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LETTER FROM THE EDITOR

Dear Reader,

This issue's selections illustrate the continuing imperative for lawyers who are ethically committed to preserving core rights and liberties—whether in schools, adult homes, county jails, or markets—to dedicate themselves to our enduring constitutional mission: to "secure the blessings of liberty to ourselves and our posterity."

This issue begins with an article by Kevin M. Cremin about the definition of "institution" in litigation challenging the legality of various facilities in which persons with disabilities are placed. The article connects the goals of the deinstitutionalization movement with a wide array of definitions of the term. Cremin concludes that the central judicial inquiry is whether unnecessary segregation of services for persons with disabilities is occurring.

The first note, by Therese Edmiston, addresses the increasing criminalization of classroom behavior in Texas and other states, and how some jurisdictions have effectively combatted the "school-to-prison pipeline." In addition to constitutional analysis, the piece evaluates several different policy approaches, and offers a list of recommendations for courts and lawmakers.

The second note, my own work, analyzes recent Texas payday-lending legislation and regulations. The note uses legislative history to reveal the powers given to regulators. It also evaluates the public policy soundness of the new consumer debiasing regulations, and recommends additional action to strengthen their corrective effect.

The final note, by Loui Itoh, examines the doctrine surrounding the recent Supreme Court decision *Florence v. Board of Chosen Freeholders*. The note traces the Supreme Court's history of deference to the Solicitor General in prison cases, and argues that it is rooted in deference to executive power over prison administration.

Please also visit our legal blog, tjclcr.blogspot.com. We write on a wide range of topics on the blog and invite you to join our dialogue. For more information, or to donate, visit our main website, txjclcr.org.

Thank you for reading,

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Article

Challenges to Institutionalization: The Definition of "Institution" and the Future of *Olmstead* Litigation

Jacobus tenBroek Disability Law Symposium

Kevin M. Cremin[*]

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I. INTRODUCTION

I was asked to facilitate a workshop at the 2011 Jacobus tenBroek Disability Law Symposium on "Challenges to Institutionalization." An appropriate starting place is to ask: What is an "institution?"

There is no universally agreed-upon answer to this question. One common way of answering this question has been to contrast institutions with facilities that are located "in the community." There is, however, widespread disagreement about what in the community means, and definitions of "community-based services" are often tautological.[1] Moreover, a facility that is located in the community can also be an institution.[2]

Another complicating factor is that our idea of what constitutes an institution is not static. When the deinstitutionalization movement began, the targets of litigation were state hospitals. But advocates, academics, and people with disabilities, over time, began to consider segregated residential settings with a wide variety of different characteristics—large or small; private or public; locked or unlocked—to be institutions.[3] Our

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[1] *See, e.g.*, DEWAYNE DAVIS ET AL., NAT'L CONF. OF STATE LEGISLATURES, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATORS (2000) (defining "[c]ommunity-based services" as "long-term support services for people who need help with activities of daily living outside of large state institutions or nursing homes and in their own homes and communities.").

[2] *See, e.g.*, Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Disabilities*, 43 AM. U. L. REV. 925, 932 (1994) ("Group homes, halfway houses, quarterway houses, and board and care homes are hardly 'homes' at all. Like institutions, they segregate people with disabilities and confine them with little, if any, attention to individual choice. The residents of such homes are seldom asked where or with whom they want to live.") (footnotes omitted); Sarah Light, Note, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 381 n.3 (1999) ("The concepts of the 'community' and 'confinement,' or 'institutionalization,' are loaded and are hardly discrete and dichotomous categories.").

[3] *See, e.g.*, William A. Krais, Note, *The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J.L. & MED. 333, 359 n.134 (1989) ("Institutionalization can mean any one of a number of living conditions. Currently, the term can refer to group adult homes, half-way houses or respite homes. The term should no longer connote the ominous images of years ago, when institutionalization largely meant commitment in an insane asylum without treatment."); David Ferleger and Penelope A. Body, *Anti-Institutionalization: The Promise of the* Pennhurst *Case*, 31 STAN. L. REV. 717, 721 n.11 (1979) ("No single definition of 'institution' can suffice for all purposes. The word is typically invoked to reflect the historic use of facilities, public and private, providing residential and other services on a full-time basis to the mentally disabled. As times change, so do the words used to denote such facilities—asylums, madhouses, state schools, training schools, colonies, centers, hospitals, farms, homes. Among the common characteristics of what we term 'institution' for the purpose of this article are: (1) congregate living in a group larger than an above-average family, (2) maintenance of most activities of life (residential, social, vocational, leisure, educational, creative) within one administrative entity, and (3) some degree of isolation or separation from the ebb and flow of

conception of what constitutes an institution can and should continue to evolve, much in the same way that our conception of what constitutes cruel and unusual punishment under the Eighth Amendment has evolved.[4]

With regard to litigation that is brought pursuant to the integration mandate[5] of the Americans with Disabilities Act (ADA),[6] asking whether a given facility is an institution is also arguably the wrong question or, at the very least, a secondary question. In *Olmstead v. L.C.*, two plaintiffs with disabilities challenged Georgia's decision to provide them with services in a mental hospital even though their "needs could be met appropriately in one of the community-based programs the State supported."[7] The Supreme Court held that, under the ADA, "unjustified isolation . . . is properly regarded as discrimination based on disability."[8] Many cases that invoke the ADA's integration mandate and the *Olmstead* precedent have involved institutions, such as mental hospitals. However, the fundamental question in these so-called *Olmstead* cases is not whether the person is receiving services in an institution, but whether the person with a disability is receiving services in the most integrated setting that is appropriate to his or her needs.[9]

The term institution, however, continues to be invoked in *Olmstead* cases. There are at least two reasons for this. First, the term "institutionalization" has strong rhetorical value. It is effective, powerful short-hand for a long history of discrimination and exclusion. Second, there is an undeniable relationship between institutionalization and segregation.[10] The two are, at the very least, highly correlated. But it is important to remember that segregation can and does occur outside of institutions. Using the term "deinstitutionalization" connects current efforts to a valiant history, but it can also lead to unnecessary obstacles to future success. One does not have to prove that a particular setting is an institution to succeed in proving that a public entity has failed to provide a service in the most integrated setting appropriate to the needs of a person with a disability.

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community life. The third characteristic merely represents the effect of the second; by definition, when one's activities are carried on in one place, one becomes isolated from community life.").

[4] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (noting that the Supreme Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual'") (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

[5] 28 C.F.R. § 35.130(d) (2011) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). *See* discussion *infra* Part III.A.1.

[6] 42 U.S.C. §§ 12101–12213 (2006). *See* discussion *infra* Part III.A.1.

[7] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593 (1999). *See* discussion *infra* Part III.A.2.

[8] *Id.* at 597.

[9] *See id.* at 591–92.

[10] *See id.* at 620 (noting that "certain congressional findings contained within the ADA . . . appear to equate institutional isolation with segregation") (Thomas, J., dissenting). *See also* 42 U.S.C. § 12101(a)(2), (3), (5) (2006).

Different definitions of institution emphasize different characteristics. But generally, characteristics such as who owns the facility; how many residents there are; and what services are provided, are not intrinsically significant. Instead, the different definitions appear to use these characteristics as objective proxies for a more subjective inquiry about unnecessary segregation. Under *Olmstead*, the key question is whether individuals with disabilities are being unnecessarily segregated from the community.

This Article attempts to shed light on the future of *Olmstead* litigation. Part II examines the characteristics of facilities that have historically been targeted by deinstitutionalization efforts. Building on this history, Part III looks at potential definitions of the term institution. It begins with an in-depth examination of *Disability Advocates, Inc. v. Paterson*,[11] which is the only *Olmstead* case that has explicitly grappled with the question of what constitutes an institution. Drawing on common usage; other federal laws; and international law, Part III then examines other potential definitions of institution. Part IV attempts to describe the implications of an accurate understanding of the term institution for future *Olmstead* litigation. In particular, residential settings that have not historically been considered institutions are being scrutinized by advocates and individuals with disabilities. This Part also describes how *Olmstead* is increasingly being applied to non-residential services. Part V concludes this Article.

II. CHARACTERISTICS OF FACILITIES HISTORICALLY TARGETED BY DEINSTITUTIONALIZATION LITIGATION

Deinstitutionalization litigation began with challenges to confinement in state mental hospitals. In addition to state hospitals, nursing homes and intermediate care facilities have been commonly

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[11] Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289 and 653 F. Supp. 2d 184 (E.D.N.Y. 2009), *vacated by* Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012). The Second Circuit recently held that the plaintiff organization did not have standing to bring this lawsuit on behalf of thousands of individuals with mental illness who live in adult homes in New York City. Disability Advocates, Inc., 675 F.3d at 159. Although the Second Circuit vacated the trial court's decision, it did not question the trial court's findings, discussed in Part III.A *infra*, that adult homes are institutions and that New York is violating the ADA. The Second Circuit also acknowledged that its decision is unlikely to be the last word regarding New York's use of adult homes:

> We are not unsympathetic to the concern that our disposition will delay the resolution of this controversy and impose substantial burdens and transaction costs on the parties, their counsel, and the courts. Should that situation arise, we are confident that the experienced and able district judge, as a consequence of his familiarity with prior proceedings, can devise ways to lessen those burdens and facilitate an appropriate, efficient resolution.

Id. at 162.

targeted by deinstitutionalization lawsuits.[12] Instead of focusing on the procedural histories or even the outcomes of these cases, this Part examines the characteristics of the facilities that have been targeted by deinstitutionalization litigation.[13]

A. State Mental Hospitals

Approximately 40,000 Americans reside in mental hospitals or general hospital psychiatric units today.[14] State mental hospitals were the first targets of deinstitutionalization litigation. Early lawsuits included *Wyatt v. Stickney*, a 1970 class action filed by guardians of patients at Bryce Hospital in Tuscaloosa, Alabama.[15] Bryce Hospital had approximately 5,000 patients.[16] Of these patients, between 1,500 and 1,600 were "geriatric patients who [were] provided custodial care but no treatment."[17] Custodial care was also provided to the "approximately 1,000 mental retardates" who were confined at Bryce.[18]

The complaint was later amended to include patients at "the Searcy Hospital at Mount Vernon, Alabama, [which was] the one other state hospital for the mentally ill in Alabama, and the Partlow State School and Hospital, Alabama's state facility for the mentally retarded."[19] Patients in these hospitals "were afforded virtually no privacy: the wards were overcrowded; there was no furniture where patients could keep clothing; [and] there were no partitions between commodes in the bathrooms."[20] At Partlow State School, patients were frequently put in seclusion "or under physical restraints, including straitjackets, without physicians' orders."[21] The hospitals did not have adequate staffing, and

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[12] These institutions are also the target of the overwhelming majority of administrative complaints filed about institutionalization. *See* Sara Rosenbaum, Joel Teitelbaum & Alexandra Stewart, Olmstead v. L.C.: *Implications for Medicaid and Other Publicly Funded Health Services*, 12 HEALTH MATRIX 93, 116 (2002) (noting that, of all the administrative complaints filed between 1996–2000, "nursing homes were the single most common institutional setting among complainants, accounting for 60% of all complaints filed by institutionalized persons. Another 30% arose in psychiatric facilities").

[13] Approximately 89 *Olmstead* lawsuits have been filed in 35 states. TERENCE NG, ALICE WONG & CHARLENE HARRINGTON, HOME AND COMMUNITY-BASED SERVICES: INTRODUCTION TO OLMSTEAD LAWSUITS AND OLMSTEAD PLANS 11 (2011), http://www.pascenter.org/olmstead/downloads/Olmstead_report_2011.pdf.

[14] U.S. CENSUS BUREAU, 2010 CENSUS, TABLE PCT20: GROUP QUARTERS POPULATION BY GROUP QUARTERS TYPE, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_PCT20&prodType=table (showing that 42,035 people reside in "[m]ental (psychiatric) hospitals and psychiatric units in other hospitals") [hereinafter U.S. CENSUS BUREAU].

[15] Wyatt v. Stickney, 325 F. Supp. 781, 782 (M.D. Ala. 1971).

[16] *Id.*

[17] *Id.* at 784.

[18] *Id.*

[19] Wyatt v. Aderholt, 503 F.2d 1305, 1308 (5th Cir. 1974).

[20] *Id.* at 1310.

[21] *Id.* at 1310–11.

they did not provide the patients with "individualized treatment programs."[22] The District Court held that "civilly committed mental patients have a constitutional right to treatment," and the Fifth Circuit affirmed that holding.[23] But that was not the end of the case. *Wyatt* was ultimately settled thirty years after it was filed.[24]

B. Nursing Homes

Almost 1.5 million Americans live in nursing homes.[25] Nursing homes are increasingly the subject of deinstitutionalization litigation. In 2000, a class of residents of Laguna Honda Hospital and Rehabilitation Center (LHH), operated by the City of San Francisco, filed an *Olmstead* case against the city.[26] The lawsuit was filed in the wake of a Department of Justice (DOJ) finding that San Francisco was "failing to ensure that LHH residents [were] being served in the most integrated setting pursuant to the ADA."[27] In particular, the DOJ found that residents who "have spinal cord injuries and use wheelchairs . . . could live in the community independently or with some supportive services."[28]

At the time the DOJ investigated LHH, the hospital had almost 1,200 residents.[29] Most of these residents lived in "large, open wards that house[d] up to 37 residents per ward, with multiple beds in close proximity, separated, at most, by hospital curtains."[30] This living

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[22] *Id.* at 1311.

[23] *Id.* at 1313–14. *See generally* Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

[24] Wyatt v. Sawyer, 105 F. Supp. 2d 1234, 1238 (M.D. Ala. 2000) (approving the settlement that included, *inter alia*, a requirement that Alabama "reduce by a total of 300 the number of extended-care mental-illness beds at Bryce Hospital, Searcy Hospital, and Thomasville Mental Health Rehabilitation Center and by a total of 300 the number of extended-care mental-retardation beds at Partlow Developmental Center, Albert P. Brewer Developmental Center, J.S. Tarwater Developmental Center, and Lurleen B. Wallace Developmental Center"). The court retained jurisdiction until 2004, when it granted a joint motion "for a declaration that the Alabama Department of Mental Health and Mental Retardation . . . complied with a 2000 settlement agreement." Wyatt v. Sawyer, 219 F.R.D. 529, 531 (M.D. Ala. 2004).

[25] U.S. CENSUS BUREAU, *supra* note 14 (showing that 1,502,264 people reside in "Nursing facilities/Skilled-nursing facilities"). *But see* CENTERS FOR MEDICARE & MEDICAID SERVICES, NURSING HOME DATA COMPENDIUM at i (2010), *available at* https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/downloads//nursinghomedatacompendium_508.pdf ("Almost 3.3 million Americans resided in our nation's nursing homes during 2009.").

[26] *See* Davis v. Cal. Health and Human Servs. Agency, No. C 00-CV-2532 SBA ADR, 2001 WL 1772763, at *1 (N.D. Cal. Aug. 21, 2001) (granting San Francisco's motion to dismiss to the extent the plaintiffs' claims were "intended to or may be interpreted as requiring San Francisco to create new programs or services," but denying it to the extent that those claims were "seeking that San Francisco make modifications to programs or services").

[27] Letter from Bill Lann Lee, Assistant Attorney General of Civil Rights Division, to The Honorable Willie L. Brown, Jr., Mayor of San Francisco at 14 (May 6, 1998), *available at* http://www.ada.gov/olmstead/documents/laguna_findings.pdf [hereinafter Letter].

[28] *Id.*

[29] *Id.* at 1.

[30] *Id. See also id.* at 13 (noting that "at least two wards did not even have these curtains").

arrangement, as well as the constant traffic through the ward, "ma[de] privacy almost impossible."[31]

The DOJ concluded that conditions at LHH violated the residents' statutory and constitutional rights.[32] For example, the nursing home did not "provide residents with adequate, individualized health care assessments necessary to develop a comprehensive plan of care."[33] The care provided was custodial: "only approximately 50 residents were receiving physical, occupational or speech therapy services."[34] The DOJ also found that Laguna Honda used "restraints on its residents in violation of accepted standards of practice and in ways that threaten[ed] the health and safety of residents."[35]

Like *Wyatt*, the story of LHH is a long one. It was not until 2011 that the DOJ ended its fourteen years of oversight of the nursing home.[36] Today, LHH states that it provides a "person-centered approach [that] promotes well-being and independence" for its 780 residents.[37]

C. Intermediate Care Facilities

In 1989, a lawsuit was filed against the State of Ohio on behalf of a class of over 9,000 people with "mental retardation or developmental disabilities" alleging that they were unnecessarily institutionalized or faced the risk of unnecessary institutionalization.[38] One of the named plaintiffs was Nancy Martin, who had resided in an intermediate care facility (ICF) for her entire adult life.[39] Mount Vernon Developmental Center, in which Ms. Martin lived for approximately twenty-five years, had more than 300 residents.[40] Mount Vernon staff acknowledged that "Ms. Martin's placement at the facility was inappropriate and recommended that Ms. Martin be moved to a community setting." However, when she was finally transferred out of the facility, she was sent to yet another ICF.[41] In 2004, a potential settlement agreement was

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[31] Letter, *supra* note 27, at 13.
[32] *Id.* at 2.
[33] *Id.* at 7.
[34] *Id.* at 11.
[35] Letter, *supra* note 27, at 12.
[36] Heather Knight, *Laguna Honda Hospital nears end of U.S. oversight*, S.F. CHRONICLE, June 13, 2011, at C1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/06/13/BA7G1JRCU1.DTL.
[37] *Our Values*, LAGUNA HONDA HOSPITAL AND REHABILITATION CENTER, http://lagunahonda.org (last visited Mar. 29, 2012).
[38] Martin v. Voinovich, 840 F. Supp. 1175, 1181 (S.D. Ohio 1993).
[39] *See id.* at 1181–82 (Ms. Martin lived in one of those ICFs, Mount Vernon Developmental Center, from March 30, 1966 through October 9, 1991). *See also* Martin v. Taft, 222 F. Supp. 2d 940, 948–49 (S.D. Ohio 2002) (noting that Ms. Martin was still living in an ICF when the relevant motion was filed in 2000).
[40] *Martin*, 222 F. Supp. 2d at 948.
[41] *Id.* at 949.

reached that would have eliminated ICF care "as a [Medicaid] state plan service and ma[de] it a waivered service that individuals could choose as an alternative to community services."[42] The settlement was "not accepted due to public outcry from people arguing that it would undermine entitlement to [ICF] services."[43] The case is currently heading to trial, over twenty years after it was filed.[44]

More recently, a class action was brought on behalf of people who reside in ICFs in Pennsylvania, but who "could reside in the community with appropriate services and supports."[45] More than 1,200 people with disabilities live in Pennsylvania's five ICFs.[46] Two of the named plaintiffs lived at one of these facilities, the Ebensburg Center, for over forty years.[47] The court found that the residents of ICFs were more segregated than people with disabilities who were receiving community-based services:

> [M]ost state ICFs/MR are in more rural parts of the state; most state ICF/MR residents live in units ranging from about 16 to 20 people; day services are usually provided on the grounds of the facilities; and residents do not have as much opportunity to interact with a wide range of people and to have access to community activities.[48]

Because plaintiffs "established that Defendants ha[d] violated the integration mandates of Section II of the ADA and Section 504 of the Rehabilitation Act by unnecessarily institutionalizing Plaintiffs,"[49] the court granted plaintiffs' motion for summary judgment.[50]

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[42] Marshall B. Kapp, *Deinstitutionalizing Long-Term Care: Making Legal Strides, Avoiding Policy Errors*, 11 ETHICS, L., & AGING REV. 53 (Marshall B. Kapp ed. 2005). *See also* Elizabeth Priaulx, *Docket of Cases Related to Access to Community Based Services for People with Disabilities*, NATIONAL DISABILITY RIGHTS NETWORK (2004), http://www.napas.org/en/issues/community-integration/345-dockets-for-community-based-services.html.

[43] CTR. FOR PERSONAL ASSISTANCE SERVS., *Ohio Olmstead and Olmstead Related Cases, 2011*, http://www.pascenter.org/olmstead/olmstead_cases.php?state=ohio (last visited Feb. 26, 2012). *See also* Kapp, *supra* note 42, at 54 ("In response to the proposed settlement, the federal court with jurisdiction over the case received more than 5,600 objections. Of these objections, 80% were on forms created by the ICF industry, attempting to preserve the status quo.").

[44] *Id.*

[45] Benjamin v. Dep't of Pub. Welfare, 768 F. Supp. 2d 747, 748 (M.D. Pa. 2011).

[46] *Id.* at 749 (citing figures from 2008 and 2009). Another approximately 2,500 people with mental retardation live in private ICFs that are funded by Pennsylvania. *Id.*

[47] *Id.* at 750.

[48] *Id.*

[49] *Id.* at 756.

[50] *Benjamin*, 768 F. Supp. 2d at 757. This lawsuit was recently settled. *See* CTR. FOR PERSONAL ASSISTANCE SERVS., *Pennsylvania Olmstead and Olmstead Related Cases, 2012*, http://www.pascenter.org/olmstead/olmstead_cases.php?state=pennsylvania&id=146#summary (last visited Feb. 26, 2012).

III. WHAT IS AN INSTITUTION?

The word institution is often used in newspaper articles, lawsuits, and law review articles about people with disabilities. The term is not, however, defined in the ADA or in the *Olmstead* decision. In this Part, various potential definitions of institution are described and their elements are analyzed. This Part begins with how the court in *Disability Advocates, Inc. v. Paterson* (*DAI I*) attempted to define institution.[51] Other definitions from dictionaries, the U.S. Census Bureau, federal law, international law, and social scientific literature are also described.[52] These definitions demonstrate that the term institution is not used consistently, and that the most useful definitions are those that focus on the presence or absence of a cluster of characteristics in a given facility. This Part also examines attempts to define institution in the negative, i.e., by saying that it is not part of the community or that it is not a "home."

A. Definition of Institution in *DAI I*

Olmstead claims have typically involved facilities or settings whose institutional nature was not in dispute.[53] In *DAI I*, however, the defendants asserted that the relevant facilities—adult homes[54] in New York City with more than 120 beds and in which at least twenty-five

[51] Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 298 (E.D.N.Y. 2009) [hereinafter *DAI I*], *vacated by* Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

[52] The term "institution" is also defined in countless state and local statutes and regulations, including licensing and zoning laws. *See, e.g.*, Brandon J. Massey, Cooper Clinic, P.A. v. Barnes: *The Arkansas Child Maltreatment Act And Its Fatal Ambiguities*, 60 ARK. L. REV. 989, 1007–09 (2008) (discussing the Arkansas Supreme Court's attempt to define the term "institution" as it is used in the Arkansas Child Maltreatment Act and noting that, in a dissenting opinion, Justice Hickman "posed the following question: 'What is an institution—one person or a dozen persons?'"). Like the federal government, some states define institution differently, depending on the context. *Cf.* CONN. GEN. STAT. ANN. § 19a-490 (defining institution for purposes of licensing to include, inter alia: "a hospital, residential care home, health care facility for the handicapped, nursing home, rest home, home health care agency, homemaker-home health aide agency, mental health facility, assisted living services agency, substance abuse treatment facility, outpatient surgical facility, an infirmary operated by an educational institution for the care of students enrolled in, and faculty and employees of, such institution . . . .") *with* CONN. GEN. STAT. ANN. § 9-159q (defining institution for purposes of absentee voting as "a veterans' health care facility, residential care home, health care facility for the handicapped, nursing home, rest home, mental health facility, alcohol or drug treatment facility, an infirmary operated by an educational institution for the care of its students, faculty and employees or an assisted living facility"). An analysis of the use of the term institution in state and local laws is, however, beyond the scope of this Article.

[53] *DAI I*, 598 F. Supp. 2d at 320–21 ("*Olmstead* and lower courts considering *Olmstead* claims have typically confronted situations in which the 'institutional' or 'community-based' nature of particular settings was not in dispute").

[54] *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 485.2(b) (defining an "adult home" to be "an adult-care facility established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator").

residents have a mental illness—were not institutions and should not be subject to an *Olmstead* lawsuit.[55] Judge Garaufis was therefore faced with determining what constitutes an institution for the purposes of Title II of the Americans with Disabilities Act. As explained below, after examining the ADA and its regulations and *Olmstead* for answers, Judge Garaufis adopted the definition of institution proffered by one of the plaintiff's expert witnesses.[56]

1. The Americans with Disabilities Act

The word institutionalization appears in the ADA's findings, where it is included as one of the "critical areas" in which "discrimination against individuals with disabilities persists."[57] The ADA does not, however, describe what institutionalization is or explicitly define what constitutes an institution.

Instead, the ADA focuses on the broader concept of the segregation of individuals with disabilities and the right they have to participate in society. The congressional findings emphasize that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society."[58] The findings also note that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[59] The ADA explains that "the Nation's proper goals regarding individuals with disabilities" include assuring "full participation" and "independent living."[60] Title III, for example, emphasizes the importance of "integrated settings" by requiring public accommodations, such as stores, to offer "[g]oods, services, facilities, privileges, advantages, and accommodations [to individuals with disabilities] in the most integrated setting appropriate to the needs of the individual."[61]

Title II protects the rights of individuals with disabilities to participate in the services, programs, and activities of public entities.[62] A "public entity" is a state or local government or "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[63] The ADA requires public entities to make "reasonable modifications to rules, policies, or practices" for qualified

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[55] *DAI I*, 598 F. Supp. 2d at 292–93.
[56] *See infra* Part III.A.4.
[57] 42 U.S.C. § 12101(a)(3) (2006).
[58] *Id.* § 12101(a)(1).
[59] *Id.* § 12101(a)(2).
[60] *Id.* § 12101(a)(7).
[61] 42 U.S.C. § 12182(b)(1)(B) (2006).
[62] 42 U.S.C. § 12132 (2006).
[63] 42 U.S.C. § 12131(1) (2006).

individuals with disabilities.[64]

The Attorney General has the responsibility to promulgate regulations for Title II.[65] The ADA specifies that these regulations shall be consistent with the regulations "applicable to recipients of Federal financial assistance under [Section 504 of the Rehabilitation Act]."[66] As the Supreme Court noted in *Olmstead*, "[o]ne of the [Section] 504 regulations requires recipients of federal funds to 'administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.'"[67]

The Title II regulations flesh out the ADA's prohibitions against discrimination by public entities.[68] These regulations elaborate on the ADA's focus on the right to full and equal participation in civil society.[69] The regulations do not define what constitutes an institution or a community-based setting.[70] However, one Title II regulation echoes the above-mentioned "most integrated setting" language from Title III of the ADA and the Rehabilitation Act regulations: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[71] The preamble to the Title II regulations explains that the "most integrated setting" for an individual is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible."[72] The meaning of this regulation, which is generally referred to as the ADA's "integration mandate," is at the heart of the landmark *Olmstead* decision.

2. Olmstead v. L.C.

Olmstead involved two plaintiffs with disabilities who challenged Georgia's decision to provide them with services in an "institutional setting" even though their "needs could be met appropriately in one of the community-based programs the State supported."[73] Both plaintiffs

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[64] *See id.* § 12131(2).
[65] 42 U.S.C. § 12134(a) (2006).
[66] *Id.* § 12134(b).
[67] *Olmstead v. L.C.*, 527 U.S. at 591–92 (quoting 28 C.F.R. § 41.51(d) (1998)).
[68] *See generally* 28 C.F.R. § 35.130 (2011).
[69] *See, e.g.*, *id.* § 35.130(a) ("No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity"); *id.* § 35.130(b)(2) ("A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different").
[70] *DAI I*, 598 F. Supp. 2d at 320.
[71] 28 C.F.R. § 35.130(d) (2011).
[72] *Id.* app. B § 35.130(d) (2011).
[73] *Olmstead*, 527 U.S. at 593. This discussion of *Olmstead* will be limited to the portions of the decision that provide insights into the meaning of the terms "institution" and "community-based" under Title II of the ADA. Numerous articles provide a more comprehensive account of the

challenged their treatment in Georgia Regional Hospital at Atlanta, a mental hospital with 352 inpatient beds.[74] The Supreme Court noted that both plaintiffs were "currently receiving treatment in community-based programs,"[75] but the characteristics of those programs were not described.[76]

The Supreme Court noted that the ADA was the "first time" Congress "referred expressly to 'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.'"[77] In describing the integration mandate, the Supreme Court noted that "the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II."[78] The litigants in *Olmstead* were focused "on the proper construction and enforcement" of the Title II regulations, not their validity.[79]

The question presented by *Olmstead* was whether Title II of the ADA "require[d] placement of persons with mental disabilities in community settings rather than in institutions."[80] The Court's answer to that question was a "qualified yes."[81] It was qualified because a community setting is required only if three conditions are met: (1) "the State's treatment professionals have determined that community placement is appropriate"; (2) "the transfer from institutional care to a less restrictive setting is not opposed by the affected individual"; and (3) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[82] If these three criteria are met, institutionalization of a person with a disability is discriminatory.[83]

In reaching this decision, the Court emphasized that the DOJ has "consistently advocated" that "undue institutionalization qualifies as

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Olmstead case and aspects of it that are not discussed in this article, including its procedural history and the fundamental alternation defense. *See, e.g.*, Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits after* Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695 (2001).

[74] GA. DEP'T OF BEHAVIORAL HEALTH & DEV. DISABILITIES, GA. REG'L-ATLANTA, http://dbhdd.georgia.gov/portal/site/DBHDD/menuitem.2f54fa407984c51e93f35eead03036a0/?vgnextoid=b75bd8d66662f210VgnVCM100000bf01010aRCRD (last visited Apr. 1, 2012).

[75] *Olmstead*, 527 U.S. at 594 n.6.

[76] *See DAI I*, 598 F. Supp. 2d at 321 (noting that in *Olmstead*, the "plaintiff L.C. had already been removed from the psychiatric hospital—in which she had undisputedly been 'institutionalized'—and placed in a 'community-based program,' but the opinion did not describe the nature of the community-based program").

[77] *Olmstead*, 527 U.S. at 589 n.1 (citing 42 U.S.C. § 12101(a)(2), (3), (5) (1990)).

[78] *Id.* at 596 (citing 28 C.F.R. § 35.130(d) (1998)).

[79] *Id.* at 592.

[80] *Id.* at 587.

[81] *Id.*

[82] *Olmstead*, 527 U.S. at 587.

[83] *Id.* at 597 (holding that "[u]njustified isolation . . . is properly regarded as discrimination based on disability").

discrimination 'by reason of . . . disability.'"[84] The Supreme Court's decision rested on the ADA's recognition that "unjustified 'segregation' of persons with disabilities [is] a 'for[m] of discrimination.'"[85] The Supreme Court explained why "unjustified segregation" is discrimination:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[86]

Unjustified isolation also discriminates against people with mental disabilities by making them choose between receiving necessary medical services and participating in community life.[87] The Court noted that people without mental disabilities are not asked to make this sacrifice and that people with mental disabilities would not have to either, if public entities provided them with reasonable accommodations.[88]

3. *The Motion for Summary Judgment in* DAI I

In 2003, *DAI I* was filed against the State of New York.[89] The

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[84] *Id.*

[85] *Id.* at 600 (citing 42 U.S.C. § 12101(a)(2), (5) (1990)).

[86] *Id.* at 600–01 (citations omitted). *Olmstead* has been criticized for focusing on "institutions" as opposed to "attitudes" and "programmatic structures." *See* Jeffery L. Geller, *Does "In the Community" Mean Anything Anymore?*, 53 PSYCHIATRIC SERVICES 1201, 1201 (2002) ("Isn't it time we stopped paying so much attention to the walls and started paying more attention to what happens within them?"). Dr. Geller was one of the expert witnesses for the defendants in *DAI I*, and during his testimony he directly criticized the *Olmstead* decision. Disability Advocates, Inc. v. Paterson, 653 F. Supp. 2d 184, 216–17 (E.D.N.Y. 2009) [hereinafter *DAI II*] ("Dr. Geller explicitly rejected the applicable legal standard for integration. He testified that he believes the Supreme Court's finding in *Olmstead* that 'confinement in an institution severely diminishes the everyday life activities of individuals' was 'wrong,' and that the setting in which a person lives and receives services does not determine whether he or she is 'integrated'"), *vacated by* Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

[87] *Olmstead*, 527 U.S. at 601. *See also* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 193 (2010) ("While the Court's decision in *Olmstead* directly addressed the specific issue of institutional confinement, it was not the institutional conditions that were the focus of the Court's concerns. Rather, the Court focused on the harms flowing from the individual's segregation from society—namely the perpetuation of demeaning stereotypes and lost opportunities for engagement in significant aspects of community life.") (footnotes omitted).

[88] *Id.*

[89] The plaintiff was represented by MFY Legal Services, Inc.; Disability Advocates, Inc.; the Bazelon Center for Mental Health Law; New York Lawyers for the Public Interest; the Urban Justice Center; and Paul, Weiss, Rifkind, Wharton & Garrison, LLP. *DAI I*, 598 F. Supp. 2d at 289.

lawsuit alleged that New York unnecessarily segregated people with psychiatric disabilities in large, isolated adult homes, and requested that New York reallocate the funds that it spends on adult homes to provide supported housing for adult home residents.[90]

Unlike *Olmstead*, the question of whether the relevant facilities were institutions was contested by the defendants in *DAI I*.[91] Judge Garaufis was first faced with the question of what constitutes an institution in deciding the parties' motions for summary judgment.[92] The defendants moved for summary judgment on the grounds that (1) Title II of the ADA did not apply "because the adult homes are privately operated and the State merely licenses and inspects them,"[93] and (2) "adult home residents [were] already in the 'most integrated setting,' because adult homes and supported housing are 'equally integrated' with the community."[94]

New York's argument focused on the ownership of the relevant facility and whether a facility can be considered an institution for purposes of Title II if the facility is owned by a private entity, as opposed to a public entity. In opposition, the plaintiff argued that it was challenging New York's policy of "relying on adult homes, rather than the more integrated setting of supported housing, to provide residential and treatment services to thousands of individuals with mental illness."[95] The plaintiff provided evidence that, when New York began closing state psychiatric hospitals, "the State made a 'policy decision' to serve large numbers of former patients in adult homes."[96] Moving people with disabilities from state mental hospitals to privately owned "board and care homes"[97] has been described as "transinstitutionalization."[98]

Judge Garaufis concluded that Title II applied because the plaintiff was challenging the state's administration of its mental health service system, and not "the conduct of any particular adult home."[99] The fact

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[90] *Id.* at 292.
[91] *Id.* at 320.
[92] *Id.*
[93] *Id.* at 293.
[94] *DAI I*, 598 F. Supp. 2d at 293. "Defendants contend that . . . adult home residents have 'virtually unlimited opportunities to interact with nondisabled persons,' and adult homes facilitate these interactions through community-based programs." *Id.* at 320.
[95] *Id.* at 313.
[96] *Id.* at 296–97. *See also id.* at 297 (summarizing evidence that "the placement of large numbers of people with mental illness into adult homes was the result of a 'conscious State policy' to discharge patients from psychiatric hospitals into these facilities 'due to the absence of other housing alternatives at a time when psychiatric centers were under pressure to downsize'").
[97] MEDICARE.GOV, *Types of Long-Term Care*, http://www.medicare.gov/longtermcare/static/ BoardCareHome.asp (defining "board and care homes" as a "group living arrangement [that] provides help with activities of daily living such as eating, bathing, and using the bathroom for people who cannot live on their own but do not need nursing home services.") (last visited Apr. 1, 2012).
[98] *See, e.g.*, Jennifer Mathis, *Where Are We Five Years After* Olmstead?, 38 CLEARINGHOUSE REV. 561, 581 (2005).
[99] *DAI I*, 598 F. Supp. 2d at 318 ("In other words, [*DAI I*] challenges the State's choice to plan and administer its mental health services in a manner that results in thousands of individuals with mental

that the state's policy decisions led to individuals with disabilities being provided with services in private facilities was therefore "immaterial."[100] After deciding that Title II applied, Judge Garaufis examined whether adult home residents were in the "most integrated setting."

The parties offered different interpretations of the integration mandate. Defendants asserted that "'under the regulatory definition of 'integration,' the key was '*whether persons with disabilities have opportunities for contact with nondisabled persons*, rather than the number of actual contacts.'"[101] Disability Advocates contended that it was not enough for a setting to be integrated—"providing services in settings with some opportunities for interaction is unlawful if another appropriate setting would provide more opportunities, and the individual in question does not oppose the more integrated setting."[102] The court agreed with Disability Advocates' interpretation of the integration mandate and declared that "[t]he question before the court is whether the large, impacted adult homes at issue enable interactions with non-disabled persons to the fullest extent possible."[103]

In order to assess "whether adult home residents are in the most integrated setting appropriate to their needs," Judge Garaufis considered evidence about the characteristics of the adult homes at issue.[104] Both parties "submitted evidence on the extent to which the adult homes share characteristics of institutions, opportunities for adult home residents to interact with people outside the adult homes, and programs and services offered in the homes."[105] However, Judge Garaufis found that "the parties' expert and fact witnesses ultimately disagree as to whether the homes are akin to 'institutions.'"[106]

In denying New York's motion for summary judgment, Judge Garaufis held that "[a] reasonable finder of fact could conclude that adult homes do not enable residents' interactions with non-disabled individuals to the fullest extent possible."[107] The court noted that it "is undisputed that the adult homes share certain characteristics of medical facilities and inpatient psychiatric facilities."[108] New York itself "ha[d] long

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illness living and receiving services in allegedly segregated settings.").

[100] *Id.* at 317 (citing Rolland v. Cellucci, 52 F. Supp. 2d 231, 237 (D. Mass. 1999)).

[101] *Id.* at 320 (emphasis in the original) (quotations omitted).

[102] *Id.*

[103] *Id.* at 321–22. *See also id.* at 296 (explaining that the term "'impacted' refers to adult homes in which at least 25% or 25 residents, whichever is fewer, have mental disabilities").

[104] *DAI I*, 598 F. Supp. 2d at 297.

[105] *Id. at* 297–98.

[106] *Id.* at 298.

[107] *Id.* at 322. *See also id.* at 330 ("DAI's evidence regarding the institutional nature of adult homes . . . is sufficient to raise an issue of disputed fact").

[108] *DAI I*, 598 F. Supp. 2d at 298. *See also id.* at 329 ("Numerous witnesses, including DAI's and defendants' experts, observed that adult homes share characteristics of psychiatric institutions. . . . [i]n particular, defendants' expert, Alan Kaufman, reported that the adult homes' 'provision . . . of laundry services, food services, housekeeping, and other daily living services-and the resident's lack of choice in performing these tasks him/herself-is characteristic of mental health institutional settings.' He concluded that 'a large [a]dult home setting coupled with a high proportion of residents

characterized adult homes as institutions."[109] Government reports "referred to . . . adult homes as 'de facto mental institutions' and 'satellite mental institutions.'"[110] The court found that the New York's Office of Mental Health's website grouped adult homes with nursing homes and state psychiatric hospitals and referred to them all as "'institutional settings.'"[111] The plaintiff provided evidence that adult homes are "segregated settings akin to institutions that impede residents' interaction with individuals without disabilities."[112] This characterization was particularly true relative to another service-delivery model that New York offered to some people with disabilities—"supported housing."[113]

Supported housing is "an alternative form of housing in which individuals with mental illness live in their own apartments scattered throughout the community and receive supportive services."[114] New York funds the housing and the flexible, individualized services with which the housing is coupled.[115] These services "are designed to be flexible, so that residents may receive help with cooking, shopping, budgeting, medication management and making appointments as needed, but can do all of these things themselves if they are able to."[116]

4. The Trial in **DAI II**

The next phase in the *Disability Advocates, Inc. v. Paterson* lawsuit was an eighteen-day bench trial in 2009 (*DAI II*).[117] Based on the evidence presented at trial, Judge Garaufis concluded that adult homes are "institutions that segregate residents from the community and impede

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with mental illness can artificially limit the interactions of residents and constrict the diversity of friends and acquaintances.'") (internal citations omitted).

[109] *Id.* at 297.

[110] *Id.*(citations omitted).

[111] *Id.*

[112] *Id.* at 322. *See also id.* at 329 ("[*DAI*] has provided evidence that most aspects of the residents' lives take place inside the adult homes, and that the residents are limited in the times they can leave the homes, given rigid schedules for meals, medications, and distribution of personal need allowances. [*DAI*] has provided evidence that the homes limit residents' ability to interact and maintain relationships with non-disabled individuals.") (citations omitted).

[113] *DAI I*, 598 F. Supp. 2d at 322.

[114] *Id.* at 292.

[115] *DAI I* also briefly discusses other types of housing programs that New York provides for individuals with psychiatric disabilities, including: "(1) congregate treatment programs (referred to as group homes or supervised community residences), (2) apartment treatment programs, and (3) community residence single-room occupancy ("CR-SRO") programs." *Id.* at 304. In New York group homes "are single-site facilities that provide meals, on-site rehabilitative services, and 24-hour staff coverage for up to forty-eight people." *Id.* (noting that, in New York, "group homes average 14.6 people per home").

[116] *Id.* at 304.

[117] *DAI II*, 653 F. Supp. 2d at 188–89 ("Twenty-nine witnesses testified, more than three hundred exhibits were admitted into evidence, and excerpts from the deposition transcripts of twenty-three additional witnesses were entered into the record, along with the 3,500 page trial transcript"). The author was part of the team of attorneys who represented Disability Advocates, Inc. during the trial.

residents' interactions with people who do not have disabilities."[118] Before reaching that conclusion, Judge Garaufis was faced with the challenge of defining the term institution.

Judge Garaufis had previously noted that "[n]owhere in Title II, its implementing regulations, or in *Olmstead* is there a definition of what constitutes an 'institution' or 'community-based' setting."[119] Judge Garaufis adopted the definition of institution that was offered during the trial by an expert witness for the plaintiff, Elizabeth Jones.[120]

According to Jones, an institution is "a segregated setting for a large number of people that through its restrictive practices and its controls on individualization and independence limits a person's ability to interact with other people who do not have a similar disability."[121] This definition set forth a number of characteristics that were relevant in evaluating whether a facility is an institution. These characteristics include the size of the facility, its practices, and whom the facility serves. But the definition makes it clear that these characteristics are important primarily because of the impact that they have on whether the facility is segregated, i.e., whether the residents have ample opportunity to interact with people who do not have disabilities.[122]

Judge Garaufis made it clear that "segregation" is the primary characteristic of an institution; he concluded that "the Adult Homes are institutions: *segregated settings that impede residents' community integration*."[123] Using Jones's definition as a framework, Judge Garaufis found that "the overwhelming weight of the evidence demonstrates that Adult Homes are institutions that impede residents' interaction with individuals in the community who do not have disabilities."[124] Adult home residents technically live within communities, but they are not

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[118] *Id.* at 187.

[119] *DAI I*, 598 F. Supp. 2d at 320.

[120] *DAI II*, 653 F. Supp. 2d at 199. In denying defendants' motion in limine "to exclude testimony and opinions of Plaintiff's experts on whether adult home residents are qualified to move to alternative settings," Judge Garafuis described Elizabeth Jones's extensive experience in the mental health field and the methodology that she employed in studying the adult homes at issue in this case. Disability Advocates, Inc. v. Paterson, No. 03-CV-3209 (NGG)(MDG), 2008 WL 5378365, at *7 (E.D.N.Y. Dec. 22, 2008) ("For more than thirty years, Elizabeth Jones has overseen the discharge of thousands of patients from state institutions for people with mental disabilities"); *id.* at *8 (noting that "Ms. Jones spent approximately 175 hours observing and talking with residents of each of the adult homes at issue in this litigation" and that she "reviewed the adult home and mental health program records for approximately 130 residents").

[121] *Id.* at 199 (internal quotations omitted).

[122] In her expert report, Jones wrote the following: "Psychiatric institutions are congregate facilities characterized by restrictive rules and practices that prohibit or severely limit opportunity for interaction with non-disabled individuals." Disability Advocates, Inc. v. Pataki, No. 03-CV-3209 (NGG), 2006 WL 6410335 (E.D.N.Y. Apr. 5, 2006) (Expert Report and Affidavit). Unsurprisingly, this definition of institution is more precise than the one she offered orally during trial. In particular, it avoids one potential ambiguity that is present in her oral definition—because it ends with the words "similar disability," one could interpret her oral definition of institution as not applying to facilities that provide services exclusively to people with disabilities if those people happen to have a variety of different types of disabilities.

[123] *DAI II*, 653 F. Supp. 2d at 202 (emphasis added).

[124] *Id.* at 218. *See also id.* at 199 ("[T]he evidence demonstrates that Adult Homes have the characteristics Ms. Jones described").

integrated into those communities. Defendants' own witness "described the Adult Homes located in Coney Island as 'community-based psychiatric ghettos in which smaller groups of individuals were located in a community, but never helped to become part of it.'"[125]

Judge Garaufis concluded that adult homes are institutions, but he noted that such a conclusion is not necessary for a finding of liability under Title II.[126] In other words, a facility that is not an institution can still violate the integration mandate. But "[w]hether a particular setting is an institution is nonetheless a relevant consideration in determining whether it enables interactions with nondisabled persons to the fullest extent possible."[127] The "institutional qualities of the Adult Homes are relevant to the issue of integration because they influence the extent to which residents can interact with individuals who do not have disabilities."[128]

Judge Garaufis emphasized that "Adult Homes bear little resemblance to the homes in which people without disabilities normally live."[129] In contrast, supported housing provides a home where "people with mental illness live much like their peers who do not have disabilities."[130] The court concluded that "supported housing is a far more integrated setting than an Adult Home."[131] One witness, who moved into supported housing after living in an adult home for sixteen years, summarized the difference between the two settings:

> I can limit what I eat or I can expand my choices. I can have as much salad as I like. I can have as little grease as I like. I can eat foods that were not permitted in the home. . . . I do my own shopping. I do my own food selection. It's free. It's freedom for me. It's freedom. It's being able to actually live like a human being again.[132]

Judge Garaufis concluded that, unlike adult home residents, "[r]esidents of supported housing live and receive services in integrated settings."[133] Because Judge Garaufis found that "virtually all [Adult Home residents] are qualified for supported housing," he concluded that adult home

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[125] *Id.* at 218.

[126] *Id.* at 223 ("Under the applicable standard set forth in the regulations for what constitutes the 'most integrated setting,' a plaintiff need not prove that the setting at issue is an 'institution' to establish a violation of the integration mandate.") (citing Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003)).

[127] *DAI II*, 653 F. Supp. 2d at 223–24.

[128] *Id.* at 224.

[129] *Id.* at 200.

[130] *Id.* at 219 ("[s]cattered site supported housing is a 'normalized' residential setting. In other words, it is a setting much like where individuals without disabilities live. It is a person's home.").

[131] *Id.*

[132] *DAI II*, 653 F. Supp. 2d at 222.

[133] *Id.* at 223 ("Compared to Adult Home residents, residents of supported housing have far greater opportunities to interact with people who do not have disabilities and to be integrated into the larger community").

residents "are not in the most integrated setting appropriate to their needs."[134] He also found that the evidence established that adult home residents were not opposed to "receiving services in a more integrated setting" and that providing services to adult home residents in supported housing would not be "a fundamental alteration of [New York's] mental health service system."[135] Based on these findings, Judge Garaufis concluded that New York "discriminated against [Disability Advocates, Inc.'s] constituents in violation of the integration mandate of the ADA and the Rehabilitation Act."[136]

B. Other Potential Definitions of Institution

In defining the term institution, Judge Garaufis had other options. Drawing on common usage, other federal laws, and international law, this Subpart examines other potential definitions of institution.

1. Common Usage

The definition of institution in the Oxford English Dictionary focuses on the ends or purpose of the relevant entity and the physical location or building where the work is done to achieve that end or purpose:

> An establishment, organization, or association, instituted for the promotion of some object, esp. one of public or general utility, religious, charitable, educational, etc., e.g. a church, school, college, hospital, asylum, reformatory, mission, or the like; as a literary and philosophical institution, a deaf and dumb institution . . . . The name is often popularly applied to the building appropriated to the work of a benevolent or educational institution.[137]

The earliest printed usages of institution in this context are from the eighteenth century, and in those cases the word was used to describe charities.[138] Some early usages specifically pertain to the treatment of

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[134] *Id.* at 311.

[135] *Id.*

[136] *Id.* at 314. As discussed in note 11, *supra*, the Second Circuit recently vacated the trial court's decision on procedural grounds. It did not, however, question Judge Garaufis's findings that adult homes are institutions and that New York State is violating the ADA and the Rehabilitation Act. Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

[137] THE OXFORD ENGLISH DICTIONARY 1046–47 (2d ed. 1989).

[138] *Id.* (quoting from a 1707 sermon, "'Tis not necessary to plead very earnestly in behalf of these Charities . . . These, of which you have had an account, are such Wise, such Rational, such

individuals with disabilities. A 1792 work, for example, is entitled "A Plan of a Charitable Institution intended to be established upon the Sea Coast, for the accommodation of Persons afflicted with such Diseases as are usually relieved by Sea Bathing."[139] In 1864, the *Times of London* wrote about "individual Institutions . . . endowed and voluntary, for every imaginable condition of want or distress."[140]

The current edition of Black's Law Dictionary defines institution somewhat similarly by focusing on the "public character" of the "established organization."[141] The only example used specifically invokes the treatment of people with mental disabilities in facilities: "[a]n established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons."[142] In a prior edition of Black's Law Dictionary, one of the definitions of institution is a "[p]ublic institution," or "[o]ne which is created and exists by law or public authority, for benefit of public in general; *e.g.*, a public hospital, charity, college, university, etc."[143]

When estimates are made of the number of people in the United States who are institutionalized, U.S. Census Bureau statistics are often cited. How the Census Bureau defines the relevant terms is therefore central to our conceptions of the current extent of institutionalization.

For purposes of its decennial survey, the Census Bureau defines "[i]nstitutionalized population" to include "[p]eople under formally authorized, supervised care or custody in institutions at the time of enumeration. Generally, restricted to the institution, under the care or supervision of trained staff, and classified as 'patients' or 'inmates.'"[144] Although it is not immediately apparent from this definition, the Census Bureau does not consider people who live in group homes or halfway houses to be institutionalized. Instead, the Census Bureau makes the normative judgment that "[t]here are two types of group quarters: institutional . . . and non-institutional."[145] As examples of institutional group quarters, the Census Bureau includes "correctional facilities, nursing homes, and mental hospitals."[146] Non-institutional group quarters

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Beneficial Institutions," and, from 1764, a work entitled, "Definitions and Axioms relative to Charity, Charitable Institutions, and the Poor Laws").

[139] *Id.*

[140] *Id.*

[141] BLACK'S LAW DICTIONARY 869 (9th ed. 2009).

[142] *Id.*

[143] BLACK'S LAW DICTIONARY 800 (6th ed. 1990).

[144] U.S. CENSUS BUREAU, GLOSSARY: AMERICAN FACTFINDER, http://factfinder2.census.gov/help/en/american_factfinder_help.htm#glossary/glossary.htm (last visited Feb. 27, 2012) (defining "Institutionalized population").

[145] *See id.* (Definition of "Group Quarters (GQ)"). The Census Bureau's Current Population Survey defines the term "Group Quarters" differently, in part because, "[b]eginning in 1972, inmates of institutions have not been included in the Current Population Survey." U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (CPS): DEFINITIONS AND EXPLANATIONS, http://www.census.gov/cps/about/cpsdef.html (last visited Feb. 27, 2012).

[146] *Id.* U.S. CENSUS BUREAU, GLOSSARY: AMERICAN FACTFINDER, http://factfinder2.census.gov/help/en/american_factfinder_help.htm#glossary/glossary.htm (last visited Feb. 27, 2012) (defining

include: "college dormitories, military barracks, group homes, missions, and shelters."[147]

The Census Bureau's 2009 American Community Survey contains more detailed descriptions of "non-institutional facilities" such as "Emergency and Transitional Shelters (with Sleeping Facilities) for People Experiencing Homelessness";[148] "Group Homes Intended for Adults";[149] and "Residential Treatment Centers for Adults."[150] It is particularly interesting that the Census Bureau does not consider residential treatment centers to be institutions because the people who reside within them seem to fall within the parameters of its definition of an "institutionalized population."[151]

The Census Bureau's definition of institution is different from those used by some advocacy groups. For example, Self-Advocates Becoming Empowered (SABE) believes that "[a]n institution is any facility or program where people do not have control over their lives."[152] Given this focus on the locus of control, SABE contends that any of the following facilities or programs can qualify as an institution: "a private or public institution, nursing home, group[] home, foster care home, day treatment program, or sheltered workshop."[153]

Social-scientific understandings of the nature of an institution influence the common usages of that term. In particular, Erving Goffman's Asylums,[154] which was one of the "seminal works on the 'institutionalization' movement,"[155] has shaped usage of the term

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"Group quarters population" and explaining, "[T]he institutionalized population . . . includes people under formally authorized supervised care or custody in institutions . . . (such as correctional institutions, nursing homes, and juvenile institutions)").

[147] *See id.* (defining "Group Quarters (GQ)"). *See also id.* (defining "[G]roup quarters population" and explaining, "the noninstitutionalized population . . . includes all people who live in group quarters other than institutions (such as college dormitories, military quarters, and group homes)"); *id.* (defining "Noninstitutionalized population" and explaining that it "[i]ncludes all people who live in group quarters other than institutions. Examples: college dormitories, rooming houses, religious group homes, communes, and halfway houses").

[148] U.S. CENSUS BUREAU, 2009 AMERICAN COMMUNITY SURVEY/PUERTO RICO COMMUNITY SURVEY
GROUP QUARTERS DEFINITIONS 6, *available at* http://www.census.gov/acs/www/Downloads/data_documentation/GroupDefinitions/2009GQ_Definitions.pdf (last visited Feb. 27, 2012) ("Facilities where people experiencing homelessness stay overnight.").

[149] *Id.* at 7 ("[G]roup homes are community-based group living arrangements in residential settings that are able to accommodate three or more clients of a service provider. The group home provides room and board and services, including behavioral, psychological, or social programs. Generally, clients are not related to the care giver or to each other").

[150] *Id.* (defining "residential treatment centers for adults" as "[r]esidential facilities that provide treatment on-site in a highly structured live-in environment for the treatment of drug/alcohol abuse, mental illness, and emotional/behavioral disorders. They are staffed 24-hours a day. The focus of a residential treatment center is on the treatment program.").

[151] *See* U.S. CENSUS BUREAU, GLOSSARY, *supra* note 146.

[152] SELF ADVOCATES BECOMING EMPOWERED, POSITION STATEMENT, http://www.sabeusa.org/user_storage/File/sabeusa/Position%20Statements/32_%20Definition%20of%20Institutions.pdf (last visited Feb. 27, 2012).

[153] *Id.*

[154] *See* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES, Anchor Books (1961).

[155] David L. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75

institution.

Goffman wrote that "[e]very institution captures something of the time and interest of its members and provides something of a world for them; in brief, every institution has encompassing tendencies."[156] Goffman used the term "total institution" to describe "closed institutions," or establishments where the "encompassing or total character is symbolized by the barrier to social intercourse with the outside and to departure that is often built right into the physical plant, such as locked doors, high walls, barbed wire, cliffs, water, forests, or moors."[157] This raises an important but somewhat subtle point—not all institutions are total institutions. In other words, a facility may still be an institution and have "encompassing tendencies" even if it is not locked or geographically isolated from the general community.

Goffman emphasized that total institutions create barriers to participation and integration in the community:

> A basic social arrangement in modern society is that the individual tends to sleep, play, and work in different places, with different co-participants, under different authorities, and without an over-all rational plan. The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating these three spheres of life . . . .[158]

The key attribute of total institutions is that they "disrupt or defile precisely those actions that in civil society have the role of attesting to the actor and those in his presence that he has some command over his world—that he is a person with 'adult' self-determination, autonomy and freedom of action."[159] Goffman classified "diverse institutions" such as "mental hospitals, nunneries, military training camps, preparatory schools, concentration camps, orphanages and 'old age homes'" as total institutions.[160]

While some have disputed Goffman's account of total institutions,[161] its influence is significant. One downside of this influence is that some people limit the use of the term institution to the total institutions that Goffman described. To do so is to misread Goffman.

COLUM. L. REV. 897, 897 n.3 (1975).

[156] GOFFMAN, *supra* note 154, at 4.

[157] *Id.*

[158] *Id.* at 5–6.

[159] *Id.* at 43.

[160] Charles W. Lidz & Robert M. Arnold, *Rethinking Autonomy in Long Term Care*, 47 U. MIAMI L. REV. 603, 615 (1993) ("[W]hile nursing homes do not meet every characteristic of a 'total institution,' they still can be classified as such").

[161] *See, e.g.*, Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 653 (2003) (arguing that "Goffman was wrong in his condemnation of institutions").

2. *Federal Law*

A number of federal statutes define the term institution. This Subpart will discuss definitions of the term institution in the Civil Rights of Institutionalized Persons Act and Medicaid and Supplemental Security Income programs that are governed by the Social Security Act.[162]

The Civil Rights of Institutionalized Persons Act (CRIPA) of 1980 gives the Attorney General authority to initiate civil actions when "the Attorney General has reasonable cause to believe that . . . persons residing in or confined to an institution" are being subjected to "egregious or flagrant conditions."[163] CRIPA defines the term institution broadly to include facilities that fall within any of the following five categories:

> (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;
> (ii) a jail, prison, or other correctional facility;
> (iii) a pretrial detention facility;
> (iv) for juveniles—
>> (I) held awaiting trial;
>> (II) residing in such facility or institution for purposes of receiving care or treatment; or
>> (III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or
>
> (v) providing skilled nursing, intermediate or long-term care,

[162] The term institution is defined in other federal statutes and regulations, but an exhaustive analysis is beyond the scope of this Article. For example, the Patient Protection and Affordable Care Act (ACA) includes nursing homes and intermediate care facilities (for persons with mental retardation) "as examples of 'institutional' settings." Leonardo Cuello, *How the Patient Protection and Affordable Care Act Shapes the Future of Home- and Community-Based Services,* 45 CLEARINGHOUSE REV. 299, 301 (citing Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 10202(f)(1), 124 Stat. 119, 926 (2010)). The implementing regulations for 18 U.S.C. § 922(g), which prohibits a person who has been committed to a mental institution from possessing a firearm, define "mental institution" to include "mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital." 27 C.F.R. § 478.11 (2011). In setting forth the criteria for eligibility, the regulations for the Food Stamp program define people as being "residents of an institution" if "the institution provides them with the majority of their meals (over 50 percent of three meals daily) as part of the institution's normal services." 7 C.F.R. § 273.1(b)(7)(vi) (2011). "Individuals who are disabled or blind and are residents of group living arrangements" are generally excluded from this category. 7 C.F.R. § 273.1(b)(7)(vii)(C).

[163] 42 U.S.C. § 1997(a) (2006).

or custodial or residential care.[164]

The Religious Land Use and Institutionalized Persons Act of 2000[165] has the same definition of institution as CRIPA.[166]

CRIPA's definition is somewhat unusual because some of the five categories focus on attributes of the people being served by the facility and others focus on the nature of the services that are provided. For example, under CRIPA, some facilities are institutions simply because they serve people with disabilities or juveniles. Other facilities are institutions, however, because of the nature of the services that they provide—for example, those that provide "skilled nursing, intermediate or long-term care, or custodial or residential care."[167] Who owns or operates the facility is also important because CRIPA covers only those facilities that are "owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State."[168] Private institutions are not covered unless the nexus between the institution and the government is stronger than merely licensing or receipt by the institution of Social Security, Medicare, or Medicaid payments.[169]

The Special Litigation Section of the Civil Rights Division enforces CRIPA. The Special Litigation Section "is generally divided into five areas: (1) Jails and Prisons, (2) Juvenile Correctional Facilities, (3) State or locally-run Mental Health Facilities, (4) State or locally-run Developmental Disability and Mental Retardation Facilities, (5) State or locally-run Nursing Homes."[170] In the 30 years since CRIPA became law, the Special Litigation Section has investigated "more than 430 facilities,"[171] or approximately fourteen per year. Because the focus of CRIPA is to protect the civil rights of people who are institutionalized, the Special Litigation Section enforces "the rights of institutionalized persons with disabilities . . . to be served in the most integrated setting appropriate to their needs."[172]

The Social Security Act also defines the term institution in ways that are significant for potential beneficiaries of public health care programs and income support. The Medicaid program, which Congress enacted in 1965, provides federal funding "for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children."[173] The definition of the term institution is central to whether a

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[164] *Id.* § 1997(1)(B).
[165] 42 U.S.C. § 2000cc-1 (2000).
[166] *Id.* § 2000cc-1(a).
[167] 42 U.S.C. § 1997(1)(B) (2006).
[168] *Id.* § 1997(1)(A).
[169] *Id.* § 1997(2).
[170] U.S. DEP'T OF JUSTICE, SUMMARY OF CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS, http://www.justice.gov/crt/about/spl/cripa.php (last visited Feb. 27, 2012).
[171] *Id.*
[172] *Id.*
[173] 42 C.F.R. § 430.0 (2011). The discussion of Medicaid in this Article is limited to those provisions

facility can be reimbursed for the services that it provides. In particular, the federal government will not provide Medicaid coverage for services provided to (1) "[i]ndividuals who are inmates of public institutions[,]" and (2) "patients in an institution for mental diseases" who are older than 21 and younger than 65.[174]

Medicaid defines an "[i]nstitution for mental diseases" as "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services."[175] This definition has two key elements. First, Medicaid focuses on the number of beds a facility has. If a facility has 16 or fewer beds, it is not an "institution for mental diseases," even if it meets every other criterion. Second, Medicaid focuses on the types of services that the facility provides. A facility is an institution only if it is diagnosing, treating, or caring for people with mental disabilities.[176] The regulations explain that this is determined by the "overall character" of the facility, and not merely "whether or not it is licensed [as an institution for mental diseases]."[177]

"[I]nstitutions for the mentally retarded" are specifically excluded from the definition of "institution for mental diseases."[178] Unlike an institution for mental diseases, the number of beds a facility contains is immaterial to whether it is an institution for the mentally retarded. Instead, an institution for the mentally retarded is defined as follows:

> [A]n institution (or distinct part of an institution) that—
>
> (a) Is primarily for the diagnosis, treatment, or rehabilitation of the mentally retarded or persons with related conditions; and
>
> (b) Provides, in a protected residential setting, ongoing evaluation, planning, 24–hour supervision, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability.[179]

The Supplemental Security Income (SSI) program, which was enacted in 1972, is a federal program that provides cash benefits to individuals who are at least 65 years old or disabled and who have

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that define or have a direct impact on "institutions."

[174] *Id.* § 436.1005(a). Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L. J. 375, 384 n. 46 (1982) ("The 1965 Medicaid Act excluded state mental hospital patients except those over 65; in 1972 the Act was amended to allow benefits to state hospital patients under 21").

[175] 42 U.S.C. § 1396d(i) (2006).

[176] 42 C.F.R. § 435.1010 (2006).

[177] *Id.*

[178] *Id.* These regulations also define a "child-care institution," an "institution for tuberculosis," a "medical institution," a "public institution," and an "institution." An "institution" is "an establishment that furnishes (in single or multiple facilities) food, shelter, and some treatment or services to four or more persons unrelated to the proprietor." *Id.*

[179] *Id.*

limited income and resources.[180] If a person receives SSI, she is also generally eligible to receive Medicaid. However, if an otherwise eligible individual resides in an institution, her SSI benefits might be affected. A person is generally not eligible for SSI benefits if "he is an inmate of a public institution."[181] The definition of public institution generally hinges on at least two aspects of a facility—who operates or controls it and how big it is. A public institution is one that is "operated by or controlled by the Federal government, a State, or a political subdivision of a State such as a city or county."[182] The Social Security Administration (SSA) can determine that a privately-owned group home is a public institution.[183] An institution is public if the government exercises either direct administrative control[184] or indirect administrative control.[185] The fact that a facility is licensed or certified by a government agency or receives government grants does not, in and of itself, make a facility public.[186] The Social Security Act specifically excludes from the definition of public institution any "publicly operated community residence which serves no more than 16 residents."[187]

Somewhat confusingly, the applicable regulations define institution, as opposed to public institution, differently with regard to the relevant size. An institution is "an establishment that makes available some treatment or services in addition to food and shelter to *four or more persons* who are not related to the proprietor."[188] In determining whether an establishment is an institution, the SSA policy dictates that "[i]t is not necessary for each resident to receive any or all of the treatment or services."[189]

The inconsistency regarding the relevant size is compounded by the exception to the eligibility requirements for voluntary residents who pay

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[180] 42 U.S.C. § 1381 (2006).

[181] 42 U.S.C. § 1382(e)(1)(A) (2006). *See* Schweiker v. Wilson, 450 U.S. 221, 224 (1981) ("From its very inception, the [SSI] program has excluded from eligibility anyone who is an 'inmate of a public institution'").

[182] 20 C.F.R. § 416.201 (2011).

[183] *See, e.g.*, HHS v. Chater, 163 F.3d 1129, 1136 (9th Cir. 1998) (affirming the SSA's determination that privately-owned group homes, which housed juvenile offenders who were under the "custody and control" of the state, were "public institutions").

[184] SSA POMS SI 00520.001(C)(2)(a), 2001 WL 1936566 (2009) ("Direct administrative control exists when a governmental unit is responsible for the ongoing daily activities of an institution; e.g., when the institution's staff members are government employees or when a governmental unit, board, or officer has the final authority (whether exercised or not) to hire and fire employees").

[185] *Id.* ("Indirect administrative control exists when a governmental unit has total control of all fiscal decisions (even though it lacks the authority to hire and fire). Indirect administrative control also exists when a governmental unit establishes a contractual arrangement whereby an institution (as a facility) becomes an agent of the governmental unit").

[186] SSA POMS SI 00520.001(C)(2)(c), 2001 WL 1936566 (2009).

[187] 42 U.S.C. § 1382(e)(1)(C) (2006). *See also* 20 C.F.R. § 416.201 (2011) ("Public institution means an institution that is operated by or controlled by the Federal government, a State, or a political subdivision of a State such as a city or county. The term public institution does not include a publicly operated community residence which serves 16 or fewer residents"); 20 C.F.R. § 416.211 (2007) (defining a publicly operated community residence and the sixteen resident threshold).

[188] 20 C.F.R. § 416.201 (2011) (emphasis added).

[189] SSA POMS SI 00520.001(B)(2), 2001 WL 1936566 (2009).

for services in public institutions within Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.[190] In *Levings v. Califano*, the Eighth Circuit focused on two other related characteristics of a potential facility: whether it is voluntary and whether the recipient of services pays for the services the public institution provides.[191] *Levings* focused on the Social Security Act's use of the term inmate and the common usage of that term.[192] The Eighth Circuit held that a person is not "an inmate of a public institution" if she resides within the relevant facility on a voluntary basis and pays for the services with which she is provided.[193]

Subsequently, the SSA amended its regulations to define inmate to include a "resident of a public institution."[194] The Social Security Act's general eligibility exclusion for residents of public institutions does not, however, apply to SSI applicants and beneficiaries within the Eighth Circuit. In the Eighth Circuit, individuals who live in a public facility of any size can still receive SSI as long as they are in the facility voluntarily and pay for the services that the facility provides. There is evidence that this exception has influenced the size of residential programs in these states.[195]

3. International Law

The Convention on the Rights of Persons with Disabilities[196] (CRPD) was adopted on December 13, 2006, during the sixty-first session of the United Nations General Assembly.[197] Pursuant to Article 42, the CRPD and its Optional Protocol was opened for signature as of March 30, 2007.[198] The United States is one of the 153 signatories to the CRPD.[199] Although the United States has not ratified the CRPD, over

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[190] SSAR 88-6(8), 1988 WL 236017 (Oct. 27, 1988).

[191] Levings v. Califano, 604 F.2d 591, 594 (8th Cir. 1979).

[192] *Id.* at 593 (noting that "[o]rdinarily, the term 'inmate' is understood to refer to persons confined in institutions under some form of restraint, not to persons who reside at facilities on a purely voluntary basis").

[193] *Id.* at 594.

[194] 20 C.F.R. § 416.201 (2011).

[195] *See, e.g.*, Jeffrey L. Geller, *Excluding Institutions for Mental Diseases From Federal Reimbursement for Services: Strategy or Tragedy?*, 51 PSYCHIATRIC SERVICES 1397, 1402 (2000), (noting that, as a result of this exception, "community residential programs exceed the 16-bed limit," and that "[i]n Iowa, for example, residential care facilities for persons with mental illness have as many as 80 beds").

[196] G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter CRPD], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/500/79/PDF/N0650079.pdf?OpenElement.

[197] Convention on the Rights of Persons with Disabilities, U.N. GAOR, 61st Sess., 76th plen. mtg. at 5, U.N. Doc. A/61/PV.76 (Dec. 13, 2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/657/07/PDF/N0665707.pdf?OpenElement.

[198] CRPD, *supra* note 196, at art. 42.

[199] Convention and Optional Protocol Signatures and Ratifications, http://www.un.org/disabilities/countries.asp?navid=12&pid=166 (last visited Feb. 18, 2012).

100 countries have.[200] The CRPD's dictates therefore represent "the overwhelming weight of international opinion."[201]

The purpose of the CRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[202] "Discrimination" is broadly defined to include "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[203] The CRPD specifically states that the denial of a request for a reasonable accommodation constitutes discrimination.[204] A "reasonable accommodation" is defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[205]

The CRPD does not define the word institution, but it addresses the subject of institutionalization. The CRPD prohibits "torture or . . . cruel, inhuman or degrading treatment or punishment."[206] States parties are required to "take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities . . . from being subjected to torture or cruel, inhuman or degrading treatment or punishment."[207] The CRPD also repeatedly emphasizes the right that people with disabilities have to liberty and to participate and be included in the community.[208]

The right to participation and inclusion in the community is paramount. The CRPD defines the term "disability" as the result of "the interaction between persons with impairments and attitudinal and

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[200] *Id.*

[201] *Cf.* Roper v. Simmons, 543 U.S. 551, 578 (2005) (acknowledging "the overwhelming weight of international opinion against the juvenile death penalty" in holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

[202] CRPD, *supra* note 196, at art. 1.

[203] *Id.* at *art.* 2.

[204] *Id.*

[205] *Id.*

[206] *Id.* at art. 15 , ¶ 1.

[207] CRPD, *supra* note 196, at art. 15 ¶ 2.

[208] Prior to the CRPD, "no specific binding international human rights convention exist[ed] to protect explicitly the right of people with disabilities to live in the community or to be free from indeterminate institutionalization." ERIC ROSENTHAL & ARLENE KANTER, DISABILITY RIGHTS EDUC. & DEFENSE FUND, THE RIGHT TO COMMUNITY INTEGRATION FOR PEOPLE WITH DISABILITIES UNDER UNITED STATES AND INTERNATIONAL LAW (2010), *available at* http://www.dredf.org/ international/paper_r-k.html. However, "[r]eferences to community integration are found in Article 23 of the Convention on the Rights of the Child, and in instruments and documents of the UN General Assembly such as the Declaration on the Rights of Mentally Retarded Persons, the 1991 Principles for the Protection of Persons with Mental Illness, the 1993 Standard Rules on Equalization of Opportunities for Persons with Disabilities, and General Comment 5 to the International Convention on Economic, Social and Cultural Rights, as well as in the Charter of Fundamental Rights of the European Union." *Id.* (citations omitted).

environmental barriers that hinders their full and effective participation in society on an equal basis with others."[209] This is just one of the four times in the preamble alone that the CRPD emphasizes the importance of participation.[210] The word participation, or participate, appears a total of 25 times within the CRPD. One of the CRPD's "general principles" is "[f]ull and effective participation and inclusion in society."[211] The importance of another general principle—"accessibility"—is directly tied to independent living and full participation in the community.[212] Article 24 also emphasizes that the right to education is essential to "[enable] persons with disabilities to participate effectively in a free society."[213] People with disabilities have the right to participate on an equal basis in "political and public life"[214] and "cultural life, recreation, leisure and sport."[215] Michael Stein and Janet Lord have written that "aspects of the Convention . . . are especially notable for their substantive and procedural inclusion of persons with disabilities and reflective of a deeply participatory model of justice."[216]

Article 19 states that "all persons with disabilities" have the right "to live in the community."[217] States parties are required to "take effective and appropriate measures to facilitate full enjoyment . . . of this right."[218] In particular, states parties are required to ensure that:

> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; (b) Persons with disabilities have access to a range of in-home, residential and other

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[209] CRPD, *supra* note 196, at pmbl. (e). *See also id.*, art. 1 ("Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others").

[210] *Id.* at pmbl. (e), (k) ("[P]ersons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world"); *id.* at pmbl. (m) ("[T]he promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty"); *id.* at pmbl. and (y) ("[A] comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres . . . .").

[211] CRPD, *supra* note 196, at art. 3.

[212] *See id.* at arts. 3, 9.

[213] *Id.* at art. 24(1)(c). *See also id.* at art. 24(3) ("States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community").

[214] *Id.* at art. 29.

[215] CRPD, *supra* note 196, at art. 30.

[216] Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 168 (2008).

[217] CRPD, *supra* note 196, at art. 19. The words "community" and "communities" are used repeatedly throughout the CRPD, appearing a total of 16 times.

[218] *Id.*

> community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; [and] (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.[219]

Article 25 also requires states parties to "[p]rovide . . . health services [to people with disabilities] as close as possible to [their] own communities."[220] The CRPD thus implicitly defines institution in the negative; it is *not* "living independently and being included in the community."[221]

To facilitate "maximum independence" and "full inclusion and participation in all aspects of life," states parties are required to "organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services."[222] The CRPD specifies that "habilitation and rehabilitation services" must be voluntary and "based on the multidisciplinary assessment of individual needs and strengths."[223]

Article 14 of the CRPD requires states parties to "ensure that Persons with disabilities, on an equal basis with others[,] [e]njoy the right to liberty and security of person."[224] States parties must also ensure that people with disabilities "[a]re not deprived of their liberty unlawfully or arbitrarily . . . and that the existence of a disability shall in no case justify a deprivation of liberty."[225] Article 14 requires that any deprivation of liberty is "in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."[226] One commentator has concluded that, although the CRPD text "neither expressly prohibits nor permits forced intervention," the ambiguity should be construed in light of the complete document's emphasis on the dignity and autonomy of persons with disabilities.[227]

Meghan Flynn has concluded that, "[t]ogether, these provisions guarantee persons with disabilities rights to enjoy freedom from institutionalization and live in the community setting of their choice."[228]

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[219] *Id.*
[220] *Id.* at art. 25(c).
[221] *Id.* at art. 19(a).
[222] CRPD, *supra* note 196, at art. 26.
[223] *Id.* at art 26(1)(a)–(b).
[224] *Id.* at art. 14(1)(a).
[225] *Id.* at art. 14(1)(b).
[226] *Id.* at art. 14(2).
[227] Amita Dhanda, *What does the Convention on Rights of Persons with Disabilities Promise to Persons with Psychosocial Disability?*, AAINA (Ctr. for Advocacy in Mental Health, Pune, Maharashtra, India), Nov. 2006, at 17, 19.
[228] Meghan Flynn, Olmstead *Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities*, 28 LAW & INEQ. 407, 424 (2010).

Similarly, Michael Perlin concludes that, to comply with the CRPD, a domestic mental health law must address the "Failure to Provide Humane Care to Institutionalized Persons" and the "Lack of Coherent and Integrated Community Programs as an Alternative to Institutional Care."[229]

IV. IMPLICATIONS FOR FUTURE *OLMSTEAD* LITIGATION

The definitions of institution found in *DAI I*, common usage, federal law, and international law shed light on the main harm that unnecessary segregation inflicts. Different definitions of institution emphasize different characteristics. But characteristics such as who owns the facility, how many residents there are, and what services are provided, are not intrinsically significant. Instead, the definitions appear to use these characteristics as objective proxies for a more subjective inquiry: are the individuals with disabilities who are being served unnecessarily segregated from the community?

By focusing on this question, the future of *Olmstead* litigation becomes more apparent. Some advocates and individuals with disabilities have begun looking beyond paradigmatic institutions—e.g., state mental hospitals, nursing homes, and intermediate care facilities—to examine whether other residential settings such as homeless shelters, board and care homes, and group homes are providing services in the most integrated setting. But this inquiry is not limited to residential facilities. Advocates and individuals with disabilities are also asking whether other services such as sheltered workshops, child protective services, assisted outpatient treatment, guardianship, and elections are being operated in a manner that violates *Olmstead.*

A. Residential Settings Being Questioned

Advocates and individuals with disabilities are increasingly scrutinizing whether segregated residential settings violate *Olmstead.* Challenges to institutionalization no longer focus only on state hospitals, nursing homes, and intermediate care facilities. Now, segregated "community" settings—such as homeless shelters, board and care homes, and group homes—are increasingly being examined to determine whether they are providing services in the most integrated setting. As Susan Stefan has written:

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[229] Michael L. Perlin, *International Human Rights Law and Comparative Mental Disability Law: The Universal Factors*, 34 SYRACUSE J. INT'L L. & COM. 333, 343, 349 (2007).

> [I]n the decade following *Olmstead*, it became increasingly clear that many state mental health and developmental disability systems operated within a framework that offered "community" services in a context of control and segregation, even after discharge from formal institutional settings. People who lived in what was euphemistically called "the community" still lived regimented lives with other disabled people, had little control over the most mundane decisions of their lives, and had little or no interaction with non-disabled people.[230]

While the policies of some of these facilities have already drawn scrutiny under the Fair Housing Act,[231] they are increasingly being looked at through the lens of the ADA's integration mandate.

Approximately 200,000 Americans reside in homeless shelters.[232] The similarities between homeless shelters and paradigmatic institutional settings have long been recognized.[233] Advocates and individuals with disabilities are now examining government policies and procedures that funnel people who are homeless with disabilities, or who have children with disabilities, into segregated shelters. In New York, for example, there is only one domestic violence shelter that is available for women or families with disabilities.[234] Discriminatory admission policies commonly lead to the segregation of people who are homeless and have physical or mental disabilities.[235] Although the ADA includes shelters as an example of public accommodations,[236] which are covered by Title III, it is clear that shelter systems are government programs that are subject to Title II and its integration mandate. These policies are subject to

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[230] Susan Stefan, *Beyond Residential Segregation: The Application of* Olmstead *to Segregated Employment Settings*, 26 GA. ST. U. L. REV. 875, 892 (2010).

[231] *See* Cmty. House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007).

[232] U.S. CENSUS BUREAU, *supra* note 14 (showing that 209,325 people reside in "[e]mergency and transitional shelters (with sleeping facilities) for people experiencing homelessness"). *But see* U.S. DEPT. OF HOUS. AND URBAN DEV., 2010 ANN. HOMELESS ASSESSMENT REP. 5 (2010), *available at* http://www.hudhre.info/documents/2010HomelessAssessmentReport.pdf (estimating that approximately 400,000 homeless people "sleep[] either in an emergency shelter or a transitional housing program").

[233] *See, e.g.*, Rhoden, *supra* note 174, at 376 ("The New York City Men's Shelter resembles nothing so much as a 19th century insane asylum. A large room off the lobby is filled with over 100 men. Some lie curled up on the dirty floor; a few are in various stages of undress; others gesture wildly in the air talking to themselves. Some just sit staring into space. The stench of urine and unwashed bodies is strong.") (quoting CINDY LYNN FREIDMUTTER, OFFICE OF THE PRESIDENT OF THE NEW YORK CITY COUNCIL, FROM COUNTRY ASYLUMS TO CITY STREETS: THE CONTRADICTION BETWEEN DEINSTITUTIONALIZATION AND STATE MENTAL HEALTH FUNDING PRIORITIES 30 (1979)).

[234] *See* Fred Scaglione, *Barrier Free Living: When Disability Isn't the Only Challenge*, N.Y. NONPROFIT PRESS, Dec. 2009, at 10, *available at* http://www.nynp.biz/current/archives/nynparchives/1209_December_2009_Edition.pdf (noting that Barrier Free Living's "Freedom House is the sole emergency domestic violence shelter for women or families with disabilities").

[235] *See* Greg C. Cheyne, Comment, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, 1 U. CHI. LEGAL F. 459, 463 (2009) ("Social scientists, though rarely targeting such policies for study, have long documented the existence of facially discriminatory policies in homeless shelters with respect to . . . disability").

[236] 28 C.F.R. § 36.104 (2011).

scrutiny under *Olmstead.*

Similarly, the assumption that board and care homes and group homes are community-based facilities is also increasingly being questioned. Board and care homes and group homes have at times been criticized "for providing substandard living conditions and inadequate treatment."[237] But, in the wake of *Olmstead*, some began to point out that "the inappropriate maintenance of a person with disabilities in a custodial group home rather than in a less restrictive independent community setting would be contrary to *Olmstead*."[238] The question is whether people who live in board and care homes and group homes could, if they were provided with the opportunity, be better integrated in the community:

> In a society that is moving (if, by some accounts, too slowly) away from housing people with disabilities in traditional institutions, it would be easy to miss the full importance of *Olmstead* and its requirement that states work toward providing services in the most integrated setting appropriate for each individual. However, when one acknowledges the unlawful discrimination that occurs when people spend decades living in settings that amount to "mini-institutions," and as a result miss the opportunity to live fuller, more normal lives, the scope and potential longevity of *Olmstead* come into focus. Even if every large state institution were to eventually close its doors, *Olmstead* would provide the standard for when states must provide people with disabilities more integrated settings, both for residential and day services, in which to live their lives.[239]

Approximately 300,000 Americans live in group homes for adults.[240] There are over 2,000 state-run group homes in New York alone.[241] With between four and eight residents, these homes are small in comparison to state hospitals and nursing homes. In 2011, an abuse scandal involving New York's group homes provided a chilling reminder of the costs to human dignity and lives that even small facilities can exact from their residents.[242] The allegations of physical and sexual

[237] Rhoden, *supra* note 174, at 388.

[238] John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 HOUS. L. REV. 1231, 1251 (2003) (stating, in addition, "[t]he choice among services for people with major mental illness or cognitive impairment is not binary--in the institution or out. Rather, people with mental disabilities, once they are deinstitutionalized, can be more or less integrated into society.").

[239] Megan Chambers, Comment, *Integration as Discrimination Against People with Disabilities?* Olmstead's *Test Shouldn't Work Both Ways,* 46 CAL. W. L. REV. 177, 207–08 (2009).

[240] U.S. CENSUS BUREAU, *supra* note 14 (showing that 304,688 people reside in "[g]roup homes intended for adults."). As discussed above, the Census Bureau does not consider group homes for adults to be "institutional" facilities. *See supra* Part III.B.1.

[241] Danny Hakim, *At State-Run Homes, Abuse and Impunity*, N.Y. TIMES, Mar. 12, 2011, http://www.nytimes.com/2011/03/13/nyregion/13homes.html?scp=1&sq=At%20State-Run%20Homes,%20Abuse%20and%20Impunity&st=cse.

[242] *Id.*

abuse, as well as the initial responses to those allegations, are reminiscent of the systemic problems that plagued larger institutions: "State records show that of some 13,000 allegations of abuse in 2009 within state-operated and licensed homes, fewer than 5 percent were referred to law enforcement."[243] The comments of one group home worker who was interviewed by *The New York Times* compare working in a group home to working in a prison: "'The job is really stressful . . . . You have residents that you work with that are attacking you, they have hepatitis, they have things that can be transferred. They bite you, they hit you, they verbally abuse you. It's almost like working in a prison.'"[244] If working in one of these group homes is like working in a prison, it seems appropriate to ask whether living in one of these group homes is like living in a prison. Unsurprisingly, based on accounts of group homes such as this one, advocates are increasingly questioning whether group homes—even those with as few as four residents—are institutions.[245]

B. Other Services Being Questioned

The next frontier in *Olmstead* litigation is the application of its principles to non-residential services. In particular, advocates and individuals with disabilities are bringing or contemplating challenges to the segregated nature or the segregating effect of other government services such as sheltered workshops, child protective services, assisted outpatient treatment, guardianship, and elections.[246]

Sheltered workshops are one of the state-funded services that are being scrutinized for unnecessary segregation. Although they have been criticized as being expensive and for paying less than minimum wage, sheltered workshops are still prevalent. In New York, for example,

> [t]here are currently 52,229 individuals enrolled in segregated

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[243] *Id.*

[244] *Id.* The alleged behavior by residents could be interpreted as being a reaction to the setting in which they are being held.

[245] *See, e.g.*, Comments from Bazelon Center for Mental Health Law on Proposed Rule for the "Medicaid Program: Community First Choice Option" to the Department of Health and Human Services (April 28, 2011), *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=4eBX2HXEfE4%3D&tabid=349 ("Additionally, we believe that institutions other than nursing facilities, IMDs or ICF-MRs should be included among the list of institutions from which individuals must transition in order for transition costs to be provided. Many individuals with serious mental illness who are currently placed in smaller institutional settings, such as adult homes or large group homes, could, with assistance, successfully transfer to independent supported housing. . . . Paragraph (b)(1) should be amended to add 'adult homes for people with mental illness and group homes with over four residents' to the list of institutions so that transition costs for people in these settings moving into independent supported housing can be covered").

[246] *See e.g.*, Michael L. Perlin, *What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom: Are the ADA (and* Olmstead v. L.C.*) Anything More Than "Idiot Wind?,"* 35 U. MICH. J.L. REFORM 235, 255 (2002) ("[Q]uestions of institutionalization and deinstitutionalization are far broader than simply inquiries into whether a patient is 'behind the wall' . . . [but] touch on virtually every aspect of interpersonal interaction.").

> employment programs, including sheltered workshops, through OMRDD [Office of Mental Retardation and Developmental Disability] alone, with a total cost to the state of more than $1 billion. The cost per person in a segregated program is $21,309 compared to $5,291 per person in supported employment.[247]

Even before *Olmstead*, sheltered workshops were criticized for "look[ing] like an institution or a warehouse."[248] One former participant in a sheltered workshop eloquently pointed out the adverse effect that shelter workshops have on the opportunity for community participation: "[i]f people work out in the community, they develop a wider range of contacts, unlike going to a segregated building every day."[249] These criticisms have been heeded in Vermont, which "has prohibited the use of state funds for sheltered workshops."[250]

Stefan has argued that *Olmstead* and *Disability Advocates, Inc.* "amply support the proposition that the ADA prohibits unjustified isolation of people with disabilities in segregated sheltered workshops when those people would prefer to work in the community with the aid of supported employment services and the states currently fund programs that would enable them to work in the community."[251] She suggests that the integration mandate could be invoked to force states that currently provide vocational assistance to people with disabilities in sheltered workshops "to convert entirely to integrated supported employment."[252] At least two such cases have already been brought, including one class action that was recently filed on behalf of thousands of people with disabilities in Oregon who "are unnecessarily segregated because of [the Oregon Department of Human Services's] over-reliance on sheltered workshops, and its failure to timely develop and adequately fund integrated employment services, including supported employment programs."[253]

Stefan has also been at the forefront of examining the applicability of the integration mandate to the child protective services that public entities provide.[254] Stefan points out that providing a family that is being

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[247] Stefan, *supra* note 230, at 905 (quoting *2009 Disability Priority Agenda*, N.Y. ASS'N ON INDEP. LIVING, http://www.nysilc.org/caucus-bu/2009Disab-Priority-Agenda5-5-09.pdf (last visited March 9, 2012)).

[248] Chambers, *supra* note 239, at 209 n.150 (quoting MICHAEL J. KENNEDY, CTR. ON HUMAN POL'Y, SYRACUSE UNIV., FROM SHELTERED WORKSHOPS TO SUPPORTED EMPLOYMENT (1988), http://thechp.syr.edu/kdywork.htm).

[249] *Id.*

[250] Stefan, *supra* note 230, at 878.

[251] *Id.* at 879.

[252] *Id.* at 880.

[253] Complaint at paragraph 2, Lane et al. v. Kitzhaber et al., No. CV12-138 ST (D. Ore. filed Jan. 25, 2012). *See also* Schwartz v. Jefferson County, No. 2004CV000091 (Jefferson County Cir. Ct. Feb. 24, 2004).

[254] *See* Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L & POL'Y 135 (2008).

affected by disability with appropriate services "greatly reduce[s]" the likelihood that one of its members "will be institutionalized or placed out of the home in segregated residential placements."[255] In the past, parents with disabilities have generally been unsuccessful when they have invoked the ADA to challenge a public entity's termination of their parental rights. Stefan suggests that a systemic case that challenges, for example, "a statute precluding parents with psychiatric disabilities from receiving reunification services provided to other parents" could be successful if it emphasized that "one or more family members is at risk of institutionalization because of the absence of family-based services that the mental health agency has reason to know that the family needs."[256] In 2011, a settlement was reached in *Katie A. v. Bontá*, "that will provide intensive home- and community-based mental health services for California children in foster care or at risk of removal from their families."[257]

Advocates are also scrutinizing the impact that the administration of assisted outpatient treatment programs has on institutionalization. In New York, an organization brought a class action alleging that "Kendra's Law"[258] violates, *inter alia*, the ADA.[259] Kendra's Law "provides for court ordered "assisted" outpatient mental health treatment ('AOT') for persons who have been hospitalized twice within the past three years or who have acted violently towards themselves or others as a result of mental illness."[260] The class action was brought on behalf of individuals with disabilities who face involuntary hospitalization because they do not meet the eligibility requirements for assisted outpatient treatment.[261] The plaintiffs alleged that, "by failing to authorize outpatient services to individuals who do not satisfy the criteria for [assisted outpatient treatment]," individuals with psychiatric disabilities faced unnecessary segregation in inpatient settings.[262]

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[255] *Id.* at 166 ("This article argues that keeping families tougher is, necessarily, a key component of the integration mandate."). *See also id.* at 140 ("This article argues that family integration is not only a natural corollary to community integration, it is a fundamental component of community integration").

[256] *Id.* at 174.

[257] Katie A. v. Bonta, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, http://www.bazelon.org/In-Court/Current-Cases/Katie-A.-v.-Bonta.aspx (last visited Feb. 28, 2012); *see also* Katie A. v. Bontá, No. CV02-5662 (C.D. Cal. Sept. 27, 2011) (Settlement Agreement), *available at* http://www.bazelon.org/LinkClick.aspx?fileticket=iyiXUKcEQH0%3d&tabid=186.

[258] N.Y. Mental Hygiene Law § 9.60 (2010).

[259] Mental Disability Law Clinic v. Hogan, No. CV-06-6320 (CPS)(JO), 2008 WL 4104460 (E.D.N.Y. Aug. 29, 2008) (partially denying defendants' motion to dismiss), *dismissed on other grounds by* Order (E.D.N.Y. April 23, 2012). Although this lawsuit portrays assisted outpatient treatment, which entails forced medication, as a desired benefit, other advocates have questioned whether that benefit comes at too high a cost to the autonomy of individuals with disabilities. *See, e.g.*, Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1044 (2000).

[260] Mental Disability Law Clinic, 2008 WL 4104460, at *1.

[261] *Id.* at *3.

[262] *Id.* at *15.

Guardianship programs have also been criticized as potentially violating the integration mandate.[263] Leslie Salzman has made a compelling case that substituted decision making systems "violate the [ADA]'s mandate to provide services in the most integrated and least restrictive manner."[264] Although people who have guardians might "reside in the community and are not physically segregated by the walls of an institution, guardianship creates a legal construct that parallels the isolation of institutional confinement."[265] Like institutionalization, guardianship entails the loss of civic participation—"when the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others."[266] There is evidence that guardianship often leads to institutionalization.[267] Salzman emphasizes that less segregated options than guardianship are used by other countries and that the CRPD dictates supported—as opposed to substituted—decision making.[268]

Civic and political participation was also at the heart of a class action that people with mobility disabilities brought against the Philadelphia Board of Elections.[269] The lawsuit claimed that the Board of Elections violated the ADA and Rehabilitation Act "by denying them equal and integrated access to neighborhood polling places in Philadelphia."[270] This lawsuit relied on evidence that people with disabilities "have been prevented from voting, or have been able to vote only with difficulty or with assistance, because their assigned polling places were inaccessible."[271] After finding that "the evidence on the record of this Motion demonstrates that there are genuine issues of material fact as to whether Defendants select inaccessible polling places and whether they give priority to providing access to voting in the most integrated settings," the court denied defendant's motion for summary judgment on the plaintiffs' integration mandate claim.[272] The

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[263] *See generally* Salzman, *supra* note 87.

[264] *Id.* at 157.

[265] *Id.* at 194.

[266] *Id.*

[267] *See* Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315, 341 (2009) ("Guardianship is certainly part of the process that results in a person being institutionalized in a nursing home, and perhaps in some cases at least part of the cause").

[268] Salzman, *supra* note 87, at 161 ("[A] move to a supported decision-making paradigm is consistent with the ADA, as well as with the recently adopted U.N. Convention on the Rights of People with Disabilities"); *see* Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law*, 25 GA. ST. U. L. REV. 527, 563 (2009) (citing CRPD, Art. 12).

[269] Kerrigan v. Phila. Bd. of Election, No. 07-687, 2008 WL 3562521, at *9 (E.D. Pa. Aug. 14, 2008) ("In their sixth claim, Plaintiffs maintain that Defendants have violated the ADA, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d), and the [Rehabilitation Act], 29 U.S.C. § 794 and 28 C.F.R. § 41.51(d), by failing to provide services in the most integrated setting possible.").

[270] *Id.* at *1.

[271] *Id.* at *6.

[272] *Id.* at *19.

exclusionary aspects of the voting system that are being challenged in this case are not, by any means, unique to Philadelphia.

V. CONCLUSION

Despite decades of deinstitutionalization, paradigmatic institutions persist. Millions of individuals with disabilities are still segregated from the community in psychiatric hospitals, nursing homes, and intermediate care facilities. But focusing on institutions alone understates the problem and potentially complicates the solution:

> The facts of *Olmstead* specifically required the Court to decide when the ADA's proscription of discrimination in the form of unjustified segregation requires a state to move a person out of the most segregated setting possible—an "institution"—and into some less segregated setting. But whether a setting is "segregated" or "integrated" is not an all-or-nothing inquiry. Integration is not "binary;" "community-based" services fall everywhere along the spectrum in terms of how integrated they really are. *Olmstead* on its facts moves states toward minimizing the most obvious and egregious form of unnecessary segregation. However, its underlying principles also obligate a state to move an individual further along the spectrum. The "integration regulation" relied upon by the Court requires that services be provided, not merely "outside of traditional institutions," but "in the most integrated setting appropriate" to an individual's needs.[273]

Different definitions of institution focus on different attributes that might be present in a given facility. The presence or absence of these characteristics is important, however, mainly for the information it gives us about whether individuals with disabilities are being provided with services that are unnecessarily segregated from the community. Understanding this is the key to future *Olmstead* litigation. Advocates and individuals with disabilities are looking beyond "total institutions" to examine whether other residential settings such as homeless shelters, board and care homes, and group homes are providing services in the most integrated setting. They are also asking whether other services such as sheltered workshops, child protective services, assisted outpatient treatment, guardianship, and elections are being provided in a manner that violates *Olmstead*. The answers to these questions will shape future challenges to institutionalization.

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[273] Chambers, *supra* note 239, at 205.

Notes

Classroom to Courtroom: How Texas's Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eighth Amendment

Therese Edmiston*

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I. INTRODUCTION

In Texas, the courthouse is the new principal's office.[1] Until recently, two Texas students who poured milk on each other in the lunchroom might have found themselves in the principal's office or in detention. But today, these students might receive Class C misdemeanor tickets and find themselves in municipal or justice court, facing high fines and criminal records.[2]

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[1] Brian Thevenot, *School District Cops Ticket Thousands of Students*, TEXAS TRIBUNE, June 2, 2010, http://www.texastribune.org/texas-education/public-education/school-district-cops-ticket-thousands-of-students/.

[2] This scenario is based on an actual ticketed incident. *See* Donna St. George, *In Texas Schools, a Criminal Response to Misbehavior*, WASH. POST, Aug. 21, 2011, http://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIQA5EG9UJ

Since the 1990s, school-based policing has rapidly expanded in Texas. Because of the ready availability of school police, Texas school districts are increasingly relying on Class C misdemeanor ticketing to address nonviolent, low-level student misbehavior. Because ticketed students face severe criminal consequences, the increase in ticketing means an increased number of students are fast-tracked into the criminal justice system. Worse, because school districts define their own ticketing practices, students in some school districts and students of minority backgrounds are disproportionately ticketed and pushed into the criminal justice system.

Meanwhile, school districts are not collecting data as they ticket; teachers are not trained in the criminal consequences of ticketing, and school police are not trained to work with youth. And it is not just the students who suffer. Texas municipal and justice courts increasingly find themselves overburdened with criminal cases that probably should have been handled in school.

Other states have similar practices, whereby school police refer misbehaving students to juvenile courts. However, Texas is the only state to issue in-school tickets that require students to appear in criminal court. The fact that Texas administers uniquely severe criminal punishment for low-level, in-school misdemeanors could qualify as an Eighth Amendment violation. For this reason, reduced and fairer ticketing practices are not just possible, but imperative.

Part II of this Note looks back at the historical development of Texas's ticketing problem and examines the scope of the problem. It also discusses the criminal consequences that accompany a ticket; the discretionary manner in which schools and police issue tickets; the fact that tickets are generally issued for low-level misbehavior; ineffectiveness at reducing student misbehavior; and the impact of ever-increasing ticketing on state criminal courts.

Part III looks at similar practices in other states. It examines school-based ticketing practices in Colorado, where tickets generally send students to juvenile (not criminal) court; the state legislative task force designed to address the state's increasing ticketing problem; and a restorative justice solution engineered in Denver. It also examines school-based referrals to juvenile court in Georgia, Alabama, and Indiana, and the graduated sanctions solution engineered in Clayton County, Georgia, and replicated elsewhere.

Part IV looks to the courts and the likely outcome of an Eighth Amendment suit against Texas public schools. The section argues that a federal court is likely to find that Texas's ticketing practice constitutes cruel and unusual punishment.

Part V looks forward to potential legislative, judicial, and school-

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based solutions to Texas's ticketing problem. Many of these solutions are modified versions of solutions that are already working in Colorado, Georgia, Alabama, and Indiana.

II. LOOKING BACK: TEXAS'S TICKETING PROBLEM

A. The Development of the Ticketing Problem

In the late 1980s, juvenile crime spiked.[3] By the 1990s, national fears about juvenile crime and violence had surged too, fueled by John DiIulio's warnings about an impending explosion of youth crime.[4] According to DiIulio, juveniles raised by poor, drug-addicted, criminal adults were poised to become "superpredators." These juveniles would commit more vicious crimes with higher frequency than past generations of juvenile offenders.[5] Other academics agreed, particularly James Fox and James Wilson.[6]

Today, much of this group's work on juvenile superpredators is regarded as "racist speculation about criminality" employed "to keep the suburbs afraid of young men of color in the inner cities."[7] In fact, contrary to DiIulio's predictions, youth crime began declining in 1992.[8] From 1992 to 2002, the rate of violent crime in American schools dropped by 50%.[9] However, media reports ensured that public fears persisted. For example, in a 1996 column, Susan Estrich warned, "Don't be fooled by the rosy numbers in this week's [juvenile] crime reports . . . . The tsunami is coming."[10] In that same year, more than two-thirds of media violence stories centered on youth, although adults over the age of twenty-five committed 57% of violent crimes.[11] Fears about juvenile violence, and particularly juvenile violence in schools, climaxed with the 1999 Columbine High School massacre.[12]

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[3] Elizabeth A. Angelone, Comment, *The Texas Two Step: The Criminalization of Truancy Under the Texas "Failure to Attend" Statute*, 13 SCHOLAR 433, 445 (2011).

[4] John J. DiIulio, Jr., *The Coming of the Superpredators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

[5] *Id.* at 25–26.

[6] Robin Templeton, *Superscapegoating*, FAIRNESS & ACCURACY IN REPORTING, http://www.fair.org/index.php?page=1414&printer_friendly=1 (last visited Oct. 21, 2011) (quoting Susan Estrich, Op-Ed, USA Today, May 9, 1996).

[7] *Id.*

[8] DEBORAH FOWLER ET AL., TEXAS APPLESEED, *Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Public Schools*, 39 (2010), *available at* http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf.

[9] ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005), *available at* http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

[10] Templeton, *supra* note 6.

[11] *See id.*

[12] *See* Ryan Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal*

Though unfounded, the fears about juvenile superpredators and youth crime in schools led Texas (and many other states) to adopt a "get tough" approach with youth crime and school misbehavior.[13] In 1995, Texas legislators adopted Chapter 37 of the Education Code, which mandated a law-and-order approach to school discipline.[14] Among other provisions, Chapter 37 enacted zero-tolerance policies and redefined several types of school misbehavior as Class C misdemeanors.[15] Most significantly, Chapter 37 authorized school districts to employ security personnel, called School Resource Officers (SROs), or to commission their own police forces.[16]

Today, juvenile crime continues to decline, and Texas schools are generally safe.[17] Less than 1% of Texas students were disciplined for conduct that could be punishable as a crime during the 2008–2009 school year.[18] Safe schools are not just a statewide trend, but also a national trend. A recent FBI study concluded that only 3.3% of reported crime occurs at school. Moreover, students are fifty times more likely to be victims of homicide away from school than at school.[19] Some proponents of Texas's "get tough" approaches argue that crime in schools, and juvenile crime in general, is decreasing *because* of these measures. However, the data show similarly low levels of crime in Texas schools both before and after the implementation of "get tough" approaches, including school policing.[20] Nevertheless, Texas schools continue to take full advantage of Chapter 37's authorization to employ or commission police officers.

B. School-Based Policing

School-based policing is the fastest growing area of law enforcement.[21] Today, police patrol the hallways, lunchrooms, and school grounds of most Texas public schools.[22] Generally, small school districts in less populated regions employ SROs, and large independent

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Cases, SEC. REP. (Juv. L. Sec., St. B. Tex., Austin, Tex.), Dec. 4, 2010, at 13, 14 (describing the immediate response to Columbine).

[13] *Id.* at 13.

[14] *Id.*

[15] *See, e.g.*, TEX. EDUC. CODE ANN § 37.124 (West 2006 & Supp. 2011) (defining disruption of class as a Class C misdemeanor).

[16] *Id.* § 37.081.

[17] FOWLER, *supra* note 8, at 23–24.

[18] *Id.* at 17.

[19] *Id.* at 27–28.

[20] *Id.* at 67.

[21] Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009).

[22] FOWLER, *supra* note 8, at 2.

districts establish their own police departments.[23]

1. School Resource Officers

The first school-based policing model to develop across the United States was the SRO model. A school district using this model contracts with a local law enforcement agency to assign one or more officers to the district.[24] As the public grew increasingly concerned about juvenile superpredators and school crime in the 1990s, federal funding became available for SRO programs.[25] Federal surveys estimate that by 1996, about 19% of the nation's school districts benefitted from SROs, and by 2005, 47.8% relied on SROs.[26]

Though an SRO's role varies from state to state, and from school district to school district, SROs are generally defined as comprising three roles: law enforcement, mentoring, and teaching.[27] Many school districts in other states employ the SRO model and benefit from armed and uniformed officers with the authority to arrest students for unruly behavior.[28] However, the school police force model tends to be more popular in Texas.[29]

2. School Police Forces

One hundred sixty-seven Texas school districts, encompassing half of the state's students, use the school police force model.[30] These school districts have commissioned their own police forces, with a chief of police who reports to the superintendent and peace officers who patrol school halls, enforcing "all laws, including municipal ordinances, county ordinances, and state laws."[31] School police forces are not bound by the SRO objectives (law enforcement, mentoring, teaching), and instead follow a more traditional law enforcement model.[32]

The sizes of and budgets for Texas school police forces continue to increase. From the 2001–2002 to the 2006–2007 school years, Houston

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[23] Angelone, *supra* note 3, at 451.
[24] FOWLER, *supra* note 8, at 38.
[25] *Id.* at 40; Nicole Bracy, *Circumventing the Law: Students Rights in Schools with Police*, 26(3) J. CONTEMP. CRIM. JUST. 294, 298 (2010).
[26] FOWLER, *supra* note 8, at 40.
[27] *Id.*
[28] Theriot, *supra* note 21, at 281.
[29] FOWLER, *supra* note 8, at 38.
[30] *Id.* at 43.
[31] TEX. EDUC. CODE ANN. § 37.081 (West 2011).
[32] FOWLER, *supra* note 8, at 44.

Independent School District (Houston ISD)'s police staff grew by 30%, and Houston ISD's police budget increased by 43%. Similarly, from 2001–02 to 2006–07, Dallas ISD experienced a 24% growth in school police staff and a 70% budget increase. Dallas ISD now allocates $13,707,231 to its police budget, equal to $86 per student. These are not even the most astounding numbers. Also from 2001–02 to 2006–07, Humble ISD's police force grew by 92%, and United ISD's police force grew by 71%. Edgewood ISD currently spends $1,708,552 on school police, or $145 per student.[33] These increases in sizes and budgets of Texas police forces makes little sense in light of the evidence that juvenile crime and school crime rates are already low and continue to decline.

There are a number of problems with the rapid expansion of school policing. One concern is that Texas does not require any specialized training for school police. Instead, school police complete the same basic training as officers assigned to work in more traditional law enforcement settings.[34] Therefore, few school officers have been trained in child development; de-escalation techniques effective with children; and special education issues. The result is that school officers approach student behavior with the traditional policing tools they were trained to use – including ticketing and arrests.[35]

A second concern is that the expansion of school policing may have a negative impact on school culture. Parents and child advocates have raised concerns about police introduction of electronic surveillance, physical restraints, searches, and interrogations. These advocates believe that strict security measures may cause an adversarial relationship between students and school adults, interfering with student learning.[36] Given that strict security is most likely to be used in schools with high numbers of low-income and minority students, advocates worry that these students will believe they are expected to be criminals.[37]

The third and perhaps most significant concern is that the availability of school police increasingly encourages teachers and administrators to rely on officers to handle student misbehavior. Student misbehaviors that used to result in a trip to principal's office now result in exposure to the criminal justice system, in the form of a ticket or an arrest.[38] The widespread shift from school-handled discipline to police-handled discipline is often called "passing the paddle."[39] The administration of criminal punishment for school misbehaviors is termed

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[33] *Id.* at 47–49.
[34] FOWLER, *supra* note 8, at 58.
[35] *Id.* at 19.
[36] Theroit, *supra* note 21, at 280.
[37] FOWLER, *supra* note 8, at 54.
[38] *Id.* at 2.
[39] Turner & Goodner, *supra* note 12, at 2.

"the school-to-prison pipeline."[40] No matter what it is called, the increasing reliance of Texas schools on their police officers to handle school discipline by arresting or issuing tickets is a problem.

C. School Police Referrals to the Court System: Arrests and Ticketing

In most Texas schools, school police make direct referrals to the court system by arresting students or by or ticketing students for Class C misdemeanors.[41]

1. Arrests

Texas grants its peace officers, including those patrolling schools, wide discretion on whether to arrest.[42] In general, when a school police officer takes a student into custody, the student will be presented or detained in a juvenile detention center. The student's case will ultimately be handled by the juvenile court system.[43] Thousands of Texas students are arrested in schools. This is problematic for two reasons: (1) the students are often arrested for low-level misbehavior, such as "disorderly conduct," and (2) the arrests for low-level school misbehavior introduce students to the juvenile justice system.[44] Referral to the juvenile justice system has many negative consequences, including the fact that juvenile justice system involvement increases the odds of dropping out of school, by some estimates by a factor of three.[45] However, many more Texas students are issued tickets than are arrested.[46] Moreover, since students receiving tickets are referred to municipal or justice courts, which are criminal courts, instead of to juvenile courts, which are civil courts, the legal consequences of ticketing are greater than the legal consequences of arrest.[47] Therefore, this Note does not focus on student arrest but instead on the problems associated with student ticketing.

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[40] FOWLER, *supra* note 8, at 2.
[41] *Id.* at 37.
[42] Texas Municipal Courts Education Center, *The Adjudication of Juveniles in Municipal and Justice Courts*, *in* THE MUNICIPAL JUDGES BOOK, 3 (2010) [hereinafter Municipal Courts].
[43] *Id.* at 4.
[44] FOWLER, *supra* note 8, at 99.
[45] *Id.*
[46] *Id.*
[47] Municipal Courts, *supra* note 42, at 1.

2. *Class C Misdemeanor Ticketing*

a. In General

More than 275,000 non-traffic tickets are issued to juveniles in Texas each year.[48] The increase in school-based policing coincides with sharp increases in the number of juveniles receiving tickets for school misbehavior. For example, in Austin ISD, a recent 31% growth in police staff coincided with a 50% increase in student ticketing. In Dallas ISD, a recent 24% growth in police staff corresponded to a 95% jump in ticketing. Across the state, the percentage of non-traffic tickets issued to juveniles grew from 2% in 1994 to an astounding 40% in 2008.[49]

When a student commits a Class C misdemeanor, a school officer may issue a ticket instead of making a full arrest.[50] In Texas, a Class C misdemeanor is a misdemeanor of the lowest level of seriousness.[51] Class C misdemeanors are punishable only by fines of up to $500.[52] The Texas Penal Code defines several Class C misdemeanors, including low-level theft,[53] low-level assault,[54] and disorderly conduct.[55] The Texas Education Code adds a few more Class C misdemeanors, including disruption of class,[56] disruption of transportation,[57] failure to attend school,[58] and gang membership.[59] Texas students are most likely to be ticketed for disruption of class or disorderly conduct.[60] The ticket serves as a written promise to appear in municipal or justice court, as opposed to juvenile court.[61]

b. The Criminal Consequences of Receiving a Ticket

Juvenile courts first emerged across the nation in the early 1900s.

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[48] FOWLER, *supra* note 8, at 1.
[49] *Id.* at 74 (describing increased percentage of all tickets to juveniles issued by school police officers).
[50] TEX. CRIM. PROC. CODE ANN. art. 45.058(g) (West 2011).
[51] TEX. PENAL CODE ANN. § 12.03 (West 2011).
[52] TEX. CRIM. PROC. CODE ANN. art. 12.23 (West 2009).
[53] TEX. PENAL CODE ANN. § 31.04(c)(1) (West 2009).
[54] *Id.* § 22.01(c).
[55] *Id.* § 42.01(d).
[56] TEX. EDUC. CODE ANN. § 37.124 (West 2011).
[57] *Id.* § 37.126.
[58] *Id.* § 25.094.
[59] *Id.* § 37.121.
[60] FOWLER, *supra* note 8, at 5.
[61] Municipal Courts, *supra* note 42, at 3.

The aim of these courts was to protect children's rights and emphasize treatment and rehabilitation. By the 1960s, the nation's juvenile courts handled all cases involving children under the age of 18.[62] The Texas Family Code grants the state's juvenile courts jurisdiction over two categories of offenses: (1) delinquent conduct, and (2) Conduct Indicating a Need for Supervision (CINS).[63] Delinquent conduct is conduct that if committed by an adult could result in incarceration, such as mid-level to serious assault or theft. CINS include misdemeanors that are punishable by fine only, such as disorderly conduct, as well as behaviors that "are not conducive to the well-being of children," such as running away and truancy from school.[64] Because the CINS category includes fine-only offenses, Class C misdemeanors could be included. However, in the 1990s, fears about juvenile superpredators convinced Texas legislators that rehabilitation should be secondary to punishment.[65] Therefore, Texas transferred "the more common misdeeds of children," including Class C misdemeanors, from juvenile court dockets to criminal court dockets.[66] Today, children's Class C misdemeanor charges are filed in municipal and justice courts, two criminal courts which share jurisdiction over Class C misdemeanors.[67]

The fact that increasing numbers of Texas students are being ticketed in school and therefore must appear in criminal court is problematic for many reasons, including (1) the disciplinary ideology; (2) the lack of prosecutorial review; (3) the absence of court-appointed attorneys; (4) subsequent criminal records; and (5) the possibility of later arrest.

First, students appearing in criminal courts are subject to disciplinary ideology, rather than rehabilitative ideology. The purpose of Texas's juvenile justice laws is to provide "treatment, training, and rehabilitation" for young offenders.[68] At various points in the juvenile justice process, there are opportunities for students to be diverted; to receive probation instead of detention; and to receive various services for mental health, anger management, and substance abuse problems. However, the purpose of the Texas Code of Criminal Procedure is more punitive. Students appearing in municipal and justice courts are likely to receive high fines, with no opportunity for rehabilitation or treatment of issues underlying the offense.[69]

Second, students appearing in criminal courts do not have access to prosecutorial review. In the juvenile court system, a prosecuting attorney

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[62] Angelone, *supra* note 3, at 444.
[63] TEX. FAM. CODE ANN. § 51.04(a) (West 2008).
[64] Municipal Courts, *supra* note 42, at 1.
[65] Angelone, *supra* note 3, at 446.
[66] Turner & Goodner, *supra* note 12, at 1.
[67] Municipal Courts, *supra* note 42, at 1.
[68] TEX. FAM. CODE ANN. § 51.01(2)(C) (West 2008).
[69] *See* Angelone, *supra* note 3, at 454; Municipal Courts, *supra* note 42, at 1.

will review each case for legal sufficiency and desirability of prosecution, and allow some offenders to be diverted before going to trial.[70] There is no prosecutor review before trial in municipal and justice courts.[71] Therefore, *every* student who receives a Class C ticket in school must stand trial in criminal court.

Third, students appearing in criminal courts are not entitled to a court-appointed attorney. Students facing charges in juvenile courts are entitled to court-appointed attorneys.[72] But a municipal or justice court has no duty to appoint an attorney to represent a defendant (including a student defendant) appearing for a Class C misdemeanor.[73]

Fourth, students appearing in criminal courts may acquire criminal records. Unlike students facing CINS petitions in juvenile courts, students convicted or entering a plea of "guilty or no contest" in municipal and justice courts have criminal records.[74] Juvenile court records are not available to the public, but criminal records generally are publicly available.[75] In 2009, the Texas legislature recognized that public access to children's criminal records could be problematic, and mandated that criminal courts issue nondisclosure orders when a child[76] is convicted of a Class C misdemeanor. However, because a court can only order nondisclosure upon conviction, nondisclosure is *not* triggered for other outcomes, such as probation or diversion to teen court.[77] Moreover, nondisclosure is not expunction or sealing of records; the clerk will not track down and destroy every reference to a case. Eleven government agencies will still have access to the criminal history record information.[78] Therefore, conviction of a Class C misdemeanor in municipal or justice courts still has criminal record implications for students.

Finally, ticketed students who do not follow the criminal court's directions may later face arrest. More specifically, when a student fails to pay the court-ordered fine, or fails to appear at all, the court can issue a bench warrant and order the student to be taken into custody.[79] However, because municipal and justice courts cannot order actual *confinement* (detention or jail time) for a child,[80] these bench warrants are rarely

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[70] TEX. FAM. CODE ANN § 53.012 (West 2008).
[71] Turner & Goodner, *supra* note 12, at 6 n.3.
[72] Ryan Turner, *The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors in Texas*, MUN. CT. RECORDER, (Tex. Mun. Cts. Educ. Ctr., Austin, Tex.), Jan. 2009, at 9.
[73] Barcroft v. State, 881 S.W.2d 838, 841 (Tex. App.—Tyler 1994, no pet.).
[74] FOWLER, *supra* note 8, at 5; Turner, *supra* note 72, at 9.
[75] Turner & Goodner, *supra* note 12, at 2.
[76] "Child" is defined as a defendant aged 10 or older, and under 17. TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2008 & Supp. 2011).
[77] Turner & Goodner, *supra* note 12, at 2.
[78] *Id.* at 3.
[79] TEX. CRIM. PROC. CODE ANN. § 45.058–9 (West 2011).
[80] *Id.* § 45.050.

enforced.[81] Instead, when the student turns seventeen, the court will issue a Notice of Continuing Obligation to Appear.[82] If the student does not appear in court in response to this notice, he has committed another Class C misdemeanor.[83] This results in issuance of a warrant for the student's arrest.[84] It is not unusual for a ticket received for school misbehavior to result in later arrest. The ACLU of Texas recently sued Hildalgo County for jailing hundreds of teens for unpaid tickets issued years earlier.[85]

Overall, an increase in school-based policing had led to an increased number of students issued Class C misdemeanor tickets. This means that a growing number of Texas schoolchildren are appearing in criminal court, paying high fines, acquiring criminal records, and potentially facing arrest and additional Class C charges years later, all for school-related misbehavior.

D. Ticketing for Low-Level Offenses

The criminal consequences of ticketing are amplified by the fact that most tickets are issued for low-level, nonviolent offenses.[86] Only 12% of tickets issued during the 2006–2007 school year were for violent or weapons offenses. The majority (52%) of tickets issued in 2006–2007 were for disorderly conduct and disruption of class.[87]

Disorderly conduct includes using profane language, making offensive gestures, and fighting in a public place.[88] Disruption of class includes emitting noise that hinders classroom instruction; enticing a student away from class; and entering a classroom without consent.[89] With schools increasingly relying on school police to address misbehavior, a scuffle between students becomes disorderly conduct.[90] Using profanity, yelling out answers, and throwing paper airplanes in

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[81] FOWLER, *supra* note 8, at 70.

[82] TEX. CRIM. PROC. CODE § 45.060.

[83] Municipal Courts, *supra* note 42, at 12.

[84] FOWLER, *supra* note 8, at 71.

[85] *Id.* The lawsuit, *De Luna v. Hidalgo County et. al.*, was filed with the United States District Court for the Southern District of Texas in July of 2010. Plaintiffs are teens aged seventeen and older who have been jailed due to inability to pay fines associated with Class C misdemeanor tickets issued years earlier for failure to attend school. Plaintiffs alleged that the ticket-to-later-jailtime model violates both the equal protection and due process guarantees of the Fourteenth Amendment. In December of 2011, the court will hold a hearing to rule on defendant's motion for summary judgment (filed in June of 2011), and whether plaintiffs qualify as a class. The case will likely proceed to trial in January of 2012. Telephone Interview with Lisa Graybill, Attorney-in-Charge for Plaintiffs & Legal Director, ACLU Foundation of Texas (Nov. 17, 2011).

[86] FOWLER, *supra* note 8, at 5.

[87] *Id.* at 82.

[88] TEX. PENAL CODE ANN. § 42.01(a) (West 2011 & Supp. 2011).

[89] TEX. EDUC. CODE ANN. § 37.124(c)(1) (West 2006 & Supp. 2011).

[90] Theroit, *supra* note 21, at 280.

class become disruption of class.[91]

E. Discretionary Ticketing

Ticketing is not just problematic because it sends students to court for low-level school misbehavior. Ticketing is also problematic because it tends to send only *certain* students to court for low-level school misbehavior.

1. Discretionary by School District

The greatest predictor of whether a student will be ticketed is not the nature of the offense. Instead, the greatest predictor is where the student attends school.[92] In 2006-07, Humble ISD issued 431 tickets to its student body of 31,144, yielding a ticketing rate of 1%. Compare that to nearby Galveston ISD, which issued 921 tickets to its student body of 8,430, yielding a ticketing rate of 11%. Other Texas school districts span the difference: Houston ISD has a ticketing rate of 2%; nearby Alief ISD has a ticketing rate of 4%; and San Antonio ISD has a ticketing rate of 7%.[93]

Galveston ISD's students likely do not commit a greater number of offenses than, say, Alief ISD's students. The disparate ticketing rates occur because different schools prefer different disciplinary methods. Alief ISD disciplines students in a variety of ways (in 2006–07 it referred 1,664 students to Disciplinary Alternative Education Programs ("DAEPs") and issued 1,900 tickets), but Galveston ISD prefers ticketing to other disciplinary measures (it referred 365 students to DAEPs and issued 900 tickets).[94] Moreover, different schools punish the exact same offense differently. As an example, Austin ISD police issue tickets for fighting only when one student assaults another, whereas Houston ISD police issue tickets for various types of fighting, including "mutual combat" between two students.[95]

It is troubling enough that students in certain Texas school districts are ticketed at a higher rate than students in other Texas school districts – but it gets worse. A 2009 study revealed that schools with economically disadvantaged and minority students are the most likely to employ SROs

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[91] FOWLER, *supra* note 8, at 84.
[92] *Id.* at 5.
[93] *Id.* at 77–78.
[94] *Id.* at 78–79.
[95] Thevenot, *supra* note 1, at 2–3.

and police officers.[96] Because increased school policing correlates with increased numbers of tickets issued,[97] students in low-income, high-minority Texas schools districts are likely ticketed and sent to criminal court at a higher rate than students in more privileged districts.

2. *Discretionary by Race and Ethnicity*

Moreover, within individual school districts, minority students are overrepresented in ticketing.[98] Of the 15 school districts able to disaggregate their Class C ticketing data by race and ethnicity, 11 found that African-American students were overrepresented. For example, in 2006–2007, Humble ISD issued 42% of its tickets to black students. Yet black students comprised only 17% of total enrollment. Similarly, Dallas ISD issued 62% of its tickets to black students, who comprised only 30% of total enrollment. And Huntsville ISD issued 51% of its tickets to black students, who comprised only 27% of total enrollment.[99]

Black and Hispanic students also disproportionately received Class C tickets for two specific offenses: (1) disorderly conduct; and (2) gang membership. First, both groups are overrepresented in tickets issued for disorderly conduct.[100] There is no evidence that minority students misbehave more than white peers. However, evidence does show that minority students receive harsher punishments for less severe behavior.[101] Therefore, this disparity likely results when school staff and officers handle white students' offenses as simple classroom misbehavior, but minority students' offenses as disorderly conduct.

Second, Hispanics are overrepresented in tickets issued for gang membership. In fact, in 2006–2007, they received 93% of all gang membership tickets issued, despite comprising only 58% of Texas public school enrollment.[102] This may be the result of racial profiling for gang membership on the basis of clothing and other signs.[103]

Ticketing is discretionary. Where a student goes to school and the student's ethnic or racial background are better predictors of whether the student will be ticketed than the student's actual offense. Students in certain school districts and minority students across the state are disproportionately fast-tracked into the criminal justice system.

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[96] Theriot, *supra* note 21, at 284.
[97] FOWLER, *supra* note 8, at 74.
[98] *Id.* at 68.
[99] *Id.* at 88–89.
[100] FOWLER, *supra* note 8, at 90.
[101] ADVANCEMENT PROJECT, *supra* note 9, at 18.
[102] FOWLER, *supra* note 8, at 90.
[103] *Id.* at 68.

F. The Effectiveness of Ticketing

If ticketing, and the corresponding brush with criminal court, convinces students to cease misbehaving, then the criminalization of school misbehavior is arguably worthwhile. However, a Texas Appleseed study discovered that students tend to receive multiple tickets at school. One municipal court in particular reported 350 students with multiple tickets, and one student with as many as eleven tickets. These numbers indicate that ticketing does not effectively deter future school misbehavior.[104]

Anecdotal evidence agrees. Deborah Fowler, stresses that tickets "are not really a meaningful punishment" for students who do not understand the corresponding criminal consequences. According to Assistant Police Chief Victor Mitchell of Houston ISD, for many students, tickets are "just a piece of paper."[105] Ticketing is not necessary for, or even effective at, preventing school misbehavior.

G. Lack of Data

Compounding the other problems associated with ticketing is a lack of organized data. When Texas Appleseed conducted its study, it asked all Texas school districts with police forces to provide information about their ticketing practices. Only twenty-six school districts could provide any information about the numbers and types of tickets issued in recent years. Only fifteen of those school districts could disaggregate ticketing data based on age, race, and special education status.[106] Houston ISD, the largest school district in the state and one of the largest in the nation, could not provide information about the race and ethnicity of students issued tickets in recent years.[107]

Ticketing data is instrumental in helping school police officers identify where and when crime is occurring. Ticketing data also helps school districts remain informed and poised to act regarding overrepresentation of minority students, and evaluate whether ticketing is an effective tool in preventing future student misbehavior.[108] Above all, ticketing data is essential to school districts wishing to study and reduce the severe criminal consequences suffered by ticketed students.

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[104] *Id.* at 69.
[105] Thevenot, *supra* note 1, at 2–3.
[106] FOWLER, *supra* note 8, at 4.
[107] *Id.* at 89.
[108] FOWLER, *supra* note 8, at 4.

H. Impact of Ticketing on Municipal and Justice Courts

As school police continue to increase the frequency with which they issue tickets for low-level misbehaviors, municipal and justice courts struggle with growing caseloads. Of all tickets issued to juveniles, the percentage issued by school police grew from 2% in 1994 to 40% in 2008.[109] Municipal and justice courts' caseloads grew by a proportional percentage. Today, the number of student cases processed by state municipal and justice courts far exceeds the number of student cases processed by both state juvenile courts and adult criminal courts. Specifically, in 2009, municipal and justice courts processed 420,667 Class C misdemeanor cases, compared to the 43,230 delinquent conduct and 1,027 CINS cases processed in juvenile courts, and the 202 cases of juveniles certified as adults processed in adult courts.[110] Ticketed students are not alone in crying out for a solution. Overburdened courts need one too.

III. LOOKING SIDEWAYS: TICKETING IN OTHER STATES

Is Texas alone in punishing school misbehavior with discretionary ticketing and corresponding criminal consequences? Are Texas courts alone in finding their dockets increasingly laden with low-level, school-based "crimes"?

No. The school-to-prison pipeline is not just a Texas problem. In the 1990s, DiIulio's warnings and Columbine inspired many states to turn to school-based policing. In some states, local police departments assign officers to schools. In other states, schools employ their own security officers or SROs. In fact, in 2004, the US Department of Justice doled out sixty million dollars to help school districts hire SROs. And as is permitted in Texas, large districts, such as Los Angeles, Baltimore, and Miami, commission their own police forces.[111] Across the nation, school teachers and administrators turn to the ever-present officers to assist in school disciplinary matters.[112] The result is that students everywhere are arrested or referred to court for low-level school misbehaviors.[113]

In most states, arrested students are brought to juvenile court. If the officers choose not to arrest the student, the officers will *not* issue a

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[109] *Id.* at 74.
[110] *Id.* at 76.
[111] ADVANCEMENT PROJECT, *supra* note 9, at 17.
[112] *Id.* at 13.
[113] *Id.* at 18.

ticket requiring appearance in criminal court, but instead make a referral to juvenile court. For example, in Connecticut, when students commit an act the state defines as "delinquent,"[114] school officers can issue a "juvenile summons," which requires the student and a parent to appear in juvenile court.[115] And in North Carolina, school officers file "delinquency complaints" with a juvenile court when students misbehave.[116]

A few urban regions, including Los Angeles, ticket for truancy, but not for in-school misdemeanors.[117] Generally these tickets are processed by the juvenile court system. Colorado is the only other state permitting school officers to ticket students for a variety of in-school misdemeanors.[118] In Colorado, most ticketed students must appear in juvenile court, but a small number of ticketed students appear in criminal court.[119]

Therefore, Texas is not unique in issuing severe consequences for school misbehavior, but it *is* unique in its practice of allowing officers to issue tickets for in-school misdemeanors and requiring ticketed students to appear in criminal court. In other words, in a nation that severely punishes school misbehavior, generally by referring students to juvenile court, Texas is the most severe punisher of all, in that it asks misbehaving students to face criminal consequences.

However, some of these other states have begun to recognize that handling student misbehavior in court is problematic, and have instituted creative solutions. Texas can better evaluate how to reduce its own ticketing problem by examining (1) Colorado's ticketing problem, and restorative justice solution; and (2) the juvenile court referral problems, and "graduated sanctions" solution of Georgia, Alabama, and Indiana.

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[114] CONN. GEN. STAT. ANN. § 46b-120(9) (West 2009 & Supp. 2012).

[115] *Connecticut Scores School-to-Prison Pipeline Victory*, NAT'L JUV. JUST. NETWORK NEWSL., Aug. 2, 2011, at 2, *available at* http://www.njjn.org.

[116] Jason Landberg, Barbara Fedders & Drew Kukorowski, *Law Enforcement Officers in Wake County Schools: The Human, Educational, and Financial Costs*, ADVOC. FOR CHILD. SERVICES, Feb. 2011, at 4.

[117] E-mail from Jim Freeman, Project Director for Ending the Schoolhouse to Jailhouse Track Project, Advancement Project, to author (Nov. 16, 2011, 20:39 CST) (on file with author).

[118] The claim that Colorado and Texas are the only states currently issuing school-based tickets for a variety of misdemeanors is supported by the author's comprehensive research of as many states as possible, and by Jim Freeman's statements so indicating. *See* Freeman, *supra* note 117. However, it is always possible that another state (or region) does ticket in a manner similar to Texas and Colorado, and the author did not discover this state in her research.

[119] ADVANCEMENT PROJECT, *supra* note 9, at 28.

A. Colorado: The Ticketing Problem and Two Solutions

1. Colorado's Ticketing Problem

Most Colorado schools have police patrolling the hallways. For example, every elementary, middle, and high school in the Denver Public Schools houses at least one school district security officer or Denver Police Department officer.[120] Student misbehaviors "that would have been handled internally a generation ago are now referred to [school] police."[121] Over the past decade, nearly 100,000 Colorado students have been "referred to law enforcement."[122] That means 100,000 students were sent to see a school officer or a city police officer, who then decided whether to issue a ticket.[123] Colorado law requires schools to report the number of students referred to law enforcement,[124] but does not require schools to keep track of how many of those referrals result in a ticket. Colorado knows it has a ticketing problem but cannot say for certain exactly how many tickets its school officers are handing out.[125]

Just as in Texas, Colorado students are increasingly referred to law enforcement and ticketed; the referrals and tickets are for low-level offenses; and minority students are disproportionately impacted. More specifically, the rate at which Colorado students are referred to law enforcement continues to increase. For example, from 2000 to 2004, the rate of referrals of Denver students shot up by 71%, though the student population grew by only 2% during that same time period.[126] Many of these referrals (and therefore any corresponding tickets issued) are for low-level school misbehavior.[127] In Denver, students are referred for use of obscenities and minor fights. Only 7% of Denver's referrals result from more serious conduct, like carrying dangerous weapons.[128] The numbers and reasons for referrals and corresponding tickets vary widely from district to district.[129] Statewide, minority students are

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[120] ADVANCEMENT PROJECT, *supra* note 9, at 25.

[121] Todd Engdahl, *State Panel Targets School Discipline*, EDNEWSCOLORADO, July 27, 2011, at 2 (quoting Colo. legislative analyst Jonathan Senft).

[122] *Id.* at 1.

[123] KELLI KELTY ET AL., COLO. LEGIS. COUNCIL, A STATEWIDE COMPARISON OF DATA ON REFERRALS TO LAW ENFORCEMENT, JUVENILE DELINQUENCY FILINGS, AND DROPOUT RATES 1 (2011) [hereinafter Statewide Comparison], *available at* http://www.colorado.gov/LCS/School DisciplineTF.

[124] STATEWIDE COMPARISON, *supra* note 123, at 1.

[125] Engdahl, *supra* note 121, at 2.

[126] ADVANCEMENT PROJECT, *supra* note 9, at 23.

[127] COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, COMPILATION OF PROBLEMS AND SOLUTIONS IDENTIFIED BY MEMBERS 1, 12 (2011) [hereinafter Compilation of Problems], *available at* http://www.colorado.gov/LCS/SchoolDisciplineTF.

[128] ADVANCEMENT PROJECT, *supra* note 9, at 24.

[129] Engdahl, *supra* note 121, at 2.

overrepresented in referrals and ticketing.[130] In Denver, 2003–04, black students were twice as likely, and Hispanic students were seven times as likely, to receive tickets as were their white peers.[131]

Though the two states have similar ticketing trends, Texas and Colorado have different procedural requirements for ticketed students. In Texas, *all* ticketed students must appear in criminal court, acquire criminal records, and pay fines (instead of being placed on probation or diverted to community service or counseling). In Colorado, most ticketed students appear in juvenile court, but some appear in the local county (criminal) court.[132] At least in Denver, more serious offenses, such as assault or weapons possession, are handled by juvenile courts.[133] Students appearing in juvenile court are entitled to an attorney[134] and may be diverted, placed on probation, or sentenced to a juvenile detention facility.[135] Less serious offenses, such as trespassing and minor fights, are handled by county courts. For Denver's ticketed students, this means appearing before the Denver County Court's Juvenile Division, which usually diverts students to a community service or counseling program or places students on probation.[136] Though the punishments (community service and counseling) are not unlike those issued in juvenile court, the county court's juvenile division is still a criminal court, and all students appearing there will have criminal records.[137]

2. *Colorado's Two Solutions*

a. Legislative Task Force

In recent years, Colorado advocacy groups called legislators' attention to the fact that, for low-level school misbehaviors, Colorado students were being referred to law enforcement, receiving tickets, and suffering juvenile court or criminal court consequences. In 2011, the legislature created the Legislative Task Force to Study School Discipline, consisting of three state senators, three state representatives, and ten individuals who represent groups, such as teachers, school administrators, school officers, criminal defense attorneys, and child advocates. The task force is required to discuss and hear public testimony

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[130] COMPILATION OF PROBLEMS, *supra* note 127, at 7.
[131] ADVANCEMENT PROJECT, *supra* note 9, at 24.
[132] *Id.* at 27.
[133] *Id.* at 28.
[134] *Id.* at 30.
[135] *Id.* at 29.
[136] ADVANCEMENT PROJECT, *supra* note 9, at 28.
[137] *Id.* at 29.

on the use of law enforcement, tickets, and arrests in schools.[138]

After six meetings, the task force released a proposed bill addressing several of the state's referral and ticketing problems. The bill (1) requires school discipline codes to explicitly define when violations will result in referral to law enforcement; (2) requires school boards to train teachers in conflict resolution and restorative justice; and (3) requires police officers who will be assigned to schools to receive special training.[139] Members of the task force have also suggested that the state (1) require schools to track the number of referrals resulting in tickets;[140] and (2) strengthen its support of charter schools that do not have ticketing and dropout problems.[141]

b. Denver's Restorative Justice Project

In 2005, a few northeast Denver schools sought to address the referral and ticketing problems independently of legislative mandates. The schools initiated the Restorative Justice Project, which expanded to six middle schools and one high school by 2009.[142] Each participating school has a full-time restorative justice coordinator. Teachers and school staff refer students engaging in certain misbehaviors, including "interpersonal conflict" (arguments and gossip), physical altercation, and horseplay, to the coordinator rather than the school police.[143] If the coordinator determines that restorative justice is appropriate to the situation, the coordinator meets with the students involved, and possibly with parents and teachers.[144] These parties work to come to a "restorative agreement" outlining steps for reparation.[145]

The results of the Restorative Justice Project are remarkable. During the 2009–10 school year, 30% of participating students halved their numbers of failing grades. Participating students attended school more often after intervention; their absences dropped by 64%.[146] Most significantly, participating students were also less likely to be referred to

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[138] COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, OVERVIEW OF THE LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE 1-2 (2011), *available at* http://www.colorado.gov/LCS/SchoolDisciplineTF.

[139] *Id.* at 2–3.

[140] COMPILATION OF PROBLEMS, *supra* note 127, at 6, 10.

[141] STATEWIDE COMPARISON, *supra* note 123, at 23.

[142] COLORADO LEGISLATIVE TASK FORCE TO STUDY SCHOOL DISCIPLINE, COLO. LEGIS. COUNCIL, RESTORATIVE JUSTICE PROGRAMS IN DENVER PUBLIC SCHOOLS (2011) [hereinafter Restorative Justice Programs], *available at* http://www.colorado.gov/LCS/SchoolDisciplineTF.

[143] MYRIAM L. BAKER, DPS RESTORATIVE JUSTICE PROJECT: YEAR THREE 5 (2009) [hereinafter DPS], *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251736451155&ssbinary=true.

[144] RESTORATIVE JUSTICE PROGRAMS, *supra* note 142, at 1.

[145] DPS, *supra* note 143, at 8.

[146] *Id.* at 2.

police, or suspended after intervention: referrals to school police for this group decreased by 88%, and suspensions decreased by 89%.[147]

B. Georgia, Alabama, and Indiana: Increasing Referrals to Juvenile Court and the Solution

Colorado may be the only state besides Texas that allows school officers to ticket students for misbehaviors other than truancy. In many other states, though, school police refer students to local juvenile courts for various in-school misdemeanors. Some of these states – Georgia and Alabama in particular – have recognized that sending students to juvenile court for low-level school offenses is a problem, and have initiated effective solutions.

1. Clayton County, Georgia: Referral Problem and Graduated Sanctions Solution

In the 1990s, Clayton County juvenile court judge Steven Teske noticed that after SROs began patrolling local schools, the numbers of students charged with crimes increased. Specifically, in 1995, SROs referred 46 school incidents to Teske's juvenile court. By 2003, SROs referred 1,200 school incidents. Minority students were disproportionately referred. Teske thought, "This is ridiculous. They weren't delinquent kids."[148]

In the summer of 2004, Teske resolved to address the increasing numbers of referrals. He gathered together school officials, law enforcement, prosecutors, parents, and child advocates. He proposed giving students warnings before referring them to court.[149] The result was a cooperative agreement among Clayton County's juvenile courts, public schools, and police departments. The agreement acknowledged that referring students to court, especially for low-level school misbehaviors, should not be taken lightly.

The agreement mandated a graduated sanctions model, whereby a student committing a "focused act" (a Georgia misdemeanor like disrupting public school, disorderly conduct, and truancy) for the first time would receive a warning. A student committing a second focused

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[147] *Id.* at 3.

[148] Donna St. George, *Judge Steve Teske Seeks to Keep Kids with Minor Problems out of Court*, WASH. POST, Oct. 17, 2011, http://www.washingtonpost.com/lifestyle/style/judge-steve-teske-seeks-to-keep-kids-with-minor-problems-out-of-court/2011/09/21/gIQA1y8ZsL_story.html.

[149] Amy Bach, *New Rules for Schools*, THE NATION, Oct. 14, 2009, http://www.thenation.com/article/new-rules-schools.

act would be diverted to a court-sponsored School Conflict or Mediation program. Only a student committing a third focused act could be referred to the juvenile court, and even then, school administrators and police still had the discretion to issue another warning or to divert to one of the programs.[150]

The cooperative agreement worked. By 2008, the number of school incidents referred to the juvenile court had decreased by 68%.[151] The number of black students referred to juvenile court for fighting dropped by 86% and for disruption of school dropped by 64%. Moreover, county schools experienced an 87% decrease in fighting offenses and a 36% decrease in other focused acts.[152] Teske attributes this to a change in police focus from referring misbehaving students to educating and counseling them.[153]

2. *Birmingham, Alabama: Referral Problem and Graduated Sanctions Solution*

Other judges experiencing the problem of increased school-based referrals are also beginning to turn to Clayton County's model. For example, Franklin County, Ohio juvenile judge Kim Browne heads the Juvenile Justice Community Planning Initiative. It has a stated goal of reaching a Clayton County-like cooperative agreement among Columbus city schools, police, and courts to reduce the numbers of low-level student misbehaviors referred to court.[154] Teske cites several other judges across the country who are also working to replicate the Clayton County model.[155] The most successful replication of the Clayton County model is occurring at the hands of juvenile judge Brian Huff in Jefferson County, Alabama.

Huff was concerned about the ever-increasing numbers of referrals

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[150] Cooperative Agreement, http://www.jdaihelpdesk.org/collmodagree/Clayton%20County%20 GA%20School%20Referral%20Cooperative%20Agreement.pdf.

[151] Bach, *supra* note 149.

[152] ADVANCEMENT PROJECT, STOP THE SCHOOLHOUSE TO JAILHOUSE TRACK, CLAYTON COUNTY, GEORGIA, http://www.stopschoolstojails.org/content/clayton-county-georgia.html (last visited Nov. 11, 2011).

[153] Bach, *supra* note 149. *See also As Suspensions, Expulsions and Juvenile Arrests Grow, JDAI Sites Push Back*, JUVENILE DET. ALT. INITIATIVE NEWS (Annie E. Casey Foun.), Spring 2010, http://aecf.org/majorityinitiatives/JuvenileDetentionAlternativesInitiative/Resources/May10newsletter/FeatureStory.aspx (last visited Nov. 6, 2011).

[154] Rita Price, *Lockup's Racial Disparity Glaring: City Schools, Police Seek Alternatives to Youth Detention*, THE COLUMBUS DISPATCH, Mar. 15, 2010, *available at* http://www.burnsinstitute.org/article.php?id=201.

[155] *See* Steve Teske, *The Blame Game: The Winner Loses and the Kids are Hurt*, JUV. JUST. INFO. EXCHANGE, 4 (Dec. 9, 2010), http://jjie.org/judge-steve-teske-blame-game-winner-loses-kids-hurt/7660 (discussing Judge Jay Blitzman in Middlesex County, Massachusetts; Judge James Burgess in Wichita, Kansas; Judge Anglela Roberts of Richmond, Virginia; and Judge Jimmie Edwards of St. Louis, Missouri).

from the Birmingham City Schools. In 2008, 90% of Birmingham student referrals to his court were for low-level misdemeanors. Even worse, 99% of all Birmingham student referrals were for black students. Following Teske's example, Huff and the Southern Poverty Law Center brought together the Birmingham City Schools Collaborative, consisting of the school superintendent, police chief, and the county district attorney. The collaborative instituted a Clayton County-style agreement mandating a graduated sanctions model.[156] For "minor school-based offenses," including misdemeanors disorderly conduct and low-level assault, students are warned the first time, sent to a school-run conflict workshop the second time, and potentially referred to juvenile court only after the third time.[157]

Prior to the formation of the collaborative, Birmingham City Schools accounted for 80% of school incident referrals to Huff's court.[158] The collaborative negotiations were so impactful that, even before the agreement was officially signed, Birmingham's court referrals began to drop.[159] After the implementation of the agreement in 2009–2010, Birmingham City Schools accounted for 66% of the referrals received by Huff's court.[160] In Jefferson County, the agreement is beginning to achieve its goal of reducing referrals to court for low-level student misbehavior.

3. *Indiana: Referral Problem and Legislative Solution*

The Clayton County model has also inspired state-wide efforts. After hearing Teske speak at a juvenile justice conference hosted by the Indiana State Bar, Indiana legislators were so inspired that they passed House Enrolled Act 1193.[161] This bill established a "youth work group"[162] of twenty-six members, including the state superintendent of public education; the executive directors of the state criminal justice

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[156] ACHIEVEMENT PROJECT, STOP THE SCHOOLHOUSE TO JAILHOUSE TRACK, JEFFERSON COUNTY, ALABAMA, http://www.stopschoolstojails.org/content/jefferson-county-alabama (last visited Nov. 11, 2011).

[157] Birmingham City Schools Collaborative, Collaborative Agreement 2–5, *available at* http://media.al.com/spotnews/other/Agreement%20to%20cut%20arrests.pdf.

[158] ACHIEVEMENT PROJECT, *supra* note 156.

[159] *Id.*

[160] Brian Huff, *Safe Schools, Fair Schools: A Community Dialogue About School Suspensions in North Carolina*, N.C. PARTNERSHIP FOR EDUC. OPPORTUNITY (2010), *available at* http://ncpeo.org/wp-content/uploads/2010/11/Judge-Huff-North-Carolina-Nov-2010.ppt.

[161] *See* Rebecca Berfanger, *Indiana Juvenile Justice Bill First in the Nation*, IND. BUS. J., Mar. 31, 2010, *available at* http://trinity.ibj.com/Repository/ml.asp?Ref=SUwvMjAxMC8wMy8zMSNB cjAwNDAx (describing Teske's presentation at the bar conference and the judge's relationship with the state legislators' creation of H.B. 1193); 2010 Ind. Legis. Serv. P.L. 74-2010 (West) (enacting H.B. 1193).

[162] 2010 Ind. Legis. Serv. P.L. 74-2010, sec. 1 § 3(22) (West).

institute and the state law enforcement academy; juvenile court judges; school police officers; students; school teachers; principals; parents; and law and college professors.[163] The youth work group will study alternatives to arrest and referral to juvenile court for school misbehavior, and recommend corresponding legislation.[164]

IV. LOOKING TO THE COURTS: TICKETING AS AN EIGHTH AMENDMENT VIOLATION

Part II defined Texas's ticketing problem, noting that school police continue to ticket students for low-level misdemeanors, though severe criminal consequences accompany each ticket. Part III reviewed similar practices in other states, noting that Texas is the only state to refer all misbehaving students to criminal court. Taken together, it is likely that in punishing low-level student offenses with such uniquely severe criminal penalties, Texas is in violation of the Eighth Amendment.

A. The Law: Proportional Crime and Punishment

The Supreme Court has previously considered whether school disciplinary methods violate students' Eighth Amendment rights. For example, in the 1970s, the Court decided that corporal punishment in schools was not unconstitutional under the Eighth Amendment.[165] Today, Texas schools use a much more serious form of discipline: ticketing and exposure to the criminal justice system. It is possible that if students and parents sued Texas and its school districts, a federal court would find that ticketing is so disproportionate a punishment for low-level school misbehaviors that it constitutes an Eighth Amendment violation.

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[166] The Cruel and Unusual Clause applies to the states through the Fourteenth Amendment.[167] The Cruel and Unusual Clause not only prohibits inhumane punishment; it also prohibits

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[163] *Id.* at sec. 2, § 3.

[164] IND. CODE ANN. § 5-2-6.9-10(a)(5) (West Supp. 2011).

[165] Ingraham v. Wright, 430 U.S. 651, 664 (1977). *See also* Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. the Constitution*, 4 S. REGIONAL BLACK L. STUDENTS ASS'N L.J. 75, 87–88 (2010) (discussing *Ingraham* in the context of whether school-to-prison pipeline practices violate the Eighth Amendment).

[166] U.S. CONST. amend. VIII.

[167] Robinson v. California, 370 U.S. 660, 667 (1962).

"sentences that are disproportionate to the crime committed."[168] Courts reviewing sentences for proportionality to the antecedent crime are guided by objective factors, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.[169]

For example, in *Solem v. Helm*, South Dakota convicted the defendant, Helm, of writing a "no account" check for $100. Because he had been previously convicted of six other nonviolent felonies, Helm's sentence was enhanced to life imprisonment without parole.[170] Using the three-factor analysis, the Court decided that the sentence was significantly out of proportion with the crime. Thus, the sentence violated the Cruel and Unusual Clause.[171] First, in comparing the gravity of the offense with the harshness of the penalty, the Court noted that in contrast to the harsh sentence, Helm's check fraud was "passive . . . involv[ing] neither violence nor threat of violence to any person." All of Helm's prior crimes were also "minor."[172] Second, in considering other sentences in the same jurisdiction, the Court noted that the other crimes that warrant life imprisonment in South Dakota were more serious than check fraud. These other crimes included murder, treason, manslaughter, and kidnapping.[173] Third, in comparing sentences imposed by other jurisdictions, the Court noted that Helm could have received life imprisonment for check fraud in only one other state besides South Dakota. Helm's sentence was more severe than it would have been in 48 out of the 50 states. The sentence was significantly, and therefore unconstitutionally, disproportionate to the crime.[174]

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[168] Solem v. Helm, 463 U.S. 277, 284 (1983).

[169] *Id.* at 292. In 1991, the Supreme Court revisited the question of whether there is a proportionality principle inherent in the cruel and unusual clause. Harmelin v. Michigan, 501 U.S. 957 (1991). The only part of the opinion to attain a majority was the narrow holding, written by Justice Scalia, that petitioner's sentence (life with the possibility of parole) was not cruel and unusual. *Id.* at 996. The remainder of Justice Scalia's opinion, which was joined by Chief Justice Rehnquist, argued that the cruel and unusual clause does not contain a proportionality requirement except in death penalty cases, that *Solem*'s three factor analysis fails, and that *Solem* itself should be overturned. *Id.* at 965, 985-90, 994. However, in four separate opinions, the other seven justices upheld the proportionality requirement, *Solem*, and the three-factor analysis. (Specifically, Justice Kennedy's concurrence argued in favor of a narrow proportionality principle, and suggested that the *Solem* factors are helpful but not mandatory. *Id.* at 997, 1004-05. Justice White's dissent argued that there is no doubt the Eighth Amendment embodies a proportionality requirement, and that the *Solem* three-factor analysis "work[s] well" and should not be abandoned. *Id.* at 1012, 1015-16. Both Justice Marshall's dissent and Justice Steven's dissent agreed with Justice White's take on proportionality and *Solem*. *Id.* at 1027-28.) Therefore, despite Justice Scalia's opinion to the contrary, the existence of a proportionality requirement, and *Solem*'s three-factor analysis for determining whether this requirement is met, remain good law.

[170] Solem, 463 U.S. at 281.

[171] *Id.* at 303.

[172] Solem, 463 U.S. at 296–97.

[173] *Id.* at 298.

[174] *Id.* at 299–300.

B. Application of Eighth Amendment Law to Texas and Its Ticketing Practice

Similar to life imprisonment for writing a "no account" check, ticketing for low-level school misbehavior represents disproportionate crime and punishment. A court using the *Solem* three-factor analysis is likely to conclude that ticketing is significantly disproportionate to school misbehavior, in violation of the Cruel and Unusual Clause of the Eighth Amendment.

First, a court will look to the gravity of the school offense and the harshness of the ticketing penalty. As previously discussed, tickets are often issued for low-level offenses, such as scuffles between students; yelling out answers in class; and using profanity. Only 1% of tickets issued during 2006–2007 were for violent or weapons offenses. Like Helm's offense, these school misbehaviors are nonviolent and minor. Yet the ticketing punishment carries severe criminal consequences. Ticketed students must appear in municipal or justice courts, which are criminal courts. The students are not entitled to court-appointed attorneys, diversion, or treatment for underlying issues, as they would be if appearing in juvenile court. Instead, students receive high fines and will have criminal records. Students who fail to pay fines, or fail to appear in court, may be arrested after they turn seventeen. Just as imprisonment is significantly disproportionate to a nonviolent check fraud offense, these criminal consequences are significantly disproportionate to simple school misbehaviors.

Second, a court will compare the sentences imposed on other criminals in the same jurisdiction. Just as the other South Dakota crimes resulting in life imprisonment were more serious than Helm's check fraud, the other Texas Class C misdemeanors resulting in the same criminal consequences are more serious than school misbehavior. Other Class C misdemeanors for which offenders must appear in municipal and justice courts and will receive fines include: criminal mischief (the destruction of another's property),[175] theft,[176] public intoxication,[177] and leaving a child in a vehicle.[178] These offenses all involve actual or possible harm to a person or property—yet an adult committing these offenses receives the same sentence as a child ticketed for chewing gum or throwing paper airplanes in school.

Third, a court will compare the sentences imposed for commission of the same crime in other jurisdictions. Though misbehaving Texas students receive tickets and criminal consequences, similarly

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[175] TEX. PENAL CODE ANN. § 28.03(b)(1) (West 2011).
[176] *Id.* § 31.03 (e)(1) (West 2011 & Supp. 2011).
[177] *Id.* § 49.02(c) (West 2011).
[178] *Id.* § 22.10(b) (West 2011).

misbehaving students in other states are generally referred to juvenile court instead. Only in one other state, Colorado, does school misbehavior land some students in criminal court, and even in Colorado, the majority of ticketed students appear in juvenile court. In *Solem*, the Court was convinced of disproportionality because Helm's crime would warrant less severe punishment in 48 other states. Similarly, misbehaving students are punished less severely in the 48 states that refer to juvenile rather than criminal court.

Overall, though the school misbehavior is generally nonviolent and low-level, it warrants criminal consequences, such as court appearances, criminal records, and fines. Though similar criminal punishment is generally reserved for offenders committing theft, public intoxication, etc., misbehaving students suffer the same treatment. And while 48 other states do not impose criminal consequences for school misbehavior, in Texas, tickets and criminal consequences are routinely administered for school misbehavior. Taken together, the three factors indicate that ticketing is a severely disproportionate punishment to school misbehavior. Therefore, Texas's method of ticketing for school misbehavior likely violates the Eighth Amendment's ban on cruel and unusual punishment.

V. LOOKING FORWARD: PROPOSED SOLUTIONS FOR TEXAS LEGISLATORS, COURTS, AND SCHOOL DISTRICTS

Texans should be motivated to reduce the number of tickets issued in schools for low-level misbehavior for at least three reasons. First, to protect Texas students: the increasing use of tickets to address student misbehavior sends increasing numbers of students—particularly students from certain school districts and minority students—to criminal court, where the students face fines, criminal records, and the possibility of later arrest. Second, to assist Texas criminal courts: municipal and justice courts are increasingly bearing the burden of hearing and resolving low-level, school-related issues. Third, to protect Texas school districts and the state from federal lawsuits: criminal punishment is so out of proportion with low-level student misbehavior that Texas is vulnerable to an Eighth Amendment suit unless it takes substantial steps to reduce ticketing.

Texas legislators, judges, and schools wishing to reduce ticketing can begin with the proposals outlined here.

A. Recommendations for Texas Legislators

Task Force: Establish a "ticketing task force" that consists of representatives from the Texas Education Agency, state legislators, municipal and justice court judges, juvenile court judges, school police force chiefs, SROs, students, parents, school teachers and administrators, and child advocates from groups like Texas Appleseed and the Children's Defense Fund. The task force should study how ticketing and the criminal consequences impact students and courts, and should report back to the legislature and the governor with recommended legislative solutions.

Data Collection: Require each school district to report to the Texas Education Agency the number of tickets issued, including offense and race information, each year. Require schools that disproportionately ticket minorities to develop and implement a remediation plan.

Eliminating Criminal Consequences: Transfer jurisdiction of ticketing cases back to juvenile court. Provide corresponding staffing and funding increases for the juvenile court system, perhaps by redirecting the funding municipal and justice courts currently receive for handling ticketing cases.

Reducing the Possibility for Discretion: Eliminate ticketing for disorderly conduct and disruption of class.

Training for Police: Require police officers who will be assigned to schools to dedicate some of their existing training hours to school-related training on child development, de-escalation techniques effective with students, and special education issues.

Training for Teachers: Require training for teachers and administrators about the severe criminal consequences of ticketing. Require training in Positive Behavioral Interventions and Supports (PBIS) or other classroom management techniques, emphasizing that sending a student to a school officer is a last resort.

School Choice: Increase support of Texas charter schools by increasing funding and/or lifting the statutory cap on the number of charters that can exist in the state. Charter schools are not permitted by state law to employ school officers and therefore do not have ticketing problems.[179]

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[179] *See* TEX. EDUC. CODE ANN. § 37.081(a) (West 2006). The provision authorizes "any school district" to employ SROs or commission their own police forces. Generally, in the Education Code, "school district" refers to traditional public school districts only, while "public school" refers to all public schools, including both traditional public school districts and charter schools.

B. Recommendations for Texas Municipal and Justice Judges

Take the Lead: Take leadership roles in advocating for changes to the state's ticketing practice. Consider Teske's words:

> [M]any judges remain uncomfortable stepping into a role off the bench . . . . Notwithstanding . . . there is something to be said about the moral implications of participating in a system that threatens the well-being of children . . . . [I]t makes sense for judges to take the lead in bringing about local system change . . . . The judge is in a strategic position to bring stakeholders together when others cannot. The role of the judge in system reform is simple – ask and they will come.[180]

Graduated Sanctions: Bring together local child advocacy groups, the local school district, and its police force or SROs. Look to the Clayton County model and establish a similar cooperative agreement mandating graduated sanctions, whereby tickets may be issued only on or after the third offense. The agreement must be adapted for use in criminal (rather than juvenile) court. One possible adaptation: If the criminal court caseload is simply too great for the judge himself to lead such a cooperative, the judge could appoint a staff member to act on his behalf.

C. Recommendations for Texas School Districts

Data Collection: Maintain a database of all tickets issued, which can be disaggregated by offense and race. Monitor the database to see whether minority students are disproportionately ticketed and to decide whether and when ticketing is effective.

Police as Mentors: In the written agreement to employ SROs or commission a police force, delineate officers' primary roles as mentors and teachers, with traditional law enforcement being secondary.

Reducing the Possibility for Discretion: In the student behavior code, specify exactly which kinds of offenses are ticketable.

Restorative Justice Project: Emulate Denver's Restorative Justice Project by appointing school restorative justice coordinators to meet with misbehaving students and establish reparations agreements. Teachers and administrators will refer students to the coordinator instead of referring to school police.

Graduated Sanctions: Develop a graduated sanctions model,

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[180] Teske, *supra* note 155, at 3–4.

whereby students can only receive a ticket after the third consecutive offense.

Teacher Training: Devote some existing staff training time to informing teachers and administrators about the criminal consequences faced by ticketed students. Emphasize that sending students to officers to be ticketed should be a last resort.

Police Training: Establish training for school-based police officers in school culture, special education issues, and working with students.

Until legislators, judges, and school districts act to address the problem, Texas's practice of ticketing for low-level school misbehaviors will continue to victimize students and courts, and place school districts at risk of lawsuits.

Texas's New Payday Lending Regulations: Effective Debiasing Entails More Than the Right Message

Michael A. Garemko III*

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I. INTRODUCTION

Like the proverbial tree falling in the woods, the message of a consumer disclosure must land close to a person to be heard. This Note evaluates recently-adopted Texas payday lending laws and their resulting regulations. It reaches two conclusions: (1) the statutes contained sufficient powers to enable regulators to provide consumers with important cautionary advice; and (2) the resulting regulations do not exercise those statutory powers effectively by failing to ensure that consumers actually hear the advice.

In 2011, the Texas legislature passed two bills seeking to regulate the practice of payday lending, H.B. 2592 and H.B. 2594,[1] both by Representative Vicki Truitt, Chair of the House Committee on Pensions, Investments, and Financial Services (PIFS). The statutory framework adopts both licensing and disclosure requirements, with delegations of rulemaking authority to the Finance Commission of Texas. The bills took effect on January 1, 2012, and a set of regulations has also been issued. This Note pays careful attention to the final language in the new laws

[1] *See* Act of May 23, 2011, 82d Leg., R.S., ch. 1301, 2011 Tex. Gen. Laws 3717 (codified at TEX. FIN. CODE ANN. §§ 393.221–.224 (West Supp. 2012)), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB02592F.htm; Act of May 23, 2011, 82d Leg., R.S., ch. 1302, 2011 Tex. Gen. Laws 3719 (codified as amendments to TEX. FIN. CODE ANN. ch. 14 (West 1998), ch 393 (West 2006 & Supp. 2012)), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm. *See also* 7 TEX. ADMIN. CODE §§ 83.1001–.5002 (2011), §§ 83.6001–.6008 (2012) (Fin. Comm'n of Tex., Rules for Credit Access Businesses) (regulations adopted under the authority of H.B. 2592 and H.B. 2594).

and argues that the laws gave the finance commission the power to create an innovative regulatory approach to payday lending. An innovative approach would have drawn upon recent experiences from other states in order to write rules aiming to help consumers make better choices when deciding whether to take out a payday loan. The Note concludes that the finance commission did not design such an innovative program. This Note's examination of the choices that could have been made in Texas may help consumer advocates develop effective strategies in other states.

Generally, a payday loan is a loan for a small amount of money, secured by the next paycheck (either through an actual post-dated check or a direct draw on the consumer's account). The term of the loan is typically for the amount of the anticipated paycheck due two weeks later. The loan has an interest rate and associated fees. Together, the fees and interest typically produce actual annual percentage rates (APRs) above 400%.[2]

The only way for a consumer to get out of paying the full amount (including all fees and interest) at the end of the loan is to renew the loan (sometimes called a rollover), which comes in the form of another two-week advance, usually under the same terms. A consumer who cannot repay the full amount essentially only has the option of fully paying off the loan or making an interest-only payment—there is no way to reach the principal by way of a partial payment.[3]

According to Karen Francis, "[p]ayday loans are generally short-term loans of small amounts offered at extremely high effective interest rates to consumers who have impaired credit histories."[4] Nathalie Martin has empirically found that the transaction can take many forms, and the industry is capable of innovating around formal definitions.[5] Despite the industry's potential for innovation to avoid regulation, Texas law defines a payday loan, or a "deferred presentment transaction," narrowly. A deferred presentment transaction has three components: (1) "a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account;" (2) "the amount of the check or

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[2] Robert W. Snarr, *No Cash 'til Payday: The Payday Lending Industry*, COMPLIANCE CORNER: FED. RESERVE BANK OF PHILADELPHIA, First Quarter 2002, at CC1, *available at* http://www.philadelphiafed.org/bank-resources/publications/compliance-corner/2002/first-quarter/q1cc_02.pdf. The author's conversation with a Texas consumer advocate provides reason to believe that the average rates in Texas are considerably higher. *See* E-mail from Ann Baddour, Senior Policy Analyst, Texas Appleseed (May14, 2012, 10:15 CST) (on file with author) (concluding that "[i]n Texas common rates are more in the range of 500 to 700%, with 533% ($20 per $100 per 2 weeks plus the 10% annualized interest) [being] a common rate").

[3] *But see* E-mail from Ann Baddour, Senior Policy Analyst, Texas Appleseed (May14, 2012, 10:15 CST) (on file with author) (explaining that "[t]his practice appears to be changing—a number of companies now do accept partial principal payments. However, because of the high fees, most borrowers do not make much headway towards principal repayment unless they pay a significant amount of money over the fee payment amount, the equivalent.").

[4] Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 611 (2010).

[5] *See* Nathalie Martin, *1000% Interest–Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 598–614 (2010).

authorized debit equals the amount of the advance plus a fee;" and (3) "the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date," usually two weeks from the date of the transaction.[6] Under the new law, the "definition does not preclude repayment in more than one installment."[7] The Note will show that the rigidity of Texas law can have negative consequences for consumers.

The payday loan industry grew rapidly during the 1990s, after the easing of state usury restrictions.[8] State usury laws were gradually weakened or abandoned after a 1978 Supreme Court decision allowed national banks to "import" high interest rates from states with no usury caps into states with caps.[9] After the industry's rapid growth, governments at the federal and state level have been pushed to reinstitute usury restrictions in the fringe lending context, particularly in payday loans.

Whether payday loans are net positive or negative in terms of consumer welfare is debated. Advocates defend payday loans as being better than the alternatives.[10] Low-income, cash-constrained people have a need for more money, but have limited access to traditional credit. Thus, the choice is not between payday lending and austerity, but between payday lending or bank overdraft fees, criminal loan sharks, pawning one's possessions, etc. Under this view, high interest rates are justified by the very high risk of default. In the end, the system is efficient because the loans are the optimal way to give this credit-constrained population the credit it demands.

Critics charge payday lenders with a number of predatory behaviors: exploiting consumer cognitive biases;[11] extracting high

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[6] TEX. FIN. CODE ANN. § 341.001 (West 2006). This definition is incorporated by cross-reference in a provision of H.B. 2594 adding § 393.601 to the Finance Code. H.B. 2594 at § 2.

[7] *Id.*

[8] *See generally*, Snarr, *supra* note 2.

[9] *See* Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp. 439 U.S. 299 (1978).

[10] *See, e.g.*, DONALD P. MORGAN & MICHAEL R. STRAIN, FED. RES. BANK OF N.Y., STAFF REPORT NO. 309, PAYDAY HOLIDAY: HOW HOUSEHOLDS FARE AFTER PAYDAY CREDIT BANS (2007) (revised Feb. 2008), http://www.newyorkfed.org/research/staff_reports/sr309.pdf; Kelly D. Edmiston, *Could Restrictions of Payday Lending Hurt Consumers?*, Econ. Rev., First Quarter 2011, at 63, *available at* http://www.kansascityfed.org/publicat/econrev/pdf/11q1Edmiston.pdf. Some of these views can also be found among the proponents of regulation. *See, e.g.*, Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. Rev. 855 (2007).

[11] For example, payday lenders may withhold information about pricing until after a loan has been approved. In practice this means that employers have been alerted to the consumer's seeking of the payday loan. Since it would be embarrassing to have the employer contacted for verification a second or third time, consumers may not shop around when this practice occurs. In addition, required disclosures may be verbally downplayed, or withheld until after the loan has been signed. Examples include refusing to show the consumer a copy of the contract or disclose APR until the contract is signed. *See* Christopher Peterson, *Failed Markets, Failing Government, or Both? Learning from the Unintended Consequences of Utah Consumer Credit Law on Vulnerable Debtors*, 2001 UTAH L. REV. 543, 573 (2001) (discussing Utah's payday lending and noting that 65% of Utah payday lenders engage in the practice of loan approval before discussing price).

payments from those in desperate circumstances;[12] and precipitating and encouraging a debt-trap whereby payday lenders do not assess a customer's ability to repay because it would be less profitable.[13] There are many more arguments on both sides of the debate, but these are enough to introduce some key issues.

Before moving to an in-depth discussion of the justifications for regulation, however, it is necessary to introduce three groups with an interest in payday lending regulation.

II. INTERESTED GROUPS

A. Consumers

There are three types of people who borrow in the consumer market: (1) those who borrow the optimal amount; (2) those who borrow too much; and (3) those who borrow too little.[14] The "right" amount is determined by an amount of borrowing that does not cause the borrower's life to "go significantly less well than [it] otherwise would."[15] Excessive borrowing (borrowing above the right amount) can have this effect by providing people with an ability to buy items that contribute little to their welfare, but saddle them with welfare-decreasing debt obligations.[16] Insufficient borrowing, perhaps as a result of a person being "unduly fearful of debt," can have a similar effect by preventing people from borrowing when it would benefit them.[17] Any regulation of payday lending must grapple with the fact that the interests of these three groups of consumers do not always align. A government action privileging one group over the other will need to be justified to be legitimate.

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[12] *Id.*

[13] *See, e.g.*, LESLIE PARRISH & URIAH KING, CTR. FOR RESPONSIBLE LENDING, PHANTOM DEMAND: SHORT-TERM DUE DATE GENERATES NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME (2009), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

[14] Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 249 (2006) [hereinafter Sunstein, *Boundedly Rational Borrowing*]. *See also* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) (discussing "attempting to help people either to reduce or to eliminate" cognitive biases). Sunstein would evaluate the "too much" and "too little" amounts both from an ex ante and ex post perspective, meaning an examination both of what people might not know before going into a transaction and what benefits and detriments the transaction actually produces in terms of their overall wellbeing. Sunstein, *Boundedly Rational Borrowing*, *supra*, at 250.

[15] *Id.*

[16] *Id.*

[17] *Id.* This risk is real in the payday lending context, where it has been demonstrated that some people choose payday loans because they are actually afraid of credit card debt. *See* Martin, *supra* note 5, at 605–06.

Nathalie Martin recently surveyed payday borrowers in New Mexico and analyzed how they behave in payday loan transactions.[18] First, they frequently borrow, and the loans are not actually used short-term.[19] Second, payday loans are used for recurring, not emergency, expenses.[20] These two facts indicate that if consumers were aware that they could get a better deal with alternatives, they might take it because their need for credit is ongoing. Third, borrowers often choose payday loans because of location and convenience, not price.[21] Fourth, other credit options are available to nearly half of payday borrowers, but the ubiquity of stores makes it much easier to take out a payday loan.[22] Finally, borrowers do not generally shop around to compare prices of payday loans available to them.[23] Consumer cognitive biases, a different set of behaviors, will be addressed as a form of market failure below.

B. Payday Lenders

There are two key aspects of the behavior of payday lenders that are important for this discussion. First, payday lenders try to undermine a consumer's access to important information at the point of sale. Nathalie Martin found that borrowers often do not understand how the loan works, and therefore do not understand why they are paying so much.[24] Her survey indicated that common practice in the industry is to try to keep the details obscure, with some businesses even handing contracts to customers in sealed envelopes to discourage reading.[25]

Second, the payday loan industry seeks to evade regulations rather than submit to them. Martin's study showed that lending restrictions that targeted payday loans were avoided by slightly changing the transaction in order to avoid the reach of the statute.[26] Therefore, any consumer disclosure requirements that actually seek to have an impact on

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[18] Martin, *supra* note 5, at 598–614.
[19] *Id.* at 598.
[20] *Id.* at 608. *See also* URIAH KING & LESLIE PARRISH, CENTER FOR RESPONSIBLE LENDING, PAYDAY LOANS, INC.: SHORT ON CREDIT, LONG ON DEBT (2011), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/payday-loan-inc.pdf (discussing how consumers typically use payday loans for long-term expenses).
[21] Martin, *supra* note 5, at 610–11. *See also* CENTER FOR RESPONSIBLE LENDING, PREDATORY PROFILING (2009), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.html (discussing how payday lenders set up shop in minority communities).
[22] Martin, *supra* note 5, at 611–13.
[23] Martin suggests a federal rate cap based on the ineffectiveness of the language of many statutes. *See id.* at 619. This Note takes the Texas statutes as a given, examines the power of the agency to regulate in particular areas.
[24] *Id.*
[25] *Id.* at 599.
[26] *Id.* at 590.

consumers must deal in some way with the gatekeeper of that information—the payday lender himself.

C. Government Actors

With any government intervention, it is important to remember that two significant risks of error are present. First, government actors, like consumers, have cognitive biases that can cause them to make unwise policy choices.[27] In particular, government actors are often under the pressure of powerful interest groups, which can acutely cloud their judgment, especially in situations affecting powerful interests.[28] Second, government actors may have a difficult time distinguishing between the kinds of consumers outlined above, and may not be able to tell if people have a conscious "taste" for consumption at high interest, or are alternatively suffering from unconscious cognitive biases.[29]

Payday loans might be good for some, but not all, of the people who use them. Consumer protection groups are often behind the push for regulation, and payday lenders have bad reputations as predatory lenders. Because there are welfare and efficiency concerns on both sides of the question of whether regulating the industry is wise,[30] it is useful to have a brief overview of the justifications for regulating the payday lending industry. This Note does not seek to settle the debate. Rather, the Note evaluates the efficacy of the regulatory framework in light of the stated goals and the powers delegated to the agency.

III. JUSTIFICATIONS FOR REGULATION

A. Liberty

A central debate in considering payday lending restrictions is their impact on freedom. When the debate occurs at this level, it is perhaps at its most abstract because of its moral basis. It is common for the political faction aligned with the industry to invoke freedom and personal

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[27] Sunstein, *Boundedly Rational Borrowing*, *supra* note 14, at 255.

[28] *Id.*

[29] *Id.* at 254–55. Sunstein also points out that individual choice is important to preserve. First, people who suffer harm from bad debt choices have an incentive to learn and improve behavior. Second, regulations with no opt-out can solidify some relationships that may be good for most, but not for all. Weaker forms of intervention can be "technology-forcing" and cause innovations that better serve consumers over time. *See id.* at 255.

[30] Edmiston, *supra* note 10.

responsibility in criticizing restrictions.[31] Industry supporters typically focus on the freedom of choice of consumers, rather than payday lenders' freedom to operate.[32]

Although freedom tends to be a pro-industry justification for maintaining the status quo in political debates, reform advocates argue that the status quo itself implicates liberty. For some commentators, the business practices of the industry are so injurious that they produce exploitation, leaving consumers worse off than before transacting, without any gain. Citing the demographic makeup of payday loan consumers as being credit-constrained and out of options,[33] Creola Johnson has argued that "[t]he demographic data . . . suggest why the principles of freedom of contract and free enterprise fail to empower these consumers in any meaningful way. The data demonstrate why a largely unregulated free market has led to what is best characterized . . . as economic *exploitation* rather than *efficiency*."[34] Because freedom of contract rests on notions of efficiency and mutual bargain, industry practices that harm a consumer's ability to make well-informed, reasonable financial decisions undermine the idea that an unregulated payday lending market is desirable on liberty grounds. They are neither efficient nor neutral.[35] Put another way, "freedom of contract shifts from a system to enhance consumer welfare, and social welfare more generally, to a tool used by more sophisticated parties to take consumers' money without giving value in return."[36] Thus, the level of harm the contract produces for the vulnerable borrower impacts the strength of the justification for leaving people free to enter into such a transaction in the first place. This argument has long roots; a version of it reaches back to traditional libertarian and religious principles, which helped justify traditional usury laws—removing lending at interest from the universe of legal contracts.[37]

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[31] For example, one of the authors of a Georgia bill that would have rolled back a strong ban on payday lending, which had passed earlier in the decade, argued that citizens should practice personal responsibility and promote their own freedom. Christopher T. Conway & Nicola M. Pasquarelli, *Crimes and Offences*, 24 GA. ST. U. L. REV. 37, 43 (2007) (citing Video Recording of House Floor Debate, Mar. 20, 2007 at 3 hr., 27 min., 27 sec. (remarks by Rep. Earl Ehrhart (D-36th)) ("Representative Ehrhart, one of the authors of the bill, maintained that the representatives should 'trust the citizens of Georgia to promote their own freedom' by limiting the government and allowing Georgians to 'exercise their own personal responsibility.'").

[32] Richard J. Thomas, Note, *Rolling Over Borrowers: Preventing Excessive Refinancing and Other Necessary Changes in the Payday Loan Industry*, 48 WM. & MARY L. REV. 2401, 2424–25 (2007) ("At least one industry supporter has even gone so far as to allege that those seeking elimination of the industry 'are dictating which types of financial services we should use' and thus threaten the '[c]onsumer freedom [that] is the very core of American democracy.'").

[33] Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 102 (2002) ("Thus, the data demonstrate a lack of access to traditional credit and provide a rational explanation as to why these consumers resort to using extremely high-interest loans.").

[34] *Id.* at 98.

[35] *Id.* at 118.

[36] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 7 (2008).

[37] Christopher Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1117–22 (2008) (discussing

For other commentators, participation in the consumer credit market can implicate freedom even if a person does not begin transacting from a desperate position. Mechele Dickerson concludes that unregulated access to credit means that "financial freedom is vanishing and . . . giving people the power to go into debt gives them the illusion of freedom, but . . . the temporary illusion of financial freedom causes people to make unwise spending decisions that ultimately strip them of control over their finances."[38] In this formulation, the initial credit, not the borrower's initial position, causes the harm by creating a false feeling that exacerbates consumers' cognitive failures and ends up curtailing freedom.

In sum, the freedom debate is between the freedom of individuals (and enterprises) to contract in the service of their own perceived self-interests, and the prevention of malicious harm that both calls into question whether an individual's choice to transact is actually free in the first place and also whether the transaction eventually curtails individual freedom to an extreme degree. When the market fails to deliver value and leaves consumers worse off, it may be the result of a violation of freedom in the form of taking advantage of an unsophisticated party's desperate starting position, or from a foreseeable result of extending credit in an unregulated market.

B. Market Failure

1. No Price Competition; Collective Action Problems

Nathalie Martin explains the concept of a market failure, which occurs when a market fails to display the characteristics of competition:

> Perfect markets are competitive. In the perfect market, many sellers offer substantially identical products, so it is easy to shop around and compare costs. There are also many buyers. All actors in the perfect market act to maximize their own financial well-being. There are no barriers to entry into the market by new sellers, and both buyers and sellers are well-informed. In a perfect market, supply and demand for products will level out and the price of goods will stabilize. The absence of any of these attributes is known as market failure.[39]

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early American views on usury and early incarnations of fringe credit).

[38] Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079, 1080 (2010).

[39] Martin, *supra* note 5, at 614 (citations omitted).

Payday lending markets experience problems with at least three of these attributes, because (1) comparing costs is futile or difficult; (2) consumers may be making non-economic or irrational decisions that do not improve their financial well-being; and (3) consumers suffer from a lack of information at a number of points in the course of a transaction.

First, payday lenders generally compete on the basis of convenience, not price.[40] Prices of payday loans remain high no matter how many entrants into the market there are.[41] High prices alone do not signify market failure, but the lack of competition on price can show that price is either hard for consumers to ascertain or that there are collective action problems dis-incentivizing pro-consumer innovations.[42] In particular, because of the dire circumstances of most payday borrowers, consumers are not willing to go to multiple locations and shop around when time and money are tight.[43]

Second, collective action problems can prevent consumers from educating themselves about financial products, and can prevent creditors from offering safer products. Elizabeth Warren and Oren Bar-Gill have addressed these issues in the context of the credit card market.[44] Unlike, for example, car manufacturers, who may have an incentive to develop new safety features in order to attract more customers, there is little incentive among payday lenders to be the first to offer a product that is safer for consumers.[45] There is a free-loader problem that is especially

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[40] Benjamin D. Faller, Note, *Payday Loan Solutions: Slaying the Hydra (And Keeping It Dead)*, 59 CASE W. RES. L. REV. 125, 139 (2008).

[41] *Id. See also* Martin, *supra* note 5, at 614 ("The payday lending and other short-term lending industries are classic failed markets. The industry is young, having developed primarily in the 1990s. Thus, price competition is not yet necessary to create a strong market share. Rather, most lenders charge similar amounts for the same loan, typically the largest amount permitted by law.").

[42] Michael Kenneth, *Payday Lending: Can 'Reputable' Banks End Cycles of Debt?*, 42 U.S.F. L. REV. 659, 689–690 (2008) ("Another basis for criticizing the industry is the utter lack of price competition among payday lenders. Those who urge greater regulation often cite to this as evidence of a basic market failure that demands legislation to protect the consumer. For example, after Colorado passed an industry-approved bill regulating payday loans, over 89% of payday loan lenders charged a finance fee of the exact maximum amount allowed under the law, and that percentage increased to almost 93% in two years. FDIC also conducted a nationwide survey that found that most payday lenders offered prices at or near the statutory limit."). *See also* Kelly Noyes, Comment, *Get Cash Until Payday! The Payday-Loan Problem in Wisconsin*, 2006 WIS. L. REV. 1627, 1662 (2006) ("Scholars argue that payday-loan legislation should limit interest rates because there is market failure in the payday-loan industry. Many payday-loan consumers do not base their borrowing decisions on price. Consumers may not understand the true cost of the loans and may focus instead on the low monthly payments, speed, or convenience. Payday lenders principally compete based on location, speed, promotions or specials, and name recognition instead of price. Further, many lenders discourage price shopping by refusing to disclose the interest rate and other loan terms until after the consumer applies for the loan. Because payday-loan consumers often do not have complete information, most cannot price shop and create price competition. Due to this market failure, increased competition between lenders has failed to lower payday-loan interest rates. Studies show that, despite industry growth, payday-loan prices have increased or remained the same, and, in states with interest-rate limits, rates cluster around the highest legal interest rate. Therefore, interest-rate caps could correct this market failure.").

[43] Peterson, *supra* note 11, at 571–72.

[44] Bar-Gill & Warren, *supra* note 36, at 15–22.

[45] *Id.* at 18.

acute in financial products—they are easy to copy quickly.[46] Thus, the research that goes into developing consumer friendly market innovation is not rewarded with higher prices and more business.[47] On a related note, financial products can be difficult to explain.[48] If a company cannot adequately make the case that a product saves consumers money, then the resources expended on developing it go to waste.[49]

Finally, a collective action problem may explain why consumers are reluctant to press their rights in the context of consumer credit contracts. An individual loss is often quite small and not worth the hassle of filing a complaint or litigation.[50] When the whole consumer credit economy tends toward the same inaction, creditors are able to mistreat consumers continuously—little by little—while suffering few consequences.

2. ***Information Problems***

There are two important kinds of information failures at work in the payday lending context: information asymmetry and consumer cognitive errors. Ronald Mann and Jim Hawkins observe that no rational consumer would pay 400% interest and have a loan outstanding for weeks or a year, and thus concludes that the market taxes cognitive failures.[51]

Information asymmetry in the payday loan market stems from a highly sophisticated industry, which knows its customers well, interacting with a customer base that is not nearly as sophisticated. As some commentators have shown, numbers can be highly deceiving in the financial context. Christopher Peterson studied usury statutes in the states and found that high numbers were routinely expressed in a way to make them appear low. For instance, an interest rate cap that bans payday loan prices in excess of $10 per $100 is not a prohibition on interest rates exceeding 10%; it is actually a cap allowing APRs of a few-hundred percent.

Information asymmetry combines with the desperate circumstances of some consumers to cause rational breakdowns which can alter a consumer's priorities.[52] Even though a mother may know a payday loan is ultimately a bad deal, she may feel forced to take one out in order to ensure that her children eat. In such a circumstance, rationality gives way to what may be "altruistic or other non-economic decision making

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[46] *Id.* at 19.
[47] *Id.*
[48] *Id.* at 19–20.
[49] *Id.*
[50] *See id.* at 21–22.
[51] Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 884 (2007).
[52] Peterson, *supra* note 11, at 573.

procedures."[53]

Consumers in Nathalie Martin's surveys did not have a handle on basic information, or could not effectively process it when it was available. Overall, borrowers do not know what APR describes, nor can they accurately predict the total cost of their loans.[54] Borrowers are not able to compare the cost of alternatives; specifically, they do not understand how the costs of payday loans and credit cards compare.[55]

Consumers also suffer from cognitive biases. Cass Sunstein outlines five general cognitive problems that consumer borrowers face when deciding to borrow money.[56] Because Sunstein discusses these biases in the credit card context, the Note draws distinctions between that market and the payday loan market where necessary.

The first cognitive problem is unrealistic optimism, or the consumer's belief in his ability to pay back the debt, even if it is unlikely.[57] This bias, at work when young smokers assume they will not be smoking in a few years, can be present when consumers incur large expenditures.[58] In the payday loan context, this bias is probably present when consumers who are short of cash today think they will be able to pay back the full amount of a loan plus a high rate of interest in only a couple of weeks. Consumers who make this assumption are not always wrong, but many are.

The second problem is myopia, or the failure of self-control, which is often operative if a consumer makes short-term choices that cause long-term harm.[59] This kind of behavior can be a rational matter of taste (for example, someone who prefers to live in the moment might choose to behave in this way). When "a day's welfare produces long-term distress," however, Sunstein says excessive borrowing is the result of similar psychological mechanisms as those that contribute to excessive smoking and drinking.[60] In the payday loan context, this behavior is not always present. Some people may use payday loans to consume, some may use them for emergency expenses, and still others may use them for recurring expenses. When used for consumption and for recurring expenses, however, this bias is likely at work.

The third problem is "miswanting," which is when people want things that are not good for them and do not want things that are good for them.[61] Consumers are often in competition with each other to "keep up

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[53] *Id.*

[54] Martin, *supra* note 5, at 598–605.

[55] *Id.*at 605–08.

[56] Sunstein, *Boundedly Rational Borrowing*, *supra* note 14, at 251–53.

[57] *Id.* at 252.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 252.

[61] Sunstein, *Boundedly Rational Borrowing*, *supra* note 14, at 253.

with the Joneses."[62] This competition does not help consumers as a group, so if easy borrowing contributes to its acceleration, it can "produce a great deal of harm" in the form of debt obligations without producing much value for consumers.[63] In the payday loan context, miswanting may be keeping consumers from shopping around based on price, asking relatives for money, or reducing other consumption, which are all usually less costly than payday loans.

The fourth problem is "cumulative cost neglect," or a tendency to treat with less caution small costs that add up over time than if the same effect occurred as a single, one-time cost.[64] For example, people are more cautious about borrowing $20,000 at a high rate of interest, but less so about borrowing small amounts at a time that end up creating the same effect.[65] In credit card transactions, swiping the card multiple times per day likely implicates this problem. It may be at work in the payday lending market as well because the loans are advertised as short-term loans, so a high yearly interest rate may not be in the consumer's mind as the actual interest rate. But, even with rollovers of payday loans, the consumer's decision to incur more debt likely occurs more infrequently than for credit cards.

The fifth problem is procrastination, which can cause the accumulation of late fees and charges.[66] It is less likely that this consumer behavior is a problem with respect to payday loans. Procrastination will generally not cause late fees, but a full-on default leading to seizure of the full principal. If consumers are putting anything off, it is this result. Consumers generally rollover the loan before it is due in order to avoid paying, a practice that has been called the cycle of debt.

Finally, information problems are exacerbated in the payday lending context due to the industry practice of marketing to consumers in a way that triggers these and other cognitive impairments. Some commentators have discussed practices that increase "shopping costs" for consumers who otherwise might be willing to shop around based on price. In particular, payday lenders may withhold information about pricing until after a loan has been approved. Because loan approval processes often entail employment verification, in practice this means that employers have been alerted to the consumer's seeking of the payday loan. Because it can be embarrassing to have the employer contacted for verification a second or third time, consumers may not shop around when this practice occurs.[67] In addition, required disclosures may be verbally downplayed or withheld until after the loan has been

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[62] *Id.*
[63] *Id.*
[64] *Id.* at 251.
[65] *Id.*
[66] Sunstein, *Boundedly Rational Borrowing*, *supra* note 14, at 251–52.
[67] Peterson, *supra* note 11, at 573 (discussing Utah and noting that 65% of Utah payday lenders engage in this practice).

signed. An example is a payday lender refusing to show a copy of the contract or disclose the APR until the contract is signed.[68]

3. *Externalities*

When consumers become extended beyond their means, it harms not only the lender, but others who are outside the transaction. This is the problem of externalities. As commentators have pointed out, consumers who have debt problems also often have family members who are harmed by the consequences of their loan transactions, for example children and spouses.[69]

An additional external cost may be carried by a consumer's lower-interest creditors.[70] Because a credit-constrained consumer has a limited paycheck, a substantial portion of it may end up going to pay the high-interest creditor first.[71] This decreases the potential that the lower-risk creditors will be paid and puts economic pressure on the providers of lower-risk credit.[72] This might have the effect of constraining credit further throughout the consumer economy.[73] At least one commentator has pointed out that the external costs alone justify intervening in the consumer credit market in light of the low value that emergency credit provides to consumers, citing increased bankruptcies, court costs, strains on welfare programs, and low consumer savings.[74]

IV. WHAT A DEBIASING DISCLOSURE MESSAGE SHOULD AIM TO DO

Now that the actors have been introduced, and the justifications for regulation described, the Note introduces Sunstein's regulatory framework. The framework helps to situate evaluations this Note makes about the specific Texas rules at issue. Sunstein has described the basic methods of regulating the consumer credit market in an article about excessive borrowing with credit cards.[75] The credit card market is

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[68] Johnson, *supra* note 33, at 32.

[69] *Id.* at 571–72. *See also* Bar-Gill & Warren, *supra* note 36, at 59–62.

[70] Diane Hellwig, Note, *Exposing the Loansharks in Sheep's Clothing: Why Re-regulating the Consumer Credit Market Makes Economic Sense*, 80 NOTRE DAME L. REV. 1567, 1578 (2005). *See also* Bar-Gill & Warren, *supra* note 36, at 63.

[71] Hellwig, *supra* note 70, at 1578.

[72] *Id.*

[73] *See id.* at 1578–80.

[74] *Id.* at 1567, 1578–80 ("This Note argues that the protection of society from these externalities justifies government intervention, even in the rare case where consumers understand the full implications of their decisions.").

[75] *See* Sunstein, *Boundedly Rational Borrowing*, *supra* note 14. *See also* Christine Jolls & Cass R.

distinct from the payday loan market, but Sunstein's discussion of the motivations of borrowing behavior; the effects of borrowing behavior; and the appropriate categories of legal responses is useful for evaluating what Texas has done.[76] Understanding the framework does not alone reveal the proper legal responses to choose (if any) from the framework. Empirical findings are necessary to make those evaluations in full. But understanding the framework can help a commentator understand whether a particular legal regime should be considered adequate to advance the policy goal it adopts.

Regulations can be strongly or weakly paternalistic.[77] Strongly paternalistic regulations remove some contracts from the realm of possible agreements on the grounds that they "produce little short-term gain but significant long-term harm."[78] If the aggregate benefits of banning the contract exceed the aggregate harms, then the ban is justified.[79] In the consumer credit context, industry practices that seek to exploit the natural cognitive limitations of the target audience, which can inflict great injury on consumers, could be candidates for these types of strongly paternalistic regulations.[80] This Note will not go into more detail on strongly paternalistic regulations, however, because Texas has not chosen to adopt that type of scheme.[81]

Weakly paternalistic regulations, on the other hand, preserve consumer choice while also leading people to choose welfare-enhancing options.[82] Sunstein identifies three types of weakly paternalistic regulations. The first, asymmetrical paternalism, inflicts a small harm on rational consumers, but greatly helps irrational consumers.[83] An example is a "cooling off" period before marriage: people who have thought it out will not be bothered much by a waiting period, but those who have not thought it out may be given the proper time to reconsider.[84] The second

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Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) (discussing "attempting to help people either to reduce or to eliminate" cognitive biases).

[76] *See* Sunstein, *Boundedly Rational Borrowing, supra* note 14, at 250 (discussing the aim of the article as "to provide a kind of regulator's guide . . . a general outline of the reasons that boundedly rational borrowing might occur and the possible legal remedies. My hope is that the discussion will be applicable to a wide range of situations in which bounded rationality is a potential problem . . . . Evaluation of the relevant mechanisms and remedies would require detailed empirical investigation").

[77] Sunstein thinks some paternalism is inevitable because the status quo itself counts as a "default rule" that may or may not promote the interests of parties, but he allows that particular weakly paternalistic regulatory choices are not inevitable and must be justified with reference to empirical reality. *Id.* at 258–59.

[78] *Id.* at 267.

[79] *Id.*

[80] *Id.*

[81] But, information regulations do not exist in a vacuum. Action is necessary on the part of the government, industry, and consumer in order to ensure that a desired message is received by a consumer. Thus, there is a necessary element of government policing of behavior even in purely informational regulation.

[82] Sunstein, *Boundedly Rational Borrowing, supra* note 14, at 256.

[83] *Id.*

[84] *Id.*

type of weakly paternalistic regulations is libertarian paternalism, which sets default rules where the government wants consumer choice to be, but allows consumers to freely opt for a different path.[85] The example is automatic enrollment (with an option for opting out) in employee savings plans. People tend to stay in the plan, and savings rates improve.[86] Finally, government "debiasing" efforts are the weakest form of weakly paternalistic regulations.[87] Debiasing regulations counteract the effects of cognitive problems that some consumers face when deciding to make a purchase.[88] An example is anti-smoking warnings on packs of cigarettes.[89] Debiasing is persuasive information regulation.

By adopting a system of mandatory consumer disclosures, Texas has primarily opted for the debiasing strategy. The debiasing strategy, when properly employed, will persuade consumers to counteract their biases by prompting them to think more cautiously about the payday loan transaction. The Note now addresses what Texas has done; what Texas has not done; and what Texas should do. This discussion begins with how the payday lending industry and the law evolved in Texas.

V. EVOLUTION OF THE TEXAS PAYDAY LENDING INDUSTRY

A. Texas Authorizes Payday Lending Within Limits

Texas formally regulates payday lending,[90] but commentators have noted that Texas does not do so in a way that actually limits the industry's practices.[91] The "payday loan" was born rather recently as a

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[85] *Id.*

[86] *Id.* at 256.

[87] See Sunstein, *Boundedly Rational Borrowing*, *supra* note 14, at 257–58.

[88] *Id.*

[89] *Id.* at 258, n.27.

[90] In 2000, the Texas finance commission issued regulations under their rulemaking authority. 25 Tex. Reg. 6316 (originally codified at TEX. ADMIN. CODE § 1.605) (June 30, 2000); JEAN ANN FOX, CONSUMER FED'N OF AM., UNSAFE AND UNSOUND: PAYDAY LENDERS HIDE BEHIND FDIC BANK CHARTERS TO PEDDLE USURY, 33 (2004), *available at* http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/pdlrentabankreport.pdf. The regulations first appeared as 7 TEX. ADMIN. CODE § 1.605 (2000). Through notice and comment in the *Texas Register*, the Texas finance commission moved those regulations to a new section, where it was updated in 2010. 31 Tex. Reg. 6568 (August 25, 2006) (proposing repeal of the old section and soliciting public comment); 31 Tex. Reg. 8984 (November 3, 2006) (adopting the repeal of the old section); 31 Tex. Reg. 6578 (August 25, 2006) (proposing new section and clean up changes); 31 Tex. Reg. 8992 (November 3, 2006) (adopting the new section); 35 Tex. Reg. 9698 (October 29, 2010) (providing for online payday lending outlets).

[91] *See* Deena Reynolds, *A Look at Payday Loans & Current Regulation in Texas*, 8 TEX. TECH. ADMIN. L.J. 321 (2007). *See also* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 884 (2007); Benjamin D. Faller, Note, *Payday Loan Solutions: Slaying the Hydra (And Keeping It Dead)*, 59 CASE W. RES. L. REV. 125, 139 (2008).

new product of check-cashing businesses and pawnshops.[92] Texas first addressed the product when the finance commission promulgated rules in 2000.[93] The regulations are still in place,[94] but Texas payday lenders no longer operate in ways captured by the formal regulations.[95] The circumvention of this first attempt at regulation places the most recent legislation in context.

The regulation governs the transaction, the ongoing relationship with the customer, and disclosure requirements. As a threshold matter, the finance commission defines a "[p]ayday loan or deferred presentment transaction" narrowly to include three elements: "(i) a cash advance in whole or part is made in exchange for a personal check or authorization to debit a deposit account; (ii) the amount of the check or authorized debit equals the amount of the advance plus a fee; and (iii) the person making the advance agrees that the check will not be cashed or deposited or the authorized debit will not be made until a designated future date."[96] Limiting the definition to check transactions alone does not necessarily capture all that payday lending could entail, as Nathalie Martin has shown occurred in New Mexico.[97] It is conceivable that the second element could also be circumvented by simply requiring two payments. Yet, the law also instructs courts to look beyond the form of the transaction to consider substance.[98]

The regulation caps finance charges and prohibits the charging of additional fees, unless they are authorized in statute.[99] It provides consumers with a right to prepay the loan before the term ends, along with a right to a credit for any unused finance charge.[100] Finally, it provides a minimum term of seven days and requires deposit of the check after a maximum of thirty-one days.[101]

In regulating the ongoing relationship of the customer and lender, the rules allow rollovers of the loan without limiting the number of

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[92] Mary Spector, *Taming the Beast: Payday Loans, Regulatory Efforts, and Unintended Consequences*, 57 DEPAUL L. REV. 961, 975 (2008).

[93] Reynolds, *supra* note 91, at 329.

[94] 7 TEX. ADMIN. CODE § 83.604 (2006) (Fin. Comm'n of Tex., Rules for Regulated Lenders).

[95] *See, e.g.*, Lawrence Meyers, *Payday Lenders Strike Back*, THE MOTLEY FOOL (July 29, 2005) *available at* http://www.fool.com/investing/small-cap/2005/07/29/payday-lenders-strike-back.aspx (discussing the big payday companies' response to new FDIC rules limiting their ability to import interest rates from outside of Texas, namely, to register as CSOs and guarantee repayment of loans with a third party lender).

[96] 7 TEX. ADMIN. CODE § 83.604.

[97] Martin, *supra* note 5, at 578 n.78.

[98] *See* TEX. FIN. CODE ANN. §§ 342.007, 342.008 (West 2006) (authorizing the finance commission to make rules about deferred presentment transactions; and prohibiting attempted evasion "by use of any device, subterfuge, or pretense."). Note, § 342.008 could have provided the hook to rein in CSO/payday lending activities in Lovick v. Ritemoney, 378 F.3d 433 (5th Cir. 2004), *infra*.

[99] 7 TEX. ADMIN. CODE 83.604(b) (2012). *See also* TEX. FIN. CODE ANN. § 342.251–342.259 (West 2006) (setting maximum finance charges and restricting allowed fees).

[100] 7 TEX. ADMIN. CODE § 83.604(e)(4).

[101] *Id.* § 83.604(d), (e)(5).

rollovers.[102] But, a loan that rolls over cannot result in the lender making more money than what would have been earned if the original loan had simply been for a longer term.[103] Finally, the regulation specifies that a payday loan is a credit relationship and that the lender can pursue "all legally available civil means" to collect in the event of a default.[104] But, lenders must comply with Texas collection regulations.

As for disclosure requirements, the regulation requires the price term to be expressed as an annual percentage rate (APR) in addition to a sum of money.[105] It requires the lender to "provide a notice" that "reads" this way: "This cash advance is not intended to meet long-term financial needs. This loan should only be used to meet immediate short-term cash needs. Renewing the loan rather than paying the debt in full when due will require the payment of additional charges."[106] Additionally, the agreement must contain "notice" of the "name and address of the Office of Consumer Credit Commissioner and the telephone number of the consumer helpline."[107] The lender must "post a notice" of the allowed fee schedule.[108] Finally, the lender must make a "good faith" effort to determine whether a borrower has the ability to repay the loan on its terms.[109]

Added together, the limitations on charges are quite generous, allowing loans between $100 and $350 to incur interest that works out to approximately 309% APR for a two week period.[110] When federal regulations made it difficult to "import" interest rates, the payday loan industry searched for another way to structure their stores to evade the new regulations, and in the process evaded the state legal structure.[111]

B. The CSO Business Model Is Created

In 1987, the Texas legislature passed a credit services organization (CSO) statute. Many states and the federal government adopted CSO statutes in the late 1980s to combat deceptive practices in the debt repair industry. In particular, bad actors in these companies encouraged people to lie on their credit applications and to "borrow" other people's cleaner credit reports for a fee.

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[102] *Id.* § 83.604(f)(1).
[103] *Id. See also*, Reynolds, *supra* note 91, at 330.
[104] 7 TEX. ADMIN. CODE § 83.604(f)(2).
[105] *Id.* § 83.604(e)(2)(D).
[106] *Id.* § 83.604(e)(3).
[107] *Id.*
[108] *Id.* § 83.604(e)(6).
[109] 7 TEX. ADMIN. CODE § 83.604(f)(3).
[110] *See* FOX, *supra* note 82, at 13.
[111] FED. DEPOSIT INS. CORP., DEP'T OF THE TREAS., FINANCIAL INSTITUTION LETTER FIL-14-2005, PAYDAY LENDING PROGRAMS REVISED EXAMINATION GUIDANCE (2005).

Under the Texas statute, a CSO includes a person that advises a consumer on how to get; assists a consumer in getting; or provides a consumer with an extension of consumer credit from a third party.[112] CSOs must file with the Secretary of State and post a $10,000 surety bond to be used to pay damages to the state or consumers in the event of a statutory violation. The statute allows civil and criminal penalties for a violation, including punitive damages. The statute includes a consumer right of rescission of a debt service contract within three days after signing.

There are a number of disclosure requirements in the statute that primarily relate to remedying the problem of dishonest debt repair. One of the required disclosures is a complete description of the services to be provided in exchange for the fees charged, but there is no limit to the amount of the fees.[113]

After 2005, when the FDIC cracked down[114] on a model of payday lending called "rent-a-bank," Texas payday lenders en masse began registering and operating as CSOs. The way this works in payday lending[115] is that the storefront sets up as a CSO, separate from a non-bank lender (the third party).[116] The CSO provides brokerage services and usually provides a letter of credit guaranteeing the payment of the customer's loan.[117] The lender lends the money to an approved consumer

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[112] TEX. FIN. CODE ANN. § 393.001 (West 2006) (defining CSO as "a person who provides, or represents that the person can or will provide . . . [a] service[ ]obtaining an extension of consumer credit [by others] for a consumer"; or "provid[es] advice or assistance to a consumer" regarding such an extension by others).

[113] *See id.* at §393.105 (requiring a CSO to disclose the following to a consumer: "(1) a complete and detailed description of the services to be performed by the organization for the consumer and the total cost of those services; (2) an explanation of the consumer's right to proceed against the surety bond or account obtained under Section 393.302; (3) the name and address of the surety company that issued the surety bond or the name and address of the depository and the trustee and the account number of the surety account, as appropriate; (4) a complete and accurate statement of the consumer's right to review information on the consumer maintained in a file by a consumer reporting agency, as provided by the Fair Credit Reporting Act (15 U.S.C. Section 1681 et seq.); (5) a statement that information in the consumer's file is available for review: (A) without charge on request made to the consumer reporting agency not later than the 30th day after the date on which the agency receives notice the consumer has been denied credit; and (B) for a minimal charge at any other time; (6) a complete and accurate statement of the consumer's right to dispute directly with a consumer reporting agency the completeness or accuracy of an item contained in the consumer's file maintained by the agency; (7) a statement that accurate information cannot be permanently removed from the files of a consumer reporting agency; (8) a complete and accurate statement explaining: (A) when consumer information becomes obsolete; and (B) that a consumer reporting agency is prevented from issuing a report containing obsolete information; and (9) a complete and accurate statement of the availability of nonprofit credit counseling services").

[114] FED. DEPOSIT INS. CORP., *supra* note 111.

[115] A useful document for more information on the CSO model is a short memo written by a lawyer for the Payday Loan Bar Association. *See* Memorandum from J. Scott Sheehan, Greenberg and Taurig, to Payday Loan Bar Association, "Re: Payday Loan Bar Association – Update and Materials on CSO Model" (Nov. 13, 2006), http://pdlba.com/images/GT_--_Payday_Loan_Bar_--_Update_on_CSO_Model_11-13-06_.doc.

[116] *Id.* at 1.

[117] *Id.*

at the default 10% usury cap rate.[118] But, the CSO runs up unregulated fees for the "services" it provides in helping the consumer get the loan.[119]

Regardless of one's opinion of the justifications for regulating the price of credit offered by payday lenders, it is important to recognize the operation of payday lenders as CSOs as the exploitation of a legal reality that allows the escape of targeted payday lending regulations. The industry has reacted similarly to regulations in other states. For example, the closing of a CSO loophole in Oklahoma led the payday lenders to seek their own law allowing the higher interest rates for payday loans. Michigan and New Mexico have also recently dealt with attempts by payday lenders to avoid narrowly-drafted regulatory caps.

In Texas, the prospect of operating without the regulation required under state law made the CSO statute a natural home for payday lenders. The practice was challenged and in a crucial respect upheld in a 2004 federal case (which was later endorsed by the Texas Attorney General), discussed next.

C. *Lovick v. Ritemoney, Ltd.* and Its Impacts

The question in *Lovick*[120] was whether the fees that payday lenders, acting as legal brokers, charged to the consumers should be considered interest for the purposes of usury law. The door was open in the *Lovick* case for the court to say that Texas law prohibits the CSO model as a pretextual attempt to evade the usury restrictions, but the court declined. Instead, it reasoned that the payday restrictions were restrictions on lending, whereas the legislature had intended brokers to be governed by the separate CSO statute. As a result, the third-party lenders, by complying with the caps were behaving appropriately, and the brokers, by being independent of the lenders were also acting appropriately, provided that the two were not sharing fees. The court also held that common law devices used to find violations of usury laws despite formal compliance had been superseded by the legislature's use of statutes to govern the relationship between brokers and lenders.

In response to the *Lovick* decision, the Texas Attorney General and state regulators clarified and accepted this interpretation of Texas law.[121] Reliance on this authority is sufficient under Texas law to shield a payday lender from liability; even if a court later rules that the *Lovick*

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[118] *Id.*at 3.

[119] *Id.* at 6. *See also* Spector, *supra* note 92.

[120] Lovick v. Ritemoney, Ltd., 378 F.3d 433, 438–39 (5th Cir. 2004).

[121] *See* Ann Baddour, *Why Texas' Small-Dollar Lending Market Matters*, E-PERSPECTIVES, (Vol. 12, Issue 2, 2012), www.dallasfed.org/microsites/cd/epersp/2012/2-2cfm (citing unpublished Letter from Barry R. McBee, First Assistant Attorney General, Office of the Attorney General of Texas, to Leslie Pettijohn, Consumer Credit Comm'r, Jan 12, 2006).

interpretation was faulty.[122]

Whether or not a regulation is justified, the industry seeks ways to offer money to customers at unlimited rates and will seek loopholes to do so.

VI. LEGISLATION CONSIDERED OR PASSED IN 2011

The Note now discusses the legislative history of the bills that passed, and did not pass, in the 2011 legislative session. While a number of bills were filed to address the CSO model of payday lenders in Texas, there were only two competing approaches. The first approach, offered by Representatives Tom Craddick and Eddie Rodriguez and embodied in H.B. 410, would have overturned *Lovick*, and opened the door for an interest rate cap. Representative Vicki Truitt's approach was more permissive, and a version of it passed.

A. Craddick/Rodriguez Approach

H.B. 410 would have amended two sections of the Texas Finance Code: (1) Chapter 302, which sets a limit of ten percent for interest rates that are not specifically addressed in other statutes; and (2) Chapter 393, which is the credit service organization statute defining CSOs and governing their operations.[123]

H.B. 410's changes to Chapter 393 would have banned CSOs from providing consumers with credit or helping consumers get credit. The change to Chapter 302 would have added Section 302.003, a "prohibition on third-party fees to arrange or guarantee certain extensions of consumer credit." Under subsection (a), the extensions of consumer credit for which a third party could not get a fee for helping to arrange are those for which "the proceeds . . . are used for personal, family, or household purposes."[124] This change would have swept up most

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[122] *About Attorney General Opinions*, TEX. STATE LIBRARY & ARCHIVES COMM'N, https://www.tsl.state.tx.us/ld/pubs/liblaws/aboutag.html (last visited Aug. 16, 2012) ("Although the courts have generally ruled that opinions are 'advisory in nature,' persons who reasonably rely on Attorney General Opinions may be protected from civil and criminal liability, even if the Attorney General has erred in his interpretation. Conversely, the failure to follow the authoritative advice of the Attorney General may be evidence of a lack of good faith.").

[123] Tex. H.B. 410, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB00410I.htm.

[124] *Id.* The only excluded category of credit is a purchase money security interest (PMSI) in personal property, which arises when the loan is for the purpose of purchasing the collateral used to secure the loan. An example of a PMSI is a car-buying transaction, where the consumer is lent the money to drive the car off the lot and must repay it in installments at interest.

practitioners of the CSO model. Because the CSO statute would no longer be a vehicle for assisting a consumer in getting consumer credit, the change to Section 302 would have been a broad change applicable to all arrangements where the person in the storefront is not the actual lender.

In addition to banning fees to third parties, subsection (b) would have also directed courts to apply the usury laws: "The amount of a fee contracted for, charged, or received in violation of Subsection (a) is considered interest for usury purposes under state law."[125] Thus, it would be a violation of the law to charge the fees, and a potential violation of usury laws if the fees brought a lender over the cap.

It appears that H.B. 410 would have gutted the *Lovick* holding in a number of ways. First, it probably rejected a line of reasoning in the case which argues that usury statutes supplanted common law doctrines that had managed the broker/lender relationship, because the statutes were passed after those doctrines were elucidated. The phrase "usury purposes under state law" is not restricted to statutory law, nor statutory actions, but all usury "purposes" under the law. Whether the argument would be successful in reviving any of the doctrines that *Lovick* said were overruled by implication,[126] the bill analysis for the senate version of H.B. 410, S.B. 251 authored by Royce West, names *Lovick* as the root of the loophole allowing the circumvention of usury laws.[127] The bill was meant to overrule the court, and this likely would have had the effect of broadening the usury statutes to once again include courts looking to the substance of transactions rather than the form.

Second, the bill would not have allowed a CSO to help a consumer obtain an extension of credit. Such a change would reject the line of reasoning in *Lovick* that the CSO statute was meant to govern brokers' fees by reuniting the analysis of fees with the other sections of the finance code that deal with lending. Under the bill, it would not have mattered how the broker is registered because the behavior affected would have been the charging of a fee.

Third, it impliedly rejected the reasoning in *Lovick* that the CSO statute and usury statute work in harmony for the purpose of determining whether fees are interest. Instead, the bill would have barred CSOs from engaging in the activity that the *Lovick* decision said they were designed for. H.B. 410 would have given Chapter 393 no role in a future usury analysis.

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[125] *Id.*

[126] Lovick v. Ritemoney, Ltd., 378 F.3d 433, 442 (5th Cir. 2004) ("The codification of Texas usury law and the enactment of CSOA governing loan brokers as credit services organizations (CSOs) has overruled by implication those cases interpreting brokerage fees of the type alleged here as potentially usurious interest. Again, *Lovick* cites no post-enactment cases. In the light of Texas' more recent usury statutes and CSOA, the complaint fails to state a claim.").

[127] *See* S. Comm. on Bus. & Commerce, Bill Analysis, Tex. S.B. 251, 82d Leg., R.S., (2011) *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/html/SB00251I.htm.

Finally, the statute would have brought payday lenders back under the purview of the previous restrictions, outlined above, and the administrative control of the finance commission.[128]

H.B. 410 was referred to the House Committee on Pensions, Investments, and Financial Services (PIFS), but was left pending after a public hearing.[129] Representative Vicki Truitt, Chair of the PIFS Committee, carried more permissive bills on the subject, intent on striking the final deal.

B. Truitt Approach

The Truitt approach is the product of three bills. For the purpose of this Note, I understand the filing of the three bills together to mean that each of them is intended to pass and that, together, they make up the full policy. Legislative skepticism, however, would demand noticing that three separate bills were filed to address parts of the same problem. Three bills allows the possibility of strategic ordering of the voting process so that certain reforms pass while others do not. This possibility is especially present when the chair of the committee is authoring the bills.

1. H.B. 2593, the Rollover and Rate Regulation Bill

H.B. 2593 included Truitt's proposed limitations on loan amounts, fees, and renewals for payday loans and auto-title loans, but did not pass.[130] The bill would have amended the section of code governing deferred presentment transactions to add a new Section 342.607, Finance Code. The new section would have limited the amount that a lender could advance to either $2000 or "35 percent of the borrower's gross

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[128] There would have been potential problems with the language in the amendment to Chapter 302. First, it leaves open the possibility that fees could be charged that are not "in connection" with the extension of consumer credit. Stronger language would have conveyed that it is not the *connection* with extending credit that the law should govern, but the conditioning of the credit upon the payment of a fee. It is possible to imagine that a new species of third party crops up that conditions access to loans on additional services that are formally unrelated to the credit. Second, because the bill seems to require the threshold finding of a "violation" of the fee restriction, the bill could conceivably make enforcement difficult. If courts fashion "in connection" exceptions, then the availability of the usury laws ceases. The bill could be broadened to say that the kinds of fees in subsection (a) are also included in any usury calculations.

[129] H.J. of Tex., 82d Leg., R.S. 400 (2011) (reading H.B. 410 first time before the house and referring H.B. 410 to PIFS Committee). *See* House Comm. on Pensions, Investments, and Financial Servs. Minutes, 82d Leg., R.S. (Mar. 22, 2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/minutes/html/C3952011032208001.htm.

[130] Tex. H.B. 2593, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02593I.htm.

monthly income," whichever measure is less. Under then-current law, this new section would have applied to the lenders, not the store-front "brokers."

If this provision had been adopted, it would have effectively set no limit on how much may be advanced, even though it posed as a limit. For example, a consumer who makes $24,000 each year, has a gross monthly income of $2000, thus the cap is set at a $700 advance. But it is unusual for payday loan principals to be so high.[131]

Next, in a new Section 342.608, the bill would have limited rollovers to three "consecutive reauthorizations," or "transaction[s] in which a borrower refinances or pays all or part of the finance charges and advance of a deferred presentment transaction with a new deferred presentment transaction." Under the regulation scheme set up before the shift to CSOs, the rollovers were unlimited, but capped at the value of the original advancement plus the interest rate, as if the original loan had been for the extended length of time. The result would be that the principle would finally be reached and the loan paid off. Even though Truitt's definition accurately described what a rollover is under current industry practice, the law would have been easy to evade by simply extending credit for a payment without a deferred presentment transaction. Then, a new deferred presentment transaction could have been done without falling under the definition. This type of approach has been used to evade the New Mexico payday lending reforms.[132]

Next, a lender would have been required to accept partial payment of an amount owed and to apply the payment to the principal. When a borrower has paid twenty-five percent of the principle, neither the lender nor the CSO would have been able to charge any additional "fees or other charges related to the transaction." The language was again limited to transactions "in the form of a deferred presentment transaction." Any innovation that fell outside of this language could have evaded the reach of the statute.

After a less stringent substitute[133] was voted out of committee,[134] H.B. 2593 died on the house floor, possibly as a result of a sustainable question of order called by Representative Jodie Laubenberg.[135] Laubenberg, who according to a report by Texans for Public Justice actually did not take considerable campaign contributions from the payday lending lobby, acted as the main parliamentary obstacle to

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[131] *See, e.g.*, KING & PARRISH, *supra* note 20, at 1; John Sandman, *Is the Payday Loan Business on the Ropes?*, REUTERS (Sept. 21, 2012), http://blogs.reuters.com/great-debate/2012/09/21/is-the-payday-loan-business-on-the-ropes/.

[132] *See* Martin, *supra* note 5.

[133] *See* House Comm. Report version of Tex. H.B. 2593, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02593H.htm.

[134] House Comm. on Pensions, Investments and Financial Servs. Minutes, 82d Leg., R.S. (April 7, 2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/minutes/html/C3952011040700001.htm.

[135] *See* H.J. of Tex., 82d Leg., R.S. 3716 (2011) (postponing bill while point of order pending, but failing to call it back up). *See also* H. Chamber Broadcast, May 12, 2011 at video position 5:27:59.

Truitt's efforts.[136] Because there was no vote on the house floor on this bill, it is an open question what the failure of H.B. 2593 means for legislative intent purposes. Craddick has said that he could have passed his rate cap bill on the house floor if it had been voted out of committee.[137] Craddick did not offer his bill as an amendment to Truitt's H.B. 2593, but nor did he have the time to do so before the point of order was called.[138] Both Truitt and Senator John Carona (the senate sponsor of the payday lending bills) have said that the industry agreed in principle to the goal of breaking the cycle of debt in H.B. 2593.[139] As will be shown below, there were enough votes to pass Truitt's other two bills through both chambers, but it is unclear whether that would have been the case had H.B. 2593 come up for a floor vote.

The failure of H.B. 2593 is potentially significant because if the agency tried to regulate the practices covered in H.B. 2593 by using rulemaking authority granted in the other two bills, there would be a debate as to whether the agency has that authority. It would be an issue for the courts whether the legislature intended to provide a back door to that authority over opposition from either the industry or from a majority of the legislature itself.

2. *H.B. 2592, the Posting and Disclosure Bill*

H.B. 2592 is currently law.[140] The law includes new disclosure requirements for all CSOs, including CSOs offering deferred presentment transactions.[141] The introduced version of the bill included a bifurcated disclosure scheme; some disclosures would be through posting required notice "in a conspicuous location in an area of the organization accessible to consumers," while others would be through providing

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[136] *See* TEXANS FOR PUBLIC JUSTICE, *Loan-Shark-Financed Campaigns Threaten Payday-Loan Reform*, http://info.tpj.org/reports/pdf/PaydayReport.mar2011.pdf (discussing payday loan money in the legislature). *See also* Brandi Grissom & Matt Stiles, *Payday Lenders Give Big Money to Lawmakers*, THE TEXAS TRIBUNE, Nov. 20, 2009, http://www.texastribune.org/texas-issues/predatory-lenders/payday-lenders-give-big-money-to-lawmakers.

[137] *See* Melissa Del Bosque, *Payday Reform: Could it Finally Pass?*, THE TEXAS OBSERVER (May 19, 2011), *available at* http://www.texasobserver.org/lalinea/payday-reform-could-it-finally-pass.

[138] H.J. of Tex., 82d Leg., R.S. 3713–14 (2011) (floor action on H.B. 2593). *See also* H. Chamber Broadcast, May 12, 2011 at video position 5:27:59.

[139] *See* Del Bosque, *supra* note 136 (quoting Truitt defending H.B. 2593 on the floor: "Are you aware[, Rep. Elkins]...do you understand that the language in these bills was negotiated between the industry and advocates?"); S. Comm. on Bus. & Commerce, broadcast of May 18, 2011 at video position 12:00.

[140] *See* Act of May 23, 2011, 82d Leg. R.S., ch. 1301, 2011 Tex. Gen. Laws 3717 (codified at TEX. FIN. CODE ANN. §§ 393.221–.224 (West Supp. 2012)), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB02592F.htm.

[141] *See id.* The bill also applies to CSOs that offer auto title loans, which I do not address in this Note.

information to consumers.[142]

As for posting, CSOs would be required to post the following: (1) a schedule of "all fees to be charged" for CSO services, including, those "in connection with" payday loans; (2) contact information for the state regulatory authority, including the "consumer helpline"; and (3) a statutory notice informing the consumer that payday loans are for short-term purposes and that "renewing the loan" will cost more.[143]

As for providing notices to consumers, CSOs would be required to provide the following: (1) a comparison of the APR of the loan (including "all interest and fees") with the APR charged on "other similar financial products"; (2) a comparison of the "amount of accumulated fees a consumer would incur" if the consumer kept a $300 payday loan outstanding for two weeks, one month, two months, and three months versus if the consumer carried the same balance on a credit card for those same intervals; and (3) "information regarding the typical profile of repayment" of payday loans.[144]

The finance commission would be given the authority to adopt rules "to implement" the disclosures required in these two additional sections.[145]

The version of H.B. 2592 voted out of committee is more limited in a number of ways.[146] First, it limits its disclosure requirements only to CSOs that offer consumers extensions of credit "in the form of []deferred presentment transaction[s]," labeling these CSOs as "credit access business[es]" (CABs).[147] It keeps the same bifurcated approach, requiring some postings and some notices to consumers.[148] The committee substitute only requires disclosure of a CAB's fees charged "in connection with" a payday loan.[149] It also alters the language of the required posted disclosure about the purpose of payday loans.[150] The committee substitute notice would warn consumers of the consequences of "refinancing the loan,"—a more confusing term that might not intuitively include payment of a rollover fee.[151]

The requirement to provide information to consumers, however,

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[142] *See* Introduced version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592I.htm (including § 3 adding TEX. FIN. CODE. ANN. §§ 393.107 and 393.108).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See* House Comm. Report version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592H.htm. Note, the house committee report also makes similar changes to the auto title loan provisions.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* House Comm. Report version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592H.htm.

was strengthened. First, a new provision required CABs to provide required disclosures to consumers before the loan processing services are performed.[152] Under the previous language, there was no mandate to provide the information before the fees were accumulated.[153] A CSO could have held the disclosure until after the customer had agreed to the loan. Second, the committee substitute strengthened required disclosures.[154] According to the substitute, a CAB would have to disclose the interest, fees, and APRs of payday loans in specific comparison to (1) "alternative financial products that a consumer might consider, such as credit card finance charges or pawn service charges"; and (2) "late charge fees or other typical costs that a consumer considering a [payday loan] may otherwise incur," including bank overdraft fees and utility late fees.[155] Additionally, the committee substitute expanded the disclosure requirement comparing outstanding payday loan balances at different intervals to the same balances on credit cards beyond the one example of a $300 balance.[156] The committee substitute requires that this comparison be "in various sample amounts."[157]

Finally, the substitute changes the requirement to disclose the "typical profile of repayment" to the "typical pattern of repayment" of a payday loan. It is unclear whether or not the profile/pattern change strengthens or weakens the disclosure. It might be helpful for people to know what the profile of a payday loan borrower is, since a potential customer might think the typical borrower is worse off, or somehow less capable of repaying than the potential customer is. But, profile information alone, without some discussion of the typical results from the typical customer, or the "pattern" of repayment, may also be ineffective at combatting consumer misconceptions. Choosing "profile" over "pattern" raises the possibility that patterns could not be included in a final regulatory scheme.

The committee substitute gave the finance commission the option to adopt rules "to implement" the posting requirements, but required it to adopt rules to implement the consumer disclosures.[158]

There was a significant floor fight during the debate on H.B. 2592.[159] Two floor amendments were added: one strengthened the bill,

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[152] *Id.* Note that the house committee report also makes similar changes to the auto title loan provisions.

[153] *See* House Comm. on Pensions, Investments, & Financial Servs., Bill Analysis, Tex. H.B. 2592, Comparison of Original to Substitute, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/H.B.02592H.pdf#navpanes=0.

[154] *See* House Comm. Report version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592H.htm.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See* H.J. of Tex., 82d Leg., R.S. 3585–87 (2011); House Chamber Broadcast, May 11, 2011 at video position 1:46.

and one weakened it. The amendment offered by Representative Burt Solomons strengthened the bill by allowing the consumer credit commissioner to assess administrative penalties for CABs that "knowingly and willfully" violate the provisions of the bill or rules adopted by the rulemaking authority it grants.[160] The amendment offered by Representative Elkins, himself an operator of payday lending stores, gutted the consumer notice disclosure requirements to only require disclosure of "interest, fees, and [APRs] . . . to be charged on a deferred presentment transaction."[161] Truitt lost her motion to table, the amendment was adopted, and the bill passed.[162]

In the Senate Business and Commerce Committee, Senator John Carona, Chair of the committee, added back some of the consumer disclosures that were stripped in the house. Carona's version of H.B. 2592 was ultimately enacted into law.[163] The final version of H.B. 2592 preserves the requirements that the finance commission adopt rules to implement the disclosures, and that the disclosures are provided before the extension of credit.[164] It also requires three disclosures. First, CABs have to disclose interest, fees, and APRs to be charged on the payday loan "in comparison to [the same] to be charged on other alternative forms of debt," which probably encompasses more than the original bill's comparisons to "other similar financial products."[165] Second, CABs would also have to disclose "the amount of accumulated fees a consumer would incur by renewing or refinancing a [payday loan] that remains outstanding" for three intervals of time.[166] There are no requirements for specific dollar amounts as examples or multiple dollar amounts as examples, as there were in the previous versions of the bill.[167] Finally, just as in the committee substitute, CABs must disclose the "typical pattern of repayment" of a payday loan.[168]

The success of Elkins's amendment raises questions concerning legislative intent. Some of the more specific required disclosures that

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[160] *See* H.J. of Tex., 82d Leg., R.S. 3585 (2011) (Amendment 2 by Solomons); Engrossed version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592E.htm.

[161] *See* H.J. of Tex., 82d Leg., R.S. 3586–87 (2011) (Amendment 3 by Elkins); Engrossed version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592E.htm.

[162] *Id.*

[163] *Compare* Engrossed version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592F.htm, *with* Senate Amendments version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/senateamend/pdf/HB02592A.pdf#navpanes=0.

[164] *Compare* Engrossed version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592E.htm, *with* Enrolled version of Tex. H.B. 2592, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592F.htm.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

came close to demonstrating to consumers how much the loans cost over the long term and how they compare with other relevant choices did not make their way back into the bill. The fact that the house voted to strip that language could be used as a legislative intent argument that the finance commission cannot go as far in rulemaking as those disclosures would have required. On the other hand, it is not clear that Elkins's amendment was necessary for passage of the bill. In that light, the senate's re-expansion of the disclosures, and subsequent passage through the house, could show that the legislature intended for disclosures to be in the bill and to be effective.

Comparing H.B. 2593 to H.B. 2592, it is clear that Truitt decided at the introduction of these bills that the overall scheme would include relatively more regulatory power over disclosure requirements than over interest rates and loan fees (price).[169] Because no statutory limitations on loan fees were enacted, however, an amendment added to H.B. 2594 could potentially open the door to some indirect regulation of CSO behavior surrounding these fees. The possibility is discussed in further detail below.

3. H.B. 2594, the Licensing Bill

H.B. 2594 is also currently law. The law includes new licensing requirements for payday lenders.[170] The bill was amended at several stages of the legislative process. This Note's discussion of the bill will be confined to the provisions that appear to have regulatory importance.

The introduced version of H.B. 2594 only required CSOs that are assisting consumers to get credit "in the form of" payday loans to register with the consumer credit commissioner.[171] A registration application is required, and the commissioner is given the authority to require additional "information . . . as the commissioner determines necessary." The commissioner may deny an application if a principal in the CSO has been previously convicted of a crime or found civilly liable for "an offense involving moral turpitude"; the CSO's registration has been previously revoked or suspended; or the commissioner "based on specific evidence" makes a finding that the "applicant does not warrant the belief that the business will be operated lawfully and fairly within the

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[169] *Compare* Introduced version of Tex. H.B. 2593, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02593I.htm, *with* Introduced version of Tex. H.B. 2592, 82d Leg., R.S. (2011) *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02592I.htm. H.B. 2593 has no rulemaking authority; H.B. 2592 does.

[170] Act of May 23, 2011, 82d Leg., R.S., ch. 1302, 2011 Tex. Gen. Laws 3719 (codified as amendments to TEX. FIN. CODE ANN. ch. 14 (West 1998), ch 393 (West 2006 & Supp. 2012)), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm.

[171] *See* Introduced version of Tex. H.B. 2594, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594I.htm.

provisions and purposes" of Chapter 393. The commissioner also has the power to revoke registration for a number of reasons, including discovery of facts that "would have been grounds for denying registration"; violations of Chapter 393; or "fail[ure] to warrant the belief" that the business will operate within the purposes of Chapter 393.[172]

In addition to the registration requirements, the introduced version of the bill would have also required the submission of an annual report about payday loans that the organization has helped a consumer secure. In addition to a list of required information, the bill included a catch-all provision that would have allowed the commissioner to require reporting "any related information the commissioner determines necessary."[173]

The committee substitute to H.B. 2594 made several important changes.[174] For brevity, the Note also discusses how the provisions in the committee substitute compare to the final version of the bill.

First, two important provisions were added to the applicability section. The *Lovick* holding was likely codified by the following provision: "In connection with a determination of usury, the fees charged by a credit access business do not constitute interest."[175] If there was any question that *Lovick* accurately states Texas law, this provision would probably end it. But, an amendment was added in the senate that changed the language of this provision. Instead of referencing a determination of usury and interest, the final language says that a CAB "may assess fees for its services as agreed to between parties."[176] Thus, there may be a good argument that the legislature did not mean to codify *Lovick*'s holding, leaving the question open as to whether these fees could be considered interest in a future case.

Additionally, a provision was added that had the potential to widen the scope of the bill: "a person may not use a device, subterfuge, or pretense to evade the application" of the law.[177] An amendment was added on the house floor and survived in the senate, however, that limits the potential. The amendment makes clear that "a lawful transaction governed under another statute . . . may not be considered a device, subterfuge, or pretense."[178]

Second, the committee substitute changes the registration process to

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[172] *Id.*

[173] *Id.*

[174] *See* House Committee Report version of Tex. H.B. 2594, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594H.htm.

[175] *Id.*

[176] *See* Enrolled version of Tex. H.B. 2594, 82d Leg., Reg .Sess. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm.

[177] *Id.*

[178] *See* H.J. of Tex., 82d Leg., R.S. 3765 (2011) (Amendment 5 by Elkins); Enrolled version of Tex. H.B. 2594, 82d Leg., R.S. (2011) (reflecting amendment), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm.

require a CAB to apply for a license for "each location" where it provides payday loans.[179] Like the introduced version, it allows the commissioner to require additional "relevant information."[180] The committee substitute also conditions the license on the commissioner's affirmative findings not only that the CAB "warrant[s] the belief" that the CAB will comply with the letter and purpose of Chapter 393, but also that "character, and general fitness" of the CAB "are sufficient to . . . command the confidence of the public."[181]

Third, the commissioner was given authority to revoke a CAB's license if the CAB "knowingly or without the exercise of due care" violates Chapter 393, or rules adopted by the agency under it.[182] Additionally, the commissioner is given the power to suspend the licenses of all of a company's locations if five or more CABs operated by that company have their licenses revoked within a three year period.[183]

Fourth, the committee version grants rulemaking authority to the commissioner to require the CAB to report its relationship with the lender.[184] Additionally, the house committee included a specific provision that "the finance commission may not establish limits on the fees charged by a credit access business."[185] This provision was changed in the senate, and the final version says that "nothing in [the provisions added by the bill] grants authority to the finance commission . . . to establish a limit on the fees charged by a credit access business."[186] As a point of legislative history, the removal of the prohibition on establishing limits on fees may allow the commission by rule or practice to scrutinize CABs that charge fees at a particular level, or in a particular way, that brings a CAB's practice within the commission's relatively broad licensing authority. In other words, if there is a "grant of authority" in the other provisions of the bill that could justify a practice of scrutinizing fees, then the legislature clearly removed a specific ban on that type of regulation. The criticism that the bills do not allow the commissioner to establish limits on fees might be open for debate if the commissioner were a creative regulator.

Finally, the house committee version and the final version set up the Texas Financial Education Endowment by way of an annual assessment on each license holder paid to the finance commission. The

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[179] *See* House Committee Report version of Tex. H.B. 2594, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594H.htm.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *See* House Committee Report version of Tex. H.B. 2594, 82d Leg., R.S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594H.htm.
[185] *Id.*
[186] *See* Enrolled version of Tex. H.B. 2594, 82d Leg., R. S. (2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm.

fund is only to be used to raise financial literacy, but allows the finance commission to produce and disseminate materials at license locations, including advertising and marketing materials. The finance commission could expand its control over consumer debiasing through this provision because it is also given rulemaking authority to implement the fund.[187]

VII. SUMMARY OF OPPORTUNITIES FOR AGENCY CREATIVITY

Through the creative use of rulemaking authority, the finance commission could potentially undertake a strong program of debiasing at the point-of-sale of payday loans. One potential avenue would be requiring CSOs to show a customer a video produced by the finance commission, presumably under its financial education fund powers, that discusses the market for payday loans and the cheaper alternatives. Video may be an attractive regulatory tool in this field because the accumulation of paper disclosures does not seem to help consumers make better choices, as Martin's work suggests. If the finance commission chose to take the job of debiasing seriously, there is also enough rulemaking authority to make the law applicable to new product innovations, through the addition of the subterfuge language, although the legal bases of that expansion, as shown earlier, might be relatively weak.

Additionally, the licensing powers could provide the finance commission with enough of a stick to target rates as a consideration for renewing or granting licenses. While there is no authority to cap rates, the language of the new law simply says what the law does not grant, removing a specific prohibition in the process. Aggressive regulators would try to take advantage of that legislative history.

The finance commission is justified, and would be on solid empirical ground, to look into a strong disclosure regime aimed at educating consumers about the market in which they are participating. Proper information might help to ensure that payday loans are less predatory in the future, but as the Note will show, the agency has taken a timid approach.

VIII. WHAT TEXAS HAS DONE: DESIGNED A DISCLOSURE WITH THE RIGHT MESSAGES

The finance commission, through the Office of Consumer Credit Commissioner (OCCC), has adopted required consumer disclosures for

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[187] *Id.*

CABs.[188] The disclosures target the most important consumer misconceptions.[189] Disclosures are required to fit on two sides of a single sheet of paper.[190] The disclosures seek to convey nine messages, but only five of them are consequential for debiasing purposes.[191] This Note will summarize each of the five important messages and describe how the disclosures graphically represent those messages. Later, the Note will assess whether the messages are likely to counteract consumer biases.

A. The Messages[192]

The first message discusses the borrower's right to consider other options. The message reads: "After reviewing the terms of the loan, you are not required to choose that loan, and may consider other borrowing options, including those shown on Page 2 of this document." The text is featured prominently at the top of the first page in a blue box with large white print.

The second message discusses the total cost (principal, fees, and interest) of a hypothetical two-week, $500 loan and how the amount would grow at different time intervals. The message is divided into two boxes. One box breaks down and totals the borrowed amount (principal),

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[188] 7 TEX. ADMIN. CODE §§ 83.6001–83.6008 (2012) (Fin. Comm'n of Tex., Rules for Credit Access Businesses, Consumer Disclosures and Notices). Some notes about citations in Part VIII follow: the disclosure sheets are available in pdf form on OCCC's website. 7 TEX. ADMIN. CODE § 83.6007(a), *available at* http://info.sos.state.tx.us/fids/201105659-1.pdf. This link is for the required disclosure for "single payment" payday loans, but the messages are not significantly different for the "multiple payment" types of loans that are also addressed in the regulations. Additionally, the stakeholder comments are available at http://www.occc.state.tx.us/pages/Legal/ANPR/Aug2011Stakeholders Meetings.html. In Part VIII, all references to the disclosures or stakeholder interests are to these online locations, unless otherwise specified.

[189] Note, there was also a requirement for wall postings in each payday lending retail store. While the posting requirement raises some interesting regulatory issues as well, this Note does not deal with them for the sake of brevity. Based on the weakness of the proposed rules, the posting will probably not be relevant to the debiasing issues discussed in the rest of the Note.

[190] *Id.* § 83.6006(c).

[191] 7 TEX. ADMIN. CODE § 83.6007(a) (containing the sixth message, defining payday loans as "cash advances provided to a borrower to meet financial needs," tells borrowers that they will be required to sign "a loan agreement," and introduces the kinds of terms a borrower will see in his contract. The final statement of this message states plainly: "Payday loans may be one of the more expensive borrowing options available to you." This message is displayed in print underneath the fifth message (at the middle of the second page). The seventh message is a similar column discussing other important considerations for borrowers. There are three of these in bullet points: (1) "Borrowers may be required to write checks . . . to cover payments for the loan"; (2) "Borrowers can compare all loan options available and select the option that is best for them"; (3) "Borrowers can avoid extra fees and loan renewal costs by not missing payments and by paying loans on time." The eighth message directs borrowers "[l]ooking for information on budgeting, personal savings, credit card management, or other personal money management skills" to OCCC's "Financial Literacy Resource" website. This box is set off by borders and is in large print. Finally, the ninth message provides information on how to get answers to general questions and to file or convey consumer complaints to OCCC. This is also a box set off from the others.).

[192] 7 TEX. ADMIN. CODE § 83.6007(a).

fees, interest charges, and total payment amount assuming the loan is paid back as agreed. The other box displays what happens to the total cost if a borrower decides to renew the loan. The disclosure shows the total cost at intervals of two weeks, one month, two months, and three months. The rollover box has a column titled "If I pay the loan in . . ." and the other titled "I will have to pay. . . ." The box also prominently displays a caveat that the sample amounts may not reflect the actual charges.

The third message discusses how long it typically takes to pay back a payday loan. This box displays in large font the words "[o]f 10 people who take out a new payday loan" followed by a breakdown of how many of those ten people would pay back a loan at a particular time interval. Stick figures are used to indicate how many people out of the ten would be in each of the following categories: people who pay off the loan in one payment; renew one or two times; renew three or four times; and renew five or more times. This message also contains a less prominent disclaimer that the information is from a 2008 national survey, so "repayment patterns may be different."

The fourth message is a column urging potential borrowers to ask themselves some questions. The words "Ask Yourself . . ." are at the top of the column with the following five questions (in order) underneath in bullet points: (1) "Is it necessary for me to borrow the money?"; (2) "Can I afford to pay the loan back in full in 2 weeks?"; (3) "Will I be able to pay my regular bills and repay this loan?"; (4) "Can I afford the extra charges, interest, and fees that may be applied if I miss or fail to make payment?"; (5) "Are other credit options available to me at this time?" The fourth message is the last message on the first page of the disclosure.

The fifth message is a box that prompts consumers to compare the cost of different types of credit that might be available by asking at the top "How does a payday loan compare to other options?" Within the box is another loan calculation box (based on the same hypothetical $500, 2-week loan) that restates the cash advance/borrowed amount; interest payment amount; total of fees amount; and total of payments amount. The smaller box contains an additional piece of information, the annual percentage rate (APR), listed as 664.30%. Under that box is a graphic comparing payday loans to other forms of credit to show that a payday loan is among the most expensive forms of credit.

The graphic has two bars that look like thermometers. The bars are hotter on the right side of the graphic, which is labeled as "Most Expensive;" and cooler on the left side of the graphic, labeled "Least Expensive." One bar represents APRs and the other represents "[a]verage amount of interest and fees . . . per $100 borrowed over 2 weeks." On both bars, payday loans are plotted the farthest to the right. The options that are listed as being cheaper are (from cheaper to cheapest): auto title loans, pawn loans, signature loans, secured loans, and credit cards.

B. Evaluating the Messages in Light of the Five Biases

This section will look at Sunstein's biases and Martin's payday-borrower behavior findings and preliminarily analyze whether these disclosures are likely to solve those problems.

First, the OCCC disclosures combat a consumer's unrealistic optimism about her ability to repay by conveying the third and fourth messages. The third message attempts to show that very few people are able to pay back the loan without paying additional fees, and that most end up renewing the loan more than three times. The fourth message prompts the consumer to question whether she really has the ability to repay the loan. Consumer groups[193] wanted this information to be framed in a clearer way: instead of showing how many times the loan is usually "renewed," they would have expressed it as the typical dollar amount a person pays on the same hypothetical $500, 2-week loan. They would also have added another sentence that states: "Most borrowers pay $900 or more to pay off this . . . loan." One consumer group would have included in this statement a reiteration of the average number of weeks a borrower would have a balance.[194] The OCCC disclosures seek to convey the right kind of information to counteract optimism bias.

Second, the disclosures combat a consumer's myopia and self-control problems. As noted above, many people use payday loans to pay for recurring expenses. If cheaper credit options are available, then myopia/self-control issues might account for the persistently bad choice. The OCCC disclosures work to counteract this behavior in the first, fourth, and fifth messages by prompting borrowers to compare the payday loan to other choices; to ask themselves what they are getting the loan for, and whether it will hurt their ability to pay those same recurring expenses; and to look at the difference in interest rates and price. Consumer advocates wanted credit cards in the disclosure, which may help consumers who already have credit cards, as well as those who erroneously think that credit cards are bad debt and payday loans are conservative.[195] Payday lenders,[196] on the other hand, wanted

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[193] *See* Memorandum from Ann Baddour, Senior Policy Analyst, Tex. Appleseed, to OCCC (Aug. 26, 2011), at 8, (Response to Advanced Notice of Proposed Rulemaking to Implement Disclosure Provisions in H.B. 2592 and H.B. 2594), *available at* http://www.occc.state.tx.us/pages/Legal/ANPR/CAB_disclosure/CABs%20ANPR2%20Cmt%20Baddour_TX%20Appleseed%208_26_11.pdf.

[194] Memorandum from Stephen Reeves, Legislative Counsel, Tex. Baptist Christian Life Comm'n, to OCCC, (Aug. 26, 2011) (Advance Notice of Proposed Rulemaking, Response to Questions, regarding: H.B. 2592 - Credit Access Businesses – Consumer Notice and Disclosures), *available at* http://www.occc.state.tx.us/pages/Legal/ANPR/CAB_disclosure/CABs%20ANPR2%20Cmt%20Reeves_TX%20Baptist%20Christian%20Life%20Cmmn%208_26_11.pdf.

[195] *Id.* at 2.

[196] *See* Memorandum from J. Scott Sheehan, Consumer Serv. Alliance of Tex., to OCCC (Aug. 26, 2011) (Texas Finance Code, Subchapter 393 – Notice and Disclosure Requirements CSAT Pre-Comments Regarding Office of the Consumer Credit Commissioner 8-18-11 Advance Notice of

comparisons to overdraft fees, and credit card penalties for exceeding the credit limit, which they did not get in this form. Overall, the disclosures might be useful for a person who is already caught in a cycle of payday loan debt to examine alternative credit sources.

Third, the disclosures might counteract miswanting. To the extent that consumers use payday loans to buy unnecessary consumer goods, the disclosures attempt to dissuade that type of borrowing by focusing on the costs and prompting the question of whether the loan is necessary or will interfere with other obligations. Martin's empirical study did not turn up much of this type of behavior in securing the loan, but the sensitivity to "keeping up with the Joneses" might be at work in the tendency of consumers not to seek out alternatives. It could keep them from taking on credit card debt because they do not want to think of themselves as fiscally irresponsible. Or it could keep them from borrowing from friends or family out of pride or social standing. The OCCC disclosures prompt necessary questions and comparisons to combat this bias.

Finally, the disclosures combat both cumulative cost neglect and procrastination. Because borrowers are not actually borrowing short-term, but continuing to pay interest without reaching the principle (so each time a loan is opened or renewed, the consumer pays less than if she had paid off the full amount), they may be discounting the cumulative cost of the loan. The OCCC disclosures, particularly the second and third messages, discuss how quickly the interest/fees accumulate and how unlikely it is that the borrower will be able to pay off the loan. Seeing these cumulative costs up front can help the consumer correct myopia. The consumer advocates wanted to be stronger in this area by adding language about the impossibility of making interest-only payments and still paying the loan off. The advocates also wanted to add language about how much the typical borrower spends on an example loan.[197] The OCCC forms only discuss how often people renew the loans (without defining what a renewal is). Nonetheless, the form does considerable work to point out the total dollar amount that customers are incurring.

The OCCC disclosures mention that paying on time will keep costs under control, and their charts show how quickly loans grow. These disclosures will help to avert the procrastination problem, to the extent that it exists in the payday loan market. All in all, the messages OCCC chose to convey were the right messages. But, as we will see below, having the right message does not do much if potential consumers do not hear it.

Proposed Rulemaking), at 5, *available at* http://www.occc.state.tx.us/pages/Legal/ANPR/CAB_disclosure/CABs%20ANPR2%20Cmt%20Sheehan_CSAT%208_26_11.pdf.

[197] *See* Baddour, *supra* note 192, at 7.

IX. WHAT TEXAS HAS NOT DONE: ENSURED CONSUMERS WILL HEAR THE MESSAGES

The payday-loan industry does not have an interest in cooperating to debias consumers. The legal scholarship has not discussed this incentive not to be cooperative in the debiasing context as much as it has in the context of strongly paternalistic regulation. Usually, the argument is used to justify why we need to limit payday lending contracts, but it is an important issue in debiasing as well. A way to describe what is happening at the point of sale is as a conversation between the consumer, the industry, and the government. The only person who is not actually in the room for the conversation is the government. At minimum, this means the consumer and industry will be able to talk, while the government's message will be relegated to a sheet of paper. There are a few places where OCCC has not decided to issue rules (even though it could through express rulemaking authority). By leaving power on the table, OCCC may have unnecessarily reduced the government's persuasive voice.

First, OCCC has not established a mechanism for updating disclosures based on the types of products a company offers. As Martin has shown, industry innovation to change the transaction in order to fall outside its formal definition is almost certain. When the inevitable innovations occur, OCCC will not be in a position to respond effectively. When making rules for the licensing bill, OCCC declined to require payday loan companies to submit sample contracts along with their licensing application.[198] Disclosures must be tailored to the types of transactions offered, otherwise they lose their force.[199] This is especially true because the government cannot chime in when the payday lender downplays the disclosure form. In short, there will likely emerge a new category of payday loans that fall outside the reach of the deferred presentment transaction. Without the power to review contracts, the government will only be able to learn very slowly. In a similar way, the agency did not take the opportunity to regulate rates through the licensing process.

Second, for the regular payday loans, OCCC has still not developed rules regarding who, how, and when to give the disclosure to consumers.[200] The regulations only require the disclosure "to be provided to a consumer before a credit application is provided or before a financial evaluation occurs in conjunction with a [payday loan]."[201] It is unknown

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[198] *See* 36 Tex. Reg. 7521 (2011) (Fin. Comm'n of Tex.) (OCCC, in official comments, declining to require contract submission).

[199] *See* Baddour, *supra* note 192.

[200] *Id.*

[201] 7 TEX. ADMIN. CODE § 83.6007(a).

what "provided" means: is it sufficient to make it available in a stack of papers; must it be physically placed in a customer's hand, etc.? In addition, even assuming that "provided" ensures that a consumer sees the disclosure both before a credit application is provided and before a financial evaluation occurs, anything that payday lenders do to persuade customers that a loan is a good idea can occur before giving the disclosure without running afoul of the rule. The payday lender could, for example, verify employment status and request documents or information necessary for the credit application or for a financial evaluation without actually performing either act. Without clearer guidelines, the consumer is again at the mercy of the way the payday lender will characterize her product—reliably in the most favorable light possible.

X. WHAT TEXAS SHOULD DO

Texas should consider joining the conversation between the consumer and the payday lender more effectively. Instead of requiring a piece of paper, OCCC could require the viewing of a DVD or web movie. This method could come close to matching the in-person sales with in-person disclosure. The video would not have to be long; it simply needs to convey the crucial messages with a real person.

OCCC likely has the statutory authority to require a more aggressive disclosure method. H.B. 2592 says the following: "[A] credit access business must provide to a consumer a disclosure adopted by rule of the Finance Commission of Texas[,] . . . in a form prescribed by the commission."[202] The disclosure could be in the *form* of a video presentation.

There was also a provision in H.B. 2594, the licensing bill, which gave the OCCC some interesting power.[203] The bill sets up Texas Financial Education Endowment by way of an annual assessment on each license-holder paid to the finance commission. The fund is only to be used to raise financial literacy, but includes a power given to the finance commission to produce and disseminate materials at license locations, including ad/marketing materials. The finance commission could likely expand its control over consumer debiasing through this provision, because it is also given rulemaking authority to implement the fund.

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[202] Act of May 23, 2011, 82d Leg., R.S., ch. 1301, § 1, 2011 Tex. Gen. Laws 3717, 3718 (codified at TEX. FIN. CODE ANN. §§ 393.221–.224 (West Supp. 2012)), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/HB02592F.htm

[203] Act of May 23, 2011, 82d Leg., R.S., ch. 1302, § 2, 2011 Tex. Gen. Laws 3719, 3724 (codified at TEX. FIN. CODE ANN. §§ 393.628 (West Supp. 2012)), *available at* http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02594F.htm.

If OCCC did propose more persuasive debiasing at the point of sale, an interesting free speech issue could be lurking in the background. Recently, a federal district court granted a preliminary injunction for tobacco companies against the FDA on the grounds that a new debiasing campaign that shows graphic, smoking-caused illnesses on pictures that take up half of a cigarette pack likely violates the First Amendment as compelled speech not falling into the commercial exception.[204] When debiasing seeks to eradicate a legal commercial practice, the strategy may have constitutional limitations.

XI. CONCLUSION

In conclusion, the OCCC rulemaking process has produced a set of potentially effective disclosures. The clear messages seek to counteract cognitive biases that lead some consumers to harm themselves. But, so far, OCCC has not taken the necessary steps to make sure that the government's voice is heard at the point of sale. For that reason, these rules do not go as far as they could to protect consumers.

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[204] R.J. Reynolds Tobacco Co. v. FDA, 11-cv-01482-RJL (D.D.C. Nov. 7, 2011) (memo op.). *See also* Jonathan Stempel, *Cigarette Makers Sue FDA Over New Labeling Rules*, REUTERS (Aug. 17, 2011), http://www.reuters.com/article/2011/08/17/us-cigarettes-advertising-lawsuit-idUSTRE77G05V20110817.

"Hands-off" the Solicitor General: *Florence v. Board of Chosen Freeholders* and the Supreme Court's Deference in Prison Cases

Loui Itoh*

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V. CONCLUSION 285

I. INTRODUCTION

Albert W. Florence is the finance director of a car dealership who lives in Burlington County, New Jersey.[1] On May 3, 2005, he was driving with his family in his BMW when he was stopped by a state trooper.[2] The officer informed Florence that he was under arrest, based on an outstanding bench warrant from neighboring Essex County for civil contempt, a non-indictable offense.[3] Florence protested the validity of the warrant, claiming that he had already paid the fine on which it was based.[4] The trooper nevertheless continued with the arrest, and Florence was admitted that night to Burlington County Jail (BCJ).[5] Florence claimed that upon his arrival, he was subjected to strip and visual body-cavity searches by BCJ officials:

> An officer took petitioner to a shower stall with a partially opened curtain. The officer removed petitioner's handcuffs and directed petitioner to strip naked. From roughly an arm's length away, the officer directed petitioner to open his mouth and lift his tongue, lift his arms, rotate, and lift his genitals. Petitioner was then directed to shower in the officer's sight.[6]

Florence was held at BCJ for six days, and then was transferred to Essex County Correctional Facility (Essex).[7] He alleged that he was subjected to another strip and visual body-cavity search at Essex.[8] Florence was released from Essex the day after he entered the facility, after which the charges against him were dismissed.[9]

After his release, Florence sued BCJ and Essex, arguing that they both violated his Fourth Amendment rights by subjecting him to strip searches without any reasonable suspicion.[10] The District Court for the District of New Jersey granted Florence's motion for summary judgment,

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[1] Brief for Petitioner at 2, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter *Florence Petitioner's Brief*].

[2] *Id.* at 3.

[3] *Id.* at 2–3.

[4] Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010), *aff'd* 132 S. Ct. 1510 (2012).

[5] *Id.*

[6] *Florence Petitioner's Brief* at 5.

[7] *Florence*, 621 F.3d at 299.

[8] *Id.* ("As described by Florence, he and four other detainees were instructed to enter separate shower stalls, strip naked and shower under the watchful eyes of two corrections officers. After showering, Florence was directed to open his mouth and lift his genitals. Next, he was ordered to turn around so he faced away from the officers and to squat and cough.").

[9] *Id.*

[10] *Id.*

but certified its ruling for an interlocutory appeal.[11] The question certified for appeal to the Third Circuit was "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment."[12] A divided Third Circuit panel noted that although ten circuits had found such searches unconstitutional, "[r]ecently, the Eleventh and Ninth Circuits, sitting en banc, reversed their prior precedents," creating a "newly-minted circuit split."[13] Applying *Bell v. Wolfish*,[14] the leading Supreme Court case concerning prison strip searches, the Third Circuit ruled for the jail and correctional facility, finding that prisons have valid reasons for strip searching arrestees charged with non-indictable offenses.[15] The Supreme Court affirmed the Third Circuit, 5–4, in an opinion by Justice Kennedy.

At the heart of this case, *Florence v. Board of Chosen Freeholders*, is a dispute about the degree of intrusion posed by strip searches and the likelihood that misdemeanor arrestees will intentionally smuggle contraband into jails via their body cavities. Florence (hereinafter "petitioner") argued that the strip searches performed on him by BCJ and Essex violated his Fourth Amendment rights because the invasion of privacy and resulting psychological harm necessarily associated with such searches outweighed any interest the government had in detecting and deterring contraband from being smuggled into the jails.[16] BCJ and Essex (hereinafter "respondents") countered that the searches were constitutional because they served the legitimate penological interest of preventing contraband from entering the jails and that they must be performed on non-indictable arrestees because they are "just as likely to introduce contraband as major offenders."[17] Respondents noted that the searches at issue were no more intrusive than those the Supreme Court upheld in *Bell v. Wolfish* and were similarly justified by the need to detect contraband.[18]

The United States Solicitor General submitted an amicus brief supporting respondents, echoing the prisons' concern that even minor offenders present a smuggling threat, and correcting petitioner's

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[11] *Id.* at 301.
[12] *Florence*, 621 F.3d at 301.
[13] *Id.* at 303–6.
[14] Bell v. Wolfish, 441 U.S. 520, 558 (1979) (holding, per Justice Rehnquist, that strip searches of prisoners including pretrial detainees following contact visits constitutional under the Fourth Amendment because they serve the legitimate penological purpose of preventing and deterring contraband from entering the prison).
[15] *Florence*, 621 F.3d at 308.
[16] *Florence Petitioner's Brief* at 28 ("The relevant question is whether the remaining tiny risk of smuggling justifies subjecting thousands of individuals to the gross intrusion and loss of dignity of a strip search.").
[17] Brief for Respondents at 14–15, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945) [hereinafter *Florence Respondents' Brief*].
[18] *Id.* at 42, 45.

assertion that federal practice does not allow for such searches.[19] "The United States . . . has a significant interest in the Court's resolution of the question presented in this case," the Solicitor General explained, because the Federal Bureau of Prisons (BOP) operates 116 prison facilities that require "all incoming pretrial detainees to be subject to visual body-cavity inspections before they may be placed in the general prison population."[20]

This Note argues that in light of the Court's historical deference to the Solicitor General in prisoners' rights cases and the corresponding doctrine developed over the last thirty years, the Solicitor General's position was crucial to the outcome in *Florence*. This is because while the Supreme Court is generally deferential to the views of the Solicitor General, the Court is *especially* deferential in cases concerning constitutional challenges to prison policies because of the constitutional separation of powers concern. The existence of a deference regime helps to explain the *Florence* decision not only because the majority ruled in favor of the state prison, as the Solicitor General urged, but also because two justices wrote separate concurrences demonstrating that their views of the constitutional limits to searching inmates were closely tied to the BOP policy.[21] Justice Alito concurred as follows: "I join the opinion of the Court but emphasize the limits of today's holding. The Court holds that jail administrators may require all arrestees *who are committed to the general jail population of a jail* to undergo visual strip searches not involving physical contact by corrections officers."[22] As he explained later, this is BOP's policy.[23] Rather than articulating its own notion of what is "reasonable" under the Fourth Amendment, the Court held the practices employed by the Solicitor General's client up as the constitutional standard, demonstrating considerable deference. Not only was the Solicitor General's input crucial to the outcome in *Florence*, but the decision cannot be fully understood without examining the Court's unique deference to the Solicitor General in prison cases.

Part II describes the doctrine established over the last three decades, in which separation of powers concerns led the Court to defer to the Solicitor General.

Part II(a) analyzes *Bell v. Wolfish*, in which the Court deferred to the Solicitor General's judgment by taking a "hands-off" approach to prison administration, believing it to be a responsibility delegated to the political branches of government.[24]

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[19] Brief for the United States as Amicus Curiae Supporting Respondents at 9, Florence v. Bd. of Chosen Freeholders, 131 S. Ct. 1816 (2011) (No. 10-945) [hereinafter *Florence Amicus Brief*].
[20] *Id.* at 1–2.
[21] *See* Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 132 S. Ct. 1510 (2012).
[22] *Id.* at 1524 (Alito, J., concurring).
[23] *Id.* Note, however, that the agency has typically chosen to segregate selected minor offenders from the general prison population.
[24] Bell v. Wolfish, 441 U.S. 520, 562 (1979).

Parts II(b) and II(c) analyze *Block v. Rutherford*, *Hudson v. Palmer*, and *Turner v. Safley*, cases in which the Court demonstrated that its "hands-off" approach also extended to prisons run by state governments.[25] The Court's deference to the prisons in these cases can also be understood as deference to the Solicitor General, who submitted amicus briefs urging the result in two of these cases.

Part II(d) examines the outer limits of the Court's deference to state prison officials. In *Johnson v. California* and *Hudson v. McMillian*, two rare cases in which the Court found state prison policies to be unconstitutional, it did so at the Solicitor General's urging.[26] While it is difficult to say whether the Court and the Solicitor General simply reached similar conclusions about the constitutionality of the practices at issue in these cases or whether the Solicitor General's views actually influenced the Court, it is plausible that at least some justices were more comfortable striking down state policies with the Solicitor General's approval. Justice O'Connor, for example, extensively quoted from the Solicitor General's brief in *Johnson*.

The analysis in Part III shifts to the Office of the Solicitor General, and offers reasons for the Court's deference. Part III(a) examines the three roles of the Solicitor General: as a gatekeeper for the Supreme Court's docket; as an advocate for the United States; and as amicus curiae on the merits. Empirical studies demonstrate that the Solicitor General is extremely influential in each of these roles, and is especially successful in its role as amicus curiae.

Part III(b) introduces three theories that academics have raised to explain the Solicitor General's influence on the Supreme Court: the Repeat Player Theory, the Tenth Justice Theory, and what I refer to as the Executive Power Theory. These theories are not mutually exclusive, and most sources endorse more than one theory. The Executive Power Theory—that the Court tends to defer to the Solicitor General especially in cases in which the Executive argues in favor of maintaining institutional power—is especially relevant in the prison cases. It was this concern that motivated Justice Rehnquist to take the hands-off approach in *Bell*, and was arguably a deciding factor in the *Florence* case.

Part IV analyzes the *Florence* decision, and argues that the majority and concurring opinions suggest that the Solicitor General's input played a significant role in the case.

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[25] *See generally* Turner v. Safley, 482 U.S. 72 (1987); Block v. Rutherford, 468 U.S. 576 (1984); Hudson v. Palmer, 468 U.S. 517 (1984).

[26] Johnson v. California, 543 U.S. 499 (2005); Hudson v. McMillian, 503 U.S. 1 (1992).

II. THE SUPREME COURT'S "HANDS-OFF" APPROACH TO PRISON ADMINISTRATION AS DEFERENCE TO THE SOLICITOR GENERAL

A. *Bell v. Wolfish* and the Revival of the "Hands-Off" Approach

The leading case on the constitutionality of strip searching prisoners, *Bell v. Wolfish*, laid out a balancing test.[27] Similar to *Florence*, the Court in *Bell* weighed the prisoners' privacy interest against the prison's interest in maintaining safety and security when assessing whether visual body-cavity searches of inmates violated the Fourth Amendment's prohibition against unreasonable searches.[28] The Court sided with the defendant, a federal facility, represented by the Solicitor General.

Bell was brought in the Southern District of New York as a class action challenging numerous conditions and practices at the Metropolitan Correctional Center (MCC).[29] The district court's injunction against twenty different MCC practices was largely affirmed by the Second Circuit, which held that "under the Due Process Clause of the Fifth Amendment, pretrial detainees may be subjected to only those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration."[30] Specifically, the Second Circuit affirmed the district court's grant of relief against "double-bunking" (housing two inmates in a room built for one); prohibiting receipt of packages of food and personal items from outside the institution; prohibiting book deliveries except those directly from the publisher; requiring detainees to wait outside of their cells during routine cell searches; and conducting body-cavity searches after contact visits.[31]

Writing for the majority, Justice Rehnquist rejected the Second Circuit's "compelling necessity standard," under which pretrial detainees have a substantive right to be free from conditions of confinement that are not justified by compelling necessity.[32] Finding that this standard was not rooted in the Constitution, Justice Rehnquist concluded that when an inmate challenges the constitutionality of conditions of pretrial confinement under the Due Process Clause, "the proper inquiry is whether those conditions amount to punishment of the detainee."[33] He

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[27] Bell v. Wolfish, 441 U.S. 520, 558–60 (1979).
[28] *Id.*
[29] *Id.* at 523.
[30] *Id.* (citing Wolfish v. Levi, 573 F.2d 118, 124 (1978)) (internal quotation marks omitted).
[31] *Id.* at 530.
[32] *Bell*, 441 U.S. at 532.
[33] *Id.* at 535.

added that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective it does not, without more, amount to 'punishment.'"[34] The majority found that double-bunking did not amount to punishment and therefore, did not violate the Due Process Clause.[35]

Turning to the MCC restrictions and practices designed to promote security that were challenged under the Due Process Clause, as well as the First and Fourth Amendments, the Court laid out four doctrinal principles that guided its analysis. "First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[36] Second, those rights are subject to certain restrictions and limitations.[37] The Court added that this principle applies to pretrial detainees as well as convicted prisoners.[38] The Court then discussed the third principle: "[M]aintaining institutional security and preserving internal order and discipline are essential goals" that may require limiting the rights of detainees and prisoners.[39] Finally, the Court concluded that because there are no easy solutions to the "problems that arise in the day-to-day operation of a corrections facility," courts should accord "wide-ranging deference" to prison administrators.[40] The Court explained that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[41]

The Court upheld the constitutionality of prohibiting inmates from receiving books unless they were mailed directly from the publisher;[42] prohibiting inmates from receiving personal packages from outside the institution;[43] and requiring inmates to wait outside their cells while their cells are being searched.[44] The Court then turned to the strip search

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[34] *Id.* at 539.

[35] *Id.* at 542.

[36] *Id.* at 545. (explaining further, "[s]o, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments; that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment; and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law") (internal citations omitted).

[37] *Bell*, 441 U.S. at 546. ("There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.") (citing *Wolfish*, 573 F.2d at 556) (internal quotation marks omitted).

[38] *Id.* ("A detainee simply does not possess the full range of freedoms of an unincarcerated individual.").

[39] *Id.* at 546.

[40] *Id.* at 547 (internal quotation marks omitted).

[41] *Id.* at 547–48 (citing Pell v. Procunier, 417 U.S. 817 (1974)).

[42] *Bell*, 441 U.S. at 550.

[43] *Id.* at 555.

[44] *Id.* at 557.

policy, stating that "[a]dmittedly, this practice instinctively gives us the most pause."[45] After having a contact visit, inmates at all BOP facilities, including the MCC, were required to undergo a visual body-cavity examination as part of a mandatory strip search.[46] The Court laid out what came to be known as the "*Bell* balancing test":

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[47]

Applying this test to the strip search policy, the Court credited the government's reasons for conducting the searches. "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in th[e] record."[48] The Court was unmoved by the fact that there had only been one instance where contraband was discovered on an MCC inmate, reasoning that this statistic "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises."[49] Noting that these searches constitute an invasion of the inmates' privacy and that instances of abuse had been documented by the district court, the Court stated that the relevant question was "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. . . . [W]e conclude that they can."[50]

By upholding these searches, the Court signaled its deference to the judgment of the prison officials. Respondents had presented evidence to the district court suggesting that the searches caused material harm by fostering an attitude of "psychological sadism" among the guards and causing a "correlative fear among inmates of sexual assault" that was so severe that some inmates chose to forego contact visits in order to avoid them.[51] Respondents also presented the "uncontradicted testimony of medical experts establish[ing] that the anal inspection procedure was

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[45] *Id.* at 558.
[46] *Id.*
[47] *Bell*, 441 U.S. at 559.
[48] *Id.* (citing App. 71–76; Ferraro v. United States, 590 F.2d 335 (6th Cir. 1978); United States v. Park, 521 F.2d 1381, 1382 (9th Cir. 1975)).
[49] *Id.*
[50] *Id.* at 560.
[51] Brief for Respondents at 17, Bell v. Wolfish, 441 U.S. 520 (1979) (No. 77-1829).

virtually useless."[52] That the Court refused to address the allegations of harm resulting from the searches, and instead upheld their constitutionality as a general matter indicates considerable deference to the judgment of the prison officials.

Justice Rehnquist explained that the Court's deference was motivated by a separation of powers concern:

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations . . . . But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . . The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.[53]

Given his belief that the Constitution entrusted prison administration to officials outside the judiciary, Justice Rehnquist signaled his intention to defer to the judgment of executive branch officials.[54] Viewed through this lens, even the "deplorable conditions and Draconian restrictions" that had caused courts to intervene in the past could pass constitutional muster.[55] Signaling a return to the hands-off approach, the Court in *Bell* deferred to the Solicitor General in upholding body-cavity searches at a federal prison. Thus it makes sense in later cases concerning state prisons that the Court would defer to a Solicitor General's argument that a certain procedure was constitutional, though similar deference may not be due to the state prison had the Solicitor General chosen not to intervene.[56]

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[52] *Id.*

[53] *Bell*, 441 U.S. at 562 (emphasis added).

[54] *Id.*

[55] *Id.*

[56] Though the Court has stated that it might have reason to defer to state officials out of federalism concerns, Turner v. Safley, 482 U.S. 78, 85 ("Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities.") (internal citations omitted), my analysis of *Turner* and other cases suggests that deference to the Solicitor General plays a larger role in the Court's rulings than federalism does. In *Turner*, for example, the Court struck down one of the two state prison policies, but this result was consistent with the Solicitor General's position. *Id.* The Court also invalidated state prison policies in

B. The Extension of Deference to State Prisons

Consistent with *Bell*, the Burger Court deferred to the judgment of prison officials by holding in *Hudson v. Palmer* that prisoners do not have any reasonable expectation of privacy within their cells.[57] An inmate at a Virginia state prison alleged that a guard at the same facility had conducted an unannounced shakedown cell search and confiscated and destroyed his property for no reason other than to harass him.[58] The Fourth Circuit affirmed the district court's holding that respondent was not deprived of his property without due process of law, but remanded on the Fourth Amendment claim because the record reflected a "factual dispute" as to the purpose of the search.[59] The Fourth Circuit recognized that *Bell* had authorized irregular unannounced shakedown searches, but held that an individual prisoner has a "limited privacy right" in his cell, protecting him from searches conducted solely to harass or humiliate.[60] Chief Justice Burger, writing for a four-member plurality stated that in order to determine whether an inmate's expectation of privacy is legitimate or reasonable, courts must balance the relevant interests:

> The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." We strike the balance in favor of institutional security, which we have noted is "central to all other corrections goals" . . . . We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.[61]

Chief Justice Burger acknowledged the Fourth Circuit's concern about "maliciously motivated searches," writing that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society."[62] However, he rejected the Fourth Circuit's solution that even "random" searches must be part of an established plan, deferring to the prison's judgment that "random searches are essential to the effective

Hudson v. McMillian, 503 U.S. 1 (1992), and *Johnson v. California*, 543 U.S. 499 (2005), at the behest of the Solicitor General. While federalism may play a role in these cases, it is not dispositive.

[57] Hudson v. Palmer, 468 U.S. 517 (1984).

[58] *Id.* at 519–520.

[59] *Id.* at 520–21.

[60] *See id.* at 521–22.

[61] *Id.* at 527–28 (citations omitted).

[62] *Hudson*, 468 U.S. at 528.

security of penal institutions."[63] Justice O'Connor concurred in the judgment, but wrote separately "to elaborate my understanding of why the complaint in this litigation does not state a ripe constitutional claim."[64] She reached similar conclusions regarding the Fourth Amendment claim.[65]

While the Solicitor General did not submit a brief in this case, the Court's holding can be understood as a continuation of the deference the Court demonstrated in *Bell*. In a four-member dissent to the Court's Fourth Amendment holding, Justice Stevens pointed out that "the reasoning in Part II-A of the Court's opinion, however, is seriously flawed—indeed, internally inconsistent."[66] He explained:

> It is well-settled that the discretion afforded prison officials is not absolute. A prisoner retains those constitutional rights not inconsistent with legitimate penological objectives. There can be no penological justification for the seizure alleged here. There is no contention that Palmer's property posed any threat to institutional security . . . if material is examined and found not to be contraband, there can be no justification for its seizure.[67]

The effect of the Court's holding, according to Justice Stevens, was to "declare that the prisoners are entitled to no measure of human dignity or individuality."[68] This holding, which according to the dissenters "cannot be squared with the text of the Constitution, nor with common sense,"[69] is a continuation of the deferential hands-off approach taken by Justice Rehnquist in *Bell*. Justice Stevens wrote the following:

> By adopting it's "bright line" rule, the Court takes the "hands off" approach to prison administration that I thought it had abandoned forever when it wrote in *Wolff v. McDonnell* . . . "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is

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[63] *Id.* at 529. Chief Justice Burger quoted a Supreme Court of Virginia opinion, *Marrero v. Commonwealth*, for the idea that "[t]his type of search allows prison officers flexibility and prevents inmates from anticipating, and thereby thwarting, a search for contraband." *Id.* (quoting Marrero v. Commonwealth, 284 S.E.2d 809, 811 (1981)). This holding is an indication of deference towards prison officials.

[64] *Id.* at 537 (O'Connor, J., concurring).

[65] *Id.* (O'Connor, J., concurring) ("I agree that the government's compelling interest in prison safety, together with the necessary ad hoc judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment. The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects.") (citations omitted).

[66] *Id.* at 541–42 (Stevens, J., concurring in part and dissenting in part).

[67] *Hudson*, 468 U.S. at 547–49 (Stevens, J., concurring in part and dissenting in part).

[68] *Id.* at 554 (Stevens, J., concurring in part and dissenting in part).

[69] *Id.* at 555 (Stevens, J., concurring in part and dissenting in part).

> imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[70]

Thus, the Court's deferential holding in *Hudson* can be understood as a continuation of the deference exhibited by *Bell*'s hands-off approach as articulated by Justice Rehnquist. Although in *Bell*, separation of powers motivated Justice Rehnquist to defer to the Solicitor General and the executive branch because the Constitution had entrusted them with the administration of prisons, *Hudson* suggests that this deference extends to state prison administrators as well.

The Court's deference to prison officials and the judgment of the Solicitor General is also evident in *Block v. Rutherford*,[71] a case decided the same day as *Hudson*. Applying the principles articulated in *Bell*, the Court upheld the Los Angeles County Central Jail's policy that denied pretrial detainees contact visits with their spouses, relatives, children, and friends.[72] Writing for the majority, Chief Justice Burger rejected the district court and Ninth Circuit's determination that a blanket prohibition of contact visits for all detainees was an exaggerated response to security concerns.[73] Finding that there is a rational connection between banning contact visits and ensuring prison security,[74] Chief Justice Burger criticized the lower courts for substituting their judgments for those of the prison officials. He wrote the following:

> On this record, we must conclude that the District Court simply misperceived the limited scope of judicial inquiry under [*Bell*]. When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in [*Bell*], "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further

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[70] *Id.* at 555–56 (Stevens, J., concurring in part and dissenting in part) (quoting Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)).

[71] 468 U.S. 576 (1984).

[72] *Id.* at 591. In its opinion, the Court also rejected the claim that the Jail's policy of conducting unannounced shakedown searches of cells in the absence of the cell occupants violated the detainees' Due Process rights, stating that this matter was settled when the Court decided *Bell*. *Id.* at 591.

[73] *Id.* at 581, 587.

[74] *Id.* at 586 ("That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion. The District Court acknowledged as much. Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.").

those interests."[75]

Significantly, this was exactly the result urged by the Solicitor General, who submitted an amicus brief in support of the jail. Although the Solicitor General acknowledged that BOP generally permits contact visits,[76] it was perhaps troubled by the prospect of a potential ruling that such visits are constitutionally mandated,[77] because any ruling against the state prisons would be applicable to the federal prisons as well.[78] Quoting from *Bell*, the Solicitor General stated that "[t]his Court plainly indicated that the federal judiciary is not to apply a strict or heightened scrutiny analysis in making the above determination . . . . Federal courts, in short, are obligated to give 'wide deference' to the expert judgment of corrections officials unless they are 'conclusively shown to be wrong.'"[79] At the urging of the Solicitor General, the Court once again applied the hands-off approach from *Bell*[80] and deferred to the judgment of the prison officials.[81]

C. *Turner v. Safley* and Deference Outside the Fourth Amendment Context

With the exception of the *Florence* case, no Fourth Amendment challenges by prisoners have made it to the Supreme Court after *Hudson v. Palmer*. According to one commentator, the *Bell*, *Block*, and *Hudson* trilogy raised the question whether "prison inmates maintain any right to privacy under the Fourth Amendment."[82] That commentator explains, "[t]he question arises in part because dicta in *Hudson* could be read as saying that it is unreasonable for prisoners to retain any privacy interests at all, including in their bodies, though *Hudson* itself did not actually say this and applied only to privacy in cells."[83]

In *Turner v. Safley*, the Court demonstrated its deference to prison

[75] *Block*, 468 U.S. at 589 (quoting *Bell*, 441 U.S. at 554).

[76] *See* Memorandum for the United States as Amicus Curiae at 6–7, Block v. Rutherford, 468 U.S. 576 (1984) (No. 83-317).

[77] *Id.* at 1 ("Any decision by this Court concerning the constitutional rights of pretrial detainees in state facilities will necessarily have implications for federal pretrial detainees. In addition, the United States has enforcement responsibilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997 et seq., to assure that state prison officials do not deprive inmates of the rights, privileges or immunities secured or protected by the Constitution and laws of the United States.").

[78] *Id.*

[79] *Id.* at 8–10 (quoting *Bell*, 441 U.S. at 547, 555).

[80] *Bell*, 441 U.S. at 562.

[81] *Block*, 468 U.S. at 591.

[82] Deborah L. MacGregor, *Stripped of All Reason?The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 174 (2003).

[83] *Id.* at 174–75.

officials and the Solicitor General outside the Fourth Amendment context, by using a rational relationship test to assess prisoners' constitutional claims under the First and Fourteenth Amendments. Considering "the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate correspondence,"[84] Justice O'Connor wrote, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[85] She identified four factors that courts ought to consider in determining the reasonableness of the regulation at issue: (1) whether there is a "valid, rational connection" between the prison regulation and a legitimate government interest; (2) "whether alternative means of exercising the right remain open to inmates"; (3) the "ripple effect," or the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) the absence of ready alternatives.[86]

Applying these factors, Justice O'Connor found that Renz prison's practice of generally prohibiting correspondence with inmates at other institutions[87] was "logically connected" to "legitimate security concerns" caused by the presence of prison gangs.[88] She noted that inmates were not deprived of all means of expression, as they were only prohibited from communicating with a "limited class of other people with whom prison officials have particular cause to be concerned—inmates at other institutions within the Missouri prison system."[89] She found that there would have been a significant "ripple effect" if the right was granted. Allowing inmate to inmate correspondence would facilitate "the development of informal organizations that threaten the core functions of prison administration."[90] In support of her final point, Justice O'Connor noted that "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and

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[84] Turner v. Safley, 482 U.S. 78, 81, 89 (1987).

[85] *Id.* at 89.

[86] *Id.* at 89–91 (quoting *Block*, 468 U.S. at 586). Justice O'Connor qualified the final factor she listed as "not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 90–91 (citations omitted).

[87] The regulation permitted correspondence with immediate family members who are inmates at other correctional institutions as well as correspondence between inmates regarding legal matters. "Other correspondence between inmates, however, is permitted only if the classification/treatment team of each inmate deems it in the best interest of the parties involved . . . . At Renz, the District Court found that the rule as practiced is that inmates may not write non-family inmates." *Turner*, 482 U.S. at 81–82 (internal quotation marks omitted).

[88] *Turner*, 482 U.S. at 91.

[89] *Id.* at 92.

[90] *Id.* at 92–93.

security."[91]

Noting that marriage was a constitutionally protected interest even in the prison context, Justice O'Connor held that the Missouri marriage regulation[92] lacked a reasonable relationship to the prison's stated objectives of promoting security and inmate rehabilitation.[93] Justice O'Connor found that the marriage ban was not rationally related to the security interest, as "[c]ommon sense likewise suggests that there is no logical connection between the marriage restriction and the formation of love triangles."[94]

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, joined the part of the opinion striking down the marriage prohibition, but dissented from the rest of the opinion.[95] The dissenters were perplexed by the varying levels of deference the Court had expressed towards the prison with regard to the correspondence and marriage prohibitions. According to Justice Stevens,

> The contrasts between the Court's acceptance of the challenge to the marriage regulation as overbroad and its rejection of the challenge to the correspondence rule are striking and puzzling. The Court inexplicably expresses different views about the security concerns common to prison marriages and prison mail. In the marriage context expert speculation about the security problems associated with "love triangles" is summarily rejected, while in the mail context speculation about the potential "gang problem" and the possible use of codes by prisoners receives virtually total deference.[96]

Justice Stevens reasoned that the differential treatment of the two regulations was due to the Court's conception of marriage as warranting greater constitutional protection:

> When all the language about deference and security is set to one side, the Court's erratic use of the record to affirm the Court of Appeals only partially may rest on an unarticulated assumption that the marital state is fundamentally different from the exchange of mail in the satisfaction, solace, and

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[91] *Id.* at 93.

[92] *Id.* at 96–97. The Missouri marriage regulation prohibited inmates from marrying other inmates as well as civilians unless the prison superintendent approved the marriage after finding that there were compelling reasons for doing so. Generally, only pregnancy and the birth of a child were considered "compelling reasons."

[93] *Turner*, 482 U.S. at 97. ("The security concern emphasized by petitioners is that 'love triangles' might lead to violent confrontations between inmates. With respect to rehabilitation, prison officials testified that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed.") (internal citations omitted).

[94] *Id.* at 98.

[95] *See id.* at 100–01 (Stevens, J., concurring in part and dissenting in part).

[96] *Id.* at 112–13 (Stevens, J., concurring in part and dissenting in part).

support it affords to a confined inmate.[97]

Justice Stevens chided the majority for ruling based on this assumption, reminding them that "[e]ven if such a difference is recognized in literature, history, or anthropology, the text of the Constitution more clearly protects the right to communicate than the right to marry."[98]

Another explanation for the differing treatment of the correspondence and marriage rules is that the majority was influenced by the Solicitor General's amicus brief, which advocated for upholding the correspondence rule, but did not comment on the marriage rule. The Solicitor General argued that the correspondence rule was reasonable, noting that "[f]ederal prison officials have come to this conclusion as well, and have promulgated a substantially similar regulation."[99] In contrast, the Solicitor General noted that "[t]here is no comparable federal regulation" to the marriage rule,[100] and thus, "[t]he United States expresses no view on the constitutionality of the Missouri marriage regulation."[101] The Court's deference to the Missouri prison officials regarding the correspondence rule, in contrast to its more critical analysis of the marriage rule, could be understood as deference to the judgment of the Solicitor General, who expressed strong views in favor of the former but not the latter.

The vast majority of constitutional claims asserted by prisoners since *Turner* have been decided in favor of the state prisons and the Solicitor General, who weighed in on the side of the prisons.[102] Notably,

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[97] *Id.* at 115–16 (Stevens, J., concurring in part and dissenting in part).

[98] *Turner*, 482 U.S. at 116 (Stevens, J., concurring in part and dissenting in part).

[99] Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Turner v. Safley, 482 U.S. 78 (1987) (No. 85-1384).

[100] *Id.* at 3.

[101] *Id.* at 17, n. 7.

[102] *See* Beard v. Banks, 548 U.S. 521 (2006) (rejecting First Amendment challenge to Pennsylvania Department of Corrections policy restricting access to newspapers, magazines, and photographs by inmates placed in the most restrictive level of the prison's long-term segregation unit. A plurality held that the district court failed to apply *Turner* and exercise due deference to the judgment of the prison officials); Brief for the United States as Amicus Curiae Supporting Petitioner, Beard v. Banks, 548 U.S. 521 (2006) (No. 04-1739) (urging Court to apply *Turner* and reject First Amendment claims); Overton v. Bazzetta, 539 U.S. 126 (2003) (applying *Turner*, upholding state prison regulations regarding visitations against First, Eighth and Fourteenth Amendment challenges); Brief for the United States as Amicus Curiae Supporting Petitioners, Overton v. Bazzetta, 539 U.S. 126 (2003) (No. 02-94) (arguing that prison regulations are valid under *Turner*); Shaw v. Murphy, 532 U.S. 223 (2001) (holding that inmates do not possess a special First Amendment right to provide legal assistance to fellow inmates that enhances the protections otherwise available under *Turner*); Brief for the United State as Amicus Curiae Supporting Reversal, Shaw v. Murphy, 532 U.S. 223 (2001) (No. 99-1613) (same); Washington v. Harper, 494 U.S. 210 (1990) (rejecting mentally ill state prisoner's claim that being treated by antipsychotic drugs against his will without a judicial hearing violated his substantive and procedural due process rights); Brief for the United States as Amicus Curiae Supporting Petitioners, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599) (same); Thornburgh v. Abbott, 490 U.S. 401 (1989) (applying *Turner's* deferential standard to reject facial challenge to Federal Bureau of Prisons regulation allowing prison officials to reject incoming publications found to be detrimental to prison security); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (holding that even where claims were made under the First Amendment, Courts should not substitute their judgment on difficult and sensitive matters of

the Court stated in *Washington v. Harper* that "the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."[103] According to the Court, "[t]his is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review."[104] Thus, if the Court is to be taken at its word, after *Harper*, all constitutional challenges to prison policies must be evaluated according to the deferential *Turner* standard, which would uphold any prison regulation deemed to be "reasonably related" to "legitimate" penological interests.

D. The Limits to Deference

Despite the Court's promise in *Harper*, there are a few cases in which the Court has applied something other than the *Turner* standard to uphold constitutional challenges against state prisons—often at the Solicitor General's urging. For example, in *Hudson v. McMillian*, the Court reversed the Fifth Circuit's holding that a prisoner's Eighth Amendment claim failed on the grounds that the injuries he sustained in a beating by prison guards was "minor" and did not require medical attention.[105] According to Justice O'Connor's majority opinion, as well as the Solicitor General's amicus brief, the proper judicial inquiry for courts faced with an accusation that prison officials used excessive force is not merely whether the use of force left a lasting injury, but "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[106] The Solicitor General noted that "even giving due deference to the concerns respondents may have had in attempting promptly to defuse what may have seemed a tense situation[,]" it was difficult to see why it was necessary for the guards to apply any considerable force, given that the prisoner was in handcuffs and shackles and unable to resist the guards as he was beaten.[107]

In *Johnson v. California*, the Court held that strict scrutiny must be applied in an equal protection challenge to the California Department of

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institutional administration for those of prison officials); Brief for the United States as Amicus Curiae Supporting Petitioners, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (No. 85-1722) (same).

[103] *Harper*, 494 U.S. at 224.

[104] *Id.* at 223.

[105] Hudson v. McMillian, 503 U.S. 1, 5, 12 (1992).

[106] *Id.* at 6–7; Brief for the United States as Amicus Curiae Supporting Petitioner at 13, Hudson v. McMillian, 503 U.S. 1 (1991) (No. 90-6531).

[107] Brief for the United States as Amicus Curiae Supporting Petitioner at 14–15, Hudson v. McMillian, 503 U.S. 1 (1991) (No. 90-6531).

Corrections (CDC) policy of placing new inmates with cellmates of the same race.[108] The Court, per Justice O'Connor, clarified that *Turner* deference does not apply to racial classifications, because the right to be free of racial discrimination is "not a right that need necessarily be compromised for the sake of proper prison administration."[109] She continued:

> When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers. For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison.[110]

Thus *Johnson* circumscribes the outer limits of *Turner* deference, indicating that the Court was backpedaling on its suggestion in *Washington v. Harper* that *Turner* applies to all constitutional rights. In doing so, the Court was undoubtedly influenced by its own precedent establishing that strict scrutiny applies to all government racial classifications.[111] However, the extent to which Justice O'Connor quotes from the Solicitor General's amicus brief suggests that the Solicitor General's opinion influenced the Court's ruling. She wrote the following:

> Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation. . . . Federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit racial segregation. . . . ("[BOP] staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs".) The United States contends that racial integration actually "leads to less violence in BOP's institutions and better prepares inmates for re-entry into society." . . . Indeed, the United States argues, based on its experience with the BOP, that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence."[112]

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[108] Johnson v. California, 543 U.S. 499, 514 (2005).
[109] *Id.* at 510.
[110] *Id.* at 511.
[111] *Id.* at 505 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).
[112] *Id.* at 508–09 (citations omitted).

Thus, in its decision to apply strict scrutiny to the CDC policy, the Court, although rejecting the judgment of state prison officials, nevertheless deferred to the judgment of the Solicitor General. The Court did not go as far as the Solicitor General, who urged the Court to find that the CDC policy failed to meet strict scrutiny.[113] Instead, this determination was remanded to the lower courts.[114] But because strict scrutiny is such a high bar to meet, especially in the context of race, the Court all but sided with the Solicitor General and the plaintiffs by prescribing it as the applicable standard of review.

In *Brown v. Plata*, a 5–4 opinion by Justice Kennedy, the Court found that overcrowded prison conditions in California violated the Eighth Amendment.[115] The Court's refusal to defer to the judgment of the state prison officials in this instance not only fits squarely into the Eighth Amendment exception to *Turner* identified in *Johnson*, but also is consistent with deference to the Solicitor General, who did not submit an amicus brief in this case.

The Court has deferred to the judgment of the Solicitor General both in upholding prison policies in the face of constitutional challenges and by striking down select state prison policies at the Solicitor General's urging. The next Part examines the literature regarding the Solicitor General's office and offers theories explaining the Court's deference.

III. The Office of the Solicitor General and Theories Explaining Deference

A. The Solicitor General's Three Roles

Appointed by the President with the consent of the Senate, the Solicitor General is the lawyer for the United States, responsible for advocating the interests of the executive branch before the Supreme Court.[116] The Solicitor General has three main responsibilities. First, as "gatekeeper," the Solicitor General decides which cases to appeal to the Supreme Court, selecting from the hundreds of cases the federal government loses in the lower federal courts. The Solicitor General also

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[113] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 9, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636). *See also Johnson*, 543 U.S. at 517 (Stevens, J., dissenting) (arguing that the prison policy of racial segregation violates the Equal Protection Clause of the Fourteenth Amendment).

[114] *Johnson*, 543 U.S. at 515.

[115] 131 S. Ct. 1910 (2011).

[116] Kristen A. Norman-Major, Note, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1082–83 (1994).

acts as a gatekeeper in deciding in which cases the United States will file an amicus brief to persuade the Court to grant certiorari.[117] Second, and most well-known, is the Solicitor General's role in representing the United States as a party before the Supreme Court.[118] Third, in cases in which the government is not a party but it nonetheless has a substantial interest, the Solicitor General not only submits amicus briefs to the Court on the merits but often shares oral argument time with the party that it is supporting.[119]

1. Gatekeeping for the Supreme Court

The Solicitor General exercises considerable discretion in deciding which of the cases the federal government should appeal to the Supreme Court.[120] Of the 800 or so cases submitted annually to the Solicitor General, only 60 to 80 can realistically be appealed.[121] In deciding which cases to appeal, the Solicitor General is often described as "a first-line gatekeeper for the Supreme Court" who must "say 'no' to many government officials who present plausible claims of legal error in the lower courts."[122]

In deciding which cases to appeal, the Solicitor General works closely with the agencies that handled the case. According to author Rebecca Mae Salokar, "[b]ecause these other agencies have been working on the cases since the trial stage, they often provide the solicitor general with a thorough history of the cases, as well as insight on the contested legal issues."[123] While the Solicitor General considers the views of the agency seeking to appeal the case, the Solicitor General is also guided by the long-term interests of the executive branch.[124]

Not surprisingly, the Solicitor General is influential in this capacity. The Solicitor General has been described as "the most important person

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[117] *Id.* at 1083.

[118] PETER N. UBERTACCIO III, LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL 8 (2005).

[119] *Id.*

[120] Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1328 (2010) (arguing that the Solicitor General's responsibilities are highly discretionary, "and thus effectively enable the Solicitor General to set the government's legal agenda.").

[121] Norman-Major, *supra* note 116, at 1089.

[122] Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L. Q. 337, 341 (1981-1982).

[123] REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 13 (1992).

[124] Cordray, *supra* note 120, at 1328–30 (2010). According to former Solicitor General Wade McCree, "[a] case ordinarily will be appealed if it has substantial importance to the government and if the government's legal position has a reasonable basis. We do not, however, petition the Supreme Court to review adverse decisions unless the case satisfies the stricter standards of exceptional importance applied by the Supreme Court itself." McCree, *supra* note 122, at 340.

in the country, except for the justices themselves, in determining which cases are heard in the Supreme Court."[125] According to one source, "the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% the Court grants at the request of other litigants."[126] Another source wrote, "[t]he Solicitor General's success as a petitioner is astounding—it successfully obtains review fourteen times as often as private litigants."[127] If the Solicitor General decides not to appeal an agency's case, the only way in which the agency can have its case heard is if the Attorney General or the President overrules the Solicitor General, which rarely happens.[128]

Because the Solicitor General has virtually exclusive power to determine which government cases are brought before the Supreme Court, it can advance a policy agenda of its choice.[129] Former Solicitor General Paul D. Clement referred to this power as a "monopoly," arguing that unlike a private law firm, which will rarely turn down a client's request to seek certiorari, the Solicitor General frequently says "no" to agencies.[130] Clement warned that like any monopoly, this one is subject to abuse.[131] The considerable discretion and power granted to the Solicitor General in playing this gatekeeper role is one reason why the office has attracted unprecedented attention and scrutiny in recent decades.

The Solicitor General plays a further role in shaping the Supreme Court's docket by arguing for and against granting certiorari in cases in which the federal government is not a party.[132] The Solicitor General also enjoys exceptional success in this role. A 1963 study found that "the Court granted certiorari in forty-seven percent of the cases supported by the Solicitor General versus only 5.8% when the Solicitor General did not support certiorari."[133] A more recent source states that "[w]hen the Solicitor General is participating as *amicus* at the petition stage—almost always at the Court's invitation—the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases."[134]

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[125] UBERTACCIO, *supra* note 118, at 9 (quoting H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 129 (1991)).
[126] Cordray, *supra* note 120, at 1333.
[127] Ryan Juliano, Note, *Policy Coordination: The Solicitor General as Amicus Curiae in the First Two Years of the Roberts Court*, 18 CORNELL J.L. & PUB. POL'Y 541, 549 (2009).
[128] Norman-Major, *supra* note 116, at 1089.
[129] *Id.*
[130] Paul D. Clement, 43rd Solicitor General of the United States, Keynote Address at the Randolph W. Thrower Symposium, (February 12, 2009), *in* 59 EMORY L.J. 311 (2009) at 313–14.
[131] *Id.*
[132] Norman-Major, *supra* note 116, at 1091.
[133] *Id.* at 1092.
[134] Cordray, *supra* note 120, at 1333–34.

2. *Representing the United States as a Party*

The most salient role of the Solicitor General is that of representing the United States at oral argument before the Court. For reasons explored later in this Note, the Solicitor General has been extremely influential in this role as the most successful party to argue before the Court.[135] According to one study, between 1959 and 1989 "the government's position prevailed 67.6% of the time, clearly failed 26.8% of the time, and obtained some mixed result 4.8% of the time."[136] Another study examining the 1983 term found that the Solicitor General prevailed in 83% of the 150 cases it participated in before the Court.[137]

3. *Participating as Amicus Curiae at the Merits Stage*

The role of the Solicitor General as amicus curiae has received the most attention in scholarship. Arguably, "[i]n performing this task, the OSG [Office of the Solicitor General] is at the height of its discretion vis-à-vis the demands, implicit or otherwise, of the Supreme Court and most free to represent the unadulterated views of the administration."[138] Karen O'Connor described the Solicitor General's amicus curiae role as follows: "[T]he solicitor can inform the Court of the ramifications of the position urged by each party and can apprise the justices of his opinions, which are given great weight. The solicitor's contribution as *amicus* is particularly useful when one or both parties to the lawsuit are inexperienced yet present the justices with an important case."[139] Salokar outlined potential reasons for why the Solicitor General may file an amicus brief:

> [T]he solicitor general is likely to address the potential impact a decision will have on federal law and federal agency operations and programs or simply provide additional information and legal considerations not contained in the litigants' documentation. Finally, the *amicus* brief has served as a vehicle to express the administration's policy positions and goals on issues that have historically been considered

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[135] Norman-Major, *supra* note 116, at 1094.

[136] Juliano, *supra* note 127, at 549.

[137] Norman-Major, *supra* note 116, at 1094.

[138] Karen Swenson, *President Obama's Policy Agenda in the Supreme Court: What We Know So Far From the Office of the Solicitor General's Service as Amicus Curiae*, 34 S. ILL. U. L.J. 359, 360 (2010).

[139] Karen O'Connor, The *Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 JUDICATURE 258, 260 (1983).

outside the scope of federal law.[140]

For all these reasons, the amicus brief is an important tool for the Solicitor General to advance the interests of the executive branch.

Numerous studies document the historical success the Solicitor General has enjoyed with respect to its amicus briefs.[141] In his Note, Ryan Juliano interpreted the data for 1946–1995 collected by law professors Joseph D. Kearney and Thomas W. Merrill and concluded that "[w]hen the Solicitor General supported the petitioner, the petitioner won 76.3 percent of the time. When the Solicitor General supported the respondent, the petitioner won just 34.1 percent of the time. These rates depart significantly from the historical petitioner win rate of 59.8 percent."[142]

Juliano added his own findings after studying the outcomes of cases heard during the first two years of the Roberts Court, which indicated that the party supported by the Solicitor General won 89.06% of the arguments heard between the Fall 2005 and Spring 2007 terms.[143] Juliano also found that "[w]ithin the sample, the majority explicitly mentioned the Solicitor General in more than one quarter of the cases, and at least one opinion either explicitly mentioned or cited the Solicitor General in more than half the cases."[144] Thus, the Roberts Court was slightly more likely to mention the Solicitor General in its opinions than its predecessors, which referred to the Solicitor General in just over 40% of the cases in which the Solicitor General had submitted an amicus brief between 1946 and 1995.[145] Though the Roberts Court appeared, at least in its early years, to have taken heightened regard of the Solicitor General's position, this was not a significant departure from the historical trend.

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[140] SALOKAR, *supra* note 123, at 26.

[141] Norman-Major, *supra* note 116, at 1096 ("As one author notes, because the Solicitor General is on the winning side about seventy-five percent of the time, these briefs can play a paramount role in shaping judicial policy-making. According to another study, the United States as amicus had a success rate of over eighty percent between 1920 and 1973 in three types of cases: civil rights cases, civil liberties cases, and cases involving political provisions of the United States Constitution. The only area in which the United States success rate was below sixty percent was in cases involving issues of naturalization and aliens.") (internal quotation marks omitted); SALOKAR, *supra* note 123, at 146 (finding that between 1959 and 1986, the Solicitor General enjoyed a success rate of 78.36% when it supported the petitioner and 58.67% when it supported the respondent with its amicus brief).

[142] Juliano, *supra* note 127, at 550.

[143] *Id.* at 552–53 (in further detail: "While respondents won judgment in 29.69 percent of all cases, they won 77.27 percent of the cases where they were supported by the Solicitor General and just 4.76 percent of the cases where they were opposed by the Solicitor General. Alternatively, while petitioners won judgment in 70.31 percent of all cases, they won 95.24 percent of the cases where they were supported by the Solicitor General and 22.73 percent of the cases where they were opposed by the Solicitor General.").

[144] *Id.* at 558.

[145] *Id.* at 549.

B. Theories Explaining the Solicitor General's Influence on the Supreme Court

Several theories have emerged to explain the Solicitor General's unparalleled success before the Court. The most salient theories fall within three categories: the Repeat Player Theory, the Tenth Justice Theory, and the Executive Power Theory. While these theories are not mutually exclusive, the Court's language deferring to the Solicitor General in cases such as *Bell* lends the most support to the Executive Power Theory.

1. The Repeat Player Theory

As an office that focuses a disproportionate amount of resources on Supreme Court litigation, the Solicitor General is a "repeat player" that enjoys significant advantages over other litigants, such as "advance intelligence, expertise, [and] access to specialists throughout the Department of Justice."[146] Moreover, the Solicitor General "is not constrained by the financial burdens imposed on other litigants" and therefore "can afford to—and does—litigate over any question of principle regardless of the amount in controversy."[147] Law professor and former Assistant Solicitor General Richard Wilkins noted that another advantage of being a repeat player is that "unlike other advocates, the Solicitor General develops a personal familiarity with individual Justices and the Court as a whole."[148]

This theory recognizes the practical advantages that the Solicitor General enjoys over other litigants—expertise, experience, resources, and familiarity—as a result of its structural role as the lawyer for one of the most frequent and well-funded litigants before the Supreme Court. It complements and arguably works in tandem with the next theory, the Tenth Justice Theory.

2. The Tenth Justice Theory

The Tenth Justice Theory was advanced most famously by Lincoln Caplan. He posited that the Solicitor General is an officer of the Court

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[146] SALOKAR, *supra* note 123, at 3–4.
[147] *Id.* at 4 (internal quotation marks omitted).
[148] Richard G. Wilkins, *An Officer and an Advocate: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1167, 1179 (1988).

with a "dual responsibility" not just to the Executive, but also the Judicial Branch, earning the nickname the "Tenth Justice."[149] Caplan explains:

> The Justices also turn to the [Solicitor General] for help on legal problems that appear especially vexing, and two or three dozen times a year they invite him and his office to submit briefs in cases where the government is not a party. In these cases especially, the Justices regard him as a counselor to the Court. But in every case in which he participates, the Justices expect him to take a long view . . . Lawyers who have worked in the [Solicitor General's] office like to say that the Solicitor General avoids a conflict between his duty to the Executive Branch, on the one hand, and his respect for the Congress or his deference to the Judiciary, on the other, through a higher loyalty to the law.[150]

In Caplan's view, the Court credits the Solicitor General's views because of his perceived (or actual) loyalty to the Court and adherence to the rule of law.

According to Caplan, "[f]or many generations before the Reagan era, in both Democratic and Republican administrations, the Solicitor General more often than not met the standards of a model public servant—discreet, able, trustworthy."[151] However, troubled by the Reagan administration's involvement and stance on hot button issues such as abortion and gay marriage, Caplan alleged that under Reagan, the Solicitor General had become "a partisan advocate for the administration in power" who treated the law "as no more than an instrument of politics."[152] Caplan was especially critical of Reagan's second Solicitor General, Charles Fried, for "misusing accepted principles of legal reasoning in major cases," which not only undermined the credibility of the Solicitor General's office before the Court, but also "threatened the law's stability."[153]

Many later authors, including Wilkins, who had worked in the Solicitor General's office during the Reagan administration, have criticized Caplan's view.[154]

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[149] LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3 (1987) ("Because of what Justice Lewis Powell has described as the Solicitor's 'dual responsibility' to both the Judicial and the Executive branch, he is sometimes called the Tenth Justice.").

[150] *Id.* at 7.

[151] *Id.*

[152] *Id.* at 271.

[153] *Id.* at 273.

[154] *See* Wilkins, *supra* note 148, at 1168 (noting that Caplan's critique of the Solicitor General's office is "largely a polemic against the Reagan Administration") (quoting Price, *What Price Advocacy?*, N.Y. Times, Oct. 25, 1987, (Book Review) at 13); Roger Clegg, *The Thirty-Fifth Law Clerk, The Tenth Justice: The Solicitor General and the Rule of Law* (Book Review), 1987 DUKE L.J. 964, 965 (1987) (reviewing CAPLAN, *supra* note 149) ("Caplan is wrong on all counts.");

But despite these objections to Caplan's conclusions, even his critics share his view that the Solicitor General enjoys unmatched influence before the Court because of the office's perceived impartiality and supposed duty to adhere to the law. Wilkins concluded that "the most important factor influencing the Solicitor General's relationship with the Court . . . is the tradition of mutual trust and respect that has pervaded their association."[155] Viewing the Solicitor General not merely as an executive officer but as an "officer of the court," Wilkins argued that the Solicitor General is accountable to the Court and therefore has a greater incentive to provide "complete intellectual candor, even when that impairs his effectiveness as an advocate."[156] Wilkins was convinced that if the Solicitor General were ever to violate his role as an "officer of the court," the Court would "quickly come to view him no differently from any other advocate that appears before it."[157] Salokar concurred that "[t]he justices expect [the Solicitors General] to maintain some degree of independence from the partisanship of the administration."[158]

As these authors suggest, part of the reason why the Court may expect the Solicitor General to demonstrate allegiance to the rule of law rather than merely advocating his own interests is due to his role as a repeat player. Because the Solicitor General appears before the Court again and again, the Court has a built-in deterrent that holds the Solicitor General accountable for misrepresenting or deviating from the law.

3. *The Executive Power Theory*

The Executive Power Theory posits that, because the Solicitor General's functional role is to represent the views of the executive branch before the Court,[159] the Court defers to the Solicitor General's judgment on certain issues that concern the executive's prerogative to maintain institutional power. As Margaret Meriwhether Cordray and Richard Cordray explained,

> [T]he Supreme Court, like the Solicitor General, represents a

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SALOKAR, *supra* note 123, at 68 ("The observation that the office was politicized during the Reagan administration implies that it was not political in the past. This is simply untrue.").

[155] Wilkins, *supra* note 148, at 1180.

[156] *Id.* (quoting Bork, *The Problems and Pleasures of Being Solicitor General*, 42 ANTITRUST L.J. 701, 705 (1973)).

[157] Wilkins, *supra* note 148, at 1181 (internal quotation marks omitted). However, Juliano appears somewhat skeptical that such a "special relationship" exists, as he writes that "[c]laims that the Solicitor General brings a distinctive and influential reputation to the Supreme Court have little empirical foundation. No direct evidence suggests that the Solicitor General's success results from careful case-selection or a reputation for neutrality or political independence." Juliano, *supra* note 130, at 560.

[158] SALOKAR, *supra* note 123, at 7.

[159] *Id.* at 2.

> branch of government, and although the two branches serve as a check on one another, they nonetheless have common institutional interests. The Court shares the executive's concern that government must be able to function from a practical standpoint, and both are concerned with effective enforcement of the law. This pro-government inclination also operates in the Solicitor General's favor.[160]

Along the same lines, Salokar found that the Court tended to be most deferential to the Solicitor General when it advocated in favor of institutional power, as opposed to cases in which institutional power was not an issue and the Solicitor General advocated the partisan goals of the executive branch.[161] Salokar wrote the following:

> The Court seems to recognize that there are issues so essential to the functioning of the government that to rule against the solicitor general would undermine the capacity of the executive branch to carry out its assigned duties. Thus, the Court defers to the expertise of solicitors general and rules in their favor when the arguments hinge on executive power.[162]

As these authors contend, both the executive and judicial branches share an interest in ensuring that the law is enforced. This is no less true in the prison context. Thus the Court's deference to the Solicitor General in the prison cases can be understood not only as motivated by a separation of powers concern, but also by a shared interest in ensuring the effective administration of the nation's prisons.

As mentioned earlier, the three theories are not mutually exclusive, but are closely intertwined. Yet the Court's language in *Bell* about deferring to executive branch officials, echoed in the subsequent prison cases is most consistent with the Executive Power Theory.[163] If the Solicitor General argues that a particular policy is necessary to ensure the effective operation of the prisons, an executive branch responsibility, the Court is likely to step out of the way so that the executive can do its job. Arguably, this is because the Court shares the executive branch's interest in ensuring the effective enforcement of the law, as Cordray and Salokar suggest. Or perhaps, it is because the Constitution entrusted prison administration to the executive, rather than the judicial branch.

Interestingly, this theory is also consistent with the rare cases when

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[160] Cordray, *supra* note 123, at 1338.

[161] SALOKAR, *supra* note 125, at 175–76.

[162] *Id.* at 177.

[163] *See, e.g,. Bell*, 441 U.S. at 562 ("But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . .The wide range of "'judgment calls'" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.") (emphasis added).

the Court has ruled against state prisons. In these cases, the Solicitor General either urged the Court to rule against the prisons—as in *McMillian* and *Johnson*—or refused to weigh in, as in *Brown*. In every prison case the Court must weigh prisoners' rights against institutional power. Seeing that the Solicitor General had effectively come down in favor of individual rights in these cases—despite the fact that one of his clients is the federal prison system—the Court likely deferred to the executive's judgment that these prison practices were not necessary to maintain executive power. Thus the results in *McMillian*, *Johnson*, and even *Brown* can be explained by the fact that, in each of these cases, the Court heavily weighed the prisoner's constitutional rights, as advocated by the Solicitor General, and devalued the state prisons' arguments that the challenged measures were necessary for effective prison administration.

IV. THE *FLORENCE* DECISION AS EVIDENCE OF DEFERENCE

In light of the doctrine highlighted in Part I, the Court's ruling in *Florence* comes as no surprise. At the urging of the Solicitor General, the Court, in a 5–4 decision by Justice Kennedy, upheld the constitutionality of prison strip searches regardless of whether prison officials had reasonable suspicion that incoming detainees had concealed weapons or contraband on their persons.[164] *Florence* supports a theory of deference not only because of the deferential language and result of the majority opinion, but also because the concurring Justices made clear that the Court's holding is closely tied to the policies currently employed by BOP.

A. The Majority Affirms *Bell* and *Atwater*

The majority began its analysis by reviewing the Court's precedent demonstrating a high level of deference to prison officials. Referring to *Turner v. Safley*, the Court noted that "[t]he difficulties of operating a detention center must not be underestimated by the courts."[165] It continued, "[t]he Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'"[166] Examining the precedent established in *Bell v. Wolfish*, *Block v. Rutherford*, and *Hudson v.*

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[164] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012).
[165] *Id.* at 1515 (citing *Turner*, 482 U.S. at 84–85).
[166] *Id.* (quoting *Bell*, 441 U.S. at 546, 548 and *Block*, 488 U.S. at 584–85).

Palmer, the Court concluded as follows:

> These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities. The task of determining whether a policy is reasonably related to legitimate security interests is "peculiarly within the province and professional expertise of corrections officials." This Court has repeated the admonition that in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.[167]

This language suggests that the majority viewed the *Florence* case from the deferential perspective established in these prior cases, employing the approach advocated by the Solicitor General. Assistant to the Solicitor General Nicole Saharsky stated in oral argument that "[t]he searches at issue in *Bell* are very similar to the searches at issue in this case, and they should be upheld."[168] Carter G. Phillips, arguing for respondents, said "[W]hat I would really like is an opinion that recognizes that deference to the prisons and to their judgment is what's appropriate under these circumstances, and that extends all the way to the *Bell v. Wolfish* line."[169]

Turning to the case at hand, the Court noted that "[c]orrectional officials have a significant interest in conducting a thorough search as a standard part of the intake process."[170] The Court identified several reasons why prison officials may adopt a policy of strip searching incoming detainees: detecting lice or other contagious infections; wounds that might need immediate treatment; and tattoos indicating gang affiliation.[171] Additionally, prison officials may uncover contraband that would cause security problems if brought into the facility: drugs, knives, scissors, glass shards, cell phones, chewing gum (which can block locking devices), and hairpins (which can be used to open handcuffs).[172] According to the Court, even innocuous items such as pens, cigarettes, or money can "pose a significant danger," because "scarce items, including currency, have value in a jail's culture and underground economy."[173]

The Court rejected petitioner's proposed rule excluding minor offenders from these searches because "[t]he record provides evidence

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[167] *Id.* at 1517 (quoting *Bell*, 441 U.S. at 546, 548; *Block*, 468 U.S. at 584–85) (internal quotation marks omitted).
[168] Transcript of Oral Argument at 53, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945).
[169] *Id.* at 504.
[170] *Florence*, 132 S. Ct. at 1518.
[171] *Id.* at 1518–20.
[172] *Id.* at 1518–20.
[173] *Id.* at 1519.

that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption."[174] According to the Court, "[g]angs do coerce inmates who have access to the outside world, such as people serving their time on the weekends, to sneak things into the jail."[175] The Court also pointed out that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals," citing examples such as Timothy McVeigh, who was stopped for driving without a license plate, and one of the terrorists responsible for September 11, who received a speeding ticket just two days before the attacks.[176] Moreover, "[e]xperience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment."[177] The Court noted that "[i]t also may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search" because "[t]he officers who conduct an initial search often do not have access to criminal history records."[178] Therefore, the Court concluded that "[i]n the absence of reliable information it would be illogical to require officers to assume the arrestees in front of them do not pose a risk of smuggling something into the facility."[179]

Some observers speculated that *Florence* might have come out differently than *Bell v. Wolfish* because of *Atwater v. City of Lago Vista*,[180] a case in which the Court upheld the constitutionality of arresting individuals even for minor offenses.[181] The Court in *Florence* acknowledged that "[p]ersons arrested for minor offenses may be among the detainees processed at these facilities," a result that is, "in part, a consequence of the exercise of state authority that was the subject of *Atwater v. Lago Vista*."[182] The Court also noted that "*Atwater* did not address whether the Constitution imposes special restrictions on the searches of offenders suspected of committing minor offenses once they are taken to jail."[183] According to Orin Kerr, *Florence* presented a question that arose out of the *Atwater* ruling: "If the Fourth Amendment allows the police to make the arrest for the very minor offense, and the arrestee is then brought to the jail, does the Fourth Amendment also allow the kind of invasive strip search that often occurs on entry into jail

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[174] *Id.* at 1520.
[175] *Florence*, 132 S. Ct. at 1519 (citing New Jersey Wardens Brief at 10).
[176] *Id.* at 1520.
[177] *Id.*
[178] *Id.* at 1521 (internal citations omitted).
[179] *Id.*
[180] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[181] Orin Kerr, *Thoughts on the strip-search case*, SCOTUSblog (Oct 12, 2011, 2:24 PM), http://www.scotusblog.com/2011/10/thoughts-on-the-strip-search-case/.
[182] *Florence*, 132 S. Ct. at 1517 (citing *Atwater*, 532 U.S. 318).
[183] *Id.* at 1518.

. . . ?"[184]

At oral argument, several Justices appeared uncomfortable with such a conclusion. Justice Alito mentioned that "[t]here have been some stories in the news recently about cities that have taken to arresting people for traffic citations" and asked respondents whether an individual arrested under such circumstances ought to be subject to such a search.[185] Justice Breyer said that his law clerk thought that for minor offenders, less than one in 64,000 had been caught with contraband.[186] Referencing Justice Alito's question, Justice Sonia Sotomayor asked,

> [S]hould we be thinking about the fact that many of these people who are now being arrested are being put into general populations or into jails, sometimes not just overnight but for longer periods of time, like this gentleman, for 6 days before he sees a magistrate? Should we be considering a rule that basically says your right to search someone depends on whether that individual has in fact been arrested for a crime that's going to lead to jail time or not, whether that person's been presented to a magistrate to see whether there is in fact probable cause for the arrest and detention of this individual? I mean, there is something unsettling about permitting the police to arrest people for things, like kids who are staying out after curfews with no other, based on probably nothing else.[187]

Respondents acknowledged her concern, conceding that Mr. Florence probably should not have been arrested in the first place.[188] Nevertheless, they did not see it as a reason to disregard the Court's precedent as articulated in *Turner v. Safley* and *Bell v. Wolfish*, which require deference to the "good faith judgment of our jailers."[189]

Ultimately, the majority ruled for the prisons and the Solicitor General, citing *Atwater*'s reasoning. In *Atwater*, a woman arrested for failure to wear a seatbelt argued that subjecting her to custodial arrest without a warrant violated her Fourth Amendment rights, because the offense would not result in jail time, and there was no compelling need for immediate detention.[190] According to the *Florence* majority, "[t]hat rule promised very little in the way of administrability. Officers could not be expected to draw the proposed lines on a moment's notice, and the risk of violating the Constitution would have discouraged them from arresting criminals in any questionable circumstances."[191] The Court

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[184] Kerr, *supra* note 181.
[185] Transcript of Oral Argument, *supra* note 168, at 38.
[186] *Id.*
[187] *Id.* at 42.
[188] *Id.* at 42–43.
[189] *Id.* at 43.
[190] *Florence*, 132 S. Ct. at 1517 (citing *Atwater*, 532 U.S. at 346).
[191] *Id.* at 1522 (internal citations and quotation marks omitted).

continued:

> One of the central principles in *Atwater* applies with equal force here. Officers who interact with those suspected of violating the law have an essential interest in readily administrable rules. The officials in charge of the jails in this case urge the Court to reject any complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees based on their behavior, suspected offense, criminal history, and other factors. They offer significant reasons why the Constitution must not prevent them from conducting the same search on any suspected offender who will be admitted to the general population in their facilities. The restrictions suggested by petitioner would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility, including the less serious offenders themselves.[192]

Deferring to the judgment of prison officials at the Solicitor General's urging, the *Florence* decision is consistent with the Court's history of deference since *Bell*. Given the Court's limited expertise in prison administration as well as its place in the constitutional scheme, the justices deferred to the prison officials' views about which measures are necessary to maintain prison security and safety. The *Florence* ruling is consistent with Justice Rehnquist's statement in *Bell* that "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."[193]

B. The Limits of *Florence*'s Holding as Deference

In *Florence*, the Court exhibited deference to the Solicitor General not only by virtue of the majority's holding, but also by circumscribing the decision in accordance with federal policy. In his concurrence, Justice Alito described the limits of the Court's holding:

> It is important to note, however, that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from

[192] *Id.* (internal citations and quotation marks omitted).
[193] *Bell*, 441 U.S. at 562.

custody prior to or at the time of their initial appearance before a magistrate.[194]

As support for his assertion that strip searching such individuals may violate the Constitution, Justice Alito cited the Solicitor General's brief.[195] Justice Alito wrote that "[f]or example, [BOP] and possibly even some local jails appear to segregate temporary detainees who are minor offenders from the general population."[196] He continued, in a footnote:

> In its *amicus* brief, the United States informs us that, according to BOP policy, prison and jail officials cannot subject persons arrested for misdemeanor or civil contempt offenses to visual body-cavity searches without their consent or without reasonable suspicion that they are concealing contraband. Those who are not searched must be housed separately from the inmates in the general population.[197]

Thus, Justice Alito left open the possibility of a constitutional challenge to strip searching detainees who were held separately from the general population. Though Chief Justice Roberts did not join Justice Alito's opinion, his own concurrence suggests that he also left open the possibility for such a constitutional challenge.[198]

Part IV of Justice Kennedy's opinion, signed by four members of the Court,[199] states that "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."[200] Citing the Solicitor General's brief, he explained that "[t]he accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue."[201] According to Justice Kennedy, "[t]he circumstances before the Court, however, do not present the opportunity to consider a narrow exception of the sort Justice Alito describes."[202]

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[194] *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).
[195] *See id.* (Alito, J., concurring).
[196] *Id.* (Alito, J., concurring) (citing Brief for the United States as Amicus Curiae at 30, Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 968 (9th Cir. 2010) (en banc)).
[197] *Id.* at 1524 n. * (Alito J. concurring) (internal citations omitted).
[198] *Id.* at 1523 (Roberts, C.J., concurring) ("I join the opinion of the Court. As with Justice Alito, however, it is important for me that the Court does not foreclose the possibility of an exception to the rule it announces. Justice Kennedy explains that the circumstances before it do not afford an opportunity to consider that possibility. Those circumstances include the facts that Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.").
[199] Justice Thomas joined all but Part IV of the opinion.
[200] *Florence*, 132 S. Ct. at 1522.
[201] *Id.* (citing United States Brief at 30).
[202] *Id.*

As Supreme Court journalist Lyle Denniston pointed out, "[b]ecause the votes of Alito and Roberts were necessary to make up the majority, it might well be that the Alito opinion will serve as the controlling opinion on that point, buttressed by the fact that Justice Kennedy's Part IV remarks left the issue open."[203]

This limit to the Court's holding is significant because it ties the constitutional standard to BOP policy. When asked about the BOP policy at oral argument, Nicole Saharsky, the Assistant to the Solicitor General, answered:

> Those people [misdemeanor or civil contempt offenders], when they go into the jail, would be asked whether they're willing to consent to this type of search. In most cases, they do consent. If they don't consent and there is not reasonable suspicion, then they are not placed in the general jail population; they are kept separate from the other offenders. So, it is the case, the rule that the Third Circuit identified, which is a blanket policy that anyone that's going to go into the general jail population and mix with everyone else has to be strip searched. That is the Federal Bureau of Prisons' policy.[204]

By upholding a blanket policy that anyone who is to be placed in the general jail population may be strip searched, the Court ruled as the Solicitor General urged it to. And in doing so, the Court effectively set BOP policy as the constitutional standard. Denniston pointed out that Alito's reference to BOP policy "implied that jail officials around the country might well want to adopt such a policy, to avoid having a general strip search policy partly nullified in a future case."[205] Not only did the Court defer to the Solicitor General by affirming the Third Circuit, but by tying the limits of its holding to BOP's policy, the Court relied on the executive branch's judgment regarding what is considered "reasonable" in accordance with the Fourth Amendment. This outcome suggests not only that the Solicitor General has a powerful influence on the Court in cases concerning the constitutionality of prison practices, but that some justices are even willing to allow the Solicitor General's view to dictate where to draw the constitutional line.

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[203] Lyle Denniston, *Opinion analysis: Routine jail strip searches OK (Final Update 2:56 pm)*, SCOTUSblog (Apr. 2. 2012, 2:56 pm), http://scotusblog.com/2012/04/opinion-analysis-routine-jail-strip-searches-ok/.

[204] Transcript of Oral Argument, *supra* note 168, at 55.

[205] Denniston, *supra* note 203.

V. CONCLUSION

The Solicitor General exerts a tremendous amount of influence over the Supreme Court. As a repeat player, the Solicitor General enjoys advantages over other litigants by virtue of its repeated appearances before the Court. The Court's deference to the Solicitor General may also stem from the belief that as the "tenth justice," the Solicitor General has a dual responsibility not only to the executive but also to the judiciary to uphold the rule of law. And because the Solicitor General's functional role is to represent the views of the executive branch before the Court,[206] the Court is especially deferential to the Solicitor General's judgment on issues that concern the executive's prerogative to maintain institutional power, such as the need for prisons to maintain some policies despite prisoners' complaints that these policies violate their constitutional rights.

The Court's language in *Bell* about deferring to executive branch officials, echoed in the subsequent prison cases is strong support for the Executive Power Theory.[207] In the vast majority of these cases, the Solicitor General submitted an amicus brief arguing that a particular policy was necessary to ensure the effective operation of the prisons, and the Court deferred to that judgment. In the rare instances in which the Solicitor General argued that the state prison policy was unnecessary for effective prison operation—such as in *McMillian* and *Johnson*—the Court deferred to that judgment as well and upheld the prisoner's right. Even silence from the Solicitor General—for example, regarding the marriage regulation at issue in *Turner*, and the racial segregation policy in *Brown v. Plata*—could increase the chances for a petitioner's victory, as these were two rare cases in which the prisoner prevailed.

Based on these theories and the actual language of the opinion, the Solicitor General's input was a deciding factor in the *Florence* case. Not only did the majority rule in favor of the prisons, as they were urged to by the Solicitor General, but Part IV of Justice Kennedy's opinion, signed by four members of the Court[208] carved out an exception based on BOP policy. It stated that, "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."[209] In

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[206] *Id.* at 2.

[207] *See, e.g,. Bell*, 441 U.S. at 562 ("But under the Constitution, the first question to be answered is not whose plan is best, *but in what branch of the Government is lodged the authority to initially devise the plan* . . . .The wide range of "'judgment calls'" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.") (emphasis added).

[208] Justice Thomas joined all but Part IV of the opinion.

[209] *Florence*, 132 S. Ct. at 1522.

other words, four members of the Court kept the door open to constitutional challenges falling outside the policy followed by the Solicitor General's client, BOP. Justice Alito wrote separately to emphasize this caveat, and his vote was crucial to the outcome.[210] Thus, the result in *Florence* is not only further confirmation that the Court tends to defer to the Solicitor General in prison cases, but that at least some members of the Court are willing to let the executive, through the Solicitor General, dictate the limits of the Constitution.

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[210] *Id.* (Alito, J., concurring) (citing Brief for the United States as Amicus Curiae at 30, Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 968 (9th Cir. 2010) (en banc)).