost by removing the Guidelines calculation as a starting point, focusing on the Supreme Court's concern about sentencing uniformity. Part IV ends by emphasizing that uniformity is but one goal of sentencing, and that it should not be saved when it means sacrificing substantive sentencing reasonableness.

Part V explores what role uniformity, honesty, and proportionality can and should play in the sentencing process once the Guidelines are removed from their current place of prominence. Part V ends with the proposal that reviewing courts should step in as the facilitators of sentencing uniformity, not by enforcing the Guidelines, but by beginning to police the meanings given by lower courts to the § 3553(a) sentencing factors. This more reasoned approach better protects the uniformity, honesty, and proportionality in sentencing that Congress sought by directing the Sentencing Commission to develop the Guidelines. It would be a new and improved tune for federal sentencing.

II. A PROGRESSION THROUGH FEDERAL SENTENCING REFORMS

Federal sentencing has moved through varying levels of discretion for district courts. For approximately two centuries before the Guidelines were developed, federal judges had nearly unfettered discretion in sentencing.[9] Generally, so long as a sentence did not exceed statutory limits, it would survive appellate review.[10] The rationale behind allowing such power to be in the hands of sentencing judges was a commitment to the ideal of individualized sentencing as a

[9] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998); MICHAEL TONRY, SENTENCING MATTERS 6 (1996) ("For all practical purposes, appellate review of sentences . . . was nonexistent."); Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 67–70 (2007).

[10] STITH & CABRANES, *supra* note 9, at 9; *see also* Dorszynski v. United States, 418 U.S. 424, 432–43 (1974) (citing Gurera v. United States, 40 F.2d 338, 340–41 (8th Cir. 1930) ("the appellate court has no control over a sentence which is within the limits allowed by a statute.")).

means of attaining fairness and justice. In 1932, the Supreme Court explained the connection between individualized sentencing, notions of fairness, and judicial discretion in *Burns v. United States*, stating, "It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion."[11] Five years later, the Supreme Court reiterated these sentiments in *Pennsylvania ex rel. Sullivan v. Ashe*:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.[12]

Perhaps the idea that fairness and justice require sentencing tailored to the specific defendant was best articulated in the 1949 case, *Williams v. New York*. Expressing a dislike for rigid sentencing, the Supreme Court explained, "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[13]

The *Williams* Court characterized individualized sentencing as a change in sentencing practices, saying, "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[14] According to the Court, this was a move from retribution to a reformation and rehabilitation of offenders as the primary purpose of sentencing.[15] Despite the Court's belief that the sentencing focus had shifted, the Court recognized that judicial discretion in federal sentencing has always been a feature of American jurisprudence.[16] Over time, as the pendulum swung from retributivist theories of punishment to utilitarian theories and back again, the sense that sentencing must fit the offender and not simply the offense has persisted in American jurisprudence.

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[11] 287 U.S. 216, 220 (1932).

[12] 302 U.S. 51, 61 (1937).

[13] Williams v. New York, 337 U.S. 241, 247 (1949).

[14] *Id.*

[15] *Id.* at 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

[16] *Id.* at 246 ("[B]efore and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

Before the era of the Guidelines, it was believed that broad judicial discretion was the best method of achieving these individualized sentences. But such discretion was thought to produce great disparities in sentencing within and across districts.

In order to investigate allegations of sentencing disparity, Congress created the National Commission on Reform of the Federal Criminal Laws, known as the "Brown Commission" in 1966.[17] In 1971, the Brown Commission reported that "sentencing disparities were large and pervasive."[18] Numerous studies and reports confirmed these disparities.[19] Congress responded to the Brown Commission's findings by, among other things, enacting Senate Bill 2699 introduced by Senator Edward Kennedy in 1975.[20] That legislation, which set out the framework for what would become the Federal Sentencing Guidelines, was based largely on the sentencing scheme envisioned by then-District Judge Marvin Frankel.[21] Judge Frankel was deeply critical of unchecked judicial discretion in sentencing, and he called the sentencing power of judges during his day "terrifying and intolerable for a society that professes a devotion to the rule of law."[22] Judge Frankel pictured a structured sentencing system in which a "Commission on Sentencing" would create "binding" guidelines.[23] In Judge Frankel's ideal sentencing scheme, the Commission would be a politically insulated body composed of "lawyers, judges, penologists, and criminologists," as well as

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[17] *See* LISA M. SEGHETTI & ALISON M. SMITH, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS CRS–11 n.58 (June 30, 2007), *available at* http://www.fas.org/sgp/crs/misc/RL32766.pdf..

[18] Joseph F. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1340 (1999).

[19] *See, e.g.*, Federal Sentencing Reporter, *25% Rule Exhibits*, 8 FED. SENT'G REP. 189 (1995) (discussing a 1974 Second Circuit Sentencing Study conducted by the Federal Judicial Center in which twenty identical files from actual cases were presented to fifty federal district court judges who were asked to indicate the sentence that they would impose, and reporting the great range of sentences that resulted) (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES 1-3 (1974)); Kevin Clancy et al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975); Marvin E. Frankel, *The Sentencing Morass and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967); Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982); Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 167 (1973) ("The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia Circuit. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit."). *But see*, STITH & CABRANES, *supra* note 9, at 106–12 (questioning the validity and thoroughness of pre-Guidelines sentences and finding sentencing disparities).

[20] S. 2699, 94th Cong.

[21] AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 124–44 (1971); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter CRIMINAL SENTENCES]. Several other scholars also called for sentencing guidelines or some means of restraining judicial discretion in sentencing. *See, e.g.*, ALAN M. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1973);.

[22] CRIMINAL SENTENCES, *supra* note 22, at 5.

[23] *Id.* at 119, 123.

"sociologists, psychologists, business people, artists, and . . . former or present prison inmates."[24] Nearly a decade later, Congress passed the Sentencing Reform Act of 1984 (SRA), and in 1987 the Guidelines were born.

A. Chaining the Melody: The Mandatory Sentencing Guidelines and the Shackling of Discretion

According to the U.S. Sentencing Guidelines Manual, in imposing the Guidelines, Congress originally sought to achieve three goals: (1) "*honesty* in sentencing"; (2) "*uniformity* in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"; and (3) "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[25] To attain these Congressional sentencing policies, the SRA abolished federal parole and directed the Sentencing Commission to create categories of offense behavior and offender characteristics and to use the combination of such categories to prescribe ranges of appropriate sentences for each class of convicted persons.[26] These sentencing ranges were almost entirely binding on sentencing judges; for nearly twenty years, judges under this mandatory Guidelines regime had very limited discretion to sentence defendants within a narrow sentencing range.[27]

Further, in the PROTECT Act of 2003, Congress made it clear that it wanted to severely limit judicial authority to depart from the applicable Guidelines ranges.[28] However, even though the Guidelines were developed to limit judicial bias and the disparate sentences that could come with individualized, discretionary sentencing, the Guidelines themselves reflect a glimmer of individualized sentencing.[29] Rather than

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[24] *Id.* at 119–20.

[25] U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, introductory cmt. 3 (2009).

[26] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 217(a), 235(b)(1), 98 Stat. 1987, 2020, 2032.

[27] *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 531 (2007) (explaining how the Guidelines slid from advisory to mandatory through judicial enforcement). In addition, the Supreme Court recognized the Guidelines as mandatory in *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and *Stinson v. United States*, 508 U.S. 36, 42 (1993). *See also* United States v. Booker, 543 U.S. 220, 233–34 (2005).

[28] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003 is aimed at preventing child abuse. But the Feeney Amendment, slipped into the PROTECT Act, limited the ability of judges to depart from sentencing guidelines in specific cases. It also required the U.S. Sentencing Commission to amend the Guidelines to substantially reduce downward departures. PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 670 (2003) (codified as amended at 18 U.S.C. § 3742(e) (2006)).

[29] *See* 18 U.S.C. § 3661 (1982) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.").

being based solely on offense conduct, the Guidelines' 258-box grid takes into account the offender's past criminal record. Even within the offense-level determination, the Guidelines call for certain aspects of the offender's behavior—in carrying out the crime and in helping or hindering the prosecution of that crime—to be a part of the sentencing calculation.[30] Nevertheless, the more central goal of the Guidelines was to eliminate sentencing procedures that cultivated judicial bias and led to unwarranted disparity.[31] Although there were many critics of this new system, it eventually became well settled that the Guidelines would withstand constitutional challenges.[32] That is, until *Booker* took the stage.[33]

B. *Booker* and the Same Old Song

In *United States v. Booker*, the Supreme Court addressed the issue

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[30] These "Offense Adjustment" factors range from an upward adjustment for a defendant who has played a major role in an offense to a downward adjustment for defendants who have accepted responsibility for the crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2009) (authorizing the increase of the Offense Level for a defendant who was the leader or organizer of criminal activity); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2009) (authorizing a two-point decrease of the Offense Level for the acceptance of responsibility).

[31] The term "unwarranted disparity" is used to refer to the situation in which similar criminal conduct by similar offenders is punished differently. Of course this definition needs refinement. For instance, how does one determine when offenses and defendants are similar? This question is beyond the scope of this Article. However, recognition of this difficulty further highlights the shortcomings of the Guidelines in serving ill-defined sentencing purposes.

[32] There are several cases in which the Supreme Court rejected constitutional challenges to the Guidelines. *See, e.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (holding that a sentencing court may consider the acquitted conduct of a defendant that has been proved by preponderance of evidence); Witte v. United States, 515 U.S. 389, 406 (1995) (rejecting constitutionality concerns regarding sentence enhancements and double jeopardy); United States v. Dunnigan, 507 U.S. 87, 98 (1993) (concluding that the obstruction of justice sentence enhancement did not undermine the defendant's right to testify); Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that the Guidelines were constitutional and amounted to neither excessive delegation of legislative power nor violation of the separation of powers principle).

[33] The Guidelines did in fact withstand constitutional scrutiny for twelve years before a line of cases began to unravel confidence in their constitutionality. This line of cases began with *Jones v. United States*, 526 U.S. 227 (1999), in which the Supreme Court held that provisions of the federal carjacking statute that imposed higher penalties for serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations. *Id.* at 229, 251–52. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that other than fact of prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. This reasoning was based on an understanding that the "historical foundation" for the criminal law in this country recognizes a need to "guard against a spirit of oppression and tyranny on the part of rulers" by requiring that "'*the truth of every accusation* . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *Id.* at 477 (Quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). Two years later, the Supreme Court advanced this line of thinking in *Ring v. Arizona* by holding that a "trial judge, sitting alone" is prohibited from determining the existence of the aggravating or mitigating factors required for the imposition of the death penalty under Arizona law. 536 U.S. 584, 588, 609 (2002). In *Ring*, the Court specifically dispelled any argument that sentencing factors should be treated differently than elements of a crime when it comes to whether a judge or jury has the authority to decide certain facts that increase a defendant's authorized punishment (the highest sentence based on the facts admitted to or found by the jury). *Id.* at 609.

of whether the Federal Sentencing Guidelines, in their mandatory form, violated the Sixth Amendment.[34] The Court reaffirmed the principle that the Sixth Amendment "protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"[35] However, the Supreme Court determined that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[36] Therefore, the Court ultimately decided that there would be no Sixth Amendment violation if the Guidelines were not binding on judges.[37] In order to remedy the constitutional problem that the Court identified as resulting from the mandatory nature of the Guidelines, the Supreme Court decided to excise only the provisions that made the Guidelines mandatory.[38] As a result, the Court held that sentencing courts are required to consider Guideline ranges, but must ultimately tailor the sentence imposed in light of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a).[39] Pursuant to § 3553(a), sentencing courts shall consider: (1) nature and circumstances of the offense and history and characteristics of defendant; (2) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and to provide just punishment; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for the offense; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities, and (7) need to provide restitution to victims.[40] The Court also determined that the appropriate standard of appellate review would be a "review for

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[34] 543 U.S. 220, 226 (2005).

[35] *Id.* at 230 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

[36] *Id.* at 233.

[37] *Id.* Justice Stevens delivered the portion of the opinion of the Court that revealed the constitutional problem with mandatory Guidelines, in which Justices Scalia, Souter, Thomas, and Ginsburg joined. *Id.* at 226, 244. Justice Breyer delivered the remedy portion of the opinion, in which Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Ginsburg joined. *Id.* at 244–45. Justice Stevens dissented in part, in which Justice Souter joined, and in which Justice Scalia partially joined. *Id.* at 272. Justices Scalia and Thomas filed opinions dissenting in part. *Id.* at 303, 313. And Justice Breyer filed an opinion dissenting in part, in which Chief Justice Rehnquist and Justices O'Connor and Kennedy joined. *Id.* at 326.

[38] *Id.* at 233–35, 259–60. The *Booker* remedy was reached by excising 18 U.S.C. § 3553(b)(1), the provision making it mandatory for sentencing courts to impose a sentence within the applicable Guidelines range absent circumstances justifying a departure, and § 3742(e), the provision setting forth the standards for appellate review. *Booker*, 534 U.S. at 245. The Court struck § 3742(e), not because it disagreed with the standard of review set forth by the Guidelines, but because § 3742(e) contained cross-references to the excised § 3553(b)(1). *Booker*, 543 U.S. at 260. Section 3742(e) instructed circuit courts to review sentences to determine whether they were (1) in violation of law; (2) resulting from an incorrect application of the Guidelines; or (3) outside of the applicable Guidelines range; and whether the district court failed to provide a written statement of reasons, or the sentence departed from the Guidelines range based on an improper factor or in contradiction to the facts. 18 U.S.C. § 3742(e) (2000 & Supp. V 2005).

[39] *Booker*, 543 U.S. at 259–60.

[40] 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

'unreasonable[ness].'"[41]

In changing the Guidelines from mandatory to advisory, the Court moved from making a constitutional determination to thinking about sentencing policy. The Court explained that "Congress sought to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities ... [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'"[42] Without much explanation, the Court concluded, "The [Guidelines] system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives."[43] Although the Court recognized that the purpose of the Guidelines was to achieve uniformity, honesty, and proportionality in sentencing, it never mentioned sentencing honesty or proportionality in *Booker* at any other point.[44] The uniformity goal, on the other hand, is mentioned by the Court numerous times in *Booker*, and it is quite clear that uniformity was the driving force in the Court's decision to change the Guidelines from a mandatory to an advisory system rather than to invalidate them altogether.[45] Professing to resolve the constitutional problem posed by mandatory guidelines, the Supreme Court apparently attempted to preserve uniformity in sentencing by requiring judges to consider both the Guidelines and statutory sentencing factors. Thus, the Court increased judicial discretion to sentence defendants outside of the Guidelines range, but it did so without giving much thought to what it meant to have honesty or proportionality in sentencing.[46]

In sum, over a span of several decades, the discretion of sentencing judges moved from virtually unrestrained, to nearly completely bound, to something seemingly in between the two. A series of Supreme Court

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[41] *Booker*, 543 U.S. at 261 (alteration in original) (citing 18 U.S.C. § 3742(e)(3) (1994 ed.)).

[42] *Id.* at 264.

[43] *Id.*

[44] *Id.* The court explained, "Finally, the Act without its 'mandatory' provision and related language remains consistent with Congress' initial and basic sentencing intent. Congress sought to 'provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.'" In support of this position, the Court cited to 28 U.S.C § 991(b)(1)(B) and U.S. SENTENCING GUIDELINES §1A1.1, application note.

[45] *Id.* at 253–54 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute—a uniformity consistent with the dissenters' remedial approach. It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance and that Justice Stevens' approach would undermine. . . . In significant part, it is the weakening of this real-conduct/uniformity-in-sentencing relationship . . . that leads us to conclude that Congress would have preferred *no* mandatory system to the system the dissenters envisage." (internal citation omitted)).

[46] The importance of the balance between uniformity and discretion to the Court was reiterated by Justice Breyer in the *Gall* oral argument. Justice Breyer asked: "I want to know your view of it, too, because what I want to figure out here by the end of today is what are the words that should be written in your opinion by this Court that will lead to considerable discretion on part of the district judge but not totally, not to the point where the uniformity goal is easily destroyed." Transcript of Oral Argument at 22, Gall v. United States, 552 U.S. 38 (2007) (No. 06-7949).

decisions following *Booker* purported to clarify the status of judicial sentencing discretion in the advisory Guidelines era. The first opinion was *Rita v. United States*, which held on appeal that a rebuttable presumption of reasonableness can be applied to a sentence within a properly calculated Guidelines range.[47] This is because a sentencing court is presumed to have taken into account the § 3553(a) sentencing factors and exercised its discretion to impose a sentence within the same range that the Commission has found acceptable.[48] Once the Court set forth the permissible methods of dealing with within-Guidelines sentences, it turned to the many questions surrounding the appropriate manner of assessing the reasonableness of sentences that fell outside of the applicable Guidelines ranges. Two years after *Booker*, the Supreme Court sought to clarify reasonableness review further in two opinions issued on the same day: *Gall v. United States*[49] and *Kimbrough v. United States*.[50] In *Gall*, the Court clarified that reasonableness review is a deferential abuse of discretion standard, which applies to all sentences regardless of their distance from the applicable Guidelines range.[51] Further, the Court explained that reasonableness review has both a substantive and procedural component. The Court described procedural reasonableness as follows:

> [Circuit courts] must first ensure that the district court committed no significant procedural error, such as failing to calculate, or improperly calculating, the Guidelines range, treating the Guidelines as mandatory, or failing to consider the statutory factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.[52]

Once procedural reasonableness has been determined, substantive reasonableness can be considered.[53] Substantive reasonableness review is a "totality of the circumstances" abuse of discretion standard, under which a court of appeals should give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the variance."[54] *Kimbrough* complemented *Gall* in clarifying the scope and breadth of reasonableness review. In *Kimbrough*, the Supreme Court held that the then-existing 100-to-1, crack-to-powder cocaine sentencing

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[47] Rita v. United States 551 U.S. 338 (2007).

[48] *Id.* at 347–49 (2007). However, as discussed in Part III, this reasoning is faulty because the Sentencing Commission itself has admitted that it did not take the § 3553(a) factors into account in determining the Guidelines ranges.

[49] Gall v. United States, 552 U.S. 38 (2007).

[50] Kimbrough v. United States, 552 U.S. 85 (2007).

[51] *Gall*, 552 U.S. at 51.

[52] *Id.*

[53] *Id.*

[54] *Id.*

disparity in the Sentencing Guidelines was advisory only.[55] As such, a sentencing judge is permitted to consider the disparity and find that, because of it, a within-Guidelines sentence would be "'greater than necessary' to serve the objectives of sentencing."[56] Therefore, the Court ultimately found that "while [§ 3553(a)] still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well.'"[57]

Finally, the Court continued this line of cases in June 2008 with *Irizarry v. United States*.[58] *Irizarry* held that district courts do not have to give parties notice when contemplating a variance from the recommended Guidelines range.[59] The Court reasoned that the Guidelines should remain the initial benchmark in sentencing decisions, but because the Guidelines are now advisory, "neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy'" that was the basis for the notice requirement under the mandatory Guidelines regime.[60] Similar to the approach in *Gall* and *Kimbrough*, in *Irizarry* the Supreme Court placed the Guidelines center-stage in sentencing determinations, while also directing district courts to look away from the spotlighted attraction.

Taken together, *Booker*, *Rita*, *Gall*, *Kimbrough*, and *Irizarry* solidify the following proposition: Post-*Booker* judicial discretion falls somewhere between pre-Guidelines unfettered discretion and the straightjacket situation that sentencing judges found themselves in during the years of mandatory Guidelines. *Booker* demoted the Guidelines to advisory status; *Rita* allowed the Guidelines to serve as evidence of the reasonableness of a district court's sentencing determination; *Gall* defined reasonableness review in terms of sentencing-court discretion; *Kimbrough* clarified the strength of the deferential nature of sentencing review; and *Irizarry* proclaimed that the expectancy associated with mandatory Guidelines no longer applies. In these cases, the Supreme Court clung to the Guidelines while still maintaining the importance of judicial sentencing discretion.[61] With all of these explanations, the Supreme Court has left one aspect of sentencing very clear—district courts should begin the sentencing process by properly calculating and considering the Guidelines.[62] According to the Court, this role of the

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[55] *Kimbrough*, 552 U.S. at 91.

[56] *Id.* (quoting 18 U.S.C. § 3553(a) (Supp. V 2000)).

[57] *Id.* at 101 (quoting United States v. Booker, 543 U.S. 220, 245–46 (2005)).

[58] 128 S. Ct. 2198 (2008).

[59] *Id.*

[60] *Id.* at 2202–03.

[61] *See, e.g.*, *Kimbrough*, 552 U.S. at 109 (reiterating the position that the Court held since *Booker*—that it is the sentencing judge who has "'greater familiarity with . . . the individual case and the individual defendant'" (quoting Rita v. United States, 551 U.S. at 357–58 (2007)). The sentencing judge is "therefore 'in a superior position to find facts and judge their import under § 3553(a)' in each particular case." (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

[62] For example, even while the Supreme Court recognized the Guidelines' deficiencies in *Kimbrough*, it still returned to the position that the Guidelines should serve as the "'starting point and the initial benchmark'" for a district court's sentencing decision. *Id.* at 108 (quoting Gall v.

Guidelines preserves the sentencing uniformity sought by mandatory guidelines.[63] Again, however, honesty and proportionality have been overlooked. Apparently, the Supreme Court is holding to its longtime position that the Guidelines achieve the sentencing purposes set forth by Congress, and that its proposed ranges are meaningful. A closer look at the development of the Guidelines casts this position in a very questionable light.

III. BREAKING AWAY FROM THE THREE-PART HARMONY: WHAT HAPPENED TO THE SENTENCING POLICIES?

In the *Booker* line of cases, the Supreme Court made it clear that it believes the Sentencing Guidelines provide valuable information to sentencing courts. This was evident in *Booker* when the Court stated "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[64] In *Rita*, the Court upheld the presumption of reasonableness for Guidelines-based sentences, reasoning, "The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate."[65] In *Gall*, the Supreme Court reiterated, "[E]ven though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[66] Finally, in *Kimbrough*, even though the Court acknowledged the faultiness of the Commission's crack cocaine sentencing ranges, the Court allowed for "a key role for the Sentencing Commission."[67] The Court held that the Sentencing Commission has the capability to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."[68] While purportedly downgrading the Guidelines to advisory status, the Supreme Court seems to ultimately maintain its confidence in the Guidelines.

Despite the Court's confidence, the Guidelines were not created in

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United States, 552 U.S. at 49 (2007)). *See also Irizarry*, 128 S. Ct. at 2202 ("the Guidelines, as the 'starting point and the initial benchmark,' continue to play a role in the sentencing determination").

[63] *Gall*, 552 U.S. at 49 (2007) (explaining that the purpose of beginning with the Guidelines calculation is "to secure nationwide consistency").

[64] United States v. Booker, 543 U.S. 220, 264 (2005).

[65] Rita v. United States, 551 U.S. 338, 349 (2007).

[66] *Gall*, 552 U.S. at 46.

[67] *Kimbrough*, 552 U.S. at 108.

[68] *Id.* at 109 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007)).

a manner that warrants such deference. Prior to the development of the Guidelines, criticism of disparate sentences for similarly situated offenders was widespread.[69] As Judge Frankel pointed out, allowing judges to sentence without guidance led to "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[70] Judge Frankel highlighted the need for "meaningful criteria" for assigning a sentence to a particular case.[71]

A. Politics as Muse: How the Guidelines Came to Be

Congress created the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[72] Additionally, with the establishment of the Sentencing Guidelines, Congress sought to achieve honesty, uniformity, and proportionality in sentencing.[73] However, the Sentencing Commission has fallen short of meeting its responsibilities. Contrary to Judge Frankel's vision for a politically insulated Sentencing Commission, Congress directed the development of guidelines that would reflect the "tough on crime" approach of Congress in the 1980s.[74] As one scholar stated, "Designed for an era of technocratic and rationalistic policymaking, [the Sentencing Commission] operated in an

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[69] *See, e.g.*, Federal Sentencing Reporter, *25% Rule Exhibits*, 8 Fed. Sent. R. 189 (1995) (discussing a 1974 Second Circuit Sentencing Study conducted by the Federal Judicial Center in which twenty identical files from actual cases were presented to fifty federal district court judges who were asked to indicate the sentence that they would impose, and reporting the great range of sentences that resulted) (citing ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES 1–3 (1974)); Kevin Clancy et. al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Shari Diamond & Hand Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975); Marvin Frankel, *The Sentencing Morass, and a Suggestion for Reform*, 3 CRIM. L. BULL. 365 (1967); Ilene H. Nagel & John Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982); Whitney North Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163, 167 (1973) ("The range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia Circuit. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit.").

[70] CRIMINAL SENTENCES, *supra* note 21, at 7.

[71] *Id.*

[72] 28 U.S.C. § 991(b)(1) (2006).

[73] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (2009).

[74] An example of this is the Anti-Drug Abuse Act of 1986, which created mandatory minimum sentences for drug crimes. Anti-Drug Abuse Act of 1986, 21 U.S.C. §§ 801–802, 841 (2006). Another example of the political influence on the Guidelines is Congress's repeated rejections of the Sentencing Commission's proposals to change the 100-to-1 crack-to-powder cocaine policy. *See* U. S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997). For more on the development of the Guidelines, see STITH & CABRANES, FEAR OF JUDGING, *supra* note 9, at 38–77.

era of politicized and symbolic policymaking."[75] The Sentencing Commission did not necessarily design the initial Guidelines around informed, tested sentencing policies, nor were the Guidelines designed to effectuate any specific purpose or set of priorities. Ultimately, the Guidelines were criticized as a rush job for which a final draft was prepared to meet a swiftly approaching deadline.[76] The Sentencing Commission admitted that it did not identify priorities when setting the sentencing ranges. Instead, the Commission stated:

> Adherents of ["just deserts" and crime-control rationales, such as deterrence] have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation.[77]

Rather than choosing guiding sentencing principles, the Commission adopted "an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice."[78] However, developing sentencing ranges based on past practices was not done in any regularized fashion. The Commission increased penalties for white-collar crimes and violent crimes, finding that the existing sentences were inadequate.[79] Drug offenses were also given significantly harsher penalties, and those penalties were based on weight rather than empirical data related to the types of sentences being imposed for such offenses or the harms created by drug offenders.[80] Overall, the Guidelines reflected harsher penalties than were the norm at the time, with custody being favored over probation in most situations.[81] Thus, the Guidelines

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[75] Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 41 (2004).

[76] *See* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 369 (1989). After a greatly criticized first draft of the Guidelines, the Sentencing Commission submitted a revised draft for public review in 1987, which also received much criticism. Rather than addressing the problems, the Commission moved quickly through the next revision process to meet the congressional deadline with very little further public input. *See Sentencing Commission Sends Guidelines to Congress*, 41 CRIM. L. REP. (BNA) 1009 (Apr. 15, 1987).

[77] From the U.S. SENTENCING GUIDELINES MANUAL (1988), set forth in T. HUTCHINSON & D. YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 4–5 (1989).

[78] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[79] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 15 (2004) [hereinafter FIFTEEN YEARS STUDY].

[80] *Id.* at 8–9.

[81] The Commission admitted that the Guidelines would reduce the availability of probation for certain property crimes from 60% to 33%, and that the percentage of offenders who would receive probation terms requiring some period of confinement would increase from 15% to over 35%. *See* U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES

contributed to the creation of an era of over-incarceration.[82] Even where the Guidelines did reflect past sentencing practices[83] by averaging the existing disparate sentences, the Commission retained the same biases in the Guidelines ranges that led to disparate sentencing in the first place. Rather than study the effects of certain sentences on crime control or a true community sense of retribution, the Commission allowed problematic sentences to serve as the basis for the new sentencing ranges, as though those problems could be averaged away.

These faults did not go unnoticed. Critics condemned the Guidelines for their rigidity and departure from individualized sentencing. Professor Charles Ogletree argued in 1988 that several failures made the Sentencing Guidelines "quite disappointing."[84] He stated that the Commission "did not draft guidelines that adequately considered important offender characteristics, such as age, prior drug history, and the extent of the individual offender's blameworthiness for the specific crime for which he is being sentenced."[85]

The failure to allow for adequately individualized sentencing was not the only source of discontent with the new sentencing scheme. Critics also argued that the Guidelines' punishments were too harsh for particular types of conduct.[86] For example, Professor Ogletree complained that "the Commission gave only modest consideration to the potential impact of prison overcrowding as a result of the existing mandatory drug and repeat offender statutes coupled with the implementation of the sentencing guidelines."[87] Further, some critics found the Guidelines out of line with public opinion.[88] Others complained that the Guidelines actually led to increased sentencing disparity.[89] On this point, Professor Ogletree asserted that, in

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AND POLICY STATEMENTS 8, 61 (1987); *see also* von Hirsch, *supra* note 73, at 369, 373.

[82] The Sentencing Commission acknowledged that the Guidelines would lead to a doubling of the federal prison population in the decade following their adoption, but did not give any significant recommendations on how to practically manage this huge increase. *See* von Hirsch, *supra* note 73, at 374 n.34 (citing T. HUTCHINSON & D. YELLEN, FEDERAL SENTENCING LAW & PRACTICE: SUPPLEMENTARY APPENDICES 215, 217 (1989)).

[83] *But see* STITH & CABRANES, *supra* note 9, at 60–61 (explaining that the Commission deviated from past practices far more often than it relied on them). This source cites U.S.S.C. 1997b, 6 and explains that "drug offenses constitute 40 percent of all convictions, firearms and robbery cases constitute another 10 percent of convictions, and varieties of white collar crime another 13 percent." *Id.*

[84] Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988).

[85] *Id.* at 1951.

[86] *See, e.g.*, MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY, 5–6 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf/$file/gssurvey.pdf (noting that most federal judges desired additional discretion to grant more lenient sentences than those recommended by the Guidelines).

[87] Ogletree, *supra* note 81, at 1951; *see also* von Hirsch, *supra* note 73, at 374 (also arguing that the Sentencing Commission did not consider the Guidelines' effect on the prison population).

[88] *See* U.S. SENTENCING COMM'N, JUST PUNISHMENT: PUBLIC PERCEPTIONS AND THE FEDERAL SENTENCING GUIDELINES 3, 5 (1997), *available at* http://www.ussc.gov/publicat/justpun.pdf.

[89] *See Sentencing Commission's First Effort Receives Outpouring of Criticism*, 40 CRIM L. REP. (BNA) 2223–28, 2225 (Dec. 17, 1986).

promulgating the Guidelines, the Commission "failed to address . . . the particular problem of racial disparity in sentencing."[90] He and others criticized the Commission for its lack of transparency while developing the final version of the Guidelines. The criticisms of the day dug directly into the sentencing purposes—honesty, uniformity, and proportionality—that Congress established for the Guidelines. All of these problems arguably persist today.

B. Today's Guidelines Are Still Discordant: Missing the Balance Among Uniformity, Honesty, and Proportionality

Although Congress has amended and revised the Sentencing Guidelines many times since their inception in the 1980s, the Guidelines' essential framework has remained the same. So, to, have their harsh, punitive nature and the consequences of that harshness. The Guidelines have remained a rigid grid calling for courts (and probation officers) to conduct mechanical calculations that lead to lengthy sentences.[91] The result has been the over-incarceration catastrophe that critics predicted when the Guidelines were first instituted.[92] Arguably, all of these problems would be worth their costs if the Guidelines actually achieved the goals for which they were created—honesty, uniformity, and proportionality. A twenty-year history has produced results that call into question the Guidelines' success at achieving those objectives.

The Court has touted uniformity as the Guidelines' most important goal.[93] Therefore, under the Guidelines, punishment should be the same for similarly situated offenders who have committed the same type of conduct and different for differently situated offenders who have committed different types of conduct.[94] However, empirical studies and scholarly research reveal that the Guidelines have failed to achieve these purposes. In some cases, the Guidelines even exacerbate sentencing disparities. For example, the Guidelines contribute to sentencing

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[90] Ogletree, *supra* note 81, at 1939.

[91] As Professor Michael Tonry has noted, there is a problem "[w]hen laws require that sentences be calculated by means of mechanical scoring systems, as the Federal Guidelines [do] rather than by looking closely at the circumstances of individual cases . . . ." Tonry, *supra* note 72, at 46.

[92] According to the Justice Department's Bureau of Justice Statistics, the American prison population exceeded two million in 2002. At the end of 2001, federal prisons were operating at 31% above capacity. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim02.pdf.

[93] United States v. Booker, 543 U.S. 220, 250 (2005) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.").

[94] For support of this definition of sentencing uniformity, see Justice Breyer's discussion in *Booker* of sentencing hypotheticals. *See id.* at 252–53.

disparities by allowing for reductions in offense points for substantial assistance[95] and by providing for the availability of fast-track[96] early disposition procedures that are used in some jurisdictions. Both of these processes allow for the disparate sentencing of defendants with the same real-world offense conduct.[97] Further, some scholars have pointed to the complexity of Guidelines calculations as a contributor to sentencing disparities.[98] The numerous factors involved in calculating sentences using the Guidelines can lead to varying results depending upon who selects the factors to include in the computation.[99] This discrepancy has been shown by studies involving different probation officers who, given the same facts, come to different sentencing range determinations.[100]

Studies conducted by the Sentencing Commission demonstrate that the Guidelines have not eliminated the federal sentencing disparity problem. A 2004 Sentencing Commission report noted that regional, inter-district differences in drug trafficking cases increased post-Guidelines.[101] The Commission suggested that much of the disparity was due to differences in charging and plea bargaining policies and practices among the ninety-four U.S. Attorney Offices.[102] Inter-judge sentencing variations, although reduced, also remain statistically significant.[103] The Commission's study revealed that disparities based on supposedly irrelevant offender characteristics, such as race and ethnicity, continue to exist under the Guidelines.[104] Other studies have confirmed these racial and ethnic disparities, as well as sentencing disparities along the lines of socioeconomic status, gender, and even political affiliation.[105]

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[95] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").

[96] *See* PROTECT Act of 2003, 117 Stat. 650, § 401(m)(2)(B), 28 U.S.C.A. § 994 (2003) and U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 cmt. background (2005).

[97] *See* United States v. Galvez-Barrios, 355 F. Supp.2d. 958, 963–65 (E.D. Wis. 2005) (identifying fast-track programs as sources of sentencing disparity); *see also* FIFTEEN YEARS STUDY, *supra* note 76, at xii, 103, 106–07 (explaining the process of reducing sentences based upon substantial assistance and the fast-track early disposition procedure, and how both contribute to disparities under the Guidelines).

[98] Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT. R. 249, 252–53 (2005) (citing R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplifications*, 7 PSYCHOL. PUB. POL'Y & L. 739, 764–65 (2001)).

[99] *Id.*

[100] *Id.*

[101] *See* FIFTEEN YEARS STUDY, *supra* note 76, at 47–48.

[102] *Id.* at xii, 92.

[103] *Id.* at 99.

[104] *See id.* at xiv, 122–27 The study explains the odds of a typical black drug offender being sentenced to imprisonment are about 20% higher than the odds of a typical white offender, while the odds of a Hispanic drug offender are about 40 % higher. "Typical" refers to average offense and average seriousness. Further, "[t]he typical Black drug trafficker receives a sentence about ten percent longer than a similar White drug trafficker. This translates into a sentence about seven months longer. A similar effect is found for Hispanic drug offenders . . . ." *Id.* at 123. The Commission was not willing to say that these disparities are due to deep-seated racism, but did acknowledge that the disparity exists and that it was not eliminated by the Guidelines.

[105] *See, e.g.*, Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentencing Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC'Y REV. 789, 817 (1997) (finding sentencing disparities related

The Sentencing Guidelines were also designed to increase honesty in sentencing. As already explained, "honesty" refers to sentence determinacy and transparency.[106] During the era of mandatory Guidelines, any sentence imposed would be a reflection of whatever sentencing sources were used by the Sentencing Commission in developing the Guidelines ranges. These sources ranged from Congressional mandate to the Commission's own policy developments. In 2004, the Commission used its fifteen years of experience with the Guidelines to make the following statement regarding sentencing transparency:

> Sentencing may now be the most transparent part of the criminal justice system. Not only is sentencing done publicly in open court, with factual findings and determinations of law made on the record, but a detailed database of offense and offender characteristics and the judge's decisions are compiled by the Sentencing Commission.[107]

The Commission's statement is illustrative of an important belief—all that is required to give meaningful information about sentencing sources is to link factual and legal determinations to their applicable Guidelines categories (offense and offender characteristics). Perhaps this position had some persuasiveness pre-*Booker*; however, for reasons previously discussed, the Commission's own sources for creating the sentencing ranges are somewhat elusive.

Now, in the post-*Booker* advisory Guidelines regime, another wrinkle has been added to the meaning of sentencing transparency—courts are now able to sentence outside of the range set by the Sentencing Commission. The source of those resulting sentences ought to be just as important as, if not more important than, the sources of the Guidelines ranges themselves. The most effective way of enforcing the transparency of sentencing in an advisory Guidelines system would be to impose a strict requirement on sentencing courts to articulate their reasons for imposing a particular sentence. The sentencing statute

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to defendants' ethnicity, gender, education level, and non-citizenship status); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311–12 (2001) (finding that black and male offenders with low educational attainment and low income levels receive longer sentences, mainly due to sentencing departures); Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 781 (2006) (finding racial disparities in Guidelines sentences for white-collar offenses). Further, certain empirical and anecdotal studies conducted pre-Guidelines indicated that characteristics of individual judges affect sentencing outcomes. *See, e.g.*, Diamond & Zeisel, *supra* note 20, at 114 ("[I]t is reasonable to infer that the judges' differing sentencing philosophies are a primary cause of the disparity."). Other studies conducted in the Guidelines era indicate that judge characteristics can still influence sentencing outcomes. *See, e.g.*, Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008).

[106] *See supra* note 13 and accompanying text.

[107] FIFTEEN YEARS STUDY, *supra* note 76, at x, 80.

already calls for the articulation of reasons in § 3553(c):

> Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is not of the kind, or is outside the range, described in subsection (a)(4),[108] the specific reason for the imposition of a sentence different from that described . . . must also be stated with specificity in the written order of judgment and commitment . . . .[109]

And while nothing in the *Booker* line of cases invalidated this provision, § 3553(c) ought to have an adjusted meaning in the advisory Guidelines regime. After *Booker*, a sentencing court does not have to rely on the Sentencing Commission's sentencing recommendation and, in fact, is prohibited from presuming that the applicable Guidelines range provides a reasonable sentence.[110] Therefore, rather than merely stating reasons in open court, a sentencing court should be required to tie those reasons to the § 3553(a) factors that both Congress and the *Booker* Court set forth as the guiding considerations in sentencing.

In *Rita*, the Supreme Court acknowledged the importance of a court stating its reasons, but then it downplayed the enforcement of an articulation of reasons and failed to require those reasons to be consistent with the § 3553(a) factors.[111] Particularly, the Supreme Court stated: "Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust."[112] The Court's words echo the Congressional concern about honesty and transparency in sentencing. However, the Court then stopped short of rigorous enforcement and explained:

> That said, we cannot read [§ 3553(c)] (or our precedent) as insisting upon a full opinion in every case. The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word "granted," or "denied" on the face of a motion while

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[108] 18 U.S.C. § 3553(a)(4) directs district courts to consider the applicable Guidelines range in determining an appropriate sentence.

[109] 18 U.S.C. § 3553(c) (2000 & Supp. v. 2005).

[110] The Supreme Court stated very clearly in *Rita* that the presumption of reasonableness for within-Guidelines sentences is an appellate presumption only, and that district courts are not allowed to presume that Guidelines sentences are reasonable. Rita v. United States, 551 U.S. 338, 351 (2007) ("We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review." (emphasis in original)).

[111] *Id.* at 356.

[112] *Id.*

> relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.[113]

And, while the Court left the quantity of stated reasons to a sentencing judge's discretion, the Court did require that a district court articulate its reasoning enough "to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority."[114] This, of course, is a very vague directive that essentially leaves it to the circuit courts to determine whether the quality of the stated reasons is adequate. But, in a final word of what can barely pass as explanation, the Supreme Court fell back on its still-unclear "reasonableness" requirement, and indicated that a district judge may need to give a more robust explanation if "a party contests the Guidelines sentence generally under § 3553(a)—that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant *characteristics* in the proper way—or argues for departure."[115] This puts the onus on the parties to give the sentencing court a reason for further explanation, rather than expecting the court to give a meaningful explanation as a matter of course.

The Supreme Court extended this line of thinking in *Gall*, stating that "a major departure [from the Guidelines] should be supported by a more significant justification than a minor one . . . ."[116] Once again, the Court did not explain what form this more significant explanation should take. Nor did it say that such explanation should indicate the sentencing court's reliance on the § 3553(a) factors. As a result of the Supreme Court's decision to not decide how thorough sentencing explanations ought to be, the circuit courts have taken it upon themselves to decide the matter. And, just as with the presumption of reasonableness, as well as other developments in the post-*Booker* sentencing world, the circuit courts have come to a variety of conclusions that take federal sentencing further away from the honesty that Congress sought and that the Supreme Court recognized as important.

Several circuits recognize that articulating reasons is required for a district court's sentence to be procedurally reasonable.[117] Similarly, most circuits identify the same or essentially the same reasons for the

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[113] *Id.*

[114] *Id.* (citing United States v. Taylor, 487 U.S. 326, 336–37 (1988)).

[115] *Rita*, 551 at 357 (emphasis added).

[116] Gall v. United States, 552 U.S. 38, 50 (2007).

[117] *See, e.g.*, United States v. Cavera, 550 F.3d 180, 192 (2d Cir. 2008) (asking, "But what does the procedural requirement, that the district court must explain its reasons for its chosen sentence, entail?"); United States v. Figaro, 273 F. App'x 161, 163–64 (3d Cir. 2008) ("It is therefore vital that the district court 'state adequate reasons for a sentence on the record so that this court can engage in meaningful appellate review.'" (quoting United States v. King, 454 F.3d 187, 196–97 (3d Cir. 2006)); *see* United States v. Cousins, 469 F.3d 572, 578 (6th Cir. 2006) (finding a sentence procedurally unreasonable when "the district judge failed to provide his reasoning for the variance").

articulation requirement, which often includes an acknowledgment that those reasons ought to be tied to the § 3553(a) factors. The Second Circuit gave a detailed explanation in the 2008 case, *United States v. Cavera*:

> Requiring judges to articulate their reasons serves several goals. Most obviously, the requirement helps to ensure that district courts actually consider the statutory factors and reach reasoned decisions. The reason-giving requirement, in addition, helps to promote the perception of fair sentencing. . . . Furthermore, the practice of providing reasons "helps [the sentencing process] evolve" by informing the ongoing work of the Sentencing Commission. Finally, for our own purposes, an adequate explanation is a precondition for "meaningful appellate review." We cannot uphold a discretionary decision unless we have confidence that the district court exercised its discretion and did so on the basis of reasons that survive our limited review. Without a sufficient explanation of how the court below reached the result it did, appellate review of the reasonableness of that judgment may well be impossible.[118]

The Second Circuit suggests that one of the goals of articulating reasons is to confirm that sentencing courts have properly considered the required sentencing factors. This should require that district courts explain how their imposed sentences relate to the § 3553(a) factors, which would satisfy the honesty goal. Even with this lengthy and promising explanation of the purposes of articulating reasons, the Second Circuit still had to explain how much and what type of articulation is needed to satisfy those purposes. In doing so, the Second Circuit merely echoed the words of the Supreme Court by determining that "what is adequate to fulfill these purposes necessarily depends on the circumstances" but declining to "require 'robotic incantations' that the district court has considered each of the § 3553(a) factors."[119] The Seventh Circuit's approach is nearly identical.[120] The Eighth Circuit gave even less meaning to the articulation requirement by openly presuming that "district judges know the law and understand their obligation to consider all of the § 3553(a) factors."[121] In each of these circuits, district courts are left with limited to no guidance on how to sentence transparently using the § 3553(a) factors to fulfill the § 3553(c)

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[118] *Cavera*, 550 F.3d at 193 (court's original emphasis included; internal citations omitted).

[119] *Id.* (quoting United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005) and citing *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006)).

[120] *See* United States v. Shannon, 518 F.3d 494, 496 (7th Cir. 2008) ("The court need not address every § 3553(a) factor in checklist fashion, explicitly articulating its conclusions regarding each one.").

[121] United States v. Jenkins, 321 F. App'x 544, 546–47 (8th Cir. 2009) (quoting United States v. Gray, 533 F.3d 942, 943 (8th Cir. 2008)).

requirement. And, the implication in most cases is that any articulation requirement is heavily geared toward explaining why a Guidelines sentence was not chosen, just as in the pre-*Booker* understanding of § 3553(c).

Even when circuit courts find that a district court has failed to adequately state reasons for a sentence, the circuit court's reasons for finding error tend to rely heavily on the district court's failure to explain why the Guidelines sentence was inadequate, rather than why the § 3553(a) factors make the imposed sentence reasonable. For instance, in the case of *United States v. Blackie*, the Sixth Circuit found plain error affecting the defendant's substantive rights because the sentencing court failed to indicate that the imposed sentence was outside the Guidelines range and failed to state specific reasons for sentencing outside of the Guidelines range.[122] The Sixth Circuit acknowledged that articulating reasons for a sentence "is important not only for the defendant, but also for the public 'to learn why the defendant received a particular sentence.'"[123] This position goes to the heart of the honesty in sentencing that Congress sought through the Commission and the Guidelines. The Sixth Circuit's reasoning reveals that its real concern was not whether the district court revealed sources that would inform whether the imposed sentence was reasonable, but rather the district court's failure to explain why the Guidelines sentence was unreasonable.

The Sixth Circuit distinguished *Blackie* from *United States v. Hernandez*,[124] in which the court found a procedural error in the district court's failure to explicitly state a reason for a particular sentence within the Guidelines range.[125] The *Hernandez* court had held that such a statement was necessary for full compliance with § 3553(c), but still found that the defendant's substantive rights were not affected.[126] Ultimately, the Sixth Circuit distinguished *Blackie* from *Hernandez* by recognizing that the unexplained sentence imposed in *Hernandez* was within the Guidelines.[127] The Tenth Circuit took this approach as well. According to that court, the articulation requirement is necessary to reveal "the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation."[128] Apparently, circuit courts are comfortable considering the Commission's sources as the sources of district courts when a within-Guidelines sentence is imposed.

In all circuits, however, the Guidelines are taken to fulfill the honesty requirement in their own right, regardless of the § 3553(a)

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[122] United States v. Blackie, 548 F.3d 395, 401 (6th Cir. 2008).
[123] *Id.* at 403 (quoting *In re* Sealed Case, 527 F.3d at 191).
[124] 213 F. App'x 457 (6th Cir. 2007).
[125] *Blackie*, 548 F.3d at 402–03, n.3 (citing *Hernandez*, F. App'x at 459 n.62).
[126] *Id.* at 402–03, n.2.
[127] *Blackie*, 548 F.3d at 402–03, n.2.
[128] United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1222–23 (10th Cir. 2008).

factors theoretically analyzing a sentence's reasonableness. Thus, the articulation requirement is satisfied without direct reference to the § 3553(a) factors. The articulation requirement is only truly an issue when a sentence is outside of the Guidelines range. Such a situation creates an obligation to supply an explanation sufficient to convince a reviewing court that the Guidelines range was inappropriate. This narrowly read articulation requirement limits a lower court's duty to be honest in sentencing. It also reduces the duty to inform both the parties and public of the reasons why a particular sentence was chosen, merely entitling them to a reason why a Guidelines sentence was not chosen.

The third sentencing objective given by Congress to the Commission was proportionality. The proportionality requirement is concerned with imposing sentences that are consistent with the actual severity of the conduct underlying offenses.[129] The proportionality problem with the Guidelines is most evident in the drug offense category. In its 2004 report on fifteen years of using the Guidelines, the Commission admitted that finding the correct punishment ratios among different drugs and the correct quantity thresholds for each penalty level has proven problematic.[130] The Commission recognized that many of the drug Guidelines resulted in severe penalties for many street-level sellers and other low culpability offenders.[131] For example, the Guidelines categorize a person having two prior drug trafficking convictions as a career offender, which puts the sentencing range at or near the statutory maximum.[132] In 2000, there were 1279 offenders subject to the career offender provisions, triggering some of the Guidelines' most severe penalties.[133] This would not be so disturbing except for the fact that the Commission found that the recidivism rates among repeat drug traffickers is significantly less than other offenders in the career offender category.[134]

Although the Guidelines were designed to be a work in progress, twenty years after their inception, many of the same problems remain. Most troubling is that the Guidelines have fallen short of their intended goals to bring uniformity, honesty, and proportionality to sentencing, even after years of use and many opportunities for improvements. Despite this troubled run, the Supreme Court has continued to advocate for the Guidelines to play a prominent position, as shown by the holdings

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[129] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 3 (2009).

[130] FIFTEEN YEARS STUDY, *supra* note 76, at 51.

[131] *Id.*

[132] *Id.* at 133–34.

[133] *Id.*

[134] For example, violent offenders, another group in the career offender category, have a 52% recidivism rate as compared to the 27% recidivism rate among drug offenders who are put in the career offender categories. *Id.* at 134. Arguably this could support the argument that locking up these "career" drug offenders for such a long time actually causes the reduced recidivism so it is therefore sound sentencing policy, but the Commission did not seem to interpret the statistics in that manner. Rather, the Commission's study suggests that this treatment of drug offenders is unjustifiably harsh. *Id.*

in *Booker* and subsequent cases on the issue. The Court has so ruled without reference to how the Guidelines serve the proportionality and honesty purposes of sentencing. On the contrary, much emphasis has been placed on the Guidelines' role in maintaining sentencing uniformity. In elevating uniformity over honesty and proportionality, the Supreme Court purported to use Congressional policy valuations in its interpretation of the constitutionally appropriate role of sentencing guidelines. But the Guidelines only provide uniformity as an end in itself, rather than uniformity in order to reach sound sentencing. In sum, there is little support in policy for the level of importance to which the Supreme Court has elevated the Guidelines. This is especially so given that the Court could have been truer to the stated reasons for developing the Guidelines.

IV. STATUTORY ROOM TO DANCE TO A NEW SENTENCING BEAT

If the Sentencing Guidelines do not reflect the original policies Congress set forth, one would think that the reason the Supreme Court continues to require district courts to begin sentencing determinations with a Guidelines calculation is because it is mandated by statute. The first rule of statutory construction is to begin with the language of the statute.[135] When the language of the statute is clear, the plain meaning of the words is applied without further analysis.[136]

In *Booker*, the Supreme Court excised the portions of the sentencing statute that made the Guidelines mandatory.[137] The portion of the remaining statute that mentions consideration of the Guidelines is 18 U.S.C. § 3553(a), which requires that sentencing courts consider the following:

> (1) the nature and circumstances of the offense and the history and characteristics of defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for [the offense] . . . ; (5) any pertinent policy statement—issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities . . . ; and (7) the need to

[135] *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.'" (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992))).

[136] *Id.* ("And where the statutory language provides a clear answer, it ends there as well." (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992))).

[137] United States v. Booker, 543 U.S. 220, 223–24 (2005).

provide restitution to any victims of the offense.[138]

Section 3553(a)(4) clearly requires consideration of the Guidelines range in imposing a sentence; however, the statute does not mandate that the sentencing range should have more importance than any of the other listed factors. While, absent any statutory amendment on the part of Congress or a finding of unconstitutionality, the Supreme Court cannot order district courts to ignore the Guidelines calculations completely, there is also no statutory command compelling the Court to *begin* sentencing determinations with the calculation of the Guidelines range. In fact, it is actually contrary to statutory construction to elevate factor (4) above any of the other factors. The Supreme Court has added its own gloss to the meaning of § 3553(a) and, in doing so, diminished valuable (and required) sentencing considerations.

Even if the inquiry looked past the plain language of § 3553(a) and considered Congressional intent, each of the § 3553(a) factors serve the Congressional sentencing goals—honesty, uniformity, and proportionality. For instance, § 3553(a)(1) calls for considering specifics about the offense as well as the offender, allowing uniform and proportional sentences. The call for a sentence to "reflect the seriousness of the offense" and "to provide just punishment" hits directly at the heart of proportionality. The uniformity goal is reflected in the mandate to "avoid unwarranted sentence disparities." The directive to consider "pertinent policy statements" by the Sentencing Commission serves the honesty goal by guiding sentencing courts toward concrete sentencing sources. Finally, "promot[ing] respect for the law" is the purpose of seeking honesty in sentencing. Even when looking to Congressional purposes, it is arguable that all of the § 3553(a) factors have equal merit in achieving the goals of sentencing set forth by Congress. Therefore, the only apparent explanation for the Supreme Court imposing this starting calculation requirement is that the Court is hesitant to lose the promise of uniformity that the Guidelines originally represented. Placing the Guidelines calculations as the anchor for sentencing determinations is actually counter to what the Supreme Court claims to preserve. In actuality, the § 3553(a) sentencing statute provides ample room for the Court to encourage honesty, proportionality, and informed uniformity in sentencing determinations.

V. WHAT HAPPENS NEXT? CHANGING THE TUNE OF FEDERAL SENTENCING BY GUIDING DISCRETION TO REASONABLENESS

This article has demonstrated that there is no convincing statutory or policy-based reason for the Supreme Court to retain the Guidelines as

[138] 18 U.S.C. § 3553(a) (2000 & Supp. V 2005).

a required starting point in sentencing. Although the Guidelines were introduced to facilitate sentencing uniformity, they were also intended to promote honesty and proportionality. The Supreme Court has put the Guidelines in an undeserved place of prominence by requiring that sentencing determinations start with consideration of the Guidelines. When this procedural approach is coupled with a weak and unenforced articulation requirement, it is evident that the Court views the § 3553(a) factors—other than those that reference the Guidelines or the uniformity goal—as unimportant. The Supreme Court has failed to proffer any reason for not protecting all of the § 3553(a) factors. The § 3553(a) factors in their entirety, combined with a robust district court articulation requirement and controlled appellate review, could save sentencing uniformity and give meaning to the honesty and proportionality goals. By allowing district courts to individualize sentences with the guidance of all the § 3553(a) factors, a new rhythm in federal sentencing can be introduced.

Once the Guidelines are removed from the heart of sentencing, several beneficial changes must take place that give substantive meaning to uniformity, honesty, and proportionality. The § 3553(a) factors must become more important to sentencing determinations. Rather than simply explaining whether a Guidelines sentence was reasonable in a given case, district courts would have to explain how the imposed sentence comports with all of the § 3553(a) factors. After all, the statute clearly states that sentencing courts *shall* consider the § 3553(a) factors. Therefore, a district court would have to explain what exactly it was about the "nature and circumstances of the offense and the history and characteristics of defendant" that warranted the imposed sentence, even if a Guidelines sentence was imposed.[139] Further, when sentencing defendants, sentencing courts should have to describe how the imposed sentences "reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment . . . ."[140] A judge would also have to articulate how the imposed sentence "avoid[s] unwarranted sentence disparities" and "provide[s] restitution to any victims" where relevant.[141] The applicable Guidelines range would be just one of the many considerations that a sentencing court would be forced to consider and address clearly.[142]

One argument against removing the Guidelines as a sentencing benchmark is that doing so would eliminate any hope of sentencing uniformity and return us to the era of unfettered judicial discretion. As already explained, uniformity was sought by Congress as a means of eliminating the bias that lead to disparate sentencing. Therefore, a

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[139] *See* 18 U.S.C. § 3553(a)(2) (2000 & Supp. V 2005).
[140] 18 U.S.C. § 3553(a)(2)(A).
[141] 18 U.S.C. §§ 3553(a)(6), (7).
[142] 18 U.S.C. § 3553(a)(4).

system that reinforces the biases sought to be eliminated does not solve the problem. The current system saves uniformity for its own sake, rather than providing uniformly sound sentencing policy.[143] Uniformity should cease to be the courts' overriding focus. Another manner of preserving uniformity while removing the Guidelines as the starting point, is to focus sentencing decisions on the sentencing factors in a meaningful way.

One might also argue that without the Guidelines as a starting point, district courts will be given the arduous and inefficient task of giving lengthy sentencing explanations even in garden variety cases. In fact, besides the loss of uniformity argument, once one accepts the premise that the Guidelines are poor indicators of sentencing reasonableness, efficiency is the only justification for using the Guidelines as a starting point. Such an argument would claim that it would be too time-consuming for courts of appeals to develop the meaning of the § 3553(a) factors, or for district courts to explain how the sentences they impose relate to the § 3553(a) factors. However, the most efficient means of coming to a reasonable sentence is not a § 3553(a) factor, and as such, efficiency should not have the same level of importance as the factors that are actually listed as proper considerations in the sentencing statute.

Furthermore, a robust explanation requirement still leaves room for courts to develop efficient ways of stating their reasons without completely skirting the statutory duty to consider the factors set forth in § 3553(a). For example, a particular district or circuit could use stock language to describe the applicability of the sentencing factors for similar cases, while only making an elaborate explanation when a case warrants it. This is very different from simply giving a cursory statement that the court has considered the § 3553(a) factors, because it would identify for appellate courts the individual sentencing factors that the district court found to be of particular importance to that specific case. An appellate court could then determine whether the district court's focus on a particular § 3553(a) factor was consistent with that circuit's developing sentencing practice.

Arguably, this approach also threatens the presumption of reasonableness for within-Guidelines sentences that has been adopted by many circuits.[144] However, the Supreme Court has made clear that the presumption of reasonableness is only an appellate presumption, and that

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[143] There is an argument that uniformity is a valuable goal even if it is empty uniformity. One could say that even unduly harsh and non-transparent sentences are acceptable if all similarly situated offenders are sentenced in the same manner. This argument would be more persuasive if Congress listed uniformity as its only or main objective in sentencing. However, the sentencing statute clearly lists other important sentencing factors. Therefore, if courts are to follow the current sentencing statute, uniformity for the sake of uniformity cannot be the only goal considered.

[144] The Fourth, Fifth, Sixth, Seventh, Eight, and Tenth Circuits have adopted a presumption of reasonableness for within-Guidelines sentences. *See, e.g,* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Tobacco, 428 F.3d 1148, 1151 (8th Cir. 2005); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

the district courts are prohibited from presuming that within-Guidelines sentences are reasonable simply because they are Guidelines sentences.[145] Therefore, even under the Court's current sentencing approach, district courts must consider the § 3553(a) factors when determining a reasonable sentence.[146] The appellate presumption of reasonableness, however, strips the circuit courts of their duty to determine whether the sentencing courts have in fact considered the reasonableness of the imposed sentence for themselves. It is appellate review that can effectively maintain uniformity in the post-*Booker* era.

By requiring district courts to clearly tie their sentences to the § 3553(a) factors, honesty in sentencing can be strengthened. There are several reasons to desire honesty in sentencing—from promoting the public's respect for the law to informing the parties for appeal purposes. As far as bias reduction is concerned, honesty in sentencing plays a vital role in forcing a sentencing judge to come up with valid reasons for imposing a sentence. It is true that a sentencing judge could fabricate an explanation in order to hide the impermissible reasons that may drive his or her decision (e.g. justifying a particularly long sentence to provide fair punishment when the judge is actually biased against defendants of that race or economic class). Regardless, the requirements do have merit. For example, when a judge must provide meaningful explanations about how sentences satisfy particular sentencing factors, appellate courts have greater opportunities to uncover dishonesty in sentencing judges' reasoning.

Another progressive change would result from removing the Guidelines as the starting point of sentencing determinations. The question remains whether the Guidelines' placement at the beginning of the process is important. After all, courts are required to consider the Guidelines at some point. Psychological anchoring studies suggest that it is difficult for decision-makers to break away from their initial starting point.[147] Therefore, beginning the sentencing determination with the Guidelines makes it difficult for a sentencing court to give equal consideration to the other § 3553(a) factors. There is no statutory basis for the Supreme Court to forbid courts from beginning their sentencing determination by calculating the applicable Guidelines range. However, by removing the requirement that they begin with the Guidelines, the Supreme Court would at least create the possibility of avoiding this anchoring effect. Once this is done, other sentencing resources can be used to fulfill the other § 3553(a) factors, especially those that speak to

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[145] *See* Rita v. United States, 551 U.S. 338, 351 (2007).

[146] *See* Gall v. United States, 552 U.S. 38, 49–50 (1997) (explaining that, in order for a sentence to be procedurally reasonable, a district court must have considered the § 3553(a) factors).

[147] *See generally* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall, Kimbrough, *and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115 (2008) (discussing the anchoring effect and why it is problematic in the current advisory Guidelines).

sentencing proportionality.

Some might argue that the Guidelines are the only reliable sentencing resource that district courts have at their disposal. There are other resources available, and once they are accepted as relevant, more resources may emerge. For instance, federal district courts can learn from the numerous state court initiatives on sentencing reform.[148] This potential fits with the directive of § 3553(a)(3) that "the kinds of sentences available" be considered by district courts. Considering a variety of sentencing resources along with the Commission's own policy statements[149] will give district courts a richer database from which to select a reasonable sentence, and will give appellate courts a true basis for determining whether district courts in fact considered all of the § 3553(a) factors. Attorneys and sentencing experts would then have the room to argue about sentencing proportionality, as well as other important sentencing characteristics, in ways that were previously trumped by reliance on the Guidelines. Of course, determining proportionate sentences is no easy task. The line between when a sentence is severe enough to reflect the seriousness of the real offense conduct, and when the sentence is too severe, is not entirely clear. This is why multiple resources should be utilized to inform a judge's decision on the appropriateness of a particular sentence in an individual case.

Sentencing is not a precise practice; however, it results in a precise punishment that must reflect precise factors. By allowing for many voices to chime in on the best methods for achieving this goal, courts will become better equipped to fit a sentence to an array of factors and characteristics. This challenge by other sentencing sources may also prompt the Commission to be more thorough in explaining the reasons behind its own recommended Guidelines ranges to demonstrate that those ranges should be given weight. In creating these explanations, the Commission may find reason to recommend that particular Guidelines ranges be revamped in order to be more in line with the sentencing purposes. This process would ensure that the Sentencing Commission is actually treating the Guidelines as the ever-evolving embodiment of the informed sentencing policy described by the Supreme Court in *Rita*.[150]

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[148] *See* PEW CENTER ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS (2009); ROGER K. WARREN, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007); STEVE AOS, MARNA MILLER & ELIZABETH DRAKE, WASHINGTON STATE INST. FOR PUBLIC POLICY, EVIDENCE-BASED PUBLIC POLICY OPTION TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006); TRACY W. PETERS & ROGER K. WARREN, NAT'L CTR. FOR STATE COURTS, GETTING SMARTER ABOUT SENTENCING: NCSC'S SENTENCING REFORM SURVEY 10 (2006). The National Center for State Courts also provides numerous sentencing resources on the Center For Sentencing Initiatives section of its website, *See generally* National Center for State Courts: Research, http://www.ncsconline.org/csi/analysis.html (last visited Mar. 25, 2009).

[149] *See* 18 U.S.C. § 3553(a)(5) (2000 Supp. V 2005).

[150] *See* Rita v. United States, 551 U.S. 338, 350. In *Rita*, the Court acknowledged that "[t]he Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." The Court envisioned a process in which "[t]he Commission will collect and examine the results. In doing so, it

As all sentencing sources, including the Guidelines, become more refined and meaningful, district judges can become the sentencing experts that are in a "superior position to find facts and judge their import under § 3553(a)" as characterized by the Supreme Court.[151]

An obvious criticism of this approach is that the § 3553(a) factors are imprecise and that they can be given any meaning and used to justify any sentencing outcome. While this is certainly true, circuit courts can give meaning to the § 3553(a) factors in order to foster uniformity in sentencing purposes by removing the Guidelines from the start of sentencing. For instance, when district courts claim that a particular sentence is reasonable because it satisfies the § 3553(a) factors, and gives specific explanations as to why this is so, appellate courts can begin to speak to whether the district courts' reasons in fact correspond to the particular § 3553(a) factors. The circuit courts can begin to develop a legal definition of the § 3553(a) factors by determining what facts can be considered with regards to specific factors.[152] Circuit courts can guarantee that the district courts' reasons do in fact correlate to the § 3553(a) factors as they have come to be understood in that circuit, giving uniform meaning to the sentencing factors. In this way, circuit courts will ensure that district courts do not abuse their sentencing discretion, which is bounded by the § 3553(a) factors. Appellate courts will become the facilitators of sentencing uniformity, not by enforcing the Guidelines, but by ensuring that sentencing courts are using a common meaning of the factors set forth in § 3553(a). The § 3553(a) factors will become the new sentencing benchmarks, rather than pre-determined Guidelines ranges. This guided discretion approach is a more reasoned method that better protects the uniformity, honesty, and proportionality in sentencing that Congress sought to achieve in directing the Commission to develop the Guidelines in the first place.

VI. CONCLUSION

The current process of sentencing in federal courts clings to uniformity above all other sentencing objectives. Such uniformity is thought to be embodied in the application of the Guidelines. And though

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may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly." *Id.*

[151] Gall v. United States, 552 U.S. 38, 51 (1997).

[152] One might ask whether the resulting legal rules developed by circuit courts would actually represent an improvement over the Guidelines. The answer is that it may, and it may not. The opportunity always remains for Congress to amend the sentencing statute to adjust the appropriate sentencing factors, or to give them more precise meanings if Congress is not satisfied with circuit court interpretations. The approach proposed by this Article merely gives one method of attempting to make up for the Guidelines' shortcomings. It is certainly always within Congress' power to remedy those shortcomings on its own through the legislative process.

the Supreme Court made room for district courts to exercise their discretion in sentencing outside of the Guidelines in *Booker*, the Supreme Court's directive that sentencing must begin with a Guidelines calculation threatens that discretion. Beginning with the Guidelines might be an acceptable requirement if the Guidelines in fact contained principles that reflect the goals of sentencing that Congress has identified—uniformity, honesty, and proportionality. However, as this Article has demonstrated, all three of those goals are lacking in the current Guidelines. This is not to say that an advisory guidelines regime could never work. When the actual sentencing factors set forth in § 3553(a) are reflected in a court's reasons for imposing a sentence and direct the circuit court's analyses of whether a sentence is reasonable, the promise of advisory guidelines can begin to be realized. Not only will district courts have guidance in choosing an appropriate sentence, but circuit courts can also ensure uniformity through reviewing sentencing reasons, rather than just relying on the presumed reasonableness of the Guidelines. This approach will allow sentencing courts to practice the sort of individualized sentencing that the United States has considered fair for hundreds of years, while still protecting defendants from impermissible judicial bias. Finally, once the Guidelines are given less weight, there will be room for courts, practitioners, and scholars to begin thinking outside of the Guidelines box and really consider alternative methods of sentencing that will reflect sound sentencing policies. In this new sentencing system, although district judges may begin to hum their own sentencing tunes, all of the inspiration behind all of those melodies will be uniformly reasonable.

Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class under the Term "Sex" and Practical Implications of Inclusion

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I. INTRODUCTION

In February of 1964, the Civil Rights Act was on the cusp of passing in the House of Representatives.[1] Representative Howard Smith, a staunch opponent of the bill, was losing ground, and it looked as though equal employment opportunity would become a reality.[2] "But Howard Smith had one last arrow in his quiver—perhaps 'bombshell' would be a better term."[3] In what is dubbed "Ladies Day," Representative Smith, in "a mocking and jocular tone," moved to add "sex" to Title VII.[4] Representative Smith's addition to Title VII was "to prevent discrimination against another minority group, the women."[5] As explained by commentators, "[c]ertainly Smith hoped that such a divisive issue would torpedo the civil rights bill, if not in the House, then in the Senate."[6] This last minute attempt to defeat the civil rights legislation by adding the term "sex" failed and the Civil Rights Act of 1964 passed both the House of Representatives and the Senate.[7]

As noted by Justice William Rehnquist, the "prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives."[8] Due to the last minute addition, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[9] When Congress enacted Title VII, it was well-accepted that the term "sex" as it is used in the Act referred to a female and a male. There also seems to be little doubt that the reference to sex was primarily meant to provide equal employment opportunity protection to women in the workforce. However, without a clear guideline within the statute regarding the term "sex" and what protections are covered by the term, the courts and employers have been forced to participate in a virtual guessing game as to just how far they should go in order to assure their compliance with the Act. For instance, it was not until the late seventies, some ten years after the passage of Title VII, that sexual harassment as a form of prohibited sex discrimination was recognized.[10]

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[1] *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY 2 (1991), *available at* http://www.jofreeman.com/lawandpolicy/titlevii.htm.

[2] *See id.* ("The [Civil Rights] momentum thwarted the plans of Representative Smith (D. Va.) to use his power as chair of the House Rules Committee to stop or at least delay the Civil Rights bill.").

[3] Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964, Part 2*, 36 PROLOGUE 2 (2004).

[4] Freeman, *supra* note 1; *see also* 110 CONG. REC. 2577–84 (1964).

[5] Id. at 2577.

[6] Gittenger & Fisher, *supra* note 3.

[7] *See id.*

[8] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986).

[9] *Id.*

[10] *See id.* at 65 ("[I]n 1980 the EEOC issued Guidelines specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII."); *see also* Williams v. Saxbe, 413 F.Supp. 654 (D.D.C. 1976); DIANNE AVERY, LITIGATING THE SEXUAL HARASSMENT CASE

Sexual harassment claims are only one of the many expansions of Title VII coverage since the inception of the Act. The purpose of this article is to trace the trajectory of state and federal law regarding the possible expansion of equal employment protections for transgender employees and applicants and the issues that will arise with such an expansion.

The authors would like to note in the opening that for the purposes of this article we will interchange the usage of the terms transsexual and transgender. While we recognize that the terms have different meanings, it is difficult to imagine any scenario in which one would be covered by Title VII and not the other; therefore, the terms are used interchangeably. Further, the authors are not discussing "sexual orientation," which is not correctly classified as a gender "disorder."[11] "Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual orientation, but sexual identity. Transgenderism describe[s] people who experience a separation between their gender and their biological/anatomical sex."[12]

Section II of this article addresses the case for exclusion and inclusion of transsexuals as a protected class under Title VII. The purpose of Section II is not to advocate for inclusion or exclusion, but rather to explore the current state of the law regarding transsexual rights. Section III of this article briefly addresses transsexual rights in the state court arena. Section IV addresses some practical implications for inclusion, whether it comes by legislative amendment or recognition by the courts. The scope of this article is to identify and elaborate on potential legal issues and lay the foundation for providing a workable solution.

II. ARE TRANSGENDERED PERSONS COVERED UNDER TITLE VII?

The first step for both proponents and opponents of inclusion begins by analyzing what falls within "sex" under Title VII. In 1964, when Title VII was adopted, there seemed little need for debate as to the meaning of the term "sex." In the more traditional social climate of the early to mid 1960s, sexual identity and sexual orientation issues

(Matthew B. Schiff & Linda C. Kramer eds., 1999) (stating that "[t]he 1976 decision of Judge Richey in *Williams v. Saxbe* is generally acknowledged as the first to recognize that sexual harassment is actionable under Title VII").

[11] "There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (Michael B. First ed., Am. Psychiatric Ass'n 2000) [hereinafter DSM]. First, "[t]here must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex." Second, there must be "evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." *Id.*

[12] Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage, 8 UCLA WOMEN'S L.J. 219, 237 (1998).

generally were not publicly accepted, and individuals faced with such issues were much more tight-lipped about those matters than today. Those openly discussing their gender identity or sexual orientation issues have grown exponentially since Title VII was originally passed; however, in the wake of this social change, the meaning of the term "sex" in the Act has never been clarified or officially defined by Congress.[13]

In other areas, Congress has been unwilling to extend protection to transgender individuals.[14] For example, the Americans with Disabilities Act ("ADA"), which was originally passed in 1990, expressly excludes gender identity disorders as a covered disability.[15] Specifically, the term "disability" does not include transvestism, transsexualism, and gender identity disorders not resulting from physical impairments.[16] These exclusions were not modified by the recent passage of the Americans with Disabilities Amendment Act of 2008, signed by President George W. Bush on September 25, 2008.[17] Certainly, although the ADA and Title VII are two separate statutes, the specific exclusion of gender identity disorders could be some indication of Congress's unwillingness to recognize gender identity disorders as illnesses or issues that require special protections in the employment arena.

Since Title VII was passed, several courts have taken a proactive stance in broadening the types of workplace conduct that are prohibited by Title VII.[18] Without a doubt, the term "sex" has spawned many of the expansions of Title VII and is the term from which many of the expansions will come as debates crop up throughout state and federal courts regarding the possibility of Title VII coverage as to sexual orientation or transgender individuals.

A. The Case of Exclusion—a "Restrictive" View

The case for exclusion centers on the meaning of "sex." The Seventh, Eighth, and Tenth Circuits have all expressly rejected the proposition that transsexuals are a protected class under Title VII based

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[13] Courts have held that Title VII's protection extends to men. *See, e.g.*, Medcalf v. Trs. of Univ. of Penn., 71 Fed. App'x. 924, 927 (3d Cir. 2003) (stating that a male applicant made out a prima facie case under Title VII by showing that (1) he was male, (2) was qualified to perform the job of Women's Crew Coach at Penn, (3) he was rejected, and (4) Penn selected a woman for the position).

[14] *See* Americans with Disabilities Act, 42 U.S.C. § 12211 (1997).

[15] *See* Rehabilitation Act, 29 U.S.C. § 706(8)(F)(i) (1997); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1).

[16] 42 U.S.C. § 12211(b)(1).

[17] *See* 42 U.S.C. § 12101 *et. seq.*; S. Res. 3406, 110th Cong. (2008) (enacted).

[18] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989) (expanding Title VII to prohibit employment discrimination based on "sexual stereotypes"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998) (expanding Title VII to cover same-sex harassment and "all reasonably comparable evils").

on the interpretation of the word "sex."[19] This is not to say that transsexuals are barred from bringing a Title VII claim. Rather, a transsexual must establish discrimination based upon status as a male or a female and not as transgender.

Posner explains this view as follows:

> To constructionists, transsexualism is the most dramatic illustration of society's insistence that sex (organs) and gender (public classification of a person as belonging to one sex or the other) coincide . . . Most Americans do not consider, say, a male transsexual, even following conversion, to be a woman. The transsexual may fool them, as might a female impersonator or a transvestite. But if they were apprised of the facts, they would say, this is not really a woman; this is a man who has undergone surgical and hormonal therapy to make him look and feel like a woman.[20]

This view, as well as American jurisprudence to date, encompasses a binary conception of sex. In other words, constructionists necessarily classify individuals into one of two "sexes," male or female.[21] As such, an individual's sexual organs coincide with that individual's gender at birth and thus fall within one of the two categories of "sexes."[22] This view of two (as opposed to three) sex classifications is further illustrated by surgical intervention in the case of hermaphroditic infants to correct, given "sex" classifications, an anomalous condition.[23] Although "[s]cientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female," at this point in time, several circuits conclude that "discrimination against a transsexual because [he or she] is a transsexual . . . is not discrimination because of sex."[24]

In *Ulane*, the Seventh Circuit explained that the definition of sex should be given its "common and traditional interpretation" for Title VII purposes.[25] Based upon the traditional meaning of the word "sex," the statutory prohibition on sex discrimination was meant as a person's "biological sex" at birth. Looking at the term as it is used in the Act under the rules of statutory construction, unless a term is otherwise defined, the word must be given its ordinary meaning.[26] The phrase in Title VII prohibiting discrimination on the basis of sex is undefined, and

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[19] *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749–50 (8th Cir. 1982); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221–22 (10th Cir. 2007).

[20] RICHARD A. POSNER, SEX AND REASON 26–27 (Harvard Univ. Press 1994).

[21] *See id.*

[22] *See id.*

[23] *Id.* at 26 ("We do not have a social niche for hermaphrodites, and in addition we can intervene surgically to correct what, given our social organization, is indeed an anomalous condition.").

[24] *Etsitty*, 502 F.3d at 1222.

[25] *Ulane*, 742 F.2d at 1086.

[26] *See id.*

by its plain meaning, implies that it is unlawful to discriminate against a woman because she is a woman or against a man because he is a man. The *Ulane* Court further reasoned that the statute's legislative history "clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."[27] Thus, Title VII provided no protection to an employee when she could only show that she was discriminated against as a transsexual, rather than as a woman or a man.[28]

The Tenth Circuit reached a similar conclusion.[29] The Court was guided by the plain language of Title VII in interpreting the statute – not the primary intent of Congress.[30] The Court recognized that statutory prohibitions are often extended beyond the principal evil to cover reasonably comparable evils.[31] The Court found "nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."[32] Rather, in light of the traditional binary conception of sex, "transsexuals may not claim protection under Title VII based solely on their status as a transsexual."[33] Transsexual employees, like all other employees, are only afforded protection if they are discriminated against because they are male or because they are female.[34]

The Tenth Circuit noted that few courts have been willing to extend the protections of Title VII to include transsexuals as a protected class.[35] The Court further noted that they have explicitly declined to extend Title VII protections to discrimination based on sexual orientation in *Medina v. Income Support Division*.[36] And, although there is a substantive distinction between sexual orientation and sexual identity, *Medina* illustrates the Tenth Circuit's reluctance to expand the traditional definition of sex in the Title VII context.[37]

The Third Circuit has recently shed some light on the practical difficulties faced by courts when deciding whether an individual is being discriminated against because he or she is transgender or because he or

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[27] *Id.* at 1085.
[28] *Id.*
[29] *Etsitty*, 502 F.3d at 1215.
[30] *Id.*
[31] *Id.* Other courts have used this argument to afford transgendered employees protection under Title VII. Essentially, the argument goes that discrimination against transgendered persons is a reasonably comparable evil that, although Congress may not have initially anticipated, the courts should now act to remedy. *See* Schroer v. Billington, No. 05-1090, 2009 WL 1543686 (D.D.C. April 28, 2009) (finding employer discriminated against transgender employee and awarding compensation for back pay and lost employment-related benefits, nonpecuniary losses, and past pecuniary losses under Title VII).
[32] *Etsitty*, 502 F.3d at 1222.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*; *see also* Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005).
[37] *Etsitty*, 502 F.3d at 1222.

she fails to conform to gender stereotypes.[38] Although the case deals with a Title VII discrimination claim brought on the basis of the plaintiffs status as a homosexual, the Third Circuit's analysis extends to transgendered persons.[39]

In *Prowel*, Brian Prowel sued under Title VII alleging that his employer harassed and retaliated against him because of sex based upon his failure to conform to gender stereotypes.[40] Prowel is a homosexual man who identified himself as an effeminate male with mannerisms starkly different from his male counterparts at his work.[41] Prowel was eventually "outed" at his work.[42] The various acts of discrimination that Prowel complained of included a co-worker leaving newspaper clippings of a "man-seeking-man" ad, being referred to as "Rosebud," "Princess" and "fag," and finding a feather tiara and package of lubricant jelly at his work station.[43] Prowel also complained that he was asked to perform more varied tasks than other employees, but was not compensated fairly for these extra tasks.[44] Prowel considered bringing a lawsuit and approached four non-management personnel, asking them to testify on his behalf.[45] The general manager confronted Prowel regarding the potential lawsuit, and Prowel was terminated later that year.[46] Prowel then exhausted his administrative remedies before the Equal Employment Opportunity Commission and sued in United States District Court alleging violations of Title VII.[47]

The district court granted summary judgment for the employer on the basis that Title VII does not prohibit discrimination based on sexual orientation.[48] On appeal, the issue before the Third Circuit was whether this grant of summary judgment in favor of the employer was appropriate.[49] The court began its analysis by stating that "sex" under Title VII does not include sexual orientation.[50] The court also noted that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."[51] The district court found that Prowel's claim fell clearly on one side of the line, holding that it was an artfully-pleaded claim of sexual orientation discrimination.[52] The Third Circuit, however, found that based upon the facts and inferences in favor

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[38] *See* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009).
[39] *See id.*
[40] *Id.* at 286.
[41] *Id.* at 287.
[42] *Id.*
[43] *Prowel*, 579 F.3d at 288.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Prowel*, 579 F.3d at 289.
[49] *Id.* at 291.
[50] *Id.* at 286.
[51] *Id.* at 291.
[52] *Id.*

of Prowel, the record is ambiguous on the issue of whether Prowel's claim was one based on sexual orientation discrimination, or discrimination because of sex, i.e. failure to conform to sexual stereotypes.[53] Despite the ambiguity, the court held that Prowel's gender stereotyping claim should be submitted to a jury.[54]

Prowel demonstrates the practical difficulties that courts face when determining whether a claim of sex discrimination is based upon an individual's sex or status as transgender. The Third Circuit acknowledged that not every case of sexual orientation discrimination (or transgender discrimination) can translate into a triable gender stereotyping claim without contradicting "Congress's decision not to make sexual orientation discrimination (or transgender discrimination) cognizable under Title VII."[55] By the same token, just because an individual is homosexual or transgender does not automatically preclude those individuals from pursuing a claim under Title VII.[56] A person's sexual orientation is not necessarily intertwined with their mannerisms such that discrimination based on a failure to conform to a gender stereotype ipso facto constitutes discrimination based on sexual orientation.[57] Striking a balance between those claims falling within the protection of Title VII and those outside Title VII will often be a difficult, fact-intensive inquiry better suited for a jury. Through development of evidence presented at trial, a court or jury could reasonably be expected to determine an employer's motive. Although Congress does not prohibit discrimination based on transgender status, a transgender person will not automatically be barred from bringing suit under Title VII if he or she can show that discrimination was based on sex and not transgender status.

Though case law has evolved in such a way that Title VII is now, once again, on the cusp of expansion, it is the job of the popularly-elected legislature to pass laws that include additional coverage beyond those that were clearly meant to be contained in Title VII. The United States Constitution vests the power to legislate in the legislative branch of government.[58] In passing Title VII, Congress acted under and within that power. Thereafter, it is the job of the courts to *interpret* the legislation *as it is written*.[59] Although there are times when poorly-drafted laws or unanticipated situations blur the line between interpreting and writing legislation, courts should be compelled to follow statutory construction under the guide of legislative intent in any situation in which the words of a statute are unclear as written. Title VII's inclusion

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[53] *Prowel*, 579 F.3d at 285.
[54] *Id.*
[55] *Id.* at 292.
[56] *See id.*
[57] *See id.* ("[T]hey constitute sufficient evidence of gender stereotyping harassment . . . rather than harassment based solely on . . . sexual orientation.").
[58] U.S. CONST. art. I.
[59] U.S. CONST. art. III.

of the term "sex" in our changing world may not be entirely clear; however, the legislative intent behind the term is clear. Any court looking to the legislative intent could see that transsexuals were not meant to be covered under the Act. Therefore, it is impossible to reasonably infer that the text of Title VII provides coverage for "transsexuals" or "transgendered persons" through its inclusion of the term "sex." Providing such coverage in the absence of a clear legislative amendment to the Act would be an act of legislating from the bench.

Further, the legislative process exists for the purposes of determining who should and who should not be provided legal protection. For example, not every ailment or injury is qualified for protection as a disability under the Americans with Disabilities Act.[60] The legislative process and legislative debate were designed as the fair and equitable gatekeepers to determining who and what should be provided legal protection. Thereafter, it is the responsibility of the courts to uphold the law as it is written by the popularly-elected legislature. Similarly, the term "sex" presumes that there are two "sexes"—male and female. As such, Title VII provides protection for those who fall within the binary concept of "sex." It is the province of the legislature, not the courts, to expand the binary concept of "sex" to include transsexuals.

So far, the only federal law that speaks to protection of transsexuals in an employment context is the ADA, and the ADA specifically mentioned the group for purposes of excluding it from protection.[61] Although transsexualism has been recognized as a medical condition for many years and is included as a psychiatric disorder in the Diagnostic and Statistical Manual of Mental Disorders under the broad heading of "gender identity disorder,"[62] both the Rehabilitation Act of 1973 and ADA explicitly *exclude* both "transsexualism" and "gender identity disorders not resulting from physical impairments" from protection.[63] Significantly, not even a certification from a doctor confirming a person suffers from a gender identity disorder will bring transsexualism within the parameters of the ADA. Although some may not like the protections, or in this case the lack of protections, provided by federal law, the legislative process must be respected.[64]

The case for exclusion centers around the fact that an expansion of Title VII must come through the legislative process. In light of this view, it is noteworthy that expansion of Title VII to include transgender persons as a protected class is gaining momentum in the legislature.[65]

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[60] Americans with Disabilities Act, 42 U.S.C. § 12211 (1997).

[61] *Id.* § 12211(b)(1).

[62] DSM, *supra* note 11, at 576.

[63] *See* Rehabilitation Act, 29 U.S.C. § 706(8)(F)(i) (1997); 42 U.S.C. § 12211(b)(1).

[64] Language in *Creed v. Family Express Corp.* suggests that the Court disagreed with the employer that a male-to-female transsexual must present herself according to her gender identity or be in violation of the dress code and grooming policy. No. 3:06-CV-465RM, 2009 WL 35237, at *10 (N.D. Ind. Jan. 5, 2009). However, "rightly or wrongly, Title VII's prohibition on sex discrimination doesn't extend so far." *Id.*

[65] *See* David Crary, Impetus Builds for Bill Banning Anti-Gay Bias in the Workplace, DESERET

Representative Barney Frank introduced the Employment Non-Discrimination Act of 2009 in the 111th Congress.[66] Versions of this bill have been introduced in the past which excluded transgender persons, but supporters of this bill have indicated their support is contingent on the inclusion of transgender persons as a protected class.[67]

B. The Case for Inclusion – the "Expansionist" View

1. The Precursor -- Price Waterhouse v. Hopkins

The case for inclusion truly begins at the doors of an office by the name of Price Waterhouse. Ironically, some of the strongest arguments behind the case for inclusion of transgender individuals in Title VII's prohibited employment discriminations were born out of this Supreme Court case that did not even involve a transgender individual. In *Price Waterhouse v. Hopkins*, the plaintiff was a senior manager in a professional accounting office who was a candidate for partner at the firm.[68] During the candidacy process, all of the partners in the local office were invited to submit written comments or evaluations of each candidate.[69] Thereafter, the firm's admissions committee reviewed the comments and interviews that partners submitted. Based on this information, the admissions committee made its recommendation to the Policy Board.[70] The recommendation options were as follows: (1) accept the candidate for partnership; (2) put the application on hold; or (3) deny the candidate the promotion.[71] If the candidate was accepted, the candidate's name was then submitted to the entire partnership for a vote.[72]

Many of the statements about the plaintiff in her reviews praised her for her efforts in securing multi-million dollar accounts for the firm, her character, and called her an "outstanding professional," among other noteworthy praises.[73] However, it appeared from her record that she may have been aggressive to the point of abrasiveness and had numerous problems in dealing with staff at the firm.[74] A great deal of the negative

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MORNING NEWS, Aug. 28, 2009 at A07.

[66] *See id.*

[67] *Id.*

[68] See Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989) (Price Waterhouse has been reversed by an amendment to the Civil Rights Act changing the Supreme Court's framework in mixed motive cases; however, the proposition that gender stereotyping can be proof of a Title VII claim has not been reversed.).

[69] *See id.*

[70] *Id.* at 233.

[71] *Id.*

[72] *Id.*

[73] *See Price Waterhouse*, 490 U.S. at 234.

[74] *Id.* at 234-35.

remarks about the plaintiff, even from those partners who supported her, took issue with her "interpersonal skills" and commented that she was "overly aggressive, unduly harsh, difficult to work with and impatient with staff."[75] This line of commenting ultimately doomed her candidacy.

It was the psychological reasoning behind the various comments that brought gender stereotyping into play. It is the age-old but never stale question of whether these characteristics are those that are seen as an asset in a man and a liability in a woman. It also brings up the question of whether or not conduct that is seen as abrasive in a female is considered assertive when the same conduct is demonstrated by a male professional. Certainly, any person, including a woman, in a top position at a competitive job must exhibit a take-charge attitude and be outspoken or aggressive to some degree. As the Court made clear in its opinion, if a woman is viewed in a negative light for exhibiting these characteristics, then she is put at odds with what is expected of her to be successful in the business world.[76]

In response to what the Court viewed as a conundrum for women in the workplace, its opinion states that it was likely that the partners reacted negatively to the plaintiff's personality because she was a woman.[77] The partners' comments about her were that she was "macho," that she "overcompensated for being a woman," and that "she should take a course at charm school."[78] Other comments admonished her use of foul language, not as a neutral professional principle, but because the male partners believed that she should be a lady.[79] At a meeting with the policy board, the male partner responsible for explaining the decision to put her application on hold told her that she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[80] Essentially, she should act and look like a prim and proper lady, even though her appearance had nothing to do with her *ability* to be an executive at Price Waterhouse.

Ultimately, the Court decided that the passing of Title VII showed Congress's intent to forbid employers from taking gender into account in making employment decisions.[81] Significantly, the Court construed Title VII as a mandate that "gender must be irrelevant to employment decisions."[82] In the Court's opinion, Price Waterhouse had engaged in sex stereotyping. To that end, it specifically acknowledged the error in the company's ways by stating:

> [W]e are beyond the day when an employer could evaluate

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[75] *See id.*
[76] *See id.* at 235.
[77] *Id.*
[78] *Price Waterhouse*, 490 U.S. at 235.
[79] *Id.*
[80] *Id.*
[81] *See id.* at 239.
[82] *Id.* at 240.

> employees by assuming or insisting that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[83]

By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women and any discrimination based on a failure to conform to stereotypical gender norms as they are related to the particular sex.[84]

2. Federal Court Inclusion of Transgender Individuals

It is with this background that the argument for inclusion takes shape. The concept created in *Price Waterhouse*—that discrimination against a person based upon his or her gender non-conformity is discrimination against that individual based upon his or her "sex" within the acceptable or intended meaning of Title VII—is perhaps the most compelling argument for inclusion. According to *Price Waterhouse*, "sex," as it is used in Title VII jurisprudence, goes beyond an individual's anatomical make-up and encompasses the totality of the individual's sexual identity. This identity includes a consideration of the individual's characteristics and behaviors, including labels such as "masculine," "macho," or "feminine." In other words, to discriminate against John for becoming Jane is to target Jane or John on the basis of his or her gender and failure to conform to his or her anatomical make-up—which *Price Waterhouse* specifically forbids.

For instance, a non-transgender woman's "sex" includes her attitude, behavior, and the manner in which she interacts with others. It even includes the clothing she chooses to wear and whether or not she chooses to put on make-up. If she is the target of discrimination based upon one or more of these stereotypes, the discrimination she encounters enjoys the label of sex discrimination, and there are protections in place for her because of that label. The similarities of the discriminations faced by transgendered employees are striking.

The case for inclusion is rapidly gaining momentum as the courts' reluctance to read "sex" as providing protection to these individuals begins to fade and courts recognize that discrimination based on a failure to conform to stereotypical gender norms support a claim under Title

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[83] *Price Waterhouse*, 490 U.S. at 251 (citation omitted).

[84] *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) (describing the impact of *Price Waterhouse*).

VII.[85]

The first case attributed to recognize transgender persons as a protected class is *Smith v. Salem Ohio.* In *Smith*, the plaintiff was a male-to-female transsexual employee of the Salem Fire Department.[86] After being diagnosed with Gender Identity Disorder, Smith began expressing a more feminine appearance at work, which resulted in discrimination.[87] The Sixth Circuit read *Price Waterhouse* to hold that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."[88] According to the *Smith* court, under *Price Waterhouse*, "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination."[89] Similarly, the court reasoned, "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[90] Thus, "discrimination against [an employee] who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse*."[91] Thus, the Sixth Circuit held that "Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."[92]

Recently, the District Court in the District of Columbia also held that a transgendered individual is entitled to protection under Title VII.[93] There, the United States government retracted an offer of employment after learning of the employee's desire to transition from a male to a

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[85] *See, e.g.*, Kastl v. Maricopa County Cmty. Coll. Dist., 325 Fed. App'x. 492, 493 (9th Cir. 2009) (stating that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("'[s]ex stereotyping by an employer based on a person's gender non-conforming behavior is impermissible discrimination.' That is, individual employees who face adverse employment actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.") (internal citations omitted); *Smith*, 378 F.3d 566 (holding that Title VII bars discrimination based on a failure to conform to stereotypical gender norms); Zalewska v. County of Sullivan, 316 F.3d 314, 323 (2d Cir. 2003) (noting that discrimination based on a failure to conform to stereotypical gender norms is prohibited by the Equal Protection Clause); Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F.Supp.2d 653, 660 (S.D. Tex. 2008) (stating that plain language of Title VII and *Price Waterhouse* "do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes"); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935, at *4 (W.D. N.Y. 2003) (holding that transsexuals are "protected under Title VII to the extent that they are discriminated against on the basis of sex").

[86] *Smith*, 378 F.3d at 568.

[87] *Id.*

[88] *Id.* at 573.

[89] *Id.* at 574.

[90] *Id.* (emphasis in original).

[91] *Smith*, 378 F.3d at 575.

[92] *Id.*

[93] Schroer v. Billington, 577 F.Supp.2d 293, 308 (D.D.C. 2008).

female.[94] After hearing the evidence, the District Court concluded that the employee was discriminated against because of sex in violation of Title VII and that the reasons given by the government for retracting the offer were a pretext for discrimination.[95] The Court likened the plight of the "converting" transgender to another area afforded Title VII protection:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII.[96]

The Court ultimately found that the decision to retract the offer for employment was because the employee's "appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear."[97]

This argument is a continuation of the foundation laid down in *Price Waterhouse* that gender must be irrelevant to employment decisions.[98] With this foundation, it is argued that a transgender "situation" would fit squarely within the confines of the Supreme Court's gender neutrality requirements for the workplace. If an employer terminates Jane for seeking to become John, then the employer is practicing a form of sex discrimination in the sense that it is making an employment decision on the basis of the employee's sex. Moreover, the employer could also be said to be sex stereotyping by making an employment decision on the basis of Jane's lack of characteristics that are traditionally associated with the female gender.

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, regardless of the cause of that behavior. Therefore, a label such as "transsexual" should not alter a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Superimposing classifications such as transsexual or transgender does not then legitimize

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[94] *Id* at 299.
[95] *Id* at 300.
[96] *Id.* at 306-07.
[97] *Id.* at 308.
[98] *See Price Waterhouse,* 490 U.S. at 231.

discrimination based on an employee's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.[99] After all, *Price Waterhouse* established the premise that it is illegal to take adverse employment action against a female employee because, in the decisionmaker's judgment, she acts like a man. This reasoning extends to include a female employee who seeks sexual reassignment surgery to become a man. There is, of course, a significant difference between acting in a particular role and actually changing characters. This difference weighs in favor of protection rather than signifying a distinction warranting exclusion.

In attempting to forecast the future of the possible inclusion of transgender individuals under Title VII, it is also important to keep in mind Supreme Court opinions showing that the Supreme Court is poised to take a proactive stance, even if that stance means that it must disregard or, more precisely, supplement Congress' original intent. The Supreme Court case of *Oncale v. Sundowner Offshore Services, Inc.* is a very good example of this proactive stance. In *Oncale*, the Supreme Court overturned case law in some states that denied that same-sex harassment was actionable conduct under Title VII.[100] The opinion states:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[101]

To some, this language may be viewed as nothing more than an esoteric exercise in the jurisprudential method used by the Court to interpret statutes when it decides cases. However, this passage is a key element in forecasting the future of Title VII coverage and litigation. The Court essentially shakes loose the limitation of Congressional intent and expands the protection of Title VII in ways that Congress did not contemplate. The Court expands the scope of Title VII to virtually any conduct that is determined to be noxious in the workplace so long as the conduct in question is a "reasonably comparable evil." Under this framework, although it is clear that Congress did not intend to cover transgender individuals by placing the word "sex" in the statute, what is not clear is whether or not discrimination against transgendered

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[99] *Smith*, 378 F.3d at 574; *Lopez*, 542 F.Supp.2d at 660.

[100] *See generally* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[101] *Id.* at 79–80.

individuals is a "reasonably comparable evil" that demands inclusion.

According to the expansionist view, courts should not shy away from expanding the scope of Title VII if doing so furthers the purpose and intent of the Act. Title VII, including subsequent amendments such as the Pregnancy Discrimination Act, was enacted to ensure that employment decisions are made on the basis of an applicant's ability to do the job for which he or she has applied or the job in which he or she is currently working. The fact that an applicant or a current employee is of a certain race or gender, for instance, should not be used by employers as a criteria for hiring or retention of employees. Expanding the coverage of Title VII to protect transgender individuals would further enhance the honorable goal of Title VII by ensuring that employers are not allowed to make an employment decision about a transgendered individual for reasons other than his or her ability to do the job. If gender has nothing to do with a person's job performance, he or she should not be denied work that he or she is qualified to perform. This is the goal of Title VII and expanding its coverage to protect another insular minority would only further that goal.

III. STATE LAW PROTECTION

Just as in the federal arena, state courts are increasingly recognizing transgender individuals as a protected class under state laws prohibiting discrimination based on sex.[102] In addition to finding discrimination based on sex, some states have protected transgender individuals under state laws based upon disability.[103] Further, state legislatures have played an active role in recognizing transgender rights. According to the Transgender Law & Policy Institute, a total of 122 states, counties, and cities have passed legislation prohibiting discrimination on the basis of gender identity or expression.[104] Moreover, many local governments that

[102] *See, e.g.*, Morales v. ATP Health & Beauty Care, Inc., No. 3:06-CV-01430, 2008 WL 3845294, at *8 (D. Conn. Aug. 18, 2008) (recognizing that a transgender employee's perceived failure to conform to gender stereotypes can constitute membership in a protected class under Connecticut antidiscrimination law); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a transgendered individual stated a valid sex discrimination claim under state law); Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001) (concluding that sex discrimination under state law includes gender discrimination "so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman").

[103] *See, e.g.*, Lie v. Sky Publ'g Corp., No. 0131171, 2002 WL 31492397, at *7 (Mass. Super. Ct. Oct. 7, 2002) (holding that the transgender plaintiff established a prima facie case of discrimination based on the disability of gender identity disorder); Doe v. Bell, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that a transsexual youth was protected by state law prohibiting discrimination on the basis of disability).

[104] *See* Transgender Law & Policy Institute, Non-Discrimination Laws that Include Gender Identity and Expression, http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions (last visited Apr. 29, 2010). According to the Transgender Law & Policy Institute, Colorado, Iowa, Oregon, Vermont, New Jersey, Washington, Hawaii, Illinois, Maine, California, New Mexico, Rhode Island, Minnesota and the District of Columbia have laws prohibiting discrimination on the basis of gender.

have enacted antidiscrimination statutes that include transgendered individuals are in areas of states, such as Texas, that do not have such protections at the state level.[105]

Many of the state antidiscrimination statutes contain the same broad prohibition of discrimination based on sex that is contained under Title VII.[106] In those states where discrimination against transgender individuals is unlawful, the courts have been presented with many of the same arguments that are beginning to trickle through many of the circuit courts. The primary argument is that discrimination against a transsexual is based on stereotyped notions of "appropriate" male and female behavior or appearances.[107] In fact, the Ninth Circuit has held that the definition of "'sex' under federal non-discrimination laws encompasses both biological differences between men and women"[108] as well as actions based on failure to "conform to socially prescribed gender expectations."[109] In a similar manner, the Superior Court for New Jersey quoted case law holding that "sex" is comprised of more than a person's genitalia at birth and based its decision to protect transgendered individuals on the belief that gender stereotyping is unlawful.[110]

However, just as there is a split between circuit courts as to coverage of transsexuals under Title VII, there is also a split between states as to whether or not state law should protect transgendered individuals. Those states with holdings that deny coverage of transsexuals view the word "sex" in their laws in the same manner as the traditional meaning under Title VII when it was first passed.[111] The Iowa Supreme Court, for instance, took a position in line with the more

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The cities and counties which have laws prohibiting discrimination on the basis of gender, listed based upon year of enactment from 2007 back to 1975, are Nashville, TN; Kalamazoo, MI; Broward, FL; Columbia, SC; Detroit, MI; Gainesville, FL; Hamtramck, MI; Kansas City, MO; Oxford, OH; Lake Worth, FL; Milwaukee, WI; Palm Beach County, FL; Saugatuck, MI; West Palm Beach, FL; Bloomington, IN; Cincinnati, OH; Easton, PA; Ferndale, MI; Hillsboro, OR; Johnson County, IA; King County, WA; Lansdowne, PA; Lansing, MI; Swarthmore, PA; West Chester, PA; Gulfport, FL; Indianapolis, IN; Lincoln City, OR; Northampton, MA; Albany, NY; Austin, TX; Beaverton, OR; Bend, OR; Burien, WA; Oakland, CA; Miami Beach, FL; Tompkins County, NY; Carbondale, IL; Covington, KY; El Paso, TX; Ithaca, NY; Key West, FL; Lake Oswego, OR; Monroe Co., FL; Peoria, IL; San Diego, CA; Scranton, PA; Springfield, IL; University City, MO; Allentown, PA; Baltimore, MD; Boston, MA; Buffalo, NY; Chicago, IL; Cook County, IL; Dallas, TX; Decatur, IL; East Lansing, MI; Erie County, PA; New Hope, PA; New York City, NY; Philadelphia, PA; Salem, OR; Tacoma, WA; Denver, CO; Huntington Woods, MI; Multnomah Co., OR; Rochester, NY; Suffolk County, NY; Atlanta, GA; Boulder, CO; DeKalb, IL; Madison, WI; Portland, OR; Ann Arbor, MI; Jefferson County, KY; Lexington-Fayette Co., KY; Louisville, KY; Tucson, AZ; Benton County, OR; Santa Cruz County, CA; New Orleans, LA; Toledo, OH; West Hollywood, CA; York, PA; Cambridge, MA; Evanston, IL; Olympia, WA; Pittsburgh, PA; Ypsilanti, MI; Iowa City, IA; Grand Rapids, MI; San Francisco, CA; Santa Cruz, CA; St. Paul, MN; Seattle, WA; Harrisburg, PA; Los Angeles, CA; Urbana, IL; Champaign, IL; and Minneapolis, MN.

[105] *See, e.g., id.* (noting that Houston, Texas has adopted legislation prohibiting discrimination in public employment on the basis of gender identity and expression).

[106] *See, e.g., Lie*, 2002 WL 31492397, at *1.

[107] *See id.* at *5.

[108] *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

[109] *Id.*

[110] *See* Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

[111] *See* Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983).

traditional view of "sex" when it determined that "the word 'sex' in Iowa's Civil Rights Act did not include transsexuals and that sexual discrimination was intended to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred."[112] Many of the courts believe that transsexuals may deserve coverage; however, if transsexuals are to enjoy such coverage, it must come from the legislature in the form of a separate law or an amendment to the current anti-discrimination law.

IV. PRACTICAL IMPLICATIONS OF INCLUSION

If transgender discrimination successfully completes its case for inclusion under Title VII, business owners and their management employees will certainly be faced with numerous changes that must be closely monitored in the workplace. Regardless of whether the inclusion comes by judicial interpretation of the term "sex," as used in Title VII, or a legislative amendment that adds transgender persons as a protected class, legal issues for employers are certainly on the horizon. Employers have to be cognizant of the fact that depending on where they do business, they may have covered employees. Employers should also consider being proactive. It is the view of the authors that the trajectory is toward more inclusion.

A. "Bathrooms as Battlegrounds"

One practical implication of inclusion presenting a challenge to employers and managers is what to do with the once segregated male and female restrooms and how to set a clear policy determining which employees are allowed to use each restroom. For the transgender individual, an employer will want to assure a safe, dignified, and convenient restroom. By the same token, other employees may not be comfortable sharing a restroom with a transgender individual. For example, a male-to-female transgender may want to use the restroom that correlates to their outside appearance as opposed to their genital or anatomical make-up. Both male and female co-workers may oppose the transgender individual using their respective restroom facilities. The employer not only has to worry about potential liability arising from the transgender individual, but also from the co-workers who oppose whatever decision the employer makes.

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[112] *See id.*

1. Transgender Employee Rights

One of the challenges in drafting a restroom policy is how to protect the privacy interests and rights of a transgender employee. For some employers, renovation to restroom facilities or the creation of a unisex bathroom may be cost prohibitive. Even if this is an available option, these renovations do not ensure that the employer is not discriminating against a transgender employee, especially during the transition period. There remains the issue of which restroom facility the transgender employee will be permitted to use.

This challenge surfaced in Arizona in the 2004 case, *Kastl v. Maricopa County Community College District.*[113] The Rebecca E. Kastl had been diagnosed with a gender identity disorder, claiming that she was a female who was incorrectly assigned to the male sex at birth.[114] Upon her original employment with the defendant, she was a male; however, sometime after being hired as an adjunct professor, she was diagnosed with a gender identity disorder, and her personal physician determined that she was a biological female.[115] This prompted her to change her name from a male name to a female name, and she sought and obtained an Arizona driver's license indicating her sex to be female.[116]

Kastl and another transgender faculty member continued to work at the Maricopa County Community College during their gender transitions.[117] During this period, Kastl began to use the women's restroom.[118] Her bathroom use was met with numerous complaints from the school's students, many of whom were minors, which prompted the school to create a restroom policy.[119] Essentially, the policy required the transgender employees to use the men's restroom until they provided proof that they had completed genital correction or sex reassignment surgery. In an attempt to compromise with the defendant, Kastl attempted to prove her transformation to her new gender by showing the defendant her state-issued driver's license.[120] The defendant rejected Kastl's attempt, calling it "inconclusive and irrelevant."[121] Kastl expressed numerous objections to the defendant's policy, including her concern for serious bodily injury if she used the men's restroom, invasion of her privacy, and her concern for the selective enforcement of the proof requirement, as it was only required of the transgender

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[113] No. Civ. 02-1531 PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004).
[114] *Id.* at *1.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Kastl*, 2004 WL 2008954, at *1.
[119] *Id.*
[120] *Id.*
[121] *Id.*

employees.[122] The defendant did not budge on the policy, so Kastl refused to abide by it and was terminated shortly thereafter.[123]

As a result of her termination, Kastl filed suit alleging that the defendant's policy and its actions in enforcing the policy violated Title VII and Title IX's prohibition against sex discrimination, among many other claims.[124] Because the court and the parties accepted as true that Title VII and Title IX issues mirror one another, the remainder of the discussion of this case will revolve around a Title VII analysis.[125]

The employer then filed a motion for summary judgment on the basis that Kastl could not prove her allegation that she is a biological female, which is the first element of a prima facie case.[126] The District Court granted summary judgment in favor of the employer stating that Kastl "has failed to meet her burden of establishing a prima facie case of discrimination because she has provided no evidence that she was a biological female."[127] The District Court's decision focused primarily on whether Kastl was protected under Title VII at all, and it did not address the employer's stated reasons for the restroom policy.

In 2009, the Ninth Circuit upheld the decision of the lower court, but on different grounds.[128] The Ninth Circuit turned to *Price Waterhouse* to guide its decision, stating that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."[129] The Ninth Circuit found that Kastl had established a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were the motivating factor in the employer's actions against her.[130] At that point, the burden shifted to the employer under the *McDonnell Douglas* test to articulate a legitimate, nondiscriminatory reason. The employer satisfied the burden when it proffered evidence that it banned Kastl for safety reasons.[131] Ultimately, the Court of Appeals found that Kastl's Title VII claim was doomed under the third stage of the *McDonnell Douglas* test, because establishing a prima facie case was not sufficient to defeat the

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[122] *Id.*

[123] *See Kastl,* 2004 WL 2008954, at *1.

[124] *See id.* at **2–10.

[125] *See id.* at *3.

[126] Kastl v. Maricopa County Cmty. Coll. Dist., No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at *2 (D. Ariz. Aug. 22, 2006).

[127] *Id.* at *6.

[128] *See* Kastl v. Maricopa County Cmty. Coll. Dist., 325 F. App'x 492, 492 (9th Cir. 2009).

[129] *Id.* at 493.

[130] *Id.* at 493 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). *McDonnell Douglas* sets forth the basic allocation of burdens and order of presentation of proof in a Title VII case. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). First, the plaintiff has the burden to prove by a preponderance of the evidence a prima facie case of discrimination. *Id.* at 253. If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* If the defendant carries this burden, the burden shifts back to the plaintiff to establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were just a pretext for discrimination. *Id.*

[131] *Id.* at 494.

employer's motion for summary judgment.[132]

This case, although addressing the issue of whether Kastl fell within Title VII, provides little guidance in the development of a workable company restroom policy. The employer's safety concern was found to be a sufficient reason for the implementation of the restroom policy.[133] On the surface, this opinion seems to indicate that safety concerns are a valid reason for a restroom policy requiring transgender employees to use the restroom which matches their genitals until they provide proof that they completed the genital recorrection or sex reassignment surgery. The Ninth Circuit's recognition of the "safety concerns" argument means that it may be possible for an employer to have such a restroom policy if it is phrased in a manner that is genital specific—albeit difficult to draft without violating some privacy rights of almost every employee. However, it is also important to note that the Ninth Circuit only afforded the safety concerns argument one sentence in their opinion.[134] The opinion does not discuss whether such an argument could be held a pretext for discrimination against transgender persons. It seems likely that such a policy, if incorrectly drafted, could be found to truly reflect an employer's discomfort with transgender employees and violate Title VII.

2. Rights of Co-Workers

In addition to the rights of the transgender employee, the recognition of transgender rights creates another legal minefield for the employer—some employees may be uncomfortable sharing a restroom with a transgender employee. Of course, some of this discomfort could be eased with training to help provide an understanding of the transgender person and the desire for reassignment.[135] As with many fears, becoming informed about whatever it is that is causing concern helps to ease the person's mind. However, training is not a quick fix and must be provided in conjunction with other solutions for those who are still uncomfortable with using a restroom with transgender persons. An employer may help resolve some of the employee's discomfort by making some renovations to its current restrooms. For instance, the employer could remove urinals from men's restrooms or assure that there are sufficient stalls that are equipped with doors in all facilities.[136] Further, an employer should assure that all restrooms have proper latches or locks and doors that close adequately so that employees have

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[132] *See Kastl*, 325 Fed. App'x at 492.
[133] *See id.*
[134] *Id.* at 494.
[135] *See* JANIS WALWORTH, MANAGING TRANSSEXUAL TRANSITION IN THE WORKPLACE (2003) *available at* http://www.gendersanity.com/shrm.html.
[136] *Id.*

sufficient privacy while using the stalls.[137]

Employers may also institute temporary accommodations that enable their employees to have time to adjust to the change. For example, employers may ask the transgender employee if he or she is willing to volunteer to use only certain restrooms appropriate for his or her new sex or only unisex restrooms for a temporary period of time. When planning for this temporary solution, the employer should assure that the transsexual employee is inconvenienced as little as possible.[138] Once the transition period has ended, other employees may have adjusted to the transgender employee in his or her new gender identity. Those employees who have not adjusted may have concerns, and while it is important to listen to and attempt to work out a compromise with employees, it may just be that some individuals cannot accept the changes. Those situations are difficult, and may be forced to end with losing an employee. If an employer handles himself or herself appropriately, the relationship should not be forced to end in a lawsuit.

The Eighth Circuit case *Cruzan v. Special School District, No. 1* provides an example and potentially some guidance into this situation.[139] There, Cruzan, a female teacher at a Minneapolis school district, brought a suit alleging that the school discriminated against her on the basis of her sex and religion by allowing a transgender co-worker to use the women's facility.[140] The transgender employee began working for the school district in 1969.[141] Nearly thirty years later, the employee informed the school district that he was transgender and would transition from male to female.[142] The transgender employee would be known as Debra Davis instead of David Nielsen.[143] After consulting legal counsel, the school district determined that Davis had the right to use the women's restroom.[144] After a few months, Cruzan entered the women's faculty restroom where she saw Davis exiting a private stall.[145] Cruzan filed suit alleging violations of Title VII and the Minnesota Human Rights Act.[146]

The Eighth Circuit found that the school district's decision to allow Davis to use the women's faculty restroom did not rise to the level of an actionable adverse employment action.[147] Davis's use of the female

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[137] *Id.*

[138] *See* Center for Gender Sanity, http://www.gendersanity.com/shrm2.html (last visited Apr. 29, 2010).

[139] 294 F.3d 981 (8th Cir. 2002).

[140] *Id.* at 982.

[141] *Id.* at 983.

[142] *Id.*

[143] *Id.*

[144] *See Cruzan*, 294 F.3d at 982. Legal counsel for the school district informed the school that the Minnesota Human Rights Act prohibited discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness." *Id.* (quoting MINN. STAT. § 363.01 (1998)).

[145] *Id.* at 983.

[146] *Id.*

[147] *Id.* at 984.

faculty restroom had no effect on Cruzan's title, salary, or benefits.[148] Cruzan also had alternate restroom accommodations available including a single-stall unisex bathroom.[149] Further, the evidence showed that in order to avoid Davis, Cruzan began using the female students' restroom.[150] Thus, Cruzan was not actually required to share the same restroom facilities with Davis.

In order to recover, Cruzan had to establish a "tangible change in duties or working conditions that constitute a material employment disadvantage."[151] "Mere inconvenience, without a decrease in title, salary, or benefits," was insufficient to show an adverse employment action.[152] Thus, the employer was within its rights to allow a transgender employee to use the restroom that matched their physical presentation. To do so will amount only to an inconvenience to non-transgender co-workers who are uncomfortable with the idea, which is not actionable under Title VII. However, it is important to note that in *Cruzan*, there were alternative restroom facilities available, including a unisex restroom. Although the analysis would most likely remain unchanged, the inability of the employer to provide these alternate restroom facilities could potentially open the door to liability.

3. Additional Challenges

Another potential pitfall for an employer arises when the employer cannot practically accommodate the transgender employee during the transition period. For example, employees in the transportation industry are often left at the mercy of the available public facilities without the benefit of other patrons being informed about the transition period. An employer solution is impractical and a transgender employee's inability to have appropriate facilities implicates serious privacy concerns. In *Etsitty v. Utah Transit Authority*, Etsitty was a driver for the Utah Transit Authority (UTA) who was transitioning from a male to a female.[153] Since Etsitty was a driver and would frequently use public restroom facilities en route, UTA could not control the restroom facilities Etsitty had access to or used.[154] Fearing liability arising out of Etsitty's restroom usage while en route, UTA terminated Etsitty's employment citing a failure to accommodate her restroom needs.[155]

Although the court ultimately decided that transgender employees

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[148] *Id.*
[149] *Cruzan*, 294 F.3d at 984.
[150] *Id.*
[151] *Id.* (quoting Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999)).
[152] *Id.*
[153] 502 F.3d 1215, 1218–19 (10th Cir. 2007).
[154] *Id.* at 1219.
[155] *Id.*

are not a protected class and thus Etsitty could not satisfy her prima facie burden on the basis of her status as transgender,[156] this case illustrates yet another potential legal battle an employer could face. What happens when an employer cannot provide for a transgender person's restroom accommodations because the available facilities are not within the employer's control? Obviously, termination of the transgender employee is not the appropriate course of action. But the question remains: how does an employer develop an appropriate restroom policy to address such concerns? In situations like this, the restroom policy should most likely require the employee to use the restroom matching the gender that they are presenting at the time.

4. Guidance for Employers

The *Kastl* case is only one of what may presumably become many cases over bathroom use as the cause for transgender inclusion continues to gain speed in many district and circuit courts. Further, *Cruzan* illustrates the potential backfire that could result in transgender accommodations which leave nontransgender co-workers feeling uncomfortable. It leaves many questions to be answered for an employer who is attempting to comply with the Act and attempting to protect the transgender employee while also seeking to protect its nontransgender employees who may not be comfortable sharing a bathroom with someone who is transgender. Any court case, legislative amendment, or Equal Employment Opportunity Commission (EEOC) interpretive guideline which includes transgender protections must provide some guidance to employers on this topic. One practical solution to help employers comply would be to provide guidance similar to the technical compliance manual that exists for the ADA.[157] Ultimately, employers cannot be left to navigate the compliance minefield without some guidance.

Transgender workers are no different from other employees in that they should use the restroom appropriate for the gender in which they are currently presenting themselves. Once the employee has begun presenting himself or herself in a new gender role, requiring him or her to walk into a restroom that is designated for his or her former gender would be extremely awkward for the employee and any other employee or third party in or around the restroom at the time. If transgender individuals are forced to use the restroom that is designated for their former sex until their genitalia are transformed, despite their presentation as members of their new sex, it singles them out for embarrassment and

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[156] *Id.* at 1221.

[157] DEP'T OF JUSTICE, ADA REGULATIONS & TECHNICAL ASSISTANCE MATERIALS, TITLE III TECHNICAL ASSISTANCE MANUAL (1993) *available at* http://www.ada.gov/taman3.html.

humiliation.

B. Employer Dress Codes

Another potential issue that arises is the ability of an employer to set a dress code. Despite the holding in *Price Waterhouse* that prohibits an employer from discriminating for a failure to live up to gender role expectations,[158] courts have long recognized an employer's ability to differentiate between men and women in appearance and grooming policies.[159] The main issue raised in those cases is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.[160] Thus, gender-specific dress codes are appropriate and do not violate Title VII as long as the dress codes do not disparately impact one's sex or impose an unequal burden.[161] For instance, it is not unlawful discrimination to require a male employee to maintain a short and well-groomed haircut.[162] However, dress or appearance requirements intending to be sexually provocative, and tending to stereotype employees as sex objects are not permitted.[163] Further, the Seventh Circuit has found that requiring female employees to wear a specified "career ensemble," while at the same time allowing male employees to wear customary business attire, violates Title VII.[164]

In *Creed v. Family Express Co.*, the issue before the court was whether an employer had violated Title VII for discharging a gender-

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[158] 490 U.S. at 231.

[159] *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc).

[160] *See* Frank v. United Airlines, Inc., 216 F.3d 845, 854–55 (9th Cir. 2000).

[161] *See, e.g.*, Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076, 1081 (9th Cir. 2004) (holding that Harrah's Casino's grooming standard which required women to wear makeup and styled hair and men to dress conservatively was not discriminatory because it did not impose an unequal burden); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1389 (11th Cir. 1998) (upholding employer's grooming policy that prevented male employees from wearing long hair); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (same).

[162] *See, e.g.*, Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); Kelley v. Johnson, 425 U.S. 238, 249 (1976) (upholding the constitutionality of regulations describing the length and style of hair appropriate for police officers). *See also* Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that "hair length requirement[s] for male employees [are] part of a comprehensive personal grooming code applicable to all employees . . . [w]here . . . such policies are reasonable and are imposed in an evenhanded manner on all employees").

[163] Eq. Empl. Opportunity Comm'n v. Sage Realty Corp., 507 F. Supp. 599, 609 (S.D.N.Y. 1981) (finding that requiring a female employee to wear a uniform where [h]er thighs and portions of her buttocks were exposed "when [the employer] knew that the wearing of this uniform on the job subjected her to sexual harassment, constituted sex discrimination").

[164] Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1034–35 (7th Cir. 1979).

transitioning employee (male-to-female) for letting her hair grow longer than the employer deemed appropriate for men and wearing makeup.[165] Presenting herself as Christopher Creed, the plaintiff was hired as a sales associate at Family Express, a retail store.[166] During the course of employment, Creed began wearing clear nail polish, trimming her eyebrows, wearing mascara, growing her hair out, and wearing her hair in a more feminine style.[167] During this time, Creed also increasingly used the name "Amber."[168] Throughout the course of her employment, however, Creed continued to wear the required unisex uniform consisting of a polo shirt and slacks.[169]

Family Express had a sex-specific dress code and grooming policy requiring all of its employees to "maintain a conservative, socially acceptable general appearance, conceal all tattoos, take out all body piercing[s], and wear uniforms neatly, with shirts tucked in and belts worn."[170] The policy also required males to maintain neat, conservative hair kept above the collar and prohibited earrings or other jewelry that accompanies body piercing.[171] Females were required to maintain neat and conservative hair, which need not be above the collar, and were permitted to wear makeup and jewelry so long as it was conservative.[172] Family Express placed great importance on their dress code and grooming policy and informed new sales associates that the policy was a non-negotiable part of employment.[173]

Following a complaint about Creed's appearance, Family Express informed her that she would no longer be permitted to present herself in a feminine manner at work and must either cut her hair and not wear nail polish and makeup or resign from her position as a sales associate.[174] Creed informed Family Express that she would not be able to conform to the policy, at which point Family Express considered her actions a "voluntary termination."[175] Creed argued that she was terminated because she did not conform to the expectations of how a man should look.[176] Family Express claimed that they simply articulated the fact that Creed was in violation of the company dress code and grooming policy.[177]

The court ruled that the company did not violate Title VII by

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[165] Creed v. Family Exp. Corp., No. 3: 06-CV-465RM, 2009 WL 35237, at *1 (N.D. Ind. Jan. 5, 2009).
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Creed*, 2009 WL 35237, at *2.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at *3.
[175] *Creed*, 2009 WL 35237, at *4.
[176] *Id.* at *9.
[177] *Id.*

requiring Creed to present as a male.[178] The court ruled that no reasonable jury could find that Family Express acted on the basis of a prohibited purpose—failure to embody sexual stereotypes—as opposed to a legitimate nondiscriminatory purpose—breach of dress code and grooming policy.[179] The court recognized that Creed may argue that "real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that [the] dress code and grooming policy discriminates on the basis of her transgender status."[180] However, the court noted that "rightly or wrongly," Title VII's prohibition on sex discrimination does not extend that far.[181]

It is important to note that Indiana is in the Seventh Circuit, a circuit which has consistently held that transgender employees do not fall within the scope of "sex" in Title VII. Thus, the result reached in *Creed v. Family Express* does not expand the ability for an employer to terminate an employee for a failure to conform to the dress code and grooming policy of their anatomical sex. This case does, however, bring an important issue to light, i.e., how does an employer develop a dress code and grooming policy for a transgender employee that does not violate Title VII?

Terminating an employee for dressing like a person of the opposite sex is really about terminating them for their appearance. If the employee has gender identity disorder but continues to dress in the appropriate clothing for the gender in which he or she was born, most employers would not terminate the employee. Therefore, any adverse employment decision is truly based upon the employee's appearance. Again, the most practical solution is to require a transgender employee to adhere to the dress code and grooming policy of the gender in which the employee is currently presenting. Requiring a transgender employee (male-to-female, for example) to present herself as male during her transition will unnecessarily complicate the issue and make what is a difficult transition period even more difficult.

C. Overnight Travels

Although there are no reported cases on the issue involving transgender individuals, another potential issue for employers is overnight travels. For example, if an employer typically bunks males with males and females with females during overnight company trips in order to be financially conservative, it takes little imagination to foresee the potential complications that arise when one of the traveling

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[178] *Id.* at *10.
[179] *Id.* at *11.
[180] *Creed*, 2009 WL 35237, at *10.
[181] *Id.*

employees is a transgender. Just as with the restroom, this issue implicates privacy concerns of both the transgendered and non-transgendered employees. A possible solution, and perhaps the one which best addresses the legal issues potentially presented, is to develop a policy which will allow a transitioning employee to maintain separate bunking accommodations. This would protect privacy concerns by nontransgender employees while at the same time would not force a transitioning employee to bunk with the sex that matches anatomically. However, it is important to recognize that isolating a transitioning employee raises potential legal concerns by itself. Accordingly, any policy which permits or requires separate bunking for a transitioning employee should eventually give way to a policy similar to that of nontransitioning employees.

D. BFOQ or Business Necessity

Employers have also been permitted to disallow a female or a male to work in certain positions through the bona fide occupational qualification exemption ("BFOQ") or business necessity defense. For example, females are allowed to be excluded from positions as security guards in all-male, maximum-security prisons for security reasons.[182] In some instances, the sex of the employee can directly undermine that employee's capacity to fulfill the requirements of the job.[183] If a female employee was seeking reassignment as a male, the issue then becomes whether those jobs which typically exclude females based on BFOQ or business necessity would now become available to the newly transitioned male employee.

As pointed out by the Supreme Court, in some instances, more is at stake than an individual's decision to weigh and accept the risks of employment.[184] In positions such as in a correctional facility, the overwhelming concern to maintain basic control and protect inmates and other security personnel will most likely exclude a transgender female-to-male employee from those positions.[185] Thus, the BFOQ would still apply to her as a male because her dressing as a male security guard does not alter the safety precautions that prompted the allowance of the BFOQ defense.

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[182] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (stating that "[a] woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary . . . could be directly reduced by her womanhood").
[183] *Id.*
[184] *Id.* at 335.
[185] *See generally id.*

E. Concerns from a Business Standpoint

Another potential issue for an employer is customer preference. Currently, there are no studies of which the authors are aware linking transsexual employees to a decrease in a company's business. An employer may argue that his or her customers prefer that a transsexual not be employed, and that the transsexual's employment will adversely affect the business's bottom line. If transsexuals are included under Title VII, the issue then becomes whether customer preference warrants discrimination. EEOC guidelines specifically state that customer preference does not warrant application of the bona fide occupational qualification exception.[186] In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit used these guidelines in arriving at the conclusion that Pan Am's passenger preferences for female stewardesses did not justify the policy of hiring only females for that position.[187] Specifically, the court said that "the fact the customers prefer [females] cannot justify sex discrimination."[188] This same reasoning would extend to transsexuals. In other words, the fact that customers may prefer the business to employ a nontranssexual employee cannot justify discrimination. As explained by the Fifth Circuit, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[189]

Most advocates of individual property interests support the idea that a business owner should have the ability to make a personal decision whether or not he or she wants to hire or retain certain individuals whose ideas may not fall in line with the company he or she built. For example, if an employer hires "Jane" to work as a sales clerk, should the employer be forced to retain that employee after "Jane" becomes "John"? Essentially, the employer hired "Jane" because she was "Jane." Thus, continued employment of "John" places the employer in the precarious position of employing someone that was not hired. Obviously, the scope of this article cannot address all the legal implications encompassed in this issue, other than to note that the extension of Title VII to include transsexual employees could implicate serious concerns in this arena. Although these concerns may eventually fall to the wayside as transsexuals and transgender persons become more visible and the social stigma surrounding them fades, currently, these concerns can and will

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[186] *See* 29 C.F.R. § 1604.2(a)(1) (2010). The guidelines provide that the bona fide occupational qualification exception as to sex should be interpreted narrowly and that labeling certain positions "men's jobs" and "women's jobs" tends to deny employment opportunities unnecessarily to one sex or the other. *Id.*

[187] 442 F.2d 385, 386 (5th Cir. 1971).

[188] *Id.* at 389.

[189] *Id.*

affect the viability of a small business owner.

F. Religious Employers

It is unclear the extent to which a faith-based employer will be able to circumvent the recognition of transgender persons as a protected class. Of course, the impact of inclusion, if legislatively recognized, would be determined in large part based on any exceptions to the bill. For example, previous versions of the Employment Non-Discrimination Act contained exemptions for corporations, associations, educational institutions, or societies that are exempt from the religious discrimination provisions of Title VII of the Civil Rights Acts of 1964.[190] Thus, to the extent that religious employers were exempt from the provisions of Title VII in other aspects, the exemptions regarding transgender persons would be similar.

Although there are no cases which currently address both the expansion of Title VII to include transgender persons and a religious exemption, the result of any judicial expansion of Title VII would likely include a similar religious exemption.

V. CONCLUSION

Whether transgender employees are protected by Title VII under the term "sex" sparks debate that demands that its participants come off the fence and pick a side. Regardless of whether courts currently recognize transgender employees as a protected class, the issues raised by transgender employees cannot be put on the backburner forever. Through the foregoing pages, readers on both sides of the issue should be willing to admit (perhaps grudgingly) that there are no easy solutions, but that the changing face of the American worker will force the issue one way or the other.

One thing is clear, recognition of transsexual and transgender individuals as a protected class under discrimination laws—whether federal or state—is increasing. Regardless of whether the expansion of Title VII eventually comes from legislative recognition (as the case for exclusion suggests) or the natural expansion of the term "sex" to protect a reasonably comparable evil (as the case for inclusion suggests), this expansion creates practical concerns for employers. The changing face of the American worker necessitates changing the policies the American employer implements. There are a variety of issues which expansion of

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[190] *See, e.g.*, H.R. 3017, 111th Cong. § 6 (2009); H.R. 3685, 110th Cong. § 6 (2007); H.R. 3285, 108th Cong. § 9 (2003).

Title VII creates for employers, ranging from restroom access to dress codes.

The most practical solution to the majority of legal issues raised is to treat the transgender employee as the sex they are presenting. This will help ease the transition period for the employee as well as curb some privacy concerns. To the extent that this practical solution does not resolve the issue, such as in the context of a prison guard, analogous judicial interpretation of Title VII will play a crucial role. This, however, will not solve all legal issues raised by inclusion of transgender persons as a protected class. Inclusion will necessarily dictate that employers reassess their employment policies.

Notes

Do Public Officials Leave Their Constitutional Rights at the Ballot Box? A Commentary on the Texas Open Meetings Act

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* B.A., The University of North Carolina at Asheville, 2007; J.D., The University of Texas School of Law, 2011. I would first like to thank Jim Harrington, my boss, professor, and mentor, for his encouragement and advice on this Note and all things legal. I would also like to thank Mary Murphy and the rest of the TJCLCR staff for their thoughtful advice and insightful comments. Finally, I owe a special thanks to Drs. Gene Helfman and Judy Meyer for their editorial assistance and endless support, and to Professor Lynn Blais for suggesting I look into the Texas Open Meetings Act.

I. INTRODUCTION

Profound questions of constitutional law arise when an individual right is pitted against an undeniable societal interest. The Texas Open Meetings Act (TOMA)[1] is a prime example. By prohibiting quorums of governmental bodies from discussing public matters in private, TOMA implicates both the free speech rights of public officials and the public's interest in transparent government.

This Note uses the recent case of *Rangra v. Brown*[2] to frame the discussion of the constitutionality of TOMA. All fifty states and the federal government have open meetings laws of some nature,[3] making the questionable constitutionality of these laws a problem of national importance. Discrepancies among statutes with regard to criminal versus civil penalties are particularly relevant. The two main questions to be answered become: Do public officials, and elected officials in particular, forfeit their constitutional rights when they take public office? And if so, what types of free speech restrictions are constitutionally justified? Nationwide applicability, combined with inconsistency among the circuits, means that the First Amendment implications of open meetings laws may be destined for the Supreme Court.

The short answer to the first question is "no." The longer answers to both questions, and the ones on which the constitutionality of these laws will depend, involve analyses of TOMA, the relationship between the state and public officials, and the courts' treatment of the classes of restrictions on free speech. Courts have disagreed about the extent to which public officials forfeit constitutional rights upon taking office. Therefore, as state legislatures redraft or amend existing open meetings laws, these bodies have an obligation to consider and balance the competing interests of public officials' free speech rights against the public's interest in transparent government. The questionable constitutionality of TOMA should put the Texas Legislature on notice that it is time to consider a new method of guaranteeing open government to the Texas people.

Because the constitutionality of TOMA is of such importance, this issue has received significant media attention as well as some scholarly comment. For example, in the Spring 2008 issue of the *Texas Tech Administrative Law Journal*, Mandi Duncan analyzed TOMA and

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[1] TEX. GOV'T CODE ANN. §§ 551.001–551.146 (Vernon 2008).

[2] *See* Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006) (trial court) ("*Rangra I*"); Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009) (original appeal) ("*Rangra II*"); Rangra v. Brown, 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc) ("*Rangra III*"); Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009) (dismissing for mootness) ("*Rangra IV*").

[3] For a discussion of other open meetings laws, see *infra*, Part VI; *see also* The Reporters Committee for Freedom of the Press, Open Government Guide, http://www.rcfp.org/ogg/ (last visited Apr. 24, 2010).

commented on the constitutional challenge in *Rangra*.[4] Duncan concentrated on TOMA's vagueness and overbreadth, as well as on the policy arguments in favor of redrafting TOMA. This Note, in contrast, focuses on TOMA's facial constitutionality, and subjects TOMA to a strict scrutiny analysis.

This Note consists of seven parts. Part I provides an overview of TOMA, with special emphasis on the enabling and criminal provisions. Part II frames the constitutionality of TOMA around *Rangra v. Brown*, a recent case in the Fifth Circuit. Part III is an analysis of the extent to which public officials retain their right of free speech when they take office. Part IV considers whether TOMA is a content-based restriction on speech. Part V considers Texas's interests in enacting and enforcing TOMA. Part VI contains a survey of open meetings laws from around the country. In conclusion, Part VII outlines an alternative method of guaranteeing open government that is both less restrictive and constitutional.

II. THE TEXAS OPEN MEETINGS ACT[5]

The Texas Open Meetings Act was originally adopted in 1967 as article 6252-17 of the Revised Civil Statutes[6] to "help make governmental decision-making accessible to the public."[7] TOMA requires that "[e]very regular, special, or called meeting of a governmental body shall be open to the public."[8] TOMA also requires that the "governmental body . . . give written notice of the date, hour, place, and subject of each meeting held by the governmental body."[9] TOMA is not a blanket prohibition on closed meetings; it contains several exceptions wherein closed meetings are allowed.[10]

A "meeting," as defined by TOMA, is "a deliberation between a quorum of a governmental body . . . during which public business or public policy over which the governmental body has supervision or

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[4] Mandi Duncan, *The Texas Open Meetings Act: In Need of Modification or All Systems Go?*, 9 TEX. TECH ADMIN. L.J. 315 (2008).

[5] For an in-depth overview on the Texas Open Meetings Act, see ATTORNEY GENERAL GREG ABBOTT, OPEN MEETINGS 2010 HANDBOOK (2010).

[6] Act of May 8, 1967, 60th Leg., R.S., ch. 271, § 1, 1967 Tex. Gen. Laws 597.

[7] OPEN MEETINGS 2010 HANDBOOK, *supra* note 5, at 2.

[8] TEX. GOV'T CODE ANN. § 551.002 (Vernon 2008).

[9] *Id.* § 551.041.

[10] These exceptions, known as executive sessions, involve discussions of: "(1) purchase or lease of real property; (2) security measures; (3) receipt of gifts; (4) consultation with attorney; (5) personnel matters; (6) economic development; and (7) certain homeland security matters. . . . [However, all] final actions, decisions, or votes must be made in an open meeting." TEXAS MUNICIPAL LEAGUE, THE TEXAS OPEN MEETINGS ACT AT A GLANCE (2006). There are also situations in which the requirements for open meetings are modified. *See, e.g.*, TEX. GOV'T CODE ANN. § 551.045 (modifying notice requirement for emergency meetings).

control is discussed or considered or during which the governmental body takes formal action."[11] Under TOMA, the *content* of the information discussed ("public business") determines whether something is a meeting or not. A "quorum" is defined as the number of people required to constitute a majority of the governing body, unless otherwise specified.[12] However, TOMA "does not require that governmental body members be in each other's physical presence to constitute a quorum."[13] For example, if enough members of a governmental body meet with one another *individually* to discuss a particular issue, this will constitute a quorum.[14] A "deliberation" is "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business."[15] Again, the *content* of the meeting is crucial—TOMA does not apply to gatherings of public officials for purely social purposes.[16]

TOMA can be enforced through both civil and criminal proceedings. It contains an enabling provision that allows interested persons to file a lawsuit for either injunctive relief or a writ of mandamus to enforce its provisions.[17] TOMA grants standing to a wide range of individuals and groups: an "interested person" can include a city,[18] a government league,[19] an environmental group,[20] a police officers' association,[21] and many other groups and individuals.[22] TOMA's civil enforcement provisions are similar to many other states' open meetings laws.[23]

The most controversial section of TOMA, and the part subject to

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[11] TEX. GOV'T CODE ANN. § 551.001(4).

[12] *Id.* § 551.001(6).

[13] Tex. Att'y Gen. Op. No. GA-0326 (2005) at *3.

[14] *Id.*

[15] TEX. GOV'T CODE ANN. § 551.001(2). Although the statute says "verbal," "deliberation" has been construed to include written communication such as e-mail. *See* Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex Nov. 7, 2006).

[16] TEX. GOV'T CODE ANN. § 551.001(4).

[17] *Id.* § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."). TOMA also creates liability for a person who knowingly discloses information about a lawful closed meeting. *Id.* § 551.146(a)(2).

[18] *See* Matagorda County Hosp. Dist. v. City of Palacios, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.).

[19] *See* Hays County v. Hays County Water Planning P'ship, 106 S.W.3d 349, 357–58 (Tex. App.—Austin 2003, no pet.).

[20] *See* Save Our Springs Alliance, Inc. v. Lowry, 934 S.W.2d 161 (Tex. App.—Austin 1996, orig. proceeding [mand. denied]).

[21] *See* Rivera v. City of Laredo, 948 S.W.2d 787 (Tex. App.—San Antonio 1997, writ denied).

[22] *See* Burks v. Yarbrough, 157 S.W.3d 876 (Tex. App.—Houston 2005, pet. denied) (holding that standing under section 551.142 is interpreted broadly, to include the interest of the general public); *see also* OPEN MEETINGS 2010 HANDBOOK, *supra* note 5, at 57 (citing *Burks*, 157 S.W.3d 876; *Hays County Water Planning P'ship*, 41 S.W.3d 174; *Save Our Springs Alliance*, 934 S.W.2d 161). *But see* City of Abilene v. Shackelford, 572 S.W.2d 742, 746 (Tex. Civ. App.—Eastland 1978, writ. denied) (holding that an "interested person" under TOMA must show "particular injury or damage" to have standing).

[23] *See* discussion on "Open Meetings Acts Across the Country," *infra* Part VI.

litigation in *Rangra*, is the provision that *criminalizes* violations of the Act:

> A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
>
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
>
> (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
>
> (3) participates in the closed meeting, whether it is a regular, special, or called meeting.[24]

Violation of section 551.144 is a misdemeanor punishable by a fine of between $100 and $500, or confinement in the county jail for between one and six months, or both.[25] Although the state of mind required for culpability under the act is "knowingly,"[26] "[a] member of a governmental body may be 'held criminally responsible [under section 551.144] for his involvement in the holding of a closed meeting which is not permitted under the Act regardless of his mental state with respect to whether the closed meeting is permitted under the Act.'"[27] Essentially, TOMA allows for the criminal punishment of public officials meeting in private, based on the content (official business) of their speech.

The criminal provisions of TOMA raise important questions of constitutional law, particularly with regard to the free speech rights of public officials. Although these questions have not all been answered, some were addressed by Texas courts and the Fifth Circuit in *Rangra v. Brown*.[28]

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[24] TEX. GOV'T CODE ANN. § 551.144(a) (Vernon 2008). TOMA also criminalizes: a conspiracy to circumvent the requirements of the act, *id.* § 551.143; a governmental body member's participation in a closed meeting with knowledge that the meeting's agenda is not being followed or that the meeting is not being recorded, *id.* § 551.145; and the unauthorized disclosure of the agenda or recordings of a lawfully closed meeting, *id.* § 551.146. All of the crimes under TOMA are misdemeanors.

[25] *Id.* § 551.144(b).

[26] *See* TEX. PENAL CODE ANN. § 6.03(b) (Vernon 2003) ("A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.").

[27] Tex. Att'y Gen. Op. No. JC-0307 (2000) at *3 (quoting Tovar v. State, 978 S.W.2d 584, 587 (Tex. Crim. App. 1998)).

[28] *See Rangra I*, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex Nov. 7, 2006) (trial court); *Rangra II*, 566 F.3d 515 (5th Cir. 2009) (original appeal); *Rangra III*, 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc); *Rangra IV*, 584 F.3d 206 (5th Cir. 2009) (dismissing for mootness).

III. *RANGRA V. BROWN*

Rangra v. Brown involved a challenge to TOMA by two members of the Alpine City Council, Avinash Rangra and Anna Monclova. Rangra and Monclova claimed that the criminal provisions of TOMA violate Article I, Section 8 of the Texas Constitution[29] and the First Amendment of the United States Constitution.[30] They claimed that TOMA was unconstitutionally vague and overbroad.[31]

The controversy arose as a result of a pair of e-mails exchanged between four of the five Alpine City Council members. In the first e-mail, Councilwoman Katie Elms-Lawrence wrote to Avinash Rangra, Manuel Payne, and Anna Monclova:

> Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt [sic] like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive..no need for interviewing another engineer at this time ... have him prepare the postphonment [sic] of the 4.8 million, get us his firms [sic] review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW....then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ [sic] standards....We don't have to marry them ... with a life long contract, lets [sic] just get engaged!
>
> Let us hear from you both
>
> KT[32]

Councilman Rangra responded the following day:

> Hello Katie....

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[29] Article I, § 8 is the free speech provision of the Texas Constitution. It states, in relevant part: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence."

[30] *Rangra I*, at *1–2; *see* U.S. CONST. amend. I.

[31] *Id.*

[32] *Id.* at *2.

> I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....
>
> I'll talk with Tom Brown also after my 8:00 class ...
>
> Thanks for the advice..... and I'll talk with Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday....
>
> We must reach some sort of decision SOOOOOOOOOOOOON.
>
> Avinash
>
> Katie.... please correct my first name spellings ... Thanks.[33]

Rangra and fellow councilmember Katie Elms-Lawrence were indicted in state court for violations of the criminal section of TOMA[34] in February 2005.[35] Eighty-third District Attorney Frank Brown, a named defendant in the civil case, brought the charges against Rangra and Elms-Lawrence.[36] District Attorney Brown eventually dismissed the charges without prejudice,[37] meaning that he reserved the right to reinstate the charges at a later date.[38]

A. *Rangra I*

Fearing renewed prosecution, Rangra, joined by then-councilwoman Anna Monclova, sued District Attorney Brown and Texas Attorney General Gregg Abbott under 42 U.S.C. § 1983.[39] *Rangra v. Brown* was first heard in the United States District Court for the Western District of Texas, Pecos Division.[40] The trial court rejected Rangra and Monclova's arguments that TOMA is unconstitutional, holding that

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[33] *Id.*

[34] TEX. GOV'T CODE ANN. § 551.144 (Vernon 2008).

[35] Betse Esparza, *2005: The Year in Review*, ALPINE AVALANCHE, Dec. 29, 2005, *available at* http://www.alpineavalanche.com/articles/2005/12/29/news/news01.txt.

[36] Jack D. McNamara, *Rangra Wins*, NIMBY NEWS, May 17, 2007, *available at* http://www.nimbynews.com/07-Rangra-wins-Archives-05-17-07.html.

[37] *Rangra II*, 566 F.3d 515, 518 (5th Cir. 2009).

[38] BLACK'S LAW DICTIONARY 502 (8th ed. 2004).

[39] *Rangra II*, 566 F.3d at 518.

[40] *Rangra I*, 2006 WL 3327634 (W.D. Tex. 2006).

"because the speech was uttered entirely in the speaker's capacity as a member of the city council, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment . . . ."[41] By deciding that TOMA does not regulate First Amendment-protected speech, the court did not have to address TOMA's overbreadth or vagueness. However, in dicta, Judge Junell opined that TOMA is neither vague nor overbroad, and would therefore be constitutional even if it did regulate speech.[42]

B. *Rangra II*

On appeal to the Fifth Circuit, the district court's opinion from *Rangra I* was reversed.[43] Writing for a Fifth Circuit panel, Judge Dennis held: "The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general."[44] Dennis held that TOMA does in fact regulate speech, and because it does so on the basis of the content of that speech, TOMA should be subject to strict scrutiny.[45] The Fifth Circuit panel remanded the case for reconsideration under a strict scrutiny analysis.[46]

C. *Rangra III* and *IV*

Between *Rangra I* and *II*, Mr. Rangra's city council term expired, and a consecutive-term-limits rule precluded him from seeking reelection. After the initial hearing and judgment in *Rangra II*, the Fifth Circuit decided to hold a rehearing en banc.[47] In a one-sentence per curiam opinion, the full court dismissed the case for mootness.[48] In an emphatic dissent, Judge Dennis characterized the court's holding as "incorrect, injudicious, and result-oriented."[49] Reiterating the standing section of his *Rangra II* opinion, Judge Dennis argued that the case was not moot because Mr. Rangra could run for city council in the future,

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[41] *Id.* at *6.

[42] *Id.* at *6–9 ("[I]t is not necessary to consider whether the Act is overbroad or vague. However, the Court finds even if those issues are reached, the statute is constitutional.").

[43] *Rangra II*, 566 F.3d 515 (5th Cir. 2009).

[44] *Id.* at 518.

[45] *Id.* ("[W]hen a state seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny . . . .").

[46] *Id.* ("[B]ecause the district court dismissed the elected officials' challenge to a state statute that regulates their speech on the basis of its content without applying the required strict scrutiny analysis, we reverse the district court's judgment and remand the case for the performance of that task.").

[47] *Rangra III*, 576 F.3d 531 (5th Cir. 2009) (announcing rehearing en banc).

[48] *Rangra IV*, 584 F.3d 206 (5th Cir. 2009).

[49] *Id.* at 207 (Dennis, J., dissenting).

subjecting himself to renewed prosecution under TOMA.[50]

Although the Fifth Circuit en banc dismissed the case for mootness in *Rangra IV*, the question of TOMA's constitutional fitness remains unanswered. In an exercise in judicial timidity, the Fifth Circuit has again refused to answer the constitutional question presented.[51] In response to the dismissal, elected officials and municipalities across Texas have joined together to file a lawsuit against the State of Texas and Attorney General Abbott.[52] The plaintiffs include cities (Alpine, Big Lake, Pflugerville, Rockport, and Wichita Falls) and public officials (Diana Asgeirsson, Angie Bermudez, Jacques DuBose, James Fitzgerald, Jim Ginnings, Victor Gonzalez, Russell C. Jones, Mel LeBlanc, Lorne Liechty, A.J. Mathieu, Johanna Nelson, Todd Pearson, Arthur "Art" Reyna, Charles Whitecotton, and Henry Wilson).[53] The lawsuit was filed December 14, 2009, in the United States District Court for the Western District of Texas, Pecos Division[54]—the same court in which *Rangra I* was litigated. Notwithstanding the change in plaintiffs, the new lawsuit makes the exact same complaint as was made in *Rangra I*.[55] The plaintiffs ask the court to honor the Fifth Circuit panel's decision in *Rangra II* and "apply strict scrutiny standards to TOMA."[56] With this new lawsuit, it appears the Fifth Circuit will be forced to analyze TOMA's effect on free speech.

IV. FREE SPEECH RIGHTS OF PUBLIC OFFICIALS

The Texas Open Meetings Act undoubtedly sets limits on the extent to which public officials can communicate, but that alone does not subject it to First Amendment scrutiny. The question becomes whether public officials' communication, made pursuant to their jobs as public officials, should be considered "speech" under the First Amendment, and if so, how much protection such communication should receive. An analysis of the First Amendment, and the relationship between public

[50] *Id.* at 208 (Dennis, J., dissenting).

[51] Courts, including the Supreme Court and the Fifth Circuit, often refuse to answer a constitutional question if there is any alternative method of resolving the case. *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (establishing the *Pullman* doctrine, allowing federal courts to ignore constitutional questions presented by state laws); Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm. of State Bar of Tex., 283 F.3d 650, 653 (5th Cir. 2002) (applying the *Pullman* doctrine). The Fifth Circuit did not invoke the *Pullman* doctrine when it dismissed *Rangra IV*; however, the *Pullman* doctrine is illustrative of federal courts' hesitance to answer difficult constitutional questions.

[52] Plaintiff's Original Complaint, City of Alpine v. Abbott, No. P09-CV-59 (W.D. Tex. 2009).

[53] *Id.*

[54] Nick Pipitone, *Valley Elected Officials Closely Watching Texas Open Meetings Act Lawsuit*, THE MONITOR, December 27, 2009, *available at* http://www.themonitor.com/articles/texas-33901-open-lawsuit.html.

[55] Plaintiff's Original Complaint at 16, City of Alpine v. Abbott, No. P09-CV-59 (W.D. Tex. 2009).

[56] *Id.* at 17.

officials and the government, shows that public officials' communications are "speech," and that such speech should be afforded effective protection against government restriction.

When presented with this issue, the Fifth Circuit's three-judge panel in *Rangra II*, led by Judge Dennis, found that officials' speech does retain First Amendment protection.[57] However, after hearing the case en banc, the Fifth Circuit as a whole vacated Judge Dennis's decision and dismissed the case for mootness.[58] As a result, the question remains unanswered in the Fifth Circuit. Other courts, including the Supreme Court, have created a separate category of free speech jurisprudence dealing with the government's authority to restrict speech depending on whether it is acting as sovereign or employer.

A. Is Texas Acting as Sovereign or Employer?

The Supreme Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[59] In *Garcetti v. Ceballos*, Richard Ceballos, a deputy district attorney, filed a § 1983 complaint against his supervisors at the Los Angeles County district attorney's office.[60] Ceballos' complaint alleged that the district attorney's office subjected him to adverse employment actions in retaliation for engaging in protected speech—he wrote an internal memorandum in which he recommended a case's dismissal on the basis of purported governmental misconduct.[61] *Garcetti* is the last of a long line of cases dealing with the government's authority to regulate speech of public employees.[62] However, *Garcetti* does not clearly answer the question of the relationship between the government and elected officials: elected officials are undoubtedly public employees, but is the government their employer?

In *Rangra I*, the United States District Court for the Western District of Texas found that *Garcetti* was controlling on a challenge to TOMA by a Texas elected official.[63] However, as this Note shows, the

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[57] 566 F.3d 515.

[58] *Rangra IV*, 584 F.3d 206 (5th Cir. 2009).

[59] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[60] *Id.* at 410.

[61] *Id.* at 414.

[62] *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563 (1968); United States Civil Service v. Nat'l Ass'n. of Letters Carriers, 413 U.S. 548 (1973); Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Rust v. Sullivan, 500 U.S. 173 (1991). For a detailed overview of the government-as-employer distinction, see WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY: CASES AND MATERIALS 293–386 (3d ed.) (2002).

[63] *Rangra I*, 2006 WL 3327634 (W.D. Tex. 2006) at *5.

Rangra I court's analysis was flawed in applying the *Garcetti* approach to an elected official's challenge of TOMA. Additionally, a number of differences exist between the disciplinary action in *Garcetti* and the criminal provisions of TOMA.

Judge Junell, in *Rangra I*, wrote that "[f]or purposes of determining what constitutes protected speech under the First Amendment, there is no meaningful distinction among public employees, appointed public officials, and elected public officials."[64] This is a bold statement, and arguably a faulty one.[65] Judge Junell inappropriately cited *Rash-Aldridge v. Ramirez*[66] in support of this assertion.[67] *Rash-Aldridge* concerned a Laredo city councilwoman's removal—as a result of her speech—from an *appointed* position on a local metropolitan planning board.[68] Although the Fifth Circuit used a *Garcetti*-like approach to uphold the disciplinary action in *Rash-Aldridge*, Ms. Rash-Aldridge was not punished in her elected-official capacity.[69] *Rash-Aldridge* pointed out this distinction, emphasizing that "Rash-Aldridge was appointed to the [planning board], not elected."[70] Judge Junell's analysis in *Rangra I* would have been appropriate only if Rash-Aldridge had lost some right deriving from her elected membership on the city council (i.e., her right to vote on issues before the council), rather than being removed from her appointed position on the planning board.

The distinction between government employees and elected public officials may seem arbitrary and minuscule, but it is very important. It parallels the distinction between the government acting as employer and the government acting as sovereign. *Garcetti* stands for the concept that "the government as employer indeed has far broader powers [to restrict speech] than does the government as sovereign."[71] The city council (the government) in *Rash-Aldridge* was acting as employer—it had appointed Ms. Rash-Aldridge to the metropolitan planning board—rather than as sovereign. Texas, on the other hand, is acting as a sovereign when it prosecutes public officials under TOMA. To claim that *Garcetti* justifies TOMA, and that Texas is acting as an employer by enforcing TOMA, is

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[64] *Id.*

[65] Judge Dennis's opinion for the three-judge panel in *Rangra II* is consistent with my disapproval of the district court's assertion, but did not go into an analysis of Judge Junell's reasoning. *See Rangra II*, 566 F.3d at 522 ("The district court's premise that the First Amendment's protection of elected officials' speech is limited just as it is for the speech of public employees, however, is incorrect. Job-related speech by public employees is clearly less protected than other speech because the Court has held that government employees' speech rights must be balanced with the government's need to supervise and discipline subordinates for efficient operations. . . . *Garcetti* did nothing to impact the speech rights of elected officials whose speech rights are not subject to employer supervision or discipline.").

[66] 96 F.3d 117 (5th Cir. 1996) (per curiam).

[67] *Rangra I*, at *5.

[68] 96 F.3d. at 118.

[69] *Id.* at 119.

[70] *Id.*

[71] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994)).

to claim that the Texas State Government has the authority to "hire and fire"[72] all members of "governmental bodies," as defined by TOMA.[73]

The Fifth Circuit, in *Jenevein v. Willing*, further highlighted the flaws in Judge Junell's *Rangra I* decision that applied *Garcetti* to elected officials.[74] Writing for a panel of the Fifth Circuit, Judge Higginbotham clearly rejected the *Rangra I* analysis: "the preferable course ought not draw directly upon the *Pickering-Garcetti* line of cases for sorting the free speech rights of employees elected to state office."[75] However, not all courts have taken this approach.[76]

The Fifth Circuit has addressed the issue of whether an elected official is in fact an "employee" of the state. In *Jenevein*, the Fifth Circuit emphasized the difference between the relationship between state and elected official, and the relationship between state and ordinary state employee:

> Our "employee" is an elected official, about whom the public is obliged to inform itself, and the "employer" is the public itself, at least in the practical sense, with the power to hire and fire. It is true that Judge Jenevein was an employee of the state. It is equally true that as an elected holder of state office, his relationship with his employer differs from that of an ordinary state employee.[77]

Such a characterization of an elected official also supports the argument that Texas is acting as sovereign rather than employer when it enforces TOMA. Because elected officials have a very different relationship with the state than other public employees, the state should have different, and in this case lesser, authority to restrict their speech. It

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[72] Jenevein v. Willing, 493 F.3d 551, 557 (5th Cir. 2007).

[73] TOMA defines a "Governmental body" as: "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members; a county commissioners court in the state; a municipal governing body in the state; a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality; a school district board of trustees; a county board of school trustees; a county board of education; the governing board of a special district created by law; a local workforce development board . . . ; a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both . . . ." TEX. GOV'T CODE ANN. § 551.001(3) (Vernon 2008) (internal numbering omitted).

[74] *See Jenevein*, 493 F.3d at 558.

[75] *Id.*

[76] *See, e.g.*, Hartman v. Register, No. 1:06-CV-33, 2007 WL 915193, at *6 (S.D. Ohio Mar. 26, 2007) ("[T]he distinction between the public employee in *Garcetti* and an elected official, in this case Plaintiff, is inconsequential."); Hogan v. Twp. of Haddon, No. 04-2036, 2006 WL 3490353, at *7 (D.N.J. Dec. 1, 2006) (applying *Garcetti* to an elected township commissioner); Shields v. Charter Twp. of Comstock, 617 F. Supp. 2d 606, 615 (W.D. Mich. 2009) ("As a[n elected] board member, Plaintiff Shields may not technically have been an employee of the Township, but he surely was a representative of the Township, and the concerns underlying *Garcetti* apply with equal force to his situation.").

[77] *Jenevein*, 493 F.3d at 557.

follows that when the state seeks to restrict the speech of elected officials, it is acting more as sovereign than as employer.

B. Criminal Provision of TOMA

The distinction between what *Garcetti* allows a government to do when acting as an employer and what Texas does when enforcing TOMA is further highlighted by the criminal nature of TOMA. Neither in Justice Kennedy's majority opinion in *Garcetti*, nor in any of the three dissenting opinions, is there any mention of criminal sanctions against Mr. Ceballos.[78] Had the State of California prosecuted Ceballos for his memorandum, little doubt exists that the Supreme Court would have issued a different ruling.[79] Criminal guilt in our society carries with it considerably more stigma than civil liability, though the penalty for both might be the same. For that reason, the Constitution confers greater due process rights on those charged with crimes than those in civil suits. Criminally accused are given protections against warrantless searches and seizures,[80] the right to a grand jury,[81] freedom from self-incrimination,[82] due process,[83] freedom from double jeopardy,[84] the right to an impartial jury,[85] and the right to an attorney.[86] Similarly, an accused cannot be convicted unless the prosecution can prove his guilt "beyond a reasonable doubt."[87] In contrast, a defendant in a civil trial has a limited right to a jury trial[88] and can be found liable if a "preponderance of the evidence" supports such a conclusion.

The Supreme Court is hesitant to allow for criminal prosecution of speech,[89] and has meticulously defined those types of speech for which it

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[78] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

[79] *But see* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 574 (1968) ("While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.").

[80] U.S. CONST. amend. IV.

[81] U.S. CONST. amend. V.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] U.S. CONST. amend. VI.

[86] *Id.*

[87] *In re* Winship, 397 U.S. 358, 364 (1970).

[88] U.S. CONST. amend. VII.

[89] *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 898–99 (1990) (O'Connor, J., concurring) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute. . . ."); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."); New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (holding that the Sedition Act "was inconsistent with the First Amendment."). *But see* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding the constitutionality of a group libel criminal law).

is appropriate to apply criminal penalties:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[90]

The classes of speech removed from First Amendment protection in *Chaplinsky* share a moral depravity and a lack of social value. And even *Chaplinsky* has been whittled down: after *New York Times v. Sullivan*, it is unconstitutional to criminalize seditious libel;[91] after *Cohen v. California*, it is unconstitutional to criminalize profanity;[92] and, arguably, after *R.A.V. v. City of St. Paul*[93] and *Brandenburg v. Ohio*,[94] the criminalization of fighting words is in question.[95] The speech subject to prosecution under TOMA has none of the qualities discussed in *Chaplinsky*. Therefore, applying *Garcetti*—a case involving a deputy district attorney being passed over for promotion—to uphold a criminal statute is ill-founded.

The criminal aspect of TOMA further supports the conclusion that Texas is acting as sovereign rather than as employer when it enforces TOMA. Criminal prosecution is the action of a sovereign. Concluding otherwise would be tantamount to granting employers the ability to perform criminal prosecutions on their employees. It would also run the risk of allowing the government to boot-strap an ability to *criminalize* employees' speech onto its authority to *civilly* regulate that same speech.

C. Free Exchange of Ideas Argument

Because Texas is acting as sovereign when it enforces TOMA, public officials prosecuted under TOMA are given greater First

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[90] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[91] New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[92] Cohen v. California, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric").

[93] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a city ordinance against hate speech).

[94] Brandenburg v. Ohio, 395 U.S. 444 (1969) (significantly increasing fighting words standard).

[95] I realize that there is a healthy debate about the extent to which *R.A.V.* and *Brandenburg* limit the "fighting words" doctrine, and have no intention of joining that debate in this Note. But, that there is discussion that the doctrine has been weakened supports my assertion that the Court has historically been very hesitant to uphold criminal prosecution of speech.

Amendment protections.[96] However, the inquiry does not end there. Perhaps the nature of the "speech" prescribed under TOMA does not deserve protection for a more basic reason: First Amendment jurisprudence reflects a valuing of free speech for the important role it plays in the free exchange of ideas and the pursuit of truth.[97] In *Cohen v. California*, Justice Harlan famously wrote:

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[98]

Free speech jurisprudence is replete with cases of undesirable speech being given protection in order to stimulate the marketplace of ideas.[99] The Reporters Committee for Freedom of the Press, in their amicus curiae brief brought in support of rehearing *Rangra* en banc, made a similar argument defending TOMA.[100]

In all these cases, the Court strengthened individuals' rights to *contribute* to the exchange of ideas. If society were a market and speech were sold by vendors, the Court has emphasized the importance of allowing as many vendors as possible to set up shop at the market, regardless of the nature of their wares. The defendants being prosecuted under TOMA, however, are like vendors trying to assert their right as members of the market to sell secret commodities, only to customers of their choosing, from a shop down the street with locked doors and tinted windows. The metaphor illustrates that protecting the free speech rights of Texas public officials, by arguing that TOMA is unconstitutional, is contrary to one of the principles on which the First Amendment was

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[96] *See Rangra II*, 566 F.3d 515, 522–23 ("[W]hen the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated."); *see also* Waters v. Churchill, 511 U.S. 661, 671–72 (1994).

[97] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas–that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell, 1947)).

[98] Cohen v. California, 403 U.S. 15, 24 (1971).

[99] *See, e.g.*, *Cohen*, 403 U.S. at 15 (overturning the conviction of a man for wearing a jacket displaying the phrase, "Fuck the Draft"); Texas v. Johnson, 491 U.S. 397 (1989) (striking down Texas's flag-burning statute); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (overruling Ohio's criminal syndicalism statute based on a challenge by the Ku Klux Klan).

[100] Brief for The Reporters Committee for Freedom of the Press as Amici Curiae Supporting Appellees at 16, Rangra v. Brown, 584 F.3d 206 (2009) (No. 06-51587) ("The types of statutes that have been analyzed under the weight of strict scrutiny have one common thread: they are aimed at keeping certain types of speech *away* from the public.").

founded. Allowing public officials to meet in private to discuss official business actually decreases the exchange of ideas. However, just because speech does not contribute to the marketplace of ideas does not mean that it is not deserving of protection.

In *Givhan v. Western Line Consolidated School District*, the Supreme Court recognized that the First Amendment protects the right to speak privately just as it protects the right to speak publicly.[101] In a discussion on the freedom of speech from his majority opinion, then-Justice Rehnquist wrote: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately . . . rather than to spread his views before the public."[102] Though the First Amendment was designed and has been interpreted chiefly to allow for open access to the marketplace of ideas, this does not mean that speech made in private deserves no First Amendment protection. The Court has even recognized a right not to speak.[103] As a result, there is no reason to refuse protection for Texas public officials' speech rights based solely on the fact that the speech is in private rather than in public.

That public officials have some First Amendment rights when speaking in their official capacity, however, does not automatically mean that TOMA is unconstitutional. To decide TOMA's constitutionality, it is necessary to determine the extent to which TOMA infringes on free speech, weigh Texas's interests in enforcing TOMA, and analyze any potential alternatives that could achieve the same purpose as TOMA.

V. IS TOMA A CONTENT-BASED RESTRICTION?

TOMA applies only to speech by public officials regarding official business.[104] Discussion by members of a city council about Sunday's Cowboys game or the weather would not be subject to TOMA. Content-based regulations of speech are presumed to be unconstitutional.[105] Though it sounds tautological, a regulation of speech is content-based if it is not "facially content-neutral."[106] In *Burson v. Freeman*, the Supreme Court held that a regulation was content-based because it conditioned individuals' exercise of free speech rights

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[101] 439 U.S. 410 (1979).

[102] *Id.* at 415–16; *see also* Am. Booksellers v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) ("[T]he Constitution does not make the dominance of truth a necessary condition of freedom of speech.").

[103] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that the First Amendment prohibits a school from requiring students to salute the flag).

[104] TEX. GOV'T CODE ANN. § 551.001(2) (Vernon 2008) (defining "Deliberation" as "a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.").

[105] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[106] Burson v. Freeman, 504 U.S. 191, 197 (1992).

"entirely on whether their speech [was] related to a political campaign."[107] Similarly, in *Republican Party of Minnesota v. White*, the Court considered the Minnesota Supreme Court's canon of conduct, which prohibited judicial candidates from discussing "their views on disputed legal or political issues."[108] The Court, in an opinion by Justice Scalia, held such a restriction to be content-based and in violation of the First Amendment.[109]

TOMA restricts only discussions involving content "concerning an issue within the jurisdiction of the governmental body or any public business."[110] The statute is not facially content-neutral, and therefore it is a content-based regulation of speech and is presumed to be unconstitutional. Judge Dennis's opinion in *Rangra II* comports with this analysis that TOMA is a content-based restriction.[111]

Texas could claim that, to the extent that TOMA is a restriction on speech, it is a time, place, and manner restriction on speech.[112] The Court has upheld such restrictions as constitutional.[113] However, time, place, and manner restrictions are not always constitutional.[114] In *Burson v. Freeman*, the Court limited the constitutionality of such restrictions: "[T]he government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication."[115] Because TOMA is not content-neutral, its constitutionality cannot be saved by claims that it is a time, place, or manner restriction.

Content-based regulations are not automatically unconstitutional. However, courts subject such laws to the highest level of scrutiny.[116] For TOMA to survive a constitutional challenge, it will have to pass a strict scrutiny analysis. Despite the popular myth that strict scrutiny is "'strict' in theory and fatal in fact,"[117] laws have a significant chance of surviving

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[107] *Id.*

[108] 536 U.S. 765 (2002).

[109] *Id.*

[110] TEX. GOV'T CODE ANN. § 551.001(2) (Vernon 2008).

[111] Rangra v. Brown, 566 F.3d 515, 518 (5th Cir. 2009).

[112] *See* Cole v. State, 673 P.2d 345, 350 (Colo. 1983) (per curiam) (upholding Colorado's Sunshine Law as a constitutional time, place, and manner restriction).

[113] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[114] Burson v. Freeman, 504 U.S. 191, 197 (1992).

[115] *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983)).

[116] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868 (1997) (applying "the most stringent review" to a content-based federal criminal law); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (arguing strict scrutiny "provides 'the baseline rule' under the First Amendment for assessing laws that regulate speech on the basis of content.") (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part and dissenting in part)).

[117] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND L. REV. 793, 794 (2006) (quoting Gerald Gunther, *The Supreme Court,*

a strict scrutiny analysis. In an empirical study, Professor Adam Winkler found that "30 percent of all applications of strict scrutiny . . . result in the challenged law being upheld."[118] More specifically, Professor Winkler found that of the 222 laws subjected to strict scrutiny analysis for restricting free speech, 22% survived.[119] Similarly, state laws have a survival rate of 23%.[120] State laws restricting free speech, such as TOMA, have a 21% survival rate.[121] To withstand strict scrutiny, a law must be narrowly tailored to serve a compelling state interest, which cannot be achieved by less restrictive means.[122]

VI. TEXAS'S INTERESTS IN ENACTING AND ENFORCING TOMA

> [S]uppose the proceedings to be completely secret . . . that judge will be at once indolent and arbitrary: how corrupt so ever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[123]

In 1827, Jeremy Bentham wrote against the Court of Star Chamber and other secret courts, and Americans have been organizing to fight for open government since before the Revolution. In 1765, John Adams published an essay in the *Boston Gazette* advocating for an informed citizenry in which he said, "whenever a general Knowledge and sensibility have prevailed among the People, Arbitrary Government and every kind of oppression have lessened and disappeared in Proportion."[124] To ensure knowledge among the people, the 1766 Boston Town Meeting initiated one of America's first open meetings policies, requiring its representatives to make the House of Representatives

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1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972)).

[118] Winkler, *supra* note 117, at 796.

[119] Winkler, *supra* note 117, at 815. Professor Winkler found that "free speech law is the area of law in which the most strict scrutiny cases arise (222 of 459), comprising 48 percent of all strict scrutiny applications in the federal courts during the covered period." *Id.* at 844.

[120] *Id.* at 818.

[121] *Id.* at 855.

[122] United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

[123] JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

[124] John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE, Sept. 30, 1765, in Robert Taylor et. al. eds., Papers of John Adams 108 (1977).

debates public.[125] The country has changed much over the past 240 years, and open meetings laws look very different from the Boston Meeting's public debate requirement. Nevertheless, the inherent interest remains the same: keep our institutions open and transparent or risk arbitrary laws, unaccountable officials, and an uninformed public.

The interest in open government is tempered by the government officials' constitutional right to free speech. Freedom of speech is a fundamental right guaranteed by the First Amendment. The next step in the strict scrutiny analysis is to look at the government interest furthered in restricting this fundamental right.[126] For a law to pass strict scrutiny, the government's interests must be compelling. Texas's interest in having an open meetings law is two-fold: (1) maintaining a free, transparent government;[127] and (2) enforcing the right of the people to access information.[128] Both interests are vital in a democracy.

A. Open Government

Texas believes open meetings are necessary to ensure open government, and that an "open government is the cornerstone of a free society."[129] TOMA "commits public officials at all levels of government to the principle of government in the sunshine."[130] Open meetings are a mechanism through which the public can communicate with the government and contribute to the decision-making process. In theory, by allowing for public involvement, open meetings result in a more informed populace better able to make more-educated decisions at the polls, which should result in a more representative government.

Without open meetings, governmental bodies are able to make

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[125] *Id.*

[126] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Fallon, *supra* note 116, at 1315–16 ("However the purposes of strict scrutiny are characterized, there are three crucial steps in applying the formula: (1) identifying the preferred or fundamental rights the infringement of which triggers strict scrutiny; (2) determining which governmental interests count as compelling; and (3) giving content to the requirement of narrow tailoring.").

[127] *See* Brief for The Reporters Committee, *supra* note 100, at 9 ("The Texas Open Meetings Act, like the open meetings laws in all 50 states and the federal government, promotes the First Amendment goals of open government and rigorous debate about matters of public concern."); *see also* Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for implementing new technologies consistent with Florida's position as a leader in open government*, 35 FLA. ST. U. L. REV. 245, 245–46 (2008) ("The philosophical underpinnings of open meetings laws are rooted in the concepts of democracy; the citizenry must be well informed in order to effectively self-govern. In addition to self-governance, open meetings laws contribute to a less corrupt, more efficient government and encourage more accurate news reporting.").

[128] *See* Va. Pharmacy Bd. v. Va. Consumer Counsel, 425 U.S. 748 (1976) (recognizing access to information as an important interest).

[129] Texas Attorney General, Open Government, http://www.oag.state.tx.us/open/index.shtml (last visited Apr. 24, 2010).

[130] Greg Abbott, Letter Introducing the Texas Open Meetings Handbook, in OPEN MEETINGS HANDBOOK 2008, *supra* note 5.

important decisions without any input from the people whom the decisions will affect most. Even where votes are cast in the open, neither the public nor the courts have any awareness of the intent, purpose, or evolution of the outcome if the deliberations are held in secret. Thus, interpreting laws and decisions made behind closed doors can become an arduous and, likely, inaccurate task.

In addition to TOMA, Texas has a Public Information Act (PIA),[131] which "gives the public the right to request access to government information."[132] Under the PIA, people can request that the government disclose certain information or documents in the government's control.[133] Pursuant to the PIA, the Office of the Attorney General publishes thousands of Open Records Letter Rulings, which help illustrate the application of the PIA.[134] To address more novel questions regarding the construction of the PIA, the Office of the Attorney General issues formal opinions, known as Open Records Decisions.[135] All of these policies further Texas's interest in ensuring open government.

B. Right to Access Information

Aside from the policy arguments in favor of open and transparent government, amici have argued that open meetings laws are simply statutory reiterations of "the public's right to attend government proceedings."[136] This alleged right comes from the line of cases protecting the right to receive information.[137] The first of such cases contemplated by the Supreme Court was *Martin v. City of Struthers*, which struck down an ordinance prohibiting a Jehovah's Witness who, while distributing handbills, summoned people from inside their homes.[138] When discussing the First Amendment, the Court said, "This freedom embraces the right to distribute literature, and necessarily

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[131] TEX. GOV'T CODE ANN. §§ 552.001–552.353 (Vernon 2008).

[132] ATTORNEY GENERAL GREG ABBOTT, PUBLIC INFORMATION 2008 HANDBOOK (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf. The preamble to the PIA, which states its purpose and effect, is discussed *infra*, note 209.

[133] TEX. GOV'T CODE ANN. § 552.221 (Vernon 2008).

[134] *See* Texas Attorney General, Open Letter Rulings, http://www.oag.state.tx.us/open/index_orl.php (last visited Apr. 24, 2010).

[135] *See* Texas Attorney General, Open Records Decisions, http://www.oag.state.tx.us/open/ogindex.shtml (last visited Apr. 24, 2010).

[136] Brief for The Reporters Committee, *supra* note 100, at 4. *But see* Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 404–05 (1979) (Rehnquist, J., concurring) (stating, "it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings."); Houchins v. KQED, 438 U.S. 1, 16 (Stewart, J., concurring) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government.").

[137] HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 12–14 (1999).

[138] 319 U.S. 141 (1943).

protects the right to receive it."[139] The next important case regarding the right to receive information was *Lamont v. Postmaster General*, in which the Court struck down a statute that restricted the freedom to receive communist propaganda through the mail.[140] Justice Brennan, in a concurring opinion, wrote, "I think the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[141] The most important case in this area is *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, wherein the Court struck down a Virginia prohibition on pharmacy advertising for prescription drugs.[142] The Court held that "where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."[143]

These "right to receive" cases all articulate a negative right—they prevent the government from prohibiting the receipt of information rather than affirmatively requiring the government to publish information. They all involve willing speakers and recipients, whose communication is being interrupted by the government. The closest the Supreme Court has come to placing an affirmative duty on a government speaker was in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.[144] In *Pico*, the Court enjoined a school district from removing books from school libraries when those books were removed as a result of their political and social content.[145] Still, *Pico* does not place an obligation on the school district to purchase and shelve additional books; it merely prevents the school from removing the books.

The Supreme Court has recognized that the Framers constructed the First Amendment with knowledge of the revolutionaries' struggle for open government under British rule.[146] Justice Sutherland wrote: "The aim of the struggle was . . . to establish and preserve the right of the . . . people to full information in respect of the doings or misdoings of their government."[147] However, the people's right to access information generally prohibits the government from preventing access to information—it does not affirmatively require the government to be open. Justice Brandeis, in his famous concurring opinion in *Whitney v.*

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[139] *Id.* at 143 (internal citations omitted).
[140] 381 U.S. 301 (1965).
[141] *Id.* at 308 (quoted in FOERSTEL, *supra* note 137, at 13).
[142] 425 U.S. 748 (1976). *Virginia Board of Pharmacy* is most famous because it included commercial speech under the protection of the First Amendment, but it also has important implications with the right to receive information.
[143] *Id.* at 756.
[144] 457 U.S. 853 (1982).
[145] *Id.*
[146] *See* Grosjean v. Am. Press Co., 297 U.S. 233, 247–49 (1936).
[147] *Id.* at 247.

California,[148] accurately articulated that the point of the First Amendment is to cultivate an informed populace,[149] but to do so by *allowing* people to discuss issues publicly.[150] He makes no mention of requiring discussions be made in public.[151]

The Texas Open Meetings Act, on the other hand, places an affirmative duty on public officials to speak openly, and places criminal sanctions on those who refuse. Most analogous is the Court's rejection of compelled speech in cases such as *Miami Herald Publishing Co. v. Tornillo*.[152] *Tornillo* struck down as unconstitutional a Florida "right to reply" statute that required newspapers to allow equal space to political candidates who sought to respond to editorial or endorsement content.[153] TOMA is similar to the Florida statute struck down in *Tornillo* because both laws require that issues be discussed publicly. A private apology by the Miami Herald would not have satisfied the Florida right-to-reply statute's requirement, just as private discussions of official business would violate TOMA. The Court struck down the Florida statute because it forced newspapers to provide political candidates with a *public* opportunity to respond to criticism. Similarly, TOMA requires that discussions of official business be done *publicly*.

To support the constitutional interpretation advocated in this Note, it is not necessary to deny the existence of a right to receive information; the Court has explicitly recognized such a right. However, the right to receive information is a negative right that prevents the government from intercepting communications between willing speakers and listeners. Construing the First Amendment to allow the government to compel speech is not supported by First Amendment jurisprudence.

Although no positive right of the people to attend government proceedings exists, Texas's interest in promoting open governance and ensuring the people's right to access information is compelling. However, a compelling interest alone is not enough to survive strict scrutiny. The interests furthered by the act must also be narrowly tailored. The most basic articulation of the narrow-tailoring requirement is that "the government's chosen means must be 'the least restrictive alternative' that would achieve its goals."[154] Professor Fallon interprets

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[148] 274 U.S. 357, 372 (1927).

[149] *Id.* (They believed that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

[150] *See id.* ("They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.").

[151] *See id.* at 375–76 ("[T]hey eschewed silence *coerced* by law—the argument of force in its worst form." (emphasis added)). Brandeis does not express any concern for *allowing*, as opposed to *coercing*, silence. Granted, the Court was not confronted by an open government requirement in *Whitney*, so it is possible that this inference is overstretched.

[152] 418 U.S. 241 (1974).

[153] *Id.* at 256. The Court held that the statute was unconstitutional because it was "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published . . . ."

[154] Fallon, *supra* note 116, at 1326 (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656,

the least restrictive alternative element to "insist[] that infringements of protected rights must be *necessary* in order to be justified."[155] An infringement is not necessary if the government can accomplish the same result with a less burdensome restriction on the protected right.[156] Assuming that other jurisdictions are attempting to advance similar interests in their open meetings laws, it is helpful to survey those laws to see if the compelling interests could be achieved through less restrictive means.

VII. OPEN MEETINGS LAWS ACROSS THE COUNTRY

Each of the fifty states, the District of Columbia,[157] and the United States[158] have open meetings laws.[159] The statutes are all relatively similar in requiring meetings be open and in providing for some form of punishment or sanction for violations of the law. However, other than Texas, only eighteen states have criminal sanctions as part of their open meetings laws. They are listed below, organized by circuit:

First and Second Circuits: No states in the First or Second Circuits have criminal provisions in their open meetings laws.

Third Circuit: In Pennsylvania, any member of an agency who intentionally participates in a meeting that violates the open meetings law is guilty of a summary offense and can be subject to a fine not to exceed $100.[160]

Fourth Circuit: In South Carolina, it is a misdemeanor to willfully violate the open meetings law. Such a crime is punishable by: a fine of not more than $100 and thirty days' imprisonment for the first offense; a fine of not more than $200 and sixty days imprisonment for the second offense; and a fine of not more than $300 and ninety days imprisonment for the third and all subsequent offenses.[161]

In West Virginia, it is a misdemeanor for any member of a public or governmental body subject to the open meetings law to willfully and knowingly violate the law. Such a crime is punishable by a fine of no more than $500 for the first offense, and between $100 and $1000 for the second and subsequent offenses.[162]

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666 (2004)).

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

[156] *Id.*

[157] D.C. CODE § 1-207.42 (2009).

[158] Government in the Sunshine Act, 5 U.S.C. § 552b (2004).

[159] *See* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2006) *available at* http://www.rcfp.org/ogg/index.php.

[160] 65 PA. CONS. STAT. § 714 (2009).

[161] S.C. CODE ANN. § 30-4-110 (2009).

[162] W. VA. CODE § 6-9A-7(a) (2010).

Fifth Circuit: Texas is the only state in the Fifth Circuit to have a criminal provision in its open meetings law.[163]

Sixth Circuit: In Michigan, it is a misdemeanor to intentionally violate the open meetings law; such a crime is punishable by a fine not to exceed $1000 for first offense, and not to exceed $2000 and a year of imprisonment for a second violation within the same term.[164]

Seventh Circuit: In Illinois, it is a Class C Misdemeanor to violate any of the provisions of the open meetings law.[165] Such a crime is punishable by imprisonment of not more than thirty days and by a fine not to exceed $1500.[166]

Eighth Circuit: A person who violates the Arkansas open meetings law is guilty of a Class C Misdemeanor,[167] and can be punished by no more than thirty days in jail. The statute also provides a possible fine up to $250.[168]

For a first offense in Nebraska, it is a Class IV misdemeanor for any member of a public body to knowingly violate or conspire to violate the act, or to attend or remain at a meeting knowing that the body is in violation of the act; it is a Class III misdemeanor for the second offense.[169] Class III misdemeanors are punishable by imprisonment of up to thirty days and a fine of no greater than $500, and Class IV misdemeanors carry a fine of up to $500 and can be punishable by imprisonment for up to three months.[170]

Violation of the South Dakota open meetings law is a Class 2 misdemeanor,[171] which can result in a criminal penalty of up to thirty days in jail and a fine of up to $500.[172]

Ninth Circuit: In California, it is a misdemeanor for a member of a state or legislative body to attend a meeting in violation of the Open Meeting Act, where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Act.[173] Such a crime is punishable by imprisonment not exceeding six months, or by a fine not exceeding $1000, or by both.[174]

In Nevada, it is a misdemeanor for a member of a public body to attend a meeting of that public body where action is taken in violation of the open meetings law, with knowledge of the fact that the meeting is in

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[163] For a discussion of the Texas Open Meetings Act, see Part I, *supra*.
[164] MICH. COMP. LAWS § 15.272 (2004).
[165] 5 ILL. COMP. STAT. 120/4 (2010).
[166] 730 ILL. COMP. STAT. 5/5-4.5-65 (2009).
[167] ARK. CODE ANN. § 25-19-104 (West 2005).
[168] *Id.* § 5-4-401.
[169] NEB. REV. STAT. § 84-1414(4) (2009).
[170] *Id.* § 28-106(1).
[171] S.D. CODIFIED LAWS § 1-25-1.1 (2009).
[172] *Id.* § 22-6-2.
[173] Bagley-Keene Open Meeting Act, CAL. GOV'T CODE § 11130.7 (West 2009).
[174] CAL. PENAL CODE § 19 (West 1999).

violation of the law.[175] It is also a misdemeanor to wrongfully exclude someone from a meeting.[176] Such a crime may be punished by imprisonment for not more than six months, or by a fine of not more than $1000, or by both fine and imprisonment.[177]

In Hawaii, it is a misdemeanor to violate any provision of the open meetings law;[178] such a crime is punishable by a fine of not more than $2000.[179]

Tenth Circuit: In New Mexico, it is a misdemeanor to violate the open meetings law, punishable by a fine of not more than $500.[180]

In Utah, a member of a public body who knowingly or intentionally violates or advises a violation of any of the closed meeting laws is guilty of a Class B Misdemeanor,[181] punishable by not more than six months' imprisonment[182] and a fine of not more than $1000.[183]

In Oklahoma, willful violations of the open meetings law are misdemeanors, punishable by a fine not to exceed $500, one-year imprisonment, or both.[184]

In Wyoming, it is a misdemeanor, punishable by a fine not to exceed $750, for any member of an agency to knowingly and willfully violate or conspire to violate the open meetings law.[185]

Eleventh Circuit: In Florida, any board or commission member who knowingly breaks the open meetings law is guilty of a misdemeanor of the second degree,[186] punishable by up to sixty days in jail[187] and a $500 fine.[188]

In Georgia, it is a misdemeanor, punishable by a fine of up to $500, to knowingly and willfully conduct or participate in a meeting in violation of the open meetings law.[189]

The above survey shows that twelve of the nineteen states with criminal provisions include imprisonment as an option for punishment: South Carolina, Texas, Illinois, Michigan, Arkansas, Nebraska, South Dakota, California, Nevada, Utah, Oklahoma, and Florida. The remaining states have a variety or combination of alternative

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[175] NEV. REV. STAT. § 241.040(1) (2008).
[176] *Id.* § 241.040(2).
[177] *Id.* § 193.150.
[178] HAW. REV. STAT. § 92-13 (2009).
[179] *Id.* § 706-640.
[180] N.M. STAT. § 10-15-4 (2009).
[181] UTAH CODE ANN. § 52-4-305 (2009).
[182] *Id.* § 76-3-204.
[183] *Id.* § 76-3-301.
[184] OKLA. STAT. tit. 25, § 314 (2009).
[185] WYO. STAT. ANN. § 16-4-408 (2009).
[186] FLA. STAT. § 286.011(3)(b) (2009).
[187] *Id.* § 775.082(4)(b).
[188] *Id.* § 775.083(1)(e).
[189] GA. CODE. ANN. § 50-14-6 (2009).

enforcement provisions: civil fines,[190] voiding any action taken by the governmental body while in closed session,[191] or even removal from office.[192]

Open meetings laws in other states have survived constitutional challenges.[193] Indeed, courts,[194] amici,[195] and commentators[196] have cited such unsuccessful challenges in support of the constitutionality of TOMA. However, none of the challenged laws contained criminal provisions. The Kansas Supreme Court upheld the Kansas Open Meetings Act (KOMA)[197] in *State ex rel. Murray v. Palmgren* against three county commissioners' vagueness and overbreadth challenges.[198] KOMA violators are not subject to criminal sanctions; rather, they are "liable for the payment of a civil penalty."[199] In upholding KOMA, the Kansas Supreme Court made a point of distinguishing the Act from a criminal law.[200] The Colorado Sunshine Law[201] was challenged in *Cole v. State*.[202] The Supreme Court of Colorado upheld the Colorado Sunshine Law as a reasonable time, place, or manner regulation that furthered an important government interest because the "restraints on appellant's freedom of speech are reasonable and justified . . . ."[203] Nevertheless, the Colorado Sunshine Law's civil penalties put a lesser restraint on free speech than TOMA's criminal sanctions. The Supreme Court of Minnesota upheld Minnesota's Open Meeting Law[204] in *St. Cloud Newspapers, Inc. v. District 742 Community Schools*.[205] Like the Kansas and Colorado laws, Minnesota's Open Meeting Law did not contain a provision for criminal penalties.[206]

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[190] These civil fines vary in their severity. *E.g.*, Louisiana Open Meetings Law, LA. REV. STAT. ANN. § 42:13 (2006) (up to $100 per violation); Missouri Sunshine Law, MO. REV. STAT. § 610.027(4) (2000) (up to $5000 for a purposeful violation).

[191] *E.g.*, North Carolina Open Meeting Law, N.C. GEN. STAT. § 143-318.16A(a) (2009).

[192] *E.g.*, Arizona Open Meetings Law, ARIZ. REV. STAT. ANN. § 38-431.07(A) (2009) (at the court's discretion).

[193] *See, e.g.*, State *ex rel.* Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982); Cole v. State, 673 P.2d 345 (Colo. 1983) (per curiam); St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1 (Minn. 1983).

[194] *Rangra I*, 2006 WL 3327634, at *6 (W.D. Tex. 2006).

[195] *See* Brief for The Reporters Committee, *supra* note 100, at 1, 12–13.

[196] Duncan, *supra* note 4, at 321.

[197] KAN. STAT. ANN. §§ 75-4317–75-4320a (2009).

[198] 646 P.2d 1091 (Kan. 1982).

[199] KAN. STAT. ANN. § 75-4320(a).

[200] 646 P.2d at 1097–98, 1101 (differentiating KOMA from a penal statute for determining the strictness of construction appropriate for judicial review).

[201] COLO. REV. STAT. § 24-6-402 (2009).

[202] 673 P.2d 345 (Colo. 1983) (per curiam).

[203] *Id.* at 350.

[204] MINN. STAT. § 13D.06 (2005).

[205] 332 N.W.2d 1 (Minn. 1983).

[206] MINN. STAT. § 471.705(13D.06) ("Any person who violates . . . [the Law] shall be subject to personal liability in the form of a civil penalty.").

VIII. ALTERNATIVES TO TOMA

The federal and numerous state open meetings laws that lack criminal provisions indicate that less restrictive means are available to advance the goal of open government and access to information. As a result, TOMA fails the strict scrutiny analysis's narrow-tailoring requirement, and thus violates the First Amendment. As news coverage demonstrates, public officials in Texas have not given up the fight against restricting their speech.[207] TOMA remains the subject of litigation, and the new suit has chosen a wide enough class of plaintiffs to avoid the mootness problem,[208] hopefully forcing the courts to answer the constitutional questions presented. The widespread existence of similar open meetings laws indicates that this issue will likely be litigated in multiple circuits, which may result in a split. The eventual striking down of TOMA's criminal sections will force Texas to draft a new open meetings law. Rather than waiting for the Supreme Court to strike down TOMA's criminal provisions, Texas should be proactive and redraft TOMA to comply with the First Amendment. Fortunately, there are numerous models to consider in drafting the new law, including existing Texas laws.

The new TOMA should begin with a statement of purpose, similar to that in the Public Information Act.[209] A statement of purpose helps to set the tone and formalizes the interests furthered by the act. Many other states' open meetings laws include statements of purpose.[210] Because the only unconstitutional provisions of the existing TOMA are those concerning criminal punishment for violations, much of the Act can remain the same.[211] Other than adding a statement of purpose, the only

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[207] *E.g.*, Pipitone, *supra* note 54.

[208] *See* Plaintiff's Original Complaint at 1, City of Alpine v. Abbott (2009) (No. 09-CV-59).

[209] TEX. GOV'T CODE ANN. § 552.001(a) (Vernon 2008) ("Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.").

[210] *E.g.*, New York Open Meetings Law, N.Y. PUB. OFF. LAW § 100 (McKinney 2008) ("It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.").

[211] The Texas Legislature should also consider the suggestions made by Mandi Duncan in her comment on TOMA's vagueness. *See* Duncan, *supra* note 4. Ms. Duncan makes good suggestions related to changing the definition of "meeting"; however, she does not advocate removing the criminal sections, which is constitutionally necessary. *Id.* at 328–30.

part of TOMA that should be changed is Subchapter G: Enforcement and Remedies; Criminal Violations. The criminal violations need to be removed, both from the title of the subchapter and from the text of the Act.

TOMA should retain the provision allowing for all actions taken during an unlawful closed meeting to be voidable.[212] Texas has a legitimate concern regarding the danger of secret decision-making; official action taken during a closed meeting should therefore have no effect. Section 142, which grants standing to any "interested person" and allows for "reasonable attorney fees" should remain; however, an "interested person" should be defined as "any resident of the region subject to the jurisdiction of the governmental body against which the complaint is directed." Thus, any Texas resident would have standing to sue a member of the Texas Legislature, just as any Alpine resident would have had standing to sue Mr. Rangra and Ms. Monclova. The harm in hidden decision-making is suffered by society as a whole; therefore, as wide a population as is reasonable should have standing to seek enforcement of the Act. Granting such broad standing will eliminate the need for direct governmental enforcement.

Allowing attorney's fees will further obviate the need for governmental enforcement by providing an incentive for attorneys to enforce TOMA. One concern with awarding attorney's fees against public officials is that the government will indemnify the public official, and indemnification would nullify the purpose of punishing public figures. To combat such an outcome, the new TOMA should specify that "no state, municipal or other government can indemnify an individual liable under the Act."[213]

TOMA's criminal provisions, sections 551.143–551.146,[214] should be removed. A general provision on civil enforcement and remedies can address the interests protected by these unconstitutional sections. Allowing recovery of attorney's fees would serve as a sufficient punitive remedy,[215] making additional civil fines unnecessary. If a plaintiff can prove actual harm, compensatory damages should be allowed. However, to prevent public officials from drowning in litigation, the new TOMA should require plaintiffs suing for compensatory damages to show a particularized harm to have standing.

Many states choose to levy civil monetary fines on open meetings laws violators. Texas, however, should not include such a provision. In

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[212] TEX. GOV'T CODE ANN. § 551.141 (Vernon 2008).

[213] On a similar note, North Dakota's open meetings law requires public officers being sued for violations of the law to pay for their own counsel. N.D. CENT. CODE § 44-04-21.1(3).

[214] Section 143 criminalizes conspiracies to circumvent the requirements of the Act; section 144 criminalizes calling, participating in, or aiding a closed meeting in violation of the Act; section 145 criminalizes a governmental body member's participation in a closed meeting with knowledge that the meeting's agenda is not being followed or that the meeting is not being recorded; and section 146 criminalizes the unauthorized disclosure of the agenda or recordings of a lawfully closed meeting.

[215] Most open meetings laws have civil fines of around $500. *See* Reporters Committee for Freedom of the Press, *supra* note 3. Attorney's fees would be at least that high.

New York Times Co. v. Sullivan, the Supreme Court recognized the danger in excessive civil remedies.[216] That is not to say that the civil fines assessed by other states' open meetings laws are unconstitutional; the civil fines merely walk a dangerously fine line between constitutional and unconstitutional restrictions on speech.

As it stands today, the Texas Open Meetings Act is on the wrong side of that fine line. Although TOMA was enacted to further the compelling state interest of open and accountable government, it does not employ the least restrictive means to achieve that interest. Therefore, TOMA cannot survive strict scrutiny, and thus violates the First Amendment. Despite the Fifth Circuit's attempt to avoid the issue in *Rangra v. Brown*, free speech rights are alive and well for public officials like Mr. Rangra and Ms. Monclova. Public officials do not leave their constitutional rights behind when they take office.

[216] 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.")

Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice

Michael J. Ritter*

I. INTRODUCTION

Like those of many other states, the laws of Texas are unclear as to whether same-sex couples may adopt children; they lack both an express permission and an express denial of such adoptions.[1] Texas is

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[1] *See generally* HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION 2 (2009), http://www.hrc.org/documents/parenting_laws_maps.pdf.

representative of many states whose laws leave the issue open to interpretation by courts and child protective services.[2] This Note argues that Texas's laws' ambiguity can create additional burdens on same-sex couples that do not exist for opposite-sex couples or for same-sex couples in other states. Though many organizations, commentators, and courts have briefly reviewed or mentioned the lack of clarity in Texas's and other states' laws, none have conducted an in-depth exploration of legal barriers to same-sex adoption.[3] This Note explores this legal issue. It contends that although Texas does not expressly prohibit or permit same-sex adoption, state statutory and administrative law bestows considerable discretion upon judges and officials in the Department of Family and Protective Services ("DFPS"). Courts and DFPS officials should resolve these tensions by relying on the public policy goals of the state's adoption process. These goals do not support categorically prohibiting a same-sex couple from obtaining a joint or second-parent adoption.

Part II of this Note surveys same-sex adoption[4] in Texas, focusing

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[2] *See, e.g.* Janet McConnaughey, *5th Circuit Court Hears Arguments for 2 Dads,* S.F. EXAMINER, Oct. 7, 2009, http://www.sfexaminer.com/local/ap/5th-us-circuit-court-hears-arguments-for-2-dads-63696112.html. At the trial level in this case the District Court for the Eastern District of Louisiana found that a same-sex adoption decree from New York was entitled to full faith and credit under Louisiana law and held that the same-sex adoptive parents were entitled to an amended birth certificate. The Fifth Circuit took the case and affirmed the district court's holding in Adar v. Smith, 597 F.3d 697 (5th Cir. 2010).

[3] *See, e.g.*, Linda B. Thomas & Ardita L. Vick, *Family Law: Parent & Child*, 61 SMU L. REV. 819, 825–26 (2008) (reviewing the facts of *Hobbs v. Van Stavern* and *Goodson v. Castellanos* discussed *infra* Part III); Patience Crozier, *Nuts and Bolts: Estate Planning and Family Law Considerations for Same-Sex Families*, 30 W. NEW ENG. L. REV. 751, 767 n.101 (2008) (cursorily mentioning a Texas restriction on supplemental birth certificates, which is discussed more at length *infra* Part II.B.2); Kisha A. Brown, *Family Law Chapter: Foster Parenting and Adoption*, 4 GEO. J. GENDER & L. 283, 292 n.56 (2002) (briefly stating in a footnote that Texas is among states whose trial courts have granted same-sex second-parent adoption); Jason N.W. Plowman, Note, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 84 (2008) (briefly discussing the facts of *Hobbs v. Van Stavern*); Tracy Kapsarek, Comment, *Fostering to Children's Needs or Fostering to Legislators' Personal Agendas?*, 9 SCHOLAR 313, 313–341 (2007) (analyzing bill on foster/adopt options for homosexuals in Texas); Cynthia J. Sgalla McClure, Note, *A Case for Same-Sex Marriage: A Look at Changes Around the Globe and in the United States, Including* Baker v. Vermont, 29 CAP. U. L. REV. 783, 806 (2002) (including Texas in a list of states that permits same-sex adoption); Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159, 166 (1999) (noting that Texas adopted a statute restricting supplementary birth certificates); Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption—And Winning*, 23 T. MARSHALL L. REV. 551, 555 (1998) (stating that Texas has no requirement that homosexuals be permitted to adopt children in its custody); HUMAN RIGHTS CAMPAIGN, TEXAS ADOPTION LAW (2009), http://www.hrc.org/issues/parenting/adoptions/1746.htm (reporting that, in Texas, "LGBT individuals" can adopt; and that there is no explicit prohibition against joint or second-parent adoption by same-sex couples).

[4] The focus of this Note is the legal ability of a same-sex couple to obtain state recognition of parent-child relationships between each parent and child. This has at least four important implications for defining the scope of this Note. First, though same-sex parents almost always have two homosexual or bisexual members, this Note does not focus much on the general ability of homosexuals to adopt. Second, because this Note focuses on the establishment of parent-child relationships, it will only address foster parenting as it pertains to the foster placement or adoption of children by the DFPS. Third, this Note does not focus on the issue of courts granting custody to homosexuals of members of a former same-sex couple since it focuses on the narrower issue of *establishing* parent–child

particularly on private adoption arrangements made by same-sex couples. Part III delves into Texas's legal procedures for adoption and identifies indirect barriers and burdens for prospective adoptive parents of the same sex by reviewing various state statutes and judicial opinions. It concludes by asking whether courts should interpret these statutes to permit or prohibit same-sex adoption. Part IV seeks to answer this question in light of Texas's public policy objectives of promoting adoption and serving the best interests of the child. It concludes that categorically excluding same-sex couples will not further the public policy objectives of Texas law. As a result of this conclusion, this Note proposes that Texas state courts and DFPS officials should not preclude same-sex individuals from establishing parent–child relationships through foster or adoption based merely on the same-sex nature of the couple. Part V concludes this Note with a few summarizing remarks.

II. SAME-SEX ADOPTION OPTIONS

A child can enter into the lives of a same-sex couple in a limited number of ways. One or both of the partners may have a biological or adoptive child prior to entering the relationship. If neither partner does, the same-sex couple can bring a child into their family through biological reproduction involving a person of the opposite sex outside of the relationship, or by adoption of a non-biological child. When adopting, same-sex couples can attempt to adopt either jointly or individually. For a same-sex couple in Texas, problems can arise in either situation: when the couple attempts to jointly adopt a child ("joint adoption"), or when the partner of a child's biological or adoptive parent adopts the child as a second parent ("second-parent adoption"). A second-parent adoption may involve terminating an existing parent's relationship with the child.[5]

The benefits of joint adoptions and second-parent adoptions—regardless of the sexes of the couples—are not identical. Joint adoptions potentially benefit several parties: the adopted child, the adoptive

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relationships with two people of the same-sex who are currently coupled. Lastly, it does not analyze the possibility of equitable adoption because that doctrine pertains mostly to probate law. In addition to statutory adoption pursuant to the Family Code, Texas law also recognizes equitable adoption or "adoption by estoppel" in defining "child" for the purposes of probate. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[1] (citing TEX. PROB. CODE ANN. § 3). The equitable adoption doctrine may be invoked to prove inheritance rights in either or both of two circumstances: when a statutory adoption is ineffective due to the lack of strict statutory compliance (such as when a person involved in an adoption proceeding dies) and when an adoption agreement went unperformed.. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[1] (citing Heien v. Crabtree, 369 S.W.2d 28, 30 (Tex. 1963)). Though the doctrine has been applied in determinations of heirship, trespass to try title, entitlement to government benefits, some survival actions, and testate succession cases, it has not been successfully deployed in cases for child support, custody, or conservatorship. 3-1 TEXAS FAMILY LAW: PRACTICE AND PROCEDURE T1.07[2]-[3].

[5] TEX. FAM. CODE ANN. § 162.001(b)(2)–(3) (Vernon 2008).

parents, and the state. The advantages to the adopted child are not only the stability and care provided by being raised in a home with two parents, but also the child's additional financial and legal security.[6] A joint adoption gives the would-be adoptive parents the ability to start a family that otherwise would not be available due to reproductive disabilities or incapacities. Couples that foster or adopt through the DFPS benefit the state of Texas by lifting burdens on taxpayers who must fund a social system to care for children in DFPS.[7] Each child in foster care costs Texas taxpayers approximately $40,000 per year,[8] and as of 2008 approximately 15,000 children were in the care of DFPS.[9]

Second-parent adoptions provide similar benefits. Although a child adopted by a second parent has a pre-established parent-child relationship (unlike those children adopted through joint adoptions by couples), the net benefits that second-parent adoptions provide to children are at least threefold. A second-parent adoption affords the child additional financial and legal security through the second parent, such as healthcare coverage from that parent's employer, workers' compensation or Social Security benefits, and child support in the event of a separation or divorce.[10] Moreover, a second-parent adoption reduces or eliminates the risk of the child being removed from its home if the biological parent becomes sick or dies.[11] As a related result, the adoption benefits the existing parent by minimizing the potentially crippling financial burdens of a serious illness of the parent or child.[12] The state's recognition of the second parent's membership in the family also benefits the him or her.[13]

A same-sex couple can attempt to jointly or individually search for an adoptable child from at least four different sources. First, couples can turn to private adoption agencies licensed by Texas. A Residential Child Care Licensing branch must license these private "child-placing agencies," which must meet several statutory requirements outlined in the Texas Administrative Code.[14] Texas has at least forty private adoption agencies,[15] many of which impose age, religious, or marriage

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[6] Timothy F. Brewer, *Benefits of Second Parent Adoption*, http://www.tfbrewer.com/pdfs/benefits_second-parent_ adoption.pdf (last visisted April 9, 2010).

[7] TEX. NETWORK OF YOUTH SERVICES, SERVS. TO AT-RISK YOUTH ("STAR") PROGRAM, FACT SHEET 2 (2009), http://www.tnoys.org/advocacy/documents/Fact%20Sheet%20-%20STAR.pdf.

[8] *Id.*

[9] TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS, 2008 DATA BOOK 52 (2008), http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2008/Databook/DataBook08.pdf.

[10] Brewer, *supra* note 6.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS, CHILD CARE STANDARDS AND REGULATIONS, http://www.dfps.state.tx.us/CHILD_CARE/Child_Care_Standards_and_Regulations/default.asp (last visited April 24, 2010).

[15] TEX. DEP'T OF FAMILY AND PROTECTIVE SERVS, PRIVATE ADOPTION AGENCIES (TARE), http://www.dfps.state.tx.us/Adoption_and_Foster_care/adoption_partners/private.asp (last visited April 24, 2010).

requirements on potential adoptive parents,[16] thereby excluding same-sex and other unmarried couples from their services.[17] Second, same-sex couples may attempt to adopt or foster through DFPS, which welcomes single and married parents.[18] Third, adopting from another state might be an option, depending upon that particular state's laws. Finally, international adoption is another possibility. Although all countries once prohibited adoption by gays and lesbians and same-sex couples, several have removed these restrictions in recent years.[19]

III. RECOGNITION OF SAME-SEX ADOPTION IN TEXAS

A. A Brief History of Adoption in Texas

Prior to the mid-1800s, Texas did not officially recognize any adoption mechanism by which adults could acquire rights relative to the biological children of others.[20] As one of the first states to recognize adoption,[21] Texas passed a statute in 1850 that provided for adoption by deed.[22] Under the statute, which remained in effect until 1931, children

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[16] *See id.*

[17] *See id.*

[18] TEX. DEPARTMENT OF FAMILY AND PROTECTIVE SERVS, REQUIREMENTS FOR FOSTER/ADOPT FAMILY (TARE), http://www.dfps.state.tx.us/Adoption_and_Foster_Care/Get_Started/requirements.asp. The DFPS website describes the foster and adoption process: "Many families are interested in both fostering and adopting. They agree with the agency that the children's needs come first. In most cases, this means helping prepare children for reunification with their birth family, mentoring the birth parents, or working toward a relative or kinship placement. When termination of parental rights is in the children's best interest and adoption is their plan, then foster parents who have cared for the children will be given the opportunity to adopt. Dual certification of parents to both foster and adopt speeds up the placement process, reduces the number of moves a child makes, and allows relationships to evolve with the initial placement process. Nearly half the adoptions of children in DFPS foster care are by their foster families." *Id.* Moreover, applicants must "share information regarding their background and lifestyle," and "show proof of marriage and/or divorce (if applicable)." *Id.*

[19] Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT'L & COMP. L. REV. 113, 113–14 (2008).

[20] Peter N. Fowler, Comment, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U. L. REV. 667, 671 (1984).

[21] Thanda A. Fields, Note, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 977 n.12 (1996).

[22] ROBERT HAMLETT BREMNER, CHILDREN AND YOUTH IN AMERICA: 1600–1865, 369 (1974). The statute provided: Be it enacted by the Legislature of the State of Texas, That any person wishing to adopt another as his or her legal heir, may do so by filing in the office of the Clerk of the County Court in which county he or she may reside, a statement in writing, by him or signed and duly authenticated or acknowledged, as deeds are required to be, which statement shall recite in substance, that he or she adopts the person named therein as his or her legal heir, and the same shall be admitted to record in said office. Be it further enacted, That such statement in writing, signed and authenticated, or acknowledged and recorded as aforesaid, shall entitle the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him or her. Provided, however, that if the party adopting such person have, at the time of such adopting, or shall

were transferred between and among adults similar to the way title to real property is transferred.[23] In providing methods of recording adoptions, this statute did not explicitly link adoption to the welfare of children, but instead emphasized the right of the adoptive parent over the adopted child.[24] It "was intended to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, or carry on the family line."[25] In 1931, the Texas Legislature passed a law that permitted the legal recognition of adoptive parents' rights through court order only, and not by deed, laying the groundwork for the basic statutory scheme that exists today.[26] The primary consideration of the current adoption process is the welfare of children over all other interests, including the property right of adoptive parents over their adoptive children.[27]

B. Current Texas Laws on Same-Sex Adoption

States vary in their approaches to same-sex adoption. Ten states and the District of Columbia explicitly permit same-sex couples to adopt any adoptable child using the same statutory procedures as opposite-sex couples.[28] Certain courts in counties in eighteen other states grant second-parent adoptions.[29] Kentucky, Ohio, Nebraska, and Wisconsin courts have prohibited same-sex couples from using the second-parent mechanism to adopt. In Texas, the Family Code, Health and Safety Code, and Administrative Code, as well as decisions issued by courts throughout the state, do not directly address the exact issue of the permissibility of same-sex adoption.[30] Because its statutes neither expressly permit nor deny adoptive rights to a same-sex couple, Texas falls into the category of states in which trial courts and child protective services officials have discretion over whether to permit same-sex adoptions.[31]

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thereafter have a child or children, begotten in lawful wedlock, such adopted child or children shall in no case inherit more than the one-fourth of the estate of the party adopting him or her, which can be disposed of by will. (citing *Laws of the State of Texs*, 3d Leg. Ch. 39 (1850).

[23] *Id.*

[24] Fowler, *supra* note 20, at 672 n.20.

[25] Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 441 (1996).

[26] Grant v. Marshall, 280 S.W.2d 559, 563 (Tex. 1955).

[27] TEX. FAM. CODE ANN. § 153.002 (Vernon 2008).

[28] Human Rights Campaign, *Where Are Second-Parent and Joint Adoption for Same-Sex Couples Available?*, http://www.hrc.org/issues/parenting/2397.htm (listing California, Connecticut, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and the District of Columbia) (last visited April 24, 2010).

[29] *Id.* (listing Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Texas and Washington).

[30] *See infra* Part III.B. However, when these provisions were enacted, they did not contemplate permitting two individuals of the same sex to adopt the same child. Interview with John J. Sampson, Professor of Law, The University of Texas School of Law in Austin, Texas (Oct. 27, 2009); Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

[31] Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

1. The Texas Family Code

Chapter 162 of the Texas Family Code designates who may adopt a child and which children may be adopted.[32] The chapter places three limitations on an individual filing an adoption petition: the adopting party (1) must be "an adult," who (2) seeks to adopt "a child who may be adopted," and (3) has standing to sue in state court.[33] A "child who may be adopted" must meet one of four disjunctive requirements.[34] First, the relationship between the child and each living biological parent is terminated or in the process of being terminated.[35] Second, the petitioner is seeking a stepparent adoption and is the spouse of an individual that still has parental rights with the child.[36] Third, the child is at least two years of age, its parent-child relationship with one parent has been terminated, and the petititioner has had a managing conservatorship or "actual care, possession, and control of the child" for at least six months before adoption.[37] Fourth, if the adoption lacks the consent of a parent whose parental rights have been terminated, the petitioner "is the child's former stepparent *and* has been a managing conservator or has had actual care, possession, and control of the child for . . . one year" prior to adoption.[38] If a court considering an adoption petition finds that the requirements for adoption have been met and that adoption is in the best interest of the child, it must grant the petition.[39] Once issued, courts' adoption decrees establish a new parent-child relationship between the new adoptive parent and the child.[40]

Chapter 162 appears to permit a same-sex couple to adopt children only through the first and third requirements. The first requirement is a possible route if courts have terminated—or are in the process of terminating—the rights of a child's living parents.[41] Under the third requirement, a same-sex couple may also adopt when one member of the couple has a parent-child relationship with the child,[42]

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[32] TEX. FAM. CODE ANN. § 162.001 (Vernon 2009).

[33] *Id.* § 162.001(a). This Note only discusses these limitations briefly as none categorically impacts the ability of same-sex couples to adopt.

[34] *See id.* § 162.001(b)(1)–(4) (listing four disjunctive conditions under which children may be adopted).

[35] *Id.* § 162.001(b)(1).

[36] *Id.* § 162.001(b)(2).

[37] *Id.* § 162.001(b)(3).

[38] TEX. FAM. CODE ANN § 162.001(b)(4) (Vernon 2009) (emphasis added).

[39] *Id.* § 162.016(b) ("If the court finds that the requirements for adoption have been met and the adoption is in the best interest of the child, the court *shall* grant the adoption.") (emphasis added). Thus, one reasonable interpretation of Chapter 162 is that a Texas court is *required* to grant an adoption by a same-sex couple when a couple meets the statutory requirements, if the court finds that such an adoption will be in the child's best interests.

[40] *Id.* § 162.017.

[41] *Id.* § 162.001(b)(1). The text of this provision provides no statutory basis for an exclusion based on sex or marital status.

[42] *Id.* § 162.001(b)(1).

which may be established through a biological relationship or an individual adoption under the first requirement.[43] The other member of the same-sex couple seeking the second-parent adoption must wait until the child is at least two years old, obtain the consent of the child's current parent, and have either a managing conservatorship or "actual care, control, and possession of the child for at least six months.[44] Because the Texas Constitution and Family Code do not recognize same-sex marriage,[45] a same-sex couple may not adopt under the second or fourth provisions because of the spousal and stepparent requirements.[46] Unlike an opposite-sex couple, a same-sex couple may not consensually adopt children when one member of the couple has the only parental relationship with the child until the child reaches the age of two, and the nonparent member has a managing conservatorship or "actual care, possession, and control of the child" for at least six months before adoption.[47] Opposite sex couples need not meet these requirements because they may marry[48] and thus may adopt sooner under the second requirement.[49]

Although the adoption procedures in the Family Code neither expressly prohibit nor permit same-sex adoptions, those challenging the validity of same-sex adoption in court have highlighted other statutes that may conflict with permitting such adoptions. They have pointed to Chapter 101 of the Family Code,[50] which defines "[p]arent" as "the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father."[51] A Texas court rejected this argument because this provision provides that adoptive mothers and fathers are considered "parents" for the purposes of a suit affecting the parent–child relationship (SAPCR) and fails to imply that two members of the same sex cannot be adoptive parents.[52] Challengers have also drawn courts' attention to Section 101.025 of the Family Code, which defines "parent–child relationship [as] the legal relationship between a child and the child's parents . . . including the mother and child relationship and the father and child relationship."[53] However, this definition does not preclude the possibility of two mother–child or two

[43] TEX. FAM. CODE ANN. § 162.001(b)(3).
[44] *Id.* § 162.001(b)(3).
[45] TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. §§ 2.001(b), 6.204, *cf.* 2.401.
[46] *See* TEX. FAM. CODE ANN. §§ 162.001(b)(2) & 162.001(b)(4) (Vernon 2009).
[47] *Id.* § 162.001(b)(3).
[48] *Id.* § 2.001(a).
[49] *Id.* § 162.001(b)(2).
[50] *E.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin, 2007, *pet. denied*); Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App.—Houston, 2006, *pet. denied*).
[51] TEX. FAM. CODE ANN § 101.024 (Vernon 2009). The opinion that notes that this argument was made did not elaborate to any extent on the argument. *Goodson*, 214 S.W.3d at 746.
[52] *Hobbs*, 249 S.W.3d at 3–5. The facts of this case are discussed *infra* text accompanying notes 88–96.
[53] TEX. FAM. CODE ANN § 101.025 (Vernon 2009).

father–child relationships for a single child.[54] While Texas courts have not reached the merits of such arguments, they are far from prohibiting same-sex adoption.

2. *The Texas Health & Safety Code*

Section 192.008 of the Health and Safety Code stipulates that the supplementary birth records of adopted children "must be in the names of the adoptive parents, one of whom must be a female . . . and the other of whom must be a male . . . This subsection does not prohibit a single individual, male or female, from adopting a child."[55] This section of the Health and Safety Code seems to present another argument that Texas law disfavors adoption by same-sex couples because of its ambiguous concluding statement—"This subsection does not prohibit a single individual, man or woman, from adopting a child."[56] A court or agency official could possibly read the subsection as requiring a supplemental birth certificate to be in the name of one man and one woman *if there is more than one adoptive parent* and as not prohibiting supplemental birth certificates in the name of one single parent.[57]

Although a court could understand this provision to preclude adoption by same-sex couples, such a construction is contrary to statutorily mandated modes of construction. In deciphering the meaning of civil statutes, Texas courts construe words consistent with their ordinary meaning,[58] "diligently attempt to ascertain legislative intent,"[59]

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[54] *Id.*

[55] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005). In addition to Texas, several other states permit supplementary birth certificates to be granted after an adoption, which entails changing the names of the birth parent(s) to the name of the adoptive parent(s). *E.g.*, OKLA. STAT. tit. 10, § 7505-6.6 (2009); N.Y. PUB. HEALTH LAW § 4138 (McKinney 2009); 35 PA. CONS. STAT. § 450.603 (2009). In the context of same-sex adoption, listing both parents' names on a supplementary birth certificate would not seem to achieve the goal of concealing the fact of adoption. Interview with John J. Sampson, Professor of Law, The University of Texas School of Law in Austin, Tex., (Oct. 27, 2009); *see supra* Part II. Thus, this Note argues that the supplementary birth certificates cannot accomplish the same goals in the context of same-sex adoption, where the mere presence of the names of two persons of the same sex would do nothing to cover up an adoption.

[56] TEX. HEALTH & SAFETY CODE ANN. §192.008 (Vernon 2005); *see, e.g.*, Goodson v. Castellanos, 214 S.W.3d 741, 746 (Tex. App.—Austin 2007, *pet. denied*) ("Goodson refers to . . . the family code as proof that two individuals of the same sex cannot both be parents of one child. Goodson also refers to . . . the health and safety code, which states that a supplementary birth certificate for an adopted child must be in the names of the adoptive parents, one of whom must be a female . . . and the other of whom must be a male." (internal citations and quotations omitted)). This Texas law also supports one of the predominant views that same-sex adoption is not valid in Texas because same-sex adoptive parents cannot obtain a birth certificate that reflects the adoption. Telephone Interview with Heidi Brugel-Cox, Executive Vice President and General Counsel, Gladney Center for Adoption (Dec. 14, 2009).

[57] This interpretation would express tension with same-sex adoption by precluding same-sex couples from procuring a supplementary birth certificate as an additional memorial of the adoption.

[58] TEX. GOV'T CODE ANN. § 312.002 (Vernon 2007).

[59] *Id.* § 312.005.

and give all words effect as to avoid surplusage.[60] Because Texas does not recognize same-sex marriages, the individuals comprising a same-sex couple would be considered "single."[61] To deny both members of a same-sex couple the ability to obtain supplementary birth certificates under this statute would seem to deny a "single individual" from adopting a child under the ordinary meaning of the statute.[62]

Moreover, an interpretation that restricted an adoption by a same-sex couple would not serve the purposes of the statute, as indicated by its legislative history. In 1997, the Texas bill that added the requirement that a supplementary birth certificate be in the name of two opposite-sex individuals also created the state's paternity registry rather than placing restrictions on who could adopt or which children could be adopted.[63] The placement of the language in the Health and Safety Code rather than in the Family Code further attests to the absence of legislative intent to restrict adoption rights.[64] The author of the bill, Representative Toby Goodman, did not refer to same-sex adoption when supporting his bill. He offered it as a way "to streamline adoption processes by amending the Family Code provisions relating to terminating parental rights, contesting adoption proceedings and preferential settings, as well as eliminating duplicative paperwork [to] clarify[] current law as to affidavits of relinquishment."[65] In fact, the changes to the Health and Safety Code prompted no floor debate about same-sex adoption; the debate was instead focused solely on paternity registration.[66] Moreover, a construction of this statute unfavorable to a same-sex couple would, at most, only prohibit the granting of a supplementary birth certificate, which is not a prerequisite to a valid adoption.[67] Contrary to the ordinary meaning and legislative intent canons, a court in its discretion might stretch this provision to deny an adoption petition.[68]

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[60] Marks v. St. Luke's Episcopal Hosp., No. 07-0783, 2009 Tex. LEXIS 636, at *8 (Tex. Aug. 28, 2009).

[61] TEX. CONST. art. I, § 32; TEX. FAM. CODE ANN. § 2.001(b) (Vernon 2009).

[62] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005). *See also* TEX. GOV'T CODE ANN. § 312.003(b) (Vernon 2007) ("The singular includes the plural and the plural includes the singular unless expressly provided otherwise.").

[63] H.B. 1091, 75th Leg., Reg. Sess. (Tex. 1997).

[64] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon 2005).

[65] Audio tape: Introduction of H.B. 1091 by Representative Goodman, Second Reading, Texas House of Representatives (Apr. 29, 1997) (on file with the Texas House of Representatives Video/Audio Services).

[66] *Id.*

[67] *See* TEX. HEALTH & SAFETY CODE ANN. § 192.006 (Vernon 2009) ("A supplementary birth certificate *may* be filed . . . .") (emphasis added). Furthermore, as interpreted by state agencies, this provision does not preclude a same-sex adoption. Instead, a birth certificate may be issued in the name of one of the adoptive parents with no other parent listed. TEX. DEP'T OF STATE HEALTH SERVS., ADOPTION: FREQUENTLY ASKED QUESTIONS (2007), http://www.dshs.state.tx.us/vs/reqproc/faq/adoption.shtm ("To meet this statutory requirement, when a child is adopted by a same-sex couple, one of the adoptive parents must choose to be designated on the birth certificate as the father, in the case of a male couple, or the mother, in the case of a female couple. The other adoptive parent is not listed.").

[68] A similar denial in Louisiana was overturned by the 5th Circuit, which could have implications for Texas's law. *See supra* note 2.

3. The Texas Administrative Code

The Department of Family and Protective Services ("DFPS") rules contained within the Texas Administrative Code govern the processing of inquiries into and applications for placement of children in foster or adoptive homes. These rules do not explicitly prohibit either the consideration of homosexual applicants or the discrimination against homosexual applicants.[69] Applicants must be, among other things, at least twenty-one years old;[70] sufficiently healthy, both mentally and physically;[71] and financially capable of caring for the child's basic material needs.[72] The Texas Administrative Code rules are somewhat restrictive as to the marital status of an applicant. If an applicant is married, both husband and wife must apply for the placement[73] and show that they have been married for at least two years, unless they "cohabited for two years prior to the marriage or obtained a civil registration of common law marriage for the length of time required . . . ."[74] If an applicant is married but seeking a divorce, the couple must finalize the divorce before DFPS may approve either for adoption.[75] Despite the two-year requirement for married couples, single parents may apply to adopt, but "are evaluated in terms of their ability to nurture and provide for a child without the assistance of a spouse," which has no strict time requirement.[76]

The Texas Administrative Code is unclear as to whether an unmarried couple may foster/adopt regardless of the partners' sexes. Because unmarried couples are legally single, they may be considered "single parent" applicants. However, this understanding of the rules seems at tension with the State's public policy, which promotes the marriage relationship[77] because it would make it easier for unmarried couples to jointly apply as "single parents." As noted above, married couples must meet the additional time requirements before DFPS will approve the couple for an adoption.[78] Ultimately though, whether this consideration is sufficient to preclude a same-sex couple from fostering

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[69] 40 TEX. ADMIN. CODE § 700.1502 (Vernon 2006).
[70] *Id.* § 700.1502(2)(A).
[71] *See id.* § 700.1502(2)(I).
[72] *Id.* § 700.1502(2)(H).
[73] *Id.* § 700.1502(2)(B).
[74] *Id.* § 700.1502(2)(C).
[75] *Id.* § 700.1502(2)(B).
[76] *Id.* § 700.1502(2)(D).
[77] TEX. FAM. CODE ANN. §1.101 (Vernon 2007) (presuming the validity of marriage against attack "to promote the public health and welfare . . . ."); *see* Southwestern Bell Tel. Co. v. Gravitt, 551 S.W.2d 421, 427 (Tex. App.—San Antonio 1976, *writ ref'd n.r.e.*) (*citing* 17 C.J.S. Contracts § 233a); Coulter v. Melady, 489 S.W.2d 156, 158 (Tex. Civ App.—Texarkana, 1972, write ref'd n.r.e.) ("Public policy that favors the relationship and preserves and upholds the validity of marriage is articulated therein.").
[78] TEX. ADMIN. CODE § 700.1502(2)(C) (Vernon 2006).

or adopting a child is a decision left to DFPS.[79]

4. State Court Decisions

Texas appellate court decisions have been inconsistent with regard to the ability of same-sex couples to adopt. Some courts generously grant adoption petitions by same-sex couples,[80] while others are more hesitant.[81] Other courts have imposed barriers to the full benefits of a same-sex adoption by not allowing both adoptive parents' names on birth certificates.[82] One Dallas judge overseeing a legal procedure to change an adopted child's name to reflect second-parent adoption by a same-sex couple purportedly balled up their petition and claimed, "Get out of my courtroom, I would never do this for you."[83] Courts addressing the legal validity of particular adoptions by two individuals of the same sex have shied away from clarifying whether Texas law prohibits or permits same-sex adoption.[84]

Three state courts of appeals have declined to consider the merits of challenges to adoption. *Hobbs v. Van Stavern*[85] addressed a collateral attack on an adoption decree issued to Kathleen Van Stavern and Julie Hobbs.[86] Hobbs and Van Stavern were in a romantic relationship. When the couple decided to have a child, Hobbs became artificially inseminated.[87] In June 1998, Hobbs gave birth to T.L.H., for whom Hobbs and Van Stavern jointly cared through August 2001, when they jointly petitioned a county court for the termination of the donor-father's rights and establishment of Van Stavern as a second parent to T.L.H.[88] When the couple separated almost three years later, Van Stavern filed a SAPCR requesting to have joint managing conservatorship over T.L.H.[89] Hobbs defended against this suit by collaterally asserting the impropriety of the county court's adoption decree.[90] After Hobbs lost at the trial

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[79] Whether or not to place a child with a particular family is usually up to the particular district or regional office or particular caseworkers. Telephone Interview with Heidi Brugel-Cox, Executive Vice President and General Counsel, Gladney Center for Adoption (Dec. 14, 2009).

[80] *See, e.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin 2007, *pet. denied*); Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App.—Houston [1st Dist.], 2006, *pet. denied*) (both cases appealed trial courts' grants of adoption decrees to same-sex couples).

[81] Telephone Interview with Ellen A. Yarrell, Attorney at Law and President, American Academy of Adoption Attorneys (Dec. 7, 2009).

[82] LYNNE Z. GOLD-BIKIN, HUMAN RIGHTS CAMPAIGN, WHICH STATES PERMIT SAME-SEX PARENTS TO BE LISTED ON A BIRTH CERTIFICATE (2010), http://www.hrc.org/issues/1627.htm.

[83] Taylor Gandossy, *Gay Adoption: A New Take on the American Family*, CNN.COM, June 27, 2007, http://www.cnn.com/2007/US/06/25/gay.adoption/index.html.

[84] *E.g.*, *Hobbs*, 249 S.W.3d at 4 n.2 ("We express no opinion on the validity of [Hobbs'] claim.").

[85] 249 S.W.3d 1.

[86] *Id.* at 2.

[87] *Id.*

[88] *Id.* at 2–3.

[89] *Hobbs*, 249 S.W.3d at 3.

[90] *Id.*

level, she appealed the decision citing various provisions of the Texas Family Code and the Texas Health and Safety Code for the argument that same-sex parents may not adopt.[91] The appellate court "express[ed] no opinion on the validity of [Hobbs's] claim[,]"[92] and instead held that Hobbs's collateral attack was untimely under Section 162.012, which forecloses attacks on adoption decrees after the six months following the adoption order.[93]

Goodson v. Castellanos[94] also considered a collateral attack contesting the validity of an adoption decree in similar circumstances.[95] Elizabeth Goodson and her girlfriend Adelina Castellanos decided to adopt a baby.[96] Goodson traveled to Kazakhstan, applied with the appropriate authorities for an adoption, and returned with a three-year-old child, K.G., who Goodson and Castellanos sought to adopt by filing a joint petition in a Bexar County court.[97] The trial court granted the petition and issued an adoption decree.[98] After Goodson and Castellanos ended their relationship a little more than a year later, Castellanos filed a SAPCR for temporary joint managing conservatorship for K.G.[99] Goodson collaterally attacked the trial court's adoption decree as a defense in the SAPCR, contending that the decree was void.[100] The court went on to "[a]ssum[e] without deciding that the district court erred in issuing the adoption decree"[101] and precluded Goodson's attack because "[she] did not attack the validity of the adoption within the deadline mandated by statute."[102] The appellate court explained the policy rationale behind the six-month deadline:

> To encourage adoptions, adoptive parents should be assured that, after a reasonable amount of time, their parental claims may not be brutally revoked due to a procedural error, birth parents changing their mind years later, or a change in relationship with another parent. The destruction of a parent–child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved, and all reasonable efforts to prevent this outcome must be invoked when there is no indication that the destruction of the existing

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[91] *Id.* at 3–4.
[92] *Id.* at 4 n.2.
[93] *Id.* at 4.
[94] Goodson v. Castellanos, 214 S.W.3d 741 at 746 (Tex. App.—Austin 2007, *pet. denied*).
[95] *Id.*
[96] *Id.* at 745.
[97] *Id.*
[98] *Id.*
[99] *Goodson*, 214 S.W.3d at 745.
[100] *Id.* at 745–46.
[101] *Id.* at 748.
[102] *Id.*

parent–child relationship is in the best interest of the child.[103]

These considerations counseled strict adherence to the six-month rule and against permitting parties thereafter to challenge courts' adoption decrees.[104]

More recently, *In the Interest of S.D.S.-C* addressed a similar situation.[105] In June 2003, Shirlinda Casey and her partner, Sonya Sanders, successfully petitioned a trial court to establish a parent–child relationship between Sanders and Casey's biological child, S.D.S.-C.[106] In 2008, Casey sought a declaration that the adoption decree was void on the grounds that the trial court lacked jurisdiction to issue the adoption order because it failed to terminate the sperm donor father's rights.[107] Just as in the prior decisions, the appellate court also upheld the adoption decree because the collateral attack fell outside of the six-month period permitted to challenge adoption decrees.[108]

Yet another Texas court of appeals recently reached the merits of a similar adoption case. *In the Interest of M.K.S.-V.*[109] involved an appeal from a trial court's denial of an adoption petition to a woman, T.S., who sought to adopt her former partner's biological child, for whom T.S. had cared.[110] The trial court dismissed T.S.'s petition on the grounds that she lacked standing.[111] On appeal, the court looked beyond the standing issue into the elements of adoption.[112] It noted that consent was an element under both methods of achieving state recognition of an adoption and held that T.S. failed to provide sufficient evidence that her former partner ever consented, or would consent, to the adoption.[113] Although the petition sought to name an individual as a second, same-sex parent of a child, neither the trial court nor the appellate court rejected the adoption petition on the grounds that the current parent was the same sex as the petitioner. This case could be read as showing that some courts exercise discretion in not barring same-sex couples from adopting children under Chapter 162.

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[103] *Id.* at 749 (citation omitted).

[104] *Goodson*, 214 S.W.3d at 749..

[105] No. 04-08-00593-CV, 2009 Tex. App. LEXIS 1828 (Tex. App.—San Antonio, Mar. 18, 2009, *pet. denied*).

[106] *Id.* at *1–2.

[107] *Id.* at *2.

[108] *Id.* at *3–5.

[109] In the Interest of M.S.K.-V., No. 05-08-00568-CV, 2009 Tex. App. LEXIS 6212 (Tex. App.—Dallas, Aug. 11, 2009, *reh'g overruled* in In the Interest of M.S., 2009 Tex. App. LEXIS 7463 (Tex. App.—Dallas, Sept. 15, 2009), vacated by and substituted opinion at 2009 Tex. App. LEXIS 9167 (Tex. App.—Dallas, Dec. 1, 2009).

[110] *Id.* at **2–5.

[111] *Id.* at *8.

[112] *Id.* at *15.

[113] *Id.* at **15–16.

C. Barriers to Same-Sex Adoption in Texas

Given the lack of clarity regarding the law on same-sex adoption, these couples can face at least five different issues in the adoption process. First, because the Family Code, and Texas law generally, is not clear either way as to the permissibility of same-sex adoptions, some courts may not be inclined to grant an adult's adoption petition for otherwise-qualifying children. A second related difficulty is that this lack of clarity may result in inconsistent granting of adoption petitions based on the views of a particular judge in any given county.[114] Third, though not prohibiting single, homosexual individuals from adopting, DFPS rules seem at tension with joint foster parenting and adoptions by same-sex couples because they may not marry under state law. Fourth, the DFPS's counterparts—private child-placement agencies in the state—sometimes impose similar marriage prerequisites on an applicant seeking adoption, as do many foreign countries. Finally, a same-sex adoptive couple may experience difficulties in obtaining a supplemental birth certificate or name change for an adopted child. Thus, a second-parent adoption seems to be the path of least resistance for an adoption by a same-sex couple, rather than seeking a joint adoption through DFPS, some private agencies, or foreign countries.[115]

IV. THE PUBLIC POLICY DEBATE OVER SAME-SEX ADOPTION

A. Statements of Public Policy

Both the Texas Family Code and decisions from the Texas Supreme Court articulate public policy goals that implicate the state's adoption procedures. In *Green v. Remling*,[116] the Texas Supreme Court noted that "[t]he paramount considerations in adoption proceedings are the rights and welfare of the children involved and these statutes are to be [so] construed . . . ."[117] In a less broad statement of public policy, the Family Code outlines a statement with regard to conservatorship, possession,

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[114] *See* Green v. Remling, 608 S.W.2d 905, 908 (Tex. 1980) (noting that trial courts are invested with great discretionary authority over whether or not to issue adoption orders). Ms. Ellen Yarrell explains that whether an adoption petition is granted can depend on the particular judge. Because Texas judges are elected, they might decide to avoid the issue to avoid hurting their chances of reelection. Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009).

[115] Telephone Interview with Ellen A. Yarrell, Attorney at Law (Dec. 7, 2009). Ms. Yarrell also recommends establishing a parent-child relationship with one parent and petitioning a court to make the other parent the joint-managing conservator.

[116] 608 S.W.2d 905 (Tex. 1980).

[117] *Id.* at 907.

and access to children. It provides that the public policy of the state is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child [and] provide a safe, stable, and nonviolent environment for the child."[118] This provision also states that the public policy is to "encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage." [119]

B. Legislative Proposals and Debate

Due to the ambiguity of Texas law regarding same-sex adoption, state legislators have introduced bills answering the same-sex adoption question in the negative by proposing express prohibitions on homosexuals becoming foster parents. This would preclude same-sex couples from both fostering and adopting children. In the regular session of the Seventy-Sixth Texas Legislature (1999), Representatives Robert Talton and Warren Chisum each introduced bills that would disqualify homosexuals from becoming foster parents.

Representative Talton's bill, H.B. 415, proposed that DFPS inquire into the sexuality of foster parents and foster parents applicants.[120] If a foster parent or applicant disclosed, or if the DFPS determined, that the foster parent or applicant was homosexual or bisexual, the bill would have prohibited DFPS from allowing the applicant to become a foster parent, or from placing or leaving a child with that foster parent.[121] Representative Talton's bill would have thus prohibited those who were forthright about their sexuality from being foster or adoptive parents. Because the bill would only have affected DFPS, it would not have required private adoption agencies to follow the same standards or prohibited courts from issuing adoption decrees to same-sex couples.[122] The State Affairs Committee took no action on the bill.[123] Though Representative Talton reintroduced this same bill in the Seventy-Eighth Regular Session (2003),[124] it met the same fate as his previous effort.[125]

Representative Chisum introduced a bill that attempted to achieve the same effect. House Bill 382 sought to investigate not only the sexuality of the foster parent, but also whether "homosexual conduct occurs or is likely to occur."[126] The bill would have required DFPS to

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[118] TEX. FAM. CODE ANN. § 153.001 (Vernon 1999).
[119] *Id.*
[120] H.B. 415, 1999 Leg., 76th Reg. Sess. (Tex. 1999).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] H.B. 194, 2003 Leg., 78th Reg. Sess. (Tex. 2003).
[125] *Id.*
[126] H.B. 382, 1999 Leg., 76th Reg. Sess. (Tex. 1999).

investigate into whether homosexual activity—defined as "deviate sexual intercourse with another individual of the same sex"—was occurring or was likely to occur in the particular adoptive home.[127] After testimony was taken on the bill, it was left pending in committee.[128]

As the testimony on Representative Chisum's H.B. 382 demonstrates, these bills were supported on multiple grounds. First, members of the public testified that homosexuals were categorically unfit to foster or adopt children from DFPS.[129] One particular proponent stated that this unfitness resulted from the inherent guilt held by all homosexuals about their sinfulness, homosexual men's disproportionately low life expectancy, and the possibility that they have diseases.[130] As a result, the proponent believed that children would be better left in orphanages than with two same-sex parents or with one homosexual adoptive parent.[131] Second, the same proponent contended that homosexual conduct should be regulated, but that such regulation was not an inherent attack on "those that practice homosexual conduct."[132] Other proponents argued that children should not be placed with those who frequently commit sex-related crimes.[133] Finally, proponents argued that it was in the best interests of children to have one mother and one father because having a homosexual parent (or two homosexual parents) would result in bullying of the child at school, increased risk of sexual abuse by adoptive parents, higher incidence of sexual promiscuity, and sexual and gender confusion resulting in the child being a homosexual as an adult.[134]

Opponents of the proposed bill countered these contentions by arguing that generalizations and stereotypes should not be used to preclude a category of people from serving as adoptive parents. First, some witnesses argued that sexual orientation is irrelevant to whether a person is able to act in the best interest of a child.[135] Second, some provided personal narratives about being homosexual and not having diseases and testified that their children never experienced harassment or bullying because of the parents' sexual orientation.[136] Third, opponents argued that by reducing the pool of qualified applicants willing to take the children considered "tougher to adopt," more children are left in

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[127] *Id.*
[128] *Id.*
[129] *Hearing on H.B. 382 Before the Texas State Affairs Committee*, 1999 Leg., 76th Reg. Sess. (Tex. 1999) (on file with the House of Representatives Video/Audio Services) (hereinafter Public Hearing).
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Public Hearing *supra* note 129.
[135] *Id.*
[136] *Id.*

institutional care and the burden on taxpayers is heightened.[137] Finally, Representative Debra Danburg testified that when controlling for the background of a child, the children's outcomes do not significantly vary between fostering and adoption by opposite-sex couples and that by same-sex couples.[138] She also cited an American Psychological Association study that concluded that ninety percent of sexual abuse of children is perpetrated by heterosexuals and that most homosexual individuals are raised by opposite-sex parents.[139]

C. Analysis of the Debate

Although the previously discussed legislative debate concerned proposed bills on fostering and adoption through DFPS, many arguments logically implicate the adoption and foster care public policy goals outlined in Chapter 153 of the Texas Family Code, and the "best interest of the child" factors.[140] This section analyzes the merits of those arguments in the specific framework of the public policy goals that Texas adoption law attempts to achieve. Though subjectively formulated for specific parents and children, the goals implicit within the public policy statements of Chapter 153 can be generalized into objectives that would apply to all adoptable children in Texas.[141]

Chapter 153's first goal is to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child."[142] Categorically excluding classes of potentially adoptive couples from consideration seems antithetical to the goal of providing children with access to parents who have shown the ability to act in the best interest of children. Even if some homosexual individuals or same-sex couples are unfit parents, these characteristics are inherent neither in the sex composition of the couples nor in their sexual orientation.[143] The preference against categorical exclusion is further demonstrated by the Family Code, which does not consider race, ethnicity, sex, or marital status as factors in determining adoption and conservatorship of children.[144] Excluding same-sex couples from joint

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[137] *Id.*

[138] *Id.*

[139] *Id.* Since 2005, no bills have been introduced in the Texas Legislature relating to same-sex adoption.

[140] Many of the arguments do not directly implicate the public policy goals outlined in the Texas Family Code, but rather reflect other legislative judgments concerning administrative efficiency and taxpayer burdens, which are outside the scope of the three-pronged statement of public policy. *See* TEX. FAM. CODE ANN. § 153.001 (Vernon 1999).

[141] *See, e.g.*, Goodson v. Castellanos, 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied) (applying the subjective test to justify application of the strict six-month limitation on attacking adoption decrees).

[142] TEX. FAM. CODE ANN. § 153.001(a)(1) (Vernon 2009).

[143] Public Hearing, *supra* note 129.

[144] TEX. FAM. CODE ANN. §§ 153.003 & 162.015 (Vernon 2007).

foster care adoption would give children access to fewer parents who would be capable of acting in the children's best interests, thereby undermining the first aim of the Family Code.[145] If Texas law prohibited same-sex second-parent adoptions, a parent's partner, who may have demonstrated an ability to act in the best interest of the child, would have no rights regarding that child.

The other relevant goal of the Family Code is to "provide a safe, stable, and nonviolent environment for [children]."[146] The debate over H.B. 382 also implicated this goal, as the bill's proponents argued that providing an environment of opposite-sex couples provides a safer, more stable, and less violent environment for children.[147] Supporters of joint same-sex adoption argue that same-sex couples can offer safe and loving homes for older children in need of adoption. Further, it is difficult to objectively quantify the risks of harms a child would experience as a result of having same-sex parents—most notably, experiencing increased harassment—especially given the mixed results of studies on the issue. These risks would vary based on the predominant attitudes of the particular community in which the child was raised. However, openness of Texas's laws to a single-parent adoption provides a formalistic procedure to bypass opposition to joint same-sex adoption, because second-parent adoptions are always available after a single-parent adoption: one person in a same-sex couple could foster or adopt a child as a single parent, and then the other in the couple could seek a second-parent adoption. Thus, as long as single-parent adoption is permitted, any advantages or disadvantages of joint same-sex adoptions can be actualized through a single-parent adoption followed by a second-parent adoption.

Recognizing same-sex second-parent adoptions, on the other hand, would not threaten the policy regarding safety and stability of the child's environment. The potential adoptive child would already have a home in which two adult figures play parental roles in the child's life, but only one has a legally established parent-child relationship with the child. Thus, establishing a legal relationship with a second parent would not affect the safety or stability of the child's environment. The public policy goals of the Texas Family Code appear to strongly support the recognition of same-sex second-parent adoptions. Even if joint same-sex adoptions do not necessarily provide safer and more stable environments for children, permitting single-parent adoption makes these concerns irrelevant. Failing to recognize same-sex adoptions offers fewer stable homes to children in need and inhibits their access to individuals capable of acting in their best interest.

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[145] TEX. FAM. CODE ANN. § 153.001(a)(2).
[146] *Id.*
[147] Public Hearing *supra* note 129.

V. CONCLUSION

A same-sex couple generally has two options to establish a parent-child relationship between each member of the couple and the child: a joint adoption, or a second-parent adoption of the biological or adopted child of one of the partners. Texas law is unclear as to whether it recognizes these options because it contains no express permission for or prohibition on either option. Chapter 162 of the Texas Family Code does not seem to preclude a same-sex couple from jointly adopting as two single individuals, or having one member adopt the other's biological or adopted child.[148] While challenges fashioned from other statutory provisions on adoptions granted under Chapter 162 ultimately have not been successful, Texas appellate courts have not addressed the merits of attacks based on the provisions of other Texas statutes. Rather, appellate courts have uniformly upheld adoptions under a strict application of the statute of limitations for challenging adoptions. This result is based on public policy considerations of maintaining a stable environment for adopted children.

Despite the general tendency of courts to uphold these adoptions after they are granted, a particular district court may decide not to grant adoption petitions, and a DFPS official may decide not to place children in the homes of same-sex couples. A judge or DFPS official might attempt to justify a denial of an adoption petition by citing provisions in the state statutes expressing tension with the idea of same-sex adoption. However, Texas appellate courts should follow the lead of district courts that have granted same-sex couples' adoption petitions. The best interest of a particular child cannot be used to justify such categorical exclusions of potential parents based on their sexes. Rather, such exclusion would greatly reduce the chances for a child to be jointly adopted by a couple that can provide a safe, stable, and nonviolent environment: exclusion would preclude a child from receiving healthcare coverage, child support, and other benefits from recognizing a second-parent adoption.

[148] There are several requirements for second-parent adoption. *See infra* Part II.

Comment

The Executive Summary: Working Within the Framework of the Texas Clemency Procedures

Sarah Hunger*

I. INTRODUCTION

In 1998, Juanita Gonzalez, a member of the Texas Board of Pardons and Paroles ("the Board"), submitted her vote to deny Joseph Stanley Faulder clemency less than two hours after receiving his petition.[1] This incident and a subsequent 1998 hearing on the matter

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[1] Testimony of Victor Rodriguez, Transcript of Record at 111, Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS (W.D. Tex. Dec. 28, 1998).

established what many practitioners in Texas had long suspected: the members of the Board often do not review the lengthy clemency petitions in making their recommendation to the governor. More recent investigation into the clemency review procedures of the governor's office reveals a similarly low standard.[2]

Neither the Faulder hearing nor the investigation into the governor's practices, however, changed the clemency procedures employed by either the Board or the governor.[3] According to the court, while "[i]t is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal," the Constitution does not require the Board to implement a higher standard.[4] These events did not prompt change in how advocates file clemency petitions on behalf of their clients.[5] Despite the publicity surrounding the Board's standard and its affirmation by the courts for more than a decade, advocates continue to file lengthy petitions on behalf of their clients, and decision makers continue not to read them in their entirety, if at all.

Although advocates should continue to challenge the constitutionality of the minimal standard of review, it is more immediately essential to alter the format of clemency petitions to effectively communicate information within the current framework of minimal review. As one technique of effective presentation, I propose that each clemency petition include a one-page "Executive Summary" of the material presented in the petition. The inclusion of such a summary will increase the likelihood that the governor and members of the Board will be informed of the central issues in the petition, even if they do not read the petition in its entirety.

II. A DECADE OF STAGNANCY: THE LOW STANDARD OF REVIEW IN TEXAS

Throughout the past decade, the standard of review of clemency petitions in Texas has remained very low. This procedure, upheld by the courts, involves both the governor and the Board. The Board consists of seven members who read clemency petitions and make a recommendation to the governor.[6] The governor then submits a final determination.[7] In capital cases, the governor is not permitted to grant

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[2] *See* Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July–Aug. 2003, *available at* http://www.theatlantic.com/magazine/archive/2003/07/the-texas-clemency-memos/2755/ (detailing the process as implemented in former Governor Bush's administration); *infra* subpart II(A).

[3] *See infra* subpart II(A).

[4] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 16 (W.D. Tex. Dec. 28, 1998).

[5] *See infra* subpart III(A).

[6] Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. LAW 37, 82 (2009).

[7] *Id.*

clemency without the written recommendation of the Board, but he is able to grant one thirty-day reprieve without a recommendation.[8] Thus, the standard employed by the Board is often more influential than the standard employed by the governor.

A. "Legal Fiction": The Low Standard of Review Employed by the Board and the Governor

Nevertheless, the low standard employed by both actors—the governor and the Board—is clearly evidenced by memos, court opinions, regulations, and interviews. In particular, two sources establish the low standard set forth in the procedure for clemency review by the Board: judicial findings and the regulations governing the Board. In reviewing the standard employed by the Board, many courts have consistently found it to be low. For example, in the pivotal 1998 hearing, federal district Judge Sam Sparks wrote an eighteen-page order critiquing the process governing the review. He remarked upon the Board members freely admitting that they do not consider all of the information submitted with clemency applications.[9] As an example, he noted that some information never made it to the Board members. In fact, four thousand letters were written on behalf of Faulder, but few were forwarded to the members for their consideration.[10] In addition, Judge Sparks commented on the Board's secrecy, noting that there is "absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the governor, can find out why they did this."[11] He then famously concluded, "a flip of the coin would be more merciful than these votes."[12] In Karla Faye Tucker's case, various courts made similar observations. A state district court, for example, echoed these same concerns, finding it particularly distressing that the Board does not meet to discuss the petition and the recommendation.[13]

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[8] *Id.*

[9] Daniel T. Kobil, *Forgiveness & the Law: Executive Clemency and the American System of Justice*, 31 CAP. U. L. REV. 219, 236 (2003) (citing *Faulder*, No. A-98-CA-801-SS at 10 n.5). The information submitted in this clemency petition included a fifteen-page letter from the Secretary of State, Madeleine Albright. Michelle McKee, *Tinkering with the Machinery of Death: Understanding Why the United States' Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 177 (2000). The letter did not arrive until after fourteen members had submitted their vote. Upon receipt of the letter, only one requested a new voting form. *Faulder*, No. A-98-CA-801-SS at 13.

[10] *Faulder*, No. A-98-CA-801-SS at 10 n.3.

[11] Berlow, *supra* note 2, at 6. *See also* Kobil, *supra* note 9, at 237 ("Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and the autonomy of the system rather than carrying out an efficient, legally sound system.") (citing *Faulder*, No. A-98-CA-801-SS at 10 n.3).

[12] Berlow, *supra* note 2, at 6 (citing *Faulder*, No. A-98-CA-801-SS at 10 n.3).

[13] Allen L. Williamson, note, *Clemency in Texas—A Question of Mercy?*, 6 TEX. WESLEYAN L. REV. 131, 148 (1999).

The concurring judges on the Texas Court of Criminal Appeals similarly declared the Board's closed process to be unwise and a "legal fiction."[14]

In addition to the conclusions reached by the courts, the low standard of review is evidenced by the practices of the Board itself. One indication of this standard is that the Board deliberates in secret, if it chooses to deliberate at all.[15] In fact, the current Board directives establish that Board members shall submit their votes by facsimile or by hand, enabling each member to vote without conducting in-person deliberations.[16] If the Board were to meet, there would be no record of the deliberations because the Board does not conduct open meetings when discussing clemency petitions. Because there are no open meetings, there is no record of the deliberations.[17]

Furthermore, the Board is not bound by any specific criteria in making its recommendation.[18] Both the observations by Judge Sparks and the statements by the current and past Board members illustrate this fact. Judge Sparks noted that in the hearing, most of the Board members testified that they did not "read every word on every line of every piece of paper in the clemency application."[19] In interviews for an article in The New Yorker, one current Board member disclosed that he views his role in reviewing the petition as limited to verifying that everything is in order and ensuring that there are no glaring errors.[20] Another member disclosed that the Board receives many reports during the clemency process, but that they do not have the mechanisms to vet them.[21] This same Board member also stated that the name Willingham, a defendant that filed for clemency during the member's tenure on the Board, did not "ring a bell."[22]

In making the final determination, the governor exercises a similar standard. This is most clearly evidenced by the memos relied upon by former Governor Bush in making this final determination in each case. These memos, written by legal counsel Alberto Gonzales, typically ranged between three and seven pages and included little or nothing regarding the grounds raised in the clemency petition.[23] Based upon this

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[14] *Ex parte* Tucker, 973 S.W.2d 950, 951 (Tex. Crim. App. 1998) (Overstreet, J., concurring).

[15] Steve Woods, *A System Under Siege: Clemency and the Texas Death Penalty After the Execution of Gary Graham*, 32 TEXAS TECH L. REV. 1145, 1162–63 (2001).

[16] Tex. Bd of Pardons & Paroles, Board Directive 143.300(III)(A) (Sept. 15, 2009) (on file with author). This procedure is known as "death by fax." *See* David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, 42, 62.

[17] *See* Woods, *supra* note 15, at 1162–63 (2001) (explaining that the Board is not bound by the open meetings requirement and therefore the contents are not submitted as public record and are not subject to public inspection).

[18] *See* McKee, *supra* note 9, at 176 (asserting that the members of the Board do not give reasons for their votes or use any standard in making their decisions); Grann, *supra* note 16, at 62 (noting that the Board is not bound by specific criteria).

[19] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 15 (W.D. Tex. Dec. 28, 1998).

[20] Grann, *supra* note 16, at 62.

[21] *Id.*

[22] *Id.*

[23] Berlow *supra* note 2, at 2. "In his summaries of the cases of Terry Washington, David Stoker, and Billy Gardner, Gonzales did not make [former] Governor Bush aware of concerns about

description of the facts of the crime, the procedural history, and a short description of the defendant's background, former Governor Bush would make a final decision in a thirty-minute meeting, often on the day of the scheduled execution.[24] Gonzales further admitted that it was not uncommon for former Governor Bush to make a final determination without either Gonzalez or Bush having read the petition.[25]

Unlike Governor Bush, Governor Perry refuses to disclose his clemency memos, making it more difficult to pinpoint the exact standard of review that he employs.[26] Recently, however, the Innocence Project obtained all of the records pertaining to an arson report filed as a supplement to the Willingham clemency petition.[27] These documents show that both the Board and the Governor received the report, but neither "has any record of anyone acknowledging it, taking note of its significance, responding to it, or calling any attention to it within the government."[28] This report indicated that the arson evidence relied upon at trial was faulty, and would have been of great significance in reviewing a petition for clemency.

As illustrated by the Board's procedures and the Bush memos, it is clear that these clemency petitions are neither read in their entirety nor considered as carefully as they could be. As a result of this structure, certain petitioners are not only denied relief by rushed and uninformed decision makers, but are also denied a decision that is based upon an understanding of the defendant's best arguments.

B. Review by the Courts Leads to Preservation of the Standard

The low standard of review employed by the Board and the Governor has not gone unnoticed by the courts. Upon each review of this procedure, however, the courts uphold the low standards employed by the Board and the governor, concluding that they meet the minimal due process requirement established by the Supreme Court in Ohio Adult Parole Authority v. Woodard.[29] These holdings are important because they reaffirm the need to work within the framework of minimal review in order to be the most effective advocate possible.

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ineffective counsel, essential mitigating evidence, and even compelling claims of innocence." *Id.* at 7.

[24] *Id.* at 1.

[25] *Id.* at 2.

[26] James C. McKinley, Jr., *Controversy Builds in Texas over an Execution*, N.Y. TIMES, Oct. 20, 2009, at A14.

[27] Grann, *supra* note 16, at 62.

[28] *Id.*

[29] 523 U.S. 272 (1998).

Under *Woodard*, the Court reaffirmed its position that pardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review.[30] In her concurrence, Justice O'Connor asserted that some minimal procedural safeguards apply to clemency proceedings, but that judicial intervention might only be warranted "in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[31] These examples have been widely cited by lower courts in upholding the standard of minimal procedural safeguards.

The *Faulder* hearing and appeals were no exception. As discussed earlier, the *Faulder* hearing upheld the standards exercised in clemency review in Texas, heavily relying upon the Supreme Court's ruling in Woodard. In his order, Judge Sparks declared the standard "extremely poor and certainly minimal," but concluded that it nonetheless adhered to the "minimal procedural safeguards" required under Woodard.[32] The Fifth Circuit echoed these standards in its review of the Faulder hearing, upholding Judge Sparks' holding because Faulder was not denied access to Texas' clemency procedures nor was his petition determined by a coin flip.[33] Although the process has been declared poor and minimal, the Board and the governor are acting constitutionally under the Woodard regime.

Moreover, neither the Board nor the Texas legislature have enacted the further procedural safeguards recommended by the courts. In his order, Judge Sparks advised the Board to enhance the existing procedural safeguards, even though it was under no constitutional obligation to do so.[34] These suggestions—that the Board members succinctly state the reasoning behind their vote, hold hearings, and distribute the full petition to all members with authority—have yet to be added.[35] The lessons in the decade post-Faulder indicate that neither the Board nor the legislature will change the standard. Given this pattern, it is important for advocates to effectively work within this framework, as even suggestions by a federal judge appear to fall on deaf ears.

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[30] *Id.* at 276.

[31] *Id.* at 289 (O'Connor, J., concurring).

[32] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 15 (W.D. Tex. Dec. 28, 1998).

[33] Faulder v. Tex. Bd of Pardons & Paroles, 178 F.3d 343, 344 (5th Cir. 1999). The court further asserted, "The Board members reviewed the information they believed material to Faulder's request, and each one independently determined whether clemency ought be recommended. . . . We need not go further in advising the Board what procedures it might choose to adopt in the future, because what they did in this case complied with the constitutional minimum set forth in *Woodard*." *Id.* at 345.

[34] *Faulder*, No. A-98-CA-801-SS at 16.

[35] *Id.* The only change made in this area is the method by which the Board votes. Instead of voting at any time after receiving the petition, the members must vote at 1:00 p.m. two days before the execution. There are no provisions for listing reasoning behind the vote. Clemency for Capital Cases, Board Directive § 143.300 (Sept. 15, 2009) (on file with author).

III. METHOD OF FILING PETITIONS

A. Status Quo: Clemency Petitions and the Laws Governing Them

Before assessing the merits of new strategies for filing clemency petitions, it is important to establish the current form clemency petitions take and understand the laws governing their submission. Under the Texas Administrative Code, a prisoner petitioning for commutation of his death sentence to a lesser penalty must submit a written request setting forth all of the grounds upon which the application is based, along with his full name, the county of conviction, and execution date.[36] A petitioner may file supplemental information, including but not limited to amendments, supplements, addenda, and exhibits.[37] There are no restrictions upon the order or format of the required information or the supplements.[38]

A petition for reprieve of execution must contain in its application specified information, including a brief statement of the offense for which the prisoner has been sentenced to death, the appellate history of the case, the legal issues raised during the judicial process, the requested length of the reprieve, the effect of the prisoner's crime upon the family of the victim, and all grounds upon the basis of which the reprieve is requested.[39] As with petitions for commutation, there is no restriction upon the format or order of this information.[40] The Executive Summary, discussed in subpart III(B), is not precluded by any of these guidelines.

As presently submitted, a typical clemency petition ranges from ten to one hundred fifty pages and includes the elements listed above.[41] Most begin with an introduction detailing the relief requested, the details of the crime, the procedural history, and the basis of relief.[42] The order of these details, however, is not always to the petitioner's advantage. In fact, one petition begins, "Frances Newton is scheduled to be executed on December 1, 2004. She was convicted of murdering her husband and

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[36] 37 TEX. ADMIN. CODE §143.57(a)(2) (2006) (Tex. Bd. of Pardons & Paroles, Commutation of Death Sentence to Lesser Penalty).

[37] *Id.* at §143.57(c). Petitioners often submit letters, videos, and tapes along with their petition. Testimony of Victor Rodriguez, Transcript of Record at 111, Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS (W.D. Tex. Dec. 28, 1998).

[38] *Id.*

[39] 37 TEX. ADMIN. CODE § 143.42 (1984) (Tex. Bd of Pardons & Paroles, Reprieve Recommended by Board).

[40] *Id.*

[41] *See* In re Jeffrey Lee Wood, Application for Commutation of Sentence, 2008; In re Toronto Markkey Patterson, Application for Reprieve from Execution and Commutation of Sentence, 2002; In re Frances Newton, Application for Reprieve from Execution, Nov. 9, 2004; In re Napoleon Beazley, 2001.

[42] *See* In re Jeffrey Lee Wood, Application for Commutation of Sentence, 2008.

two small children for the purpose of collecting the proceeds from life insurance policies."[43] If the governor or Board members were to open to the introduction of the petition, the first sentence they would read is a succinct and strong case for execution instead of a concise argument in favor of reprieve. This qualification is important because while the petition as a whole may be persuasive, the question is whether the presentation is effective, given the standard exercised in Texas.

The introduction generally spans several pages and is not presented separately from the remainder of the petition.[44] Lengthier petitions often include a more detailed statement of the facts and procedural history before explaining the grounds for relief. In a minority of petitions, the introduction focuses solely on the grounds for relief, but even these portions span several pages, include substantial detail, and, most importantly, are not separate from the lengthy petition.[45] Therefore, reading these introductions is functionally the same as reading the petition, which the members do not do. If the Board member has no intention of reading the petition, he will not even see the contents of the introduction. Furthermore, in some petitions, merely reading the beginning of the introduction provides a stronger argument for the state than the petitioner.

B. "Executive Summary"

An unsettling pattern has arisen due to the lack of progression in either the standard of review or the method of filing clemency petitions: advocates file lengthy petitions on behalf of their clients that the Board members and the governor do not read. Given that the courts consistently uphold this standard, the burden now rests on advocates to present their clients' information in a way that ensures a more substantial consideration of the material than that which currently exists. Including an Executive Summary in the petition will increase the amount of information considered by the Board and the governor. Doing so will result in not only more effective advocacy, but also a more fair and just process. Advocates may not be able to change the politics of the decision makers, but they can present the material in a way that ensures the decision makers will have knowledge of the pertinent issues. In Texas, this concern is half of the battle.

The use of the Executive Summary is widespread in many other fields, such as business, academia, and other aspects of the legal practice. For example, academic works include abstracts before the introduction.

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[43] In re Frances Newton, Application for Reprieve from Execution, 2004.

[44] *Id.*

[45] *See* In re Toronto Markkey Patterson, Application for Reprieve from Execution and Commutation of Sentence, 2002. This petition included an introduction comprised of a two-page-long paragraph indistinct from the fifty-nine-page petition.

Similarly, business executives generally do not read full reports—a shorter summary is prepared for them. Executive Summaries are even used within the clemency process. The governor receives a short memo from his legal counsel, and he depends on the memo rather than the petition in reaching his final determination. The only problem from the defense perspective is that the memo is written by someone unfamiliar with the issues rather than the defense team.

The Executive Summary in a clemency petition should be limited to one page and include only the most essential elements of the petitioner's claim, emphasizing the most compelling grounds for relief. Unlike the introductions currently included in the petitions, this summary is separate and distinct from the body of the clemency petition and serves an entirely different purpose: informing the reader of the petitioner's most persuasive grounds for relief.[46] In order to make this supplement conspicuous, it should be printed on a thicker or glossy paper and include stylistic distinctions such as bullet points, varying typefaces, graphics, and distinct subparts. In addition to creating both a visual and a tactile distinction from the body of the clemency petition, this type of summary is meant to immediately draw the attention of the reader in a way that an introduction cannot. The accessibility of this document and the information contained in it are two of its greatest virtues.

The Executive Summary confronts both major obstacles initially facing advocates filing these petitions: the Board's lax attitude in reading the petition and the governor's ignorance of its contents. In advocating effectively to a Board that admits to not reading the petition in full, the most important features of a clemency petition are its accessibility and brevity. As illustrated by their statements, Board members do not read lengthy petitions and often make recommendations within minutes of having received the petition.[47] The addition of an Executive Summary addresses both concerns. If the Board members decide not to read the entire petition, they will be casting their vote with at least having been informed of the most important information regarding the petitioner's claim.[48] The Executive Summary, placed at the beginning of the petition, will inform the Board of the main issues from the perspective of the petitioner. Thus, even if they do not read the details of the claims, the Board members will nonetheless be made aware of the most critical facts in the light most helpful to the petitioner.

If, as in *Faulder*, Board members do not intend to read any part of

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[46] The introductions generally summarize the entirety of the petition, including the facts of the crime and the procedural posture.

[47] It is impossible to determine how long the individual board members spend considering the petition's contents. It is still possible, though, as indicated above, for the member to make his or her decision immediately upon receipt of the petition despite not casting his vote until two days before the scheduled execution.

[48] This Comment does not intend to address the motivations of those reading clemency petitions. It merely acknowledges that these motivations could exist and asserts the Executive Summary's relevance in either case.

the petition, the stylistic and tactile differences in the Executive Summary will catch their attention, resulting in a brief glance of the issues at the very least. While this modification may not cause the Board members to change their recommendation in every circumstance, they will at least think twice about their vote and recognize the important issues at stake in the petition.

The Executive Summary also addresses the concerns raised by the governor's low standard of review. Because the governor only reads that which his legal counsel summarizes, the key part of this process is the legal counsel's review of the petition.[49] As evidenced by the Gonzales memos, the grounds for the petition and other important factors are often not presented to the governor for his consideration.[50] The Executive Summary has potential to resolve this problem in two ways. First, if the reason that the petitioner's arguments do not appear in the clemency memos is that the legal counsel does not read the entire petition, the accessibility of this information may lead to its inclusion in the clemency memos. The legal counsel has many responsibilities, and even if he has the best intentions in accurately representing the information, he may not be able to fully absorb and read a hundred-page petition. A summary written by an advocate will be a much stronger rendition of the argument than that which a third party can generate.

Second, the Executive Summary could replace the clemency memo as the information that the legal counsel presents to the governor. Because current clemency petitions do not include an Executive Summary, the legal counsel must write his own, including information he thinks is important. If an advocate submits an Executive Summary, it might be the summary presented to the governor rather than one written by his legal counsel. In either scenario, the governor will have available the most important grounds raised in the clemency petition in making the final determination. As demonstrated in the Karla Faye Tucker case, the decision to deny clemency becomes considerably more difficult for the governor when confronted with an individual's grounds for clemency.[51]

Proponents of preserving the current form of clemency petitions may argue that including such a summary will only ensure that the Board and the governor will never read a clemency petition in its entirety. While this concern is significant, it is abundantly clear that these individuals do not read the clemency petitions in their entirety as a matter of practice. Instead of expecting the Board members or the governor to change their method of review without being required by the courts, a

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[49] *See supra* subpart II(A).

[50] *See supra* subpart II(A).

[51] The only exception to the standard employed by former Governor Bush is in the case of a highly publicized clemency petition, such as that of Karla Faye Tucker. In this case, former Governor Bush reportedly did not sleep the night before the execution and reflected much longer than thirty minutes on the merits of her petition. In fact, he noted that it was one of the hardest decisions of his life. Berlow, *supra* note 2, at 6.

more effective strategy is to accept this standard and design the petition to appeal to those making the recommendation. Until the courts overturn this standard, the decision makers will continue to exercise it; ignoring this fact only renders the petition less effective.

IV. CONCLUSION

Clemency is a unique feature of the American justice system that allows prisoners to request relief based upon mercy or unfair adjudication in the legal system. In order for the clemency process to work effectively, however, the individuals making this determination must be aware of the grounds upon which the petitioner asserts his worthiness of mercy or the unfair adjudication of his claims. In a system such as Texas that reviews petitions with such a low standard, this basic requirement is the first, and often the most difficult, obstacle in the clemency review process.

Unfortunately, this standard has not improved in the past decade, and it is unlikely to do so in the near future. Thus, the burden currently lies on the advocates to assert these grounds in a manner that forces the Board and the governor to take notice of the critical issues in each petition. Inclusion of an Executive Summary will effectively communicate the crucial information to the decision makers and enable them to understand the main issues from the petitioner's perspective, all without requiring a change in their standard of review. Until it is possible to change the law or the politics in Texas, the best approach in advocating for a petitioner is to add a clear and concise Executive Summary to the full-length petition, thereby ensuring each decision maker's awareness of the essential elements of the petition.