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THE REVIEW OF LITIGATION

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The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence

By David Sonenshein and Charles Fitzpatrick*

I. INTRODUCTION

In the United States, expert witnesses are selected, paid, and prepared by the parties to the litigation. In this Article, we will explain why this system often leads to biased and partisan testimony from experts and explore several possible options for reform.

In Part II, we will examine how the American adversarial system and its allowance for party payment and preparation of expert witnesses lead to an inevitable and unavoidable danger of partisan bias in expert testimony. We will also explain why this problem is exacerbated by a lack of jury competence in evaluating expert testimony and has led to contempt for experts amongst lawyers, judges, and those professional groups from which experts are often chosen. Finally, we will show that the lack of uniform ethical guidelines for testifying experts opens the door to biased testimony.

In Part III, we will demonstrate that, although the problem of expert bias has long been recognized, past efforts for reform have been either ignored or proven inadequate. We will focus a large portion of this section on the widespread call for an increase in the use of court-appointed experts as well as some of the reasons that this practice has not become more prevalent.

In Part IV, we will explore the possibility of American courts adopting a system akin to those in the civil law universe of continental Europe, including the regimes used in Germany, France, and Italy, whereby expert witnesses are appointed by the courts. These systems aim for neutral and independent expert testimony. We will argue that the use of court-appointed neutral experts—with some modifications which acknowledge the imperatives of the adversarial system—might provide a model for effective reform. We will then turn to the adversarial systems of England, Canada, and Australia. Despite sharing a legal tradition with the United States,

we will show that the English system offers relatively little that could improve the use of expert witnesses in this country, but that the procedures used in the Canadian provincial system offer some intriguing ideas for reform. Finally, in Part V we will suggest that the American legal system should also consider adoption of recent reforms in Australia, which continue to allow experts to be chosen by the parties but focus on cooperation between competing experts.

In Part VI, we conclude by arguing that the Canadian provincial and Australian national models offer a proven mechanism for diminishing expert bias within the adversarial tradition in the United States while also avoiding the difficulties which have prevented effective reform in the past.

II. THE PROBLEM OF EXPERT BIAS

The role of the expert witness in the American system is explained by Federal Rule of Evidence 702 which states, in part, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[1] As the system has become inundated with more complex litigation and cases of a more technical nature, the use of expert witnesses has increased.[2] In fact, the use of experts has come to be recognized as a necessity for parties to put on the strongest possible case and is actually explicitly required in some instances.[3]

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1. FED. R. EVID. 702.

2. M. Neil Browne et al., *The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France*, 18 CONN. J. INT'L L. 55, 66 (2002).

3. *Id.* (citing Stephen D. Easton, *"Yer Outta Here!" A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1, 8 (1998) (explaining that according to the law of some states, a plaintiff bringing a medical or other professional malpractice action must present admissible expert testimony about the standard of care and the

Nonetheless, many commentators who have examined the use of expert witnesses in the United States have concluded that "[e]xpert witnesses in court are often not deserving of our confidence. Their conclusions cannot be relied upon, and their words cannot be trusted."[4] They argue that an adversarial trial system which allows the use of experts who are selected, paid, and prepared by the parties to the litigation has a built-in danger of producing biased and partisan testimony.[5] As described by one such commentator, the American use of expert witnesses is akin to "hiring the cookie monster to guard Girl Scout cookies; the temptation to take a little bite here and another there is too great."[6]

There is a danger that a party-selected expert will unconsciously lose some degree of objectivity and slant his testimony in favor of that party which hired him as he prepares for and becomes enmeshed in the case.[7] This problem was famously described by John H. Langbein in the *University of Chicago Law Review*:

> At the American trial bar, those of us who serve as expert witnesses are known as 'saxophones.' This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert . . . and I have experienced the subtle pressure to join the team—to shade one's views, to conceal doubt, to overstate nuance, to

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defendant's failure to meet this standard)). *See also* Mitsubishi Elec. Corp. v. Ampex Corp., 190 F.3d 1300, 1313 (Fed. Cir. 1999) (emphasizing the importance of experts by stating that "it is well recognized that the persuasiveness of the presentation of complex technology-based issues to lay persons depends heavily on the relative skills of the experts").

4. Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1010 (2008).

5. *See id.* at 1010–11 (explaining the perceived dangers of parties using experts). *See also* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1125–53 (1991) (discussing the difference between the selection and preparation of lay witnesses versus expert witnesses and how the American system of adversarial fact finding is flawed with respect to expert witnesses).

6. Browne, *supra* note 2, at 65 (quoting Michael D. Bayles, *Professional Power and Self-Regulation*, 5 BUS. & PROF. ETHICS J. 26, 35–36 (1986)).

7. Mnookin, *supra* note 4, at 1010–11.

> downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.[8]

Worse, some experts may be willing to sell their opinions and credentials to anyone who will meet their price.[9] For example, in the 1970s, a psychiatrist nicknamed "Dr. Death" was called to testify for the prosecution in more than fifty sentencing hearings.[10] According to published accounts, Dr. Death always testified that the defendant would be violent in the future regardless of whether he had actually examined the defendant.[11] Although his conclusions were contrary to the position of the American Psychiatric Association, which concluded that no psychiatrist can accurately predict the potential of a defendant for future acts of violence, he was repeatedly and consistently asked to testify by the prosecution.[12]

The problem of skepticism toward experts is not a new one. An 1870 study reported that judges and juries were attaching less and less significance to scientific testimony based on the "surprising facility with which scientific gentlemen will swear to the most opposite opinions upon matters falling within their domain."[13] In a more recent example, an expert physician, selected and paid by the

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8. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985).

9. Mnookin, *supra* note 4, at 1011.

10. L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1442 (1995) (citing Joseph R. Tybor, *Dallas' Doctor of Doom*, NAT'L L.J., Nov. 24, 1980, at 1).

11. *Id.*

12. *Id.*

13. Ted Golan, *Revisiting the History of Scientific Expert Testimony*, 73 BROOK. L. REV. 879, 916 (2006) (quoting I.T. Hoague, *Expert Testimony*, 5 AM. L. REV. 227, 228 (1871)).

plaintiff in a case regarding silicone breast implants, claimed his testimony was based on personal examination of more than 4,700 women.[14] It was later discovered that the expert had not actually conducted the examinations himself, but rather had paid a medical student to conduct the examinations on his behalf.[15]

The potential for biased testimony is compounded by the inability of lay jurors to accurately assess the validity of technical evidence presented by an expert.[16] The result has been "a systematic distrust and devaluation of expertise"[17] amongst attorneys, judges, and even the experts themselves.[18]

A. Payment of Experts Leads to Biased Testimony

In order to protect the truth-finding purpose of a trial, it is generally illegal to pay for a witness's testimony.[19] Lay witnesses "may not be paid anything beyond nominal witness fees and expenses. All common law jurisdictions, however, allow experts to contract for special fees for their services and testimony."[20] Expert

14. Sven Timmerbeil, *The Role of Expert Witnesses in German and U.S. Civil Litigation*, 9 ANN. SURV. INT'L & COMP. L. 163, 171 (2003) (citing George C. Harris, *Testimony for Sale—The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 2–3 (2000)).

15. *Id.*

16. Mnookin, *supra* note 4, at 1014.

17. Langbein, *supra* note 8, at 836.

18. *See* Gross, *supra* note 5, at 1135 (asserting that the present system of obtaining expert witnesses breeds contempt in judges, lawyers, and more qualified experts).

19. *See* 18 U.S.C. § 201(c)–(d) (2009) (prohibiting a party from giving or receiving anything of value "for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial" but permitting "the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying").

20. Gross, *supra* note 5, at 1129. Payment of expert witnesses is justified because it is unrealistic to imagine that experts would devote their time and energy preparing for and testifying at trial pro bono on a regular basis. Mnookin, *supra* note 4, at 1011.

witnesses in major cases may be able to charge the parties $500 to $1,000 an hour.[21]

Because experts are paid, there is now a thriving industry of individuals who make their living testifying for or consulting with litigants.[22] Thousands of individuals, spanning a vast array of subjects, advertise their availability to testify on behalf of litigating parties as expert witnesses.[23] Many advertise their services in legal publications.[24] Others seek employment through services which act as referral firms and headhunting agencies for experts.[25] These firms put attorneys in touch with experts for a fee and advertise their own ability to find an expert that fits the needs of the lawyer.[26]

In most cases, any minimally qualified practitioner of the expert discipline at issue is eligible to testify.[27] Thus, the parties are free to select their experts from a large pool of potential witnesses. There is no limit on the number of potential expert witnesses with whom a party can consult before trial. As described by one commentator, "I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they

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21. Adam Liptak, *Experts Hired to Shed Light Can Leave U.S. Courts in Dark*, N.Y. TIMES, Aug. 12, 2008, at A1. *See* STEFANO MAFFEI, COMPARATIVE STUDY ON EXPERT WITNESS IN COURT PROCEEDINGS, 1, 62 (2010) (providing an example of a contract between an attorney and an expert for initial case review and consultation).

22. Gross, *supra* note 5, at 1131; Lewis A. Kaplan, *Experts in the Courthouse: Problems and Opportunities—Remarks at the Milton Handler Antitrust Review*, 2006 COLUM. BUS. L. REV. 247, 248 (2006); Perrin, *supra* note 10, at 1411–12.

23. Perrin, *supra* note 10, at 1411.

24. *See* Gross, *supra* note 5, at 1131 (referring to an issue of the *National Law Journal* that includes a page of advertisements for expert witness testimony).

25. Perrin, *supra* note 10, at 1411–12 (citing Ann Kates Smith, *Opinions with a Price*, U.S. NEWS & WORLD REP., July 20, 1992, at 64 (claiming that the Technical Advisory Service for Attorneys (TASA) listed more than 18,500 experts on its roles)).

26. *See* Gross, *supra* note 5, at 1132 (describing, as an example, the Medical Quality Foundation, which promises that its 1,150 medical experts are board certified, eminently qualified, and can effectively double the monetary value of a case).

27. *Id.* at 1127 (citing as an example United States v. Viglia, 549 F.2d 335 (5th Cir. 1977) (allowing a physician with no particular expertise in the area in question to testify on the use of a drug alleged to treat obesity)).

found one .... [T]herefore, I have always the greatest possible distrust of scientific evidence of this kind."[28]

This so-called "expert shopping" gives the party the opportunity to hire the expert based almost exclusively on the content and manner of their testimony.[29] Lawyers will often give little consideration to whether the individual is the most knowledgeable or most respected in the field.[30] Rather, some argue that lawyers "shop for experts, ultimately choosing the one that talks right, looks right, has the right credentials, and will work with the lawyer in the development of her opinions."[31]

Attorneys prize those experts who have the best testimonial manner and appealing credentials, but avoid those who look bad, speak poorly, or have insufficiently impressive diplomas.[32] Experts who come across as measured and impartial are unlikely to be chosen by either side.[33] Thus, "[a] fool with a small flair for acting and mathematics might be a more successful witness than say, Einstein."[34]

Unfortunately, the correlation between the qualities attorneys seek in expert witnesses and the truth is eliminated when they are sold like commodities.[35] Because an individual's success in being chosen as an expert is not dependent on her knowledge of the issue, but rather on her ability to testify persuasively to the viewpoint that the paying party wants to hear,[36] there are substantial incentives for the professional expert to advocate positions that are not supported

28. Mnookin, *supra* note 4, at 1010.

29. Gross, *supra* note 5, at 1133, 1143.

30. Perrin, *supra* note 10, at 1415.

31. *Id.* *See also* Sanja Kutnjak Ivkovic & Valeri P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 470 (2003) (emphasizing that clarity of the expert's presentation is critically important in terms of influencing the jury).

32. Gross, *supra* note 5, at 1133.

33. Langbein, *supra* note 8, at 835.

34. Perrin, *supra* note 10, at 1415–16 (quoting GERRY SPENCE, WITH JUSTICE FOR NONE 270 (1989)). *See also* Gross, *supra* note 5, at 1133 (quoting a litigator as stating, "Usually, I like my expert to be around 50 years old, have some gray in his hair, wear a tweedy jacket and smoke a pipe .... You must recognize that jurors have prejudices and you must try to anticipate these prejudices .... Some people may be geniuses, but because they lack training in speech and theater, they have great difficulty conveying their message to the jury").

35. Gross, *supra* note 5, at 1134.

36. Mnookin, *supra* note 4, at 1012.

by available research and data.[37] According to one prominent trial lawyer,

> [Expert witnesses] supply information that can salvage a lost cause or turn a winning case into a loser by purposely misleading the jurors. A lawyer who presents false evidence can be held in contempt of court. Yet there is nothing wrong with using professional opinion that puts the jury in a trance and leads them off on a tangent. . . . Expert witnesses sell their services like anyone else in the legal profession, and the best in the field can sound convincing defending either side of an argument. Their function is to snow the jury.[38]

The process of being repeatedly retained by the parties with which they are identified can further solidify expert biases.[39] "Obviously, [an expert witness] is highly motivated out of self interest to develop relationships with lawyers because those relationships are the expert's lifeblood. The more effective the expert is in advancing the lawyer's case, the greater the likelihood the expert will be retained [and paid] again."[40]

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37. Perrin, *supra* note 10, at 1413.

38. *Id.* at 1441 (quoting ROY GRUTMAN & BILL THOMAS, LAWYERS AND THIEVES 128 (1990)).

39. Gross, *supra* note 5, at 1132–33 ("It is common . . . in many jurisdictions, for some physicians to be identified as 'plaintiffs' doctors' and others as 'defendants' doctors.' Once these labels become known, these doctors are retained repeatedly by the sides with which they are identified, a process which solidifies their biases.").

40. Perrin, *supra* note 10, at 1413. *See also* Trower v. Jones, 520 N.E.2d 297, 300 (Ill. 1988) (upholding cross examination of expert witness about how much the expert made annually for services related to rendering expert testimony). In *Trower*, the Illinois Supreme Court described the financial incentives for an expert witness as follows:

> [W]e reach our decision based on an appreciation of the fact that the financial advantage which accrues to an expert witness in a particular case can extend beyond the remuneration he receives for testifying in that case. A favorable verdict may well help him establish a "track record" which, to a professional witness, can be all-important in determining not only the frequency with which he is asked to testify but also the price which he can demand for such testimony.

There is a general consensus that the "expert witness industry has grown exponentially and with it the misuse of experts as mere partisan mouthpieces."[41] As one commentator notes, "The marketplace for experts cannot, therefore, be trusted to produce reliable information."[42]

In addition to the decreased emphasis on pure scientific truth, the payment of experts leads to economic costs. First, commercially available testimony often leads to a "cancelling effect."[43] This results when each side pays an expert and the dueling opinions negate each other.[44] Since each side spent money on an expert, with little to no effect on the jury's ability to discern the truth, there is a net economic loss.[45] Second, paid experts can lead to costly incorrect verdicts.[46] This results either when the technically incorrect side prevails or when a compromise results in an incorrect amount of damages.[47] Third, there is a potential two-pronged "distrust externality."[48] The first distrust externality is that even the most careful and trustworthy experts may be ignored in a system inundated with biased experts.[49] The second externality affects experts and includes their opportunity costs and any discomfort they have becoming part of the legal process.[50] Finally, the fourth cost is the "misallocation of expertise."[51] Because the experts do not fully internalize the costs of becoming an expert witness, they do not choose to become experts at an economically optimal level.[52] This

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Id.

41. Perrin, *supra* note 10, at 1469. *See also* Gross, *supra* note 5, at 1132 (explaining that when experts become "repeat performers" whose inclinations are known and who are hired because of the testimony they give, "professional partisanship" becomes a problem); Mnookin, *supra* note 4, at 1015 (recognizing the risk of partisanship that is posed by expert testimony as an "old problem").

42. Mnookin, *supra* note 4, at 1012.

43. Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls, and Proposed Responses*, 18 YALE J. ON REG. 253, 263 (2001).

44. *Id.*

45. *Id.*

46. *Id.* at 264.

47. *Id.*

48. *Id.* at 265.

49. *Id.* at 265–66.

50. *Id.* at 266.

51. *Id.*

52. *Id.*

may artificially inflate the incentive to become an expert witness and draw many academics away from scholarly work and toward expert testimony.[53]

B. Partisan Preparation of Experts Leads to Biased Testimony

Partisan preparation of witnesses is a traditional feature of the adversarial system of fact finding employed in the United States.[54] It is the responsibility of lawyers that operate within an adversarial system to present only the evidence that favors his side, and to do so intelligently.[55] In fact, the rules of evidence assume that a lawyer will be able to anticipate the answer to each question he asks on direct examination.[56] Thus, before a trial, an attorney will generally meet with each witness he intends to call to the stand, discuss the witness's testimony, explain the process of examination, go over lists of questions and answers, anticipate lines of likely cross-examination, and offer advice in the form of testimony.[57]

The process of working with the attorney seems designed to bias the witness and produce partisan testimony.[58] Many experts admit that they face significant pressure from the party that hires them to skew their testimony.[59] In one published survey of experts,

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53. *Id.* at 266–67.

54. *See* Gross, *supra* note 5, at 1136 ("Partisan preparation is inherent in our method of adversarial fact finding.").

55. *Id.*

56. *Id.* at 1137 (citing as examples FED. R. EVID. 611(c) and 104(a)(2) (stating that a direct examiner may not ask leading questions, but must be able to make an offer of proof advising the court of the anticipated answers to his or her questions)).

57. *Id.* at 1136.

58. *Id.*

59. *See* Joseph Sanders, *Expert Witness Ethics*, 76 FORDHAM L. REV. 1539, 1577–78 (2007) (stating that expert witnesses are often pushed to manipulate their testimony and skew their statements towards the position of the side that hired them). Sanders quotes one expert who described his first preparation sessions with a trial attorney as follows:

> [The attorney] asked me a question about whether the belt was on or not, the lap belt. And I said, "Well, could have been. But then, it may not have been." Woo, rockets went off. "What do you mean? You're my expert in this case, and you say it 'could be' or 'couldn't be?' Look, I'm going to tell you. The other side doesn't waffle. They pick one view. And

seventy-seven percent agreed with the statement, "[l]awyers manipulate their experts to weaken unfavorable testimony and strengthen favorable testimony."[60] Fifty-five percent of experts interviewed in the same survey agreed that "[l]awyers urge their experts to be less tentative."[61] Additionally, many lawyers focus expert witness preparation on potential jury biases instead of the most relevant factual evidence in the case.[62]

This potential bias from preparation is compounded by the fact that the adversarial nature of the legal system tends to draw experts who are "marginal" in that they are more willing than most of their colleagues to give opinions based on less than overwhelming evidence.[63] Also, the legal system's reliance upon verbal formulas to encapsulate key concepts may "rigidify" ideas that scientists tend to treat much more flexibly.[64] In sum, through the process of expert-shopping and pre-trial preparation, many experts have become partisan players whose testimony prioritizes confidence and clarity over scientific integrity.

Economic reward incentivizes experts to fulfill this role. As previously discussed, if the expert values her role as a witness, she will be motivated to work with the attorney who has called on her, as careful preparation and close collaboration are likely to increase the satisfaction of that attorney with the testimony and in turn make it more likely that the expert will be retained as a witness in future

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> they will push that view. And they will make their case in front of a jury. And there will be no misunderstanding. There will be no gray area. They will take a position one way or the other and make it stick. Now, they don't have any other course of action. That's their life. They make their living going in front of juries and making statements, whether they have facts to back them up or not. Now you, you can go back to designing cars. You have another career. They don't. You better start thinking like they do."

Id. at 1578.

60. *Id.* at 1577 (citing Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193, 201 (1994)).

61. *Id.*

62. Jody Weisberg Menon, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform*, 21 AM. J.L. & MED. 281, 286 (1995).

63. Susan Haack, *Irreconcilable Differences? The Troubled Marriage of Science and Law*, 72 LAW & CONTEMP. PROBS. 1, 16 (2009).

64. *Id.* at 19.

cases.[65] Further, because an expert is paid for this time, an expert witness is generally all too happy to spend significant time working to fully develop her testimony.[66]

The nature of in-court expert testimony also requires that far more time be spent in preparation than is the case for lay witnesses.[67] Because an expert, unlike a lay witness, is called to testify about matters that are beyond the common knowledge of the jury, and because the lawyer must ask questions in the way most effective for his client's case, there is a special need for collaboration as well as close and careful preparation between the expert and the attorney.[68]

Extensive preparation of an expert witness is also necessary because of the cross-examination and rebuttal she is likely to face. In addition to facing all the modes of impeachment available in the cross-examination of a lay witness,[69] experts are likely to be questioned about their training, their observations, their opinions, and the bases for their opinions.[70] These lines of questioning invite "abusive cross-examination. Since each expert is party-selected and party-paid, he is vulnerable to attack on credibility regardless of the merits of his testimony."[71] During cross-examination, an expert is likely to face accusations that his testimony has been bought rather than based on his studied professional opinion.[72]

In addition, experts hired by the opposing side are likely to criticize their opponent's methods and conclusions.[73] Typically, "an expert witness risks being attacked as not merely wrong, but

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65. Gross, *supra* note 5, at 1138.

66. *Id.*

67. *See* Perrin, *supra* note 10, at 1417 (arguing that experts need more preparation than lay witnesses to testify because they lack personal knowledge of the case at issue).

68. Gross, *supra* note 5, at 1138.

69. FED. R. EVID. 611.

70. Gross, *supra* note 5, at 1139.

71. Langbein, *supra* note 8, at 836.

72. *Id.* ("A mode of attack ripe with potential is to pursue a line of questions which, by their form and the jury's studied observation of the witness in response, will tend to cast the expert as a 'professional witness.' By proceeding in this way, the cross-examiner will reap the benefit of a community attitude, certain to be present among several of the jurors, that bias can be purchased, almost like a commodity.").

73. Gross, *supra* note 5, at 1139. *But see* Section II.C, *infra*, describing how the jury does not have access to much of the information that would reveal the source of expert witness bias.

unqualified, ignorant, incompetent, biased, misleading or silly. Moreover, the attack is not directed to some passing observation but to her profession, her life's work."[74]

Expert witness preparation "pushes the expert to identify with the lawyers on [their] side of the lawsuit and to become a partisan member of the litigation team."[75] In addition to developing a sense of camaraderie with the attorney with whom they are working during the preparation process, experts are dependent on that lawyer to ensure their success and to protect them from attacks from the opposing side.[76] "Lawyers use their power of preparation to shape the expert's opinions. The lawyer decides what information the expert receives, what issues the expert testifies about, and, in some instances, the words the expert uses in stating her opinions."[77]

C. *Lack of Jury Competence and Limited Access to Expert's Background Contribute to the Problem of Expert Bias*

Often, juries are left to choose between the testimonies of experts from the opposing sides which have each offered conflicting opinions. Because jurors lack the scientific knowledge needed to evaluate the expert's testimony, "it can be very difficult for a jury to determine which expert opinion is correct."[78] After conflicting testimony was given in a recent case in a New York state court, the judge told the *New York Times* that "[t]he two experts were biased in favor of the parties who employed them . . . and they had given predictable testimony. 'The two sides have canceled each other out.'"[79]

In this situation, the advantage is likely to go to the party whose expert the jury found most appealing.[80] David L. Bazelon, a

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74. Gross, *supra* note 5, at 1139.

75. *Id.*

76. *Id.*

77. Perrin, *supra* note 10, at 1418 (citing Shuman, *supra* note 60, at 202 (stating that 65% of responding lawyers believed that experts are willing to be coached about how testimony should be presented)).

78. Timmerbeil, *supra* note 14, at 169.

79. Liptak, *supra* note 21, at A1.

80. Langbein, *supra* note 8, at 836 ("If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing.").

former chief judge for the United States Court of Appeals for the District of Columbia,[81] has noted that because judges and juries lack the independent expertise to form an opinion on technical or scientific issues, a litigant's "success may depend on the plausibility or self-confidence of the expert, rather than his professional competence."[82] As noted by many trial lawyers, "[j]uries often find it hard to evaluate the expert testimony on complex scientific matters . . . and they tend to make decisions based on the expert's demeanor, credentials, and ability to present difficult information without condescension. An appealingly folksy expert . . . can have an outsize effect in a jury trial."[83] In sum, lack of knowledge and experience in the area of testimony may make a jury incapable of rendering a wise judgment on the subject.[84]

The qualities in a witness which fact-finders find most convincing such as verbal fluency, ease of manner, the appearance of humility, and stellar credentials, have little relation to the truth.[85] Further, they are an inaccurate indicator of partisan bias.[86] Thus, it is possible for an appealing yet untruthful and biased expert to sway the jury in favor of the party for which he has testified.[87] As stated by one noted scholar on the subject, "[t]he concept that the . . . jury can detect a fraud is absurd."[88] This is not a desirable result for a system which strives to discover the truth.

Additionally, many facts about the expert and the circumstances of the expert's preparation for the case are hidden from the jury. Though the risk of expert bias is well known, "some of the bias-fostering elements of the system have been allowed to

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81. *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/public/home.nsf/hisj (last visited Sept. 9, 2012).

82. Timmerbeil, *supra* note 14, at 169 (quoting John Basten, *The Court Expert in Civil Trials—A Comparative Appraisal*, 40 MODERN L. REV. 174, 174 (1977)).

83. Liptak, *supra* note 21, at A1.

84. Menon, *supra* note 62, at 283.

85. Gross, *supra* note 5, at 1134.

86. Mnookin, *supra* note 4, at 1014 ("Without epistemic competence, the jury has no choice but to rely on proxies as secondary indicia of bias, and these may often be either inaccurate or difficult to evaluate.").

87. *See id.* (arguing that because the jury lacks the expertise needed to evaluate expert testimony, it is unlikely to detect partisan bias).

88. Perrin, *supra* note 10, at 1469 (quoting Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the FRCP: Part Two, an Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 189 n.44).

remain hidden and therefore prosper and grow."[89] Traditionally, the lone tool for exposing these biases has been cross-examination.[90] However, in order to fully reveal an expert's bias, an opposing attorney must have access to the materials the expert consulted in forming an opinion.[91] In some cases, the opposing attorney also must have access to communications between the expert and the attorney who prepared him or her to testify.[92] Without this information, some scholars argue, the jury can never be adequately informed about how the expert arrived at the opinion he or she presents in court. For instance, the jury should know when an overly zealous attorney shaped an expert's testimony.[93]

One commentator's solution would amend the federal rules to require full disclosure of attorney-expert communication as well as copies of all the information relevant to the development of expert opinion.[94] The resulting system would give jurors a clearer picture of any potential bias held by the expert including any influence the attorney had over them during trial preparation.[95] The commentator also argues that the common fears against full disclosure, the disruption of the work product doctrine and the attorney-client privilege, are unfounded.[96]

D. Perceived Bias Breeds Contempt for Expert Witnesses

The potential for bias in the testimony presented by expert witnesses in the American judicial system is widely recognized in

89. Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 472–73 (2000).

90. *Id.* at 473.

91. *Id.*

92. *Id.* at 473–74.

93. *Id.* at 519.

94. *Id.* at 527–28. *See id.* at 544–49 (detailing proposed rule 26 amendments). *See also* Stephen D. Easton, *That Is Not All There Is: Enhancing Daubert Exclusion by Applying Ordinary Witness Principles to Experts*, 84 NEB. L. REV. 674, 714–15 (2006) (arguing that once an attorney shares his opinions with an expert, those opinions are likely to affect an expert's testimony and should therefore be disclosed).

95. Easton, *supra* note 89, at 549.

96. *See id.* at 576–608 (arguing that work product doctrine would not be disrupted because the attorney should only share his thoughts that he would not mind the jury knowing as well).

the legal community.[97] Malvin Belli, the self-proclaimed "King of Torts"[98] once said, "If I got myself an impartial witness, I'd think I was wasting my money."[99] This potential for bias has led to disdain for experts amongst lawyers and judges alike.[100]

The disdain for expert testimony extends beyond the legal professions. Some of the most respected members of other fields believe that colleagues who agree to testify face strong pressure to become partisans for the side that calls them, are treated in a demeaning manner while providing their evidence at trial, and that the evidence they present is poorly used.[101] As a result, some well-qualified experts refuse to be witnesses, "leaving the field to those with fewer scruples or fewer options."[102]

Some professional groups openly acknowledge the conflicts faced by testifying experts. For example, the ethical guidelines of the American Academy of Psychiatry and Law note,

> The adversarial nature of most legal processes presents special hazards for the practice of forensic psychiatry. Being retained by one side in a civil or criminal matter exposes psychiatrists to the potential for unintended bias and the danger of distortion of their opinion. It is the responsibility of psychiatrists to minimize such hazards by acting in an honest manner and striving to reach an objective opinion.[103]

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97. *See* CAROL KRAFKA ET AL., FED. JUDICIAL CTR., JUDGE AND ATTORNEY EXPERIENCES, PRACTICES, AND CONCERNS REGARDING EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS 21 (2002) (noting that judges and lawyers agreed in separate surveys in 1998 and 1999 that the biggest problem with expert testimony in civil cases was that "[e]xperts abandon objectivity and become advocates for the side that hired them").

98. Browne, *supra* note 2, at 70.

99. *Id.*

100. Gross, *supra* note 5, at 1135 ("One of the most unfortunate consequences of our system of obtaining expert witnesses is that it breeds contempt all around. The contempt of lawyers and judges for experts is famous.").

101. *Id.*

102. *Id.* at 1135–36.

103. *American Academy of Psychiatry and the Law Ethics Guidelines for the Practice of Forensic Psychiatry, IV, Honesty and Striving for Objectivity*, Commentary (May 2005) *available at* http://www.aapl.org/ethics.htm (explaining that "[p]sychiatrists should not distort their opinion in the service of the retaining party. Honesty, objectivity and the adequacy of the clinical evaluation may be

Nonetheless, "in many professions, service as an expert witness is not generally considered honest work . . . ."

In addition, experts themselves admit that they sometimes find their work compromising.[104] A psychologist who has testified as an expert on behalf of the defendant in a lawsuit recently told the New York Times: "After you come out of court you feel like you need a shower. They're asking you to be certain of things you can't be certain of."[105]

E. Lack of Uniform Ethical Guidelines Creates Environment for Biased Testimony

Often, individuals who agree to serve as an expert witness do not have a definitive ethics resource to consult. The ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility merely forbid attorneys from paying experts a contingent fee and note that experts have a duty to the court above the client.[106] The Model Code also stresses that expert witnesses should "testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."[107] Though these guidelines offer some restrictions on expert testimony, it is important to remember that it is the attorney who is subject to the

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called into question when an expert opinion is offered without a personal examination"; noting that "[c]ontingency fees undermine honesty and efforts to attain objectivity and should not be accepted. Retainer fees, however, do not create the same problems in regard to honesty and efforts to attain objectivity and, therefore, may be accepted").

104. Liptak, *supra* note 21, at A1.

105. *Id.*

106. John P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217, 229–30 (2000).

107. *See id.* at 229–30 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-28 (1999)). *See also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-28 n. 47 (1986) ("The prevalence of perjury is a serious menace to the administration of justice, to prevent which no means have as yet been satisfactorily devised. But there certainly can be no greater incentive to perjury than to allow a party to make payments to its opponent's witnesses under any guise or on any excuse, and at least attorneys who are officers of the court to aid it in the administration of justice, must keep themselves clear of any connection which in the slightest degree tends to induce witnesses to testify in favor of their clients.")

ABA regulations and who has the ultimate burden of compliance.[108] Also, when it comes to scientific testimony, these rules offer minimal restrictions on attorneys.[109] Unless an expert explicitly states that his or her testimony will be "absolutely erroneous," a violation of these rules is extremely rare.[110]

Alternatively, some experts may be able to look to professional organizations in their field for guidance on giving expert testimony. For instance, both the American Medical Association ("AMA") and the American Psychological Association ("APA") have articulated standards for expert testimony.[111] Still, many specialty organizations do not have disciplinary measures in place for addressing unethical testimony.[112]

Even if these guidelines can help the testifying expert, they still do little to solve the ethical problems of expert testimony. Most notably, there exists a conflict between the goals of attorneys and the goals of experts.[113] Attorneys operate within an adversarial environment in which their primary goal is to convince the fact-finder of their point of view.[114] In contrast, science requires a focus

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108. Murphy, *supra* note 106, at 230.

109. David S. Caudill, *Legal Ethics and Scientific Testimony: In Defense of Manufacturing Uncertainty, Deconstructing Expertise and Other Trial Strategies*, 52 VILL. L. REV. 953, 957 (2007).

110. *Id.* ("Whether by alluding 'to any matter that will not be supported by admissible evidence' (Rule 3.4(e)), by presenting evidence known to be false (Rule 3.3(a)(3)) or by making frivolous claims or contentions (Rule 3.1), an attorney can violate the ethical rules, but the prerequisites are, respectively, no reasonable belief in admissibility, personal knowledge of falsity and no good faith basis at all for a claim or contention. With respect to scientific testimony, unless an attorney's expert states that his or her testimony will be absolutely erroneous, it is difficult to see how these rules can be violated in practice.").

111. Murphy, *supra* note 106, at 231–34. The AMA has five factors for medical testimony: 1) "the physician is a professional with special training," 2) the physician cannot become partial, 3) the physician "should testify truthfully" and be prepared, 4) the physician must make the attorney aware of both positive and negative evidence, and 5) "the physician must not accept a contingency fee." *Id.* at 231. The APA's guidelines call for psychologists to use their professional judgment, recognize and warn about the limits of their assessments, and not use outdated procedures. *Id.* at 233.

112. Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1399 (2006) (noting that only seven out of thirty-six specialty organizations surveyed had disciplinary procedures in place).

113. Murphy, *supra* note 106, at 234–35.

114. *Id.* at 235.

on evidence without the influence of striving for a particular conclusion.[115] This inherent tension will continue to hinder the use of unbiased expert testimony until the system is reformed.

III. FAILED EFFORTS AT REFORM IN THE UNITED STATES

It has long been recognized that the American tradition of an adversarial trial system which allows the use of experts who are selected, prepared, and paid by the parties to the litigation leads to inevitable questions of bias.[116] Nonetheless, efforts for reform have been either ignored or proven inadequate leaving what one commentator describes as "a systematic distrust and devaluation of expertise."[117] In his view, "[s]hort of forbidding the use of experts altogether, we probably could not have designed a procedure better suited to minimize the influence of expertise."[118]

A. Frye and Daubert

Under the traditional common law approach, although experts might provide overtly partisan testimony, it was believed that each side had an equal opportunity to bring truth to the forefront through use of their own experts and cross examination.[119] Under this view, "so long as parties had an equal opportunity to bring forward opposing experts, under the same rules and with the same judge as umpire, then whatever the jury made of the competing experts' reports was acceptable."[120]

This approach fell under criticism as early as the end of the nineteenth century.[121] Even with a level adversarial playing field,

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115. *Id.*

116. *See generally* Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 VILL. L. REV. 763 (2007) (providing a detailed look at the views of expert evidence at the end of the nineteenth century).

117. Langbein, *supra* note 8, at 836.

118. *Id.*

119. Mnookin, *supra* note 4, at 1015.

120. *Id.* (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 447–48 (1906)).

121. *Id.* (citing Mnookin, *supra* note 116, as providing a look at the historic anxieties surrounding the use of expert witnesses).

critics felt that juries lacked the competence to adequately evaluate the reliability of expert testimony because of the complicated nature of such testimony.[122] As noted by a scholar from that period, this practice had the effect of turning "expert witnesses[] into partisans pure and simple."[123]

In 1923, the Court of Appeals for the District of Colombia created what has come to be known as the "Frye test" or "general acceptance test."[124] The *Frye* court held that a scientific principle must have gained "general acceptance" in its field to form the basis of expert testimony.[125] Under this test, "it was not enough that one qualified expert believed the procedure was reliable. Instead, the court must determine that 'general acceptance' has been reached."[126]

This standard dominated the admission of scientific evidence for at least fifty years.[127] Critics of the Frye test claimed the rule was difficult to apply because it required the judge to determine: in what community should he look to see if the standard was accepted; who should be counted in that community; how should votes be counted; what constitutes "general acceptance"; how can "general acceptance" be proven; and, how should the "general acceptance" of conflicting techniques be resolved.[128] Others claimed that, in practice, the courts often ignored the required focus on "general acceptance."[129] Rather, they argued that courts only required a demonstration of adequate qualifications to support a witness's claim of expertise and rarely questioned such a claim in any meaningful

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122. *Id.* at 1016.

123. *Id.* (quoting Pound, *supra* note 120, at 448).

124. *See generally* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

125. *Id.* at 1014.

126. Browne, *supra* note 2, at 56–57. In *Frye*, the defendant in a murder trial attempted to offer expert testimony regarding the results of a systolic blood pressure lie detector test which indicated his innocence. *Frye*, 293 F. at 1013. The court held that because the test had not gained the requisite standing and recognition among psychological and physiological authorities, the trial court had been correct in refusing to allow defendant's expert to testify. *Id.* at 1014.

127. Browne, *supra* note 2, at 56 (citing Jon P. Thames, *It's Not Bad Law—It's Bad Science: Problems with Expert Testimony in Trial Proceedings*, 18 AM. J. TRIAL ADVOC. 545, 549 (1995)).

128. *Id.* at 59–60.

129. *See* Mnookin, *supra* note 4, at 1016 ("[I]n practice, most judges, most of the time, did not actually interrogate a proposed experts' bona fides in a detailed or rigorous way.").

way.[130] Thus, these critics maintained that the application of the Frye standard led to testimony from unethical and biased experts, allowing lawsuits to move forward and sizeable verdicts to be awarded despite the lack of scientific merit.[131]

Nonetheless, as late as 1983 the Supreme Court continued to express support for the traditional view of cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[132] The Court continued to believe that "the adversary process [could] be trusted to sort out the reliable from the unreliable evidence" and made no further efforts to protect against partisan expert testimony.[133]

In 1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court held that the Frye test had been superseded in federal law by the promulgation of Federal Rule of Evidence Rule 702.[134] In applying Rule 702, the Court held that trial judges should act as gatekeepers, and only allow scientific evidence which is truly based on "scientific knowledge."[135] Rather than requiring the jury to determine scientific fallacies through cross-examination, the Court directed judges to allow the jury to hear only that testimony which was deemed "reliable."[136]

The *Daubert* court identified four non-exclusive "general observations" which trial judges should utilize in assessing the reliability of scientific evidence before allowing the presentation of expert testimony at trial: (1) whether the expert's methodology has been tested; (2) whether the theory applied by the expert or the methodology utilized has been published and subject to peer review; (3) what the method's rate of error is when it has been applied and what standards of control direct the technique's operation; and,

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130. *Id.*

131. *Id.* at 1017.

132. Bruce D. Black, *The Use (or Abuse) of Expert Witnesses in Post-*Daubert *Employment Litigation*, 17 HOFSTRA LAB. & EMP. L.J. 269, 270 (2000) (citing 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

133. Barefoote v. Estelle, 463 U.S. 880, 901 (1983).

134. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993) (holding that the "general acceptance" test was absent from and incompatible with the Federal Rules of Evidence and should not be applied in federal trials).

135. *Id.* at 589–91.

136. *Id.* at 589.

(4) whether the theory or technique has been generally accepted in the relevant scientific or professional community.[137]

In *Kumho Tire Co. v. Carmichael*, the Court extended the rationale and factors in *Daubert* to non-scientific areas of expertise.[138] The text of Rule 702 itself was amended on December 1, 2000, to require judges to serve as gatekeepers who would exclude unreliable evidence of both the scientific and un-scientific variety when presented by an expert witness.[139] Writing for the majority in *Kumho*, Justice Breyer explained that the "objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[140] Thus, if the expert's chosen theory or methodology has no use outside of the courtroom or cannot be verified by reference to real world examples, it is much less likely to be admissible.[141] If the expert's principle and methodology are utilized in science, industry, or some other practical forum outside of litigation, they are likely acceptable for use in trial testimony.[142]

Thus, *Daubert* can be seen as an indirect response to the potential for biased expert testimony created by party hiring and payment of experts and a lack of jury competence.[143] Under this standard, an expert's qualifications will not be enough to allow his testimony to be admissible.[144] Nor will allowance for the presentation of conflicting evidence from an opposing expert be

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137. *Id.* at 593–94.

138. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1998) (holding that the trial judge's general "gatekeeping" obligation and the *Daubert* principles apply "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge").

139. FED. R. EVID. 702 advisory committee's notes on the 2000 amendments.

140. *Kumho Tire Co.*, 526 U.S. at 152.

141. Black, *supra* note 132, at 270–71. *See also In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 (3d Cir. 1994) (quoting U.S. v. Downing, 753 F.2d 1224, 1239 (3d Cir. 1985) (noting that in determining the reliability of expert testimony, courts should consider "non-judicial uses to which the scientific technique are put")).

142. ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE 114 (Anthony J. Bocchino & Zelda Harris eds., 1991).

143. Mnookin, *supra* note 4, at 1019.

144. *Id.*

enough to counter the potential for biased testimony.[145] Rather, it is hoped that the traditional adversarial tools of cross-examination and the presentation of conflicting evidence, combined with enhanced judicial scrutiny and the power to exclude testimony determined to be "unreliable," will reveal an expert's bias and provide the fact finder with the information needed to properly evaluate expert testimony.[146]

Unfortunately, application of the Daubert criteria has not adequately eliminated the potential for biased expert testimony.[147] A study released in 2002 based on surveys of judges and lawyers reveals that although "expert testimony has received increased judicial attention in the years since *Daubert* . . . problems with testifying experts have been largely unaffected by the passage of time. Judges and attorneys in the recent surveys reported frequent problems with partisan experts . . . These same issues dominated in pre-*Daubert* times."[148]

The shift to the Daubert criteria has also had several unintended consequences.[149] These include a new area of discovery into the peer-review process as well as the growing prevalence of "litigation-driven scholarship."[150] In terms of the peer-review

145. *Id.*

146. Perrin, *supra* note 10, at 1424. In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998), the plaintiffs claimed that a tire blowout, which resulted in death and injuries to the vehicle's occupants, was caused by a defect in the tire. The plaintiffs' case was based in large measure on the deposition of a tire failure analyst, who intended to testify as an expert that a defect in the tire's manufacture or design caused the blow out. His opinion was based upon a visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred here was caused by a defect. Applying the *Daubert* principles, the Court held that the trial court was correct in determining that the expert's opinion was unreliable. The Court found no indication in the record that other experts in the industry followed the experts particular approach nor any reference to articles or papers which could be used to validate the approach.

147. *But see* Cheng, *supra* note 112, at 1401–02 (noting that "[t]his transformative potential of *Daubert*, coupled with the modern willingness to accept the role of the managerial judge, may encourage a greater degree of inquisitorial thinking, opening the door to institutions like court-appointed experts and scientific tribunals").

148. KRAFKA, *supra* note 97, at 24.

149. William G. Childs, *The Overlapping Magisteria of Law and Science: When Litigation and Science Collide*, 85 NEB. L. REV. 643, 645–46 (2007).

150. *Id.*

process, publication-related documents have been subpoenaed and participants in the process have been deposed.[151] Some fear that this injection of legal procedure into the scientific research process may have an adverse effect by chilling independent research.[152]

Litigation-driven research is the phenomenon in which scientists conduct research in preparation for litigation and then subsequently submit it for publication in an attempt to bolster the likelihood that their testimony will be admitted.[153] While the potential for bias in such practice is obvious, it is important to avoid a universal ban of litigation-driven research for several reasons.[154] First, some research that is in the public interest will only be conducted in the context of litigation.[155] Thus, it is important not to dissuade such research. Second, just because research is conducted in the context of litigation, and therefore funded by a party with clear interest in the results, it is not necessarily bad science.[156] Instead, the judge and jury must evaluate each litigation-driven study independently and determine its reliability accordingly.[157]

B. Court-Appointed Experts and Other Failed Efforts at Reform

1. Science Courts and Expert Judges

In addition to the Frye and Daubert tests, there have been several other reform proposals aimed more specifically at attacking bias in expert witness testimony.[158] These efforts, however, have all proven either too difficult to implement or ineffective in practice.

Some have proposed the creation of a special "science court" consisting of experts capable of evaluating the different scientific arguments of parties and their experts.[159] This proposal has never

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151. *Id.* at 645.
152. *Id.*
153. *Id.*
154. *Id.* at 670–71.
155. *Id.* at 670.
156. *Id.* at 670–71.
157. *Id.* at 671.
158. Timmerbeil, *supra* note 14, at 170.
159. *Id.* (citing Arthur Kantrowitz, *The Science Court Experiment: Criticism and Responses*, 33 BULLETIN OF ATOMIC SCIENTISTS 44, 44 (1977) ("The Science Court is intended to deal only with scientific questions of fact.")). *See also* James

been implemented due to the expense associated with the permanent hiring of qualified experts from many different scientific fields, who would need to be paid competitive salaries, and because of the need to provide such experts with a basic legal education.[160] Additionally, it is possible that that Jury Selection and Service Act of 1968, with its requirement that juries be selected at "random from a fair cross section of the community," could prevent such a system.[161]

Others have proposed establishing panels of "expert judges."[162] This proposal is seen as overly expensive and impossible to implement because of the difficulty of providing an expert capable of handling every scientific issue that may arise at trial.[163] Also, there is some concern that a specialist judge, with his or her own biases, might unduly influence the jury.[164]

2. Court-Appointed Experts

The use of court-appointed experts has received more support than any other suggested reform. In 1901, Judge Learned Hand concluded that the typical "jury is not a competent tribunal"[165] to understand the theories and techniques utilized by experts, and as such was unable to overcome the obstruction of truth by biased expert witnesses.[166] The seriousness of the problem led him to propose the creation of a system of neutral, court-appointed experts.[167] These experts would provide the jury "the final statement of what was true"[168] and recommend decisions on scientific issues.[169] Similarly, John Henry Wigmore, author of an early 20th

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A. Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1058, 1064–69 (1977) ("[T]he science court would be a body to pass on scientific aspects of public policy questions presented to it[].").

160. Timmerbeil, *supra* note 14, at 170.

161. Menon, *supra* note 62, at 294.

162. Timmerbeil, *supra* note 14, at 171.

163. *Id.*

164. Menon, *supra* note 62, at 295.

165. Billings Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 55 (1901).

166. *See* Timmerbeil, *supra* note 14, at 171 (presenting Judge Hand's argument that "expert juries" are necessary to protect against truth obstructing expert witnesses).

167. Hand, *supra* note 165, at 56.

168. *Id.* at 54.

169. *Id.*

century treatise on evidence, was moved in part by the partisanship of expert witnesses[170] to propose that "the State, not the party, shall be the one to pay his fee, and . . . the Court, not the party, shall be the one to summon him."[171]

In 1937, the National Conference of Commissioners on Uniform State Law adopted a Model Expert Testimony Act which provides for court-appointed experts.[172] The following year, the Act was endorsed by the American Bar Association Committee on the Improvement of the Law of Evidence.[173] Today, federal courts are free to appoint their own expert witnesses through authority granted in Federal Rule of Evidence 706.[174] Many other jurisdictions have

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170. Gross, *supra* note 5, at 1189.

171. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 563 (2d ed. 1923).

172. Gross, *supra* note 5, at 1189.

173. *Id.*

174. FED R. EVID. 706. The relevant provisions of Rule 706 provide:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
>
> (c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

also made room for the use of court-appointed experts through rules modeled on Rule 706.[175] Often, "[c]ourts use this power when a factual issue arises that would be better solved with the support of scientific knowledge and the partisan experts are not helpful due to their relationship to the parties."[176]

Despite the availability of this power, court-appointed experts are rarely used in U.S. civil courts.[177] The rule's drafters acknowledged that "actual appointment is a relatively infrequent occurrence."[178] They hoped "the availability of the procedure in itself [would] decrease . . . the need for resorting to it."[179] They postulated that "[t]he ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."[180] Despite the drafters' original optimism, there remains a deep-seated suspicion of the reliability of expert witnesses amongst attorneys, judges, and experts themselves.[181] Thus, it seems clear that further reforms are necessary to remove the potential for biased testimony from expert witnesses.

> (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Id.

175. Gross, *supra* note 5, at 1190 (citing JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S EVIDENCE § 706(04), at 706–40 (1988) (listing jurisdictions adopting versions of Federal Rule of Evidence 706)). In limited circumstances, some jurisdictions have also used experts in special proceedings. For instance, some experts have been used in compulsory unitization proceedings in the field of oil regulation to determine ownership interests. Still, the use of experts is limited and should likely be utilized more in processes such as compulsory unitization in which some parties believe there is procedural unfairness. Gideon Wiginton, *Addressing Perceptions of Procedural Unfairness in Compulsory Unitization by Appointing Neutral Experts*, 55 AM. U. L. REV. 1801, 1802–06 (2006).

176. Timmerbeil, *supra* note 14, at 167.

177. KRAFKA, *supra* note 97, at 19 (discussing an empirical study which found that 73.9% of federal judges had never appointed an expert in a civil case utilizing Rule 706).

178. FED. R EVID. 706 advisory committee notes on proposed rules.

179. *Id.*

180. *Id.*

181. *See supra* notes 4–18 and accompanying text.

a. *Reasons Against Using Court-Appointed Experts*

1. Lack of Necessity

Some deem court-appointed experts to be unnecessary in most circumstances. Court-appointed experts are useful only when the court feels the need for an independent assessment of a disputed issue.[182] The Federal Judicial Center asked eighty-one judges why they believed that the authority to appoint experts was used so infrequently.[183] Echoing Weinstein, the judges indicated that they view appointing experts as an extraordinary action.[184] The judges stated that the types of cases that require court-appointed experts are "both rare and unusually demanding, implying that appointed experts should be reserved for cases with extraordinary needs."[185] Patent, product liability, and antitrust violations were the most common cases requiring court-appointed experts.[186] Other judges responded that court-appointed experts were only necessary in response to a combination of unusual events, such as a complex technical issue combined with a need to protect a poorly represented party.[187]

A number of judges surveyed mentioned the need for a court-appointed expert when both parties' experts were in complete disagreement.[188] Such a concern is more in line with those of the Advisory Committee, whose main concern when proposing Rule 706 was the venality of experts called upon by parties.[189] But as one judge noted: "One needs a complete divergence in the views of the

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182. JOE S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 18 (1993).

183. Joe S. Cecil & Thomas E. Willging, *Accepting* Daubert*'s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1015 (1994).

184. *Id.*

185. *Id.* at 1016.

186. *Id.*

187. *Id.* at 1017. *See also* Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS J. 371, 383 Table 2 (2010) (showing that a higher percentage of state judges would appoint more experts for testimony on medicine, pharmacology, physics and economics than for any other areas).

188. Cecil & Willging, *supra* note 183, at 1018.

189. FED. R. EVID. 706 advisory committee notes on proposed rules.

parties' experts in a technically complex field. Often experts differ, but not in a crazy way."[190] Thus, it would seem that the parties' experts would have to exhibit blatant, extreme venality before a judge would consider appointing its own in response.

2. Respect for the Adversarial System

Respect for the adversarial system was cited as a major reason for the infrequent appointment of experts by the judges surveyed by the Federal Judicial Center.[191] Many of the judges professed a commitment to the adversarial system, the ability of lawyers to find qualified experts, and the ability of juries to sift through difficult evidence.[192] One judge stated:

> The lawyers are pretty good about shooting holes in each others' experts. It's generally a credibility question and the jury can sort it out . . . . In general, it conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.[193]

Further, some scholars have argued that, by designating a witness as "court-appointed" and "impartial," the court has cloaked the witness with a "robe of infallibility."[194] These scholars are concerned that a designation of impartiality may elevate the opinion of the court-appointed expert above those of the parties' experts, regardless of their position.[195] As a result, there is concern that juries will be unduly deferential to court-appointed experts, which

190. Cecil & Willging, *supra* note 183, at 1018.
191. *Id.*
192. *Id.* at 1018–19.
193. *Id.* at 1019.
194. *See* Karen Butler Reisinger, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225, 236 (1998) (citing Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416, 424 (1961)).
195. *Id.* at 236.

would usurp the jury's fact-finding authority.[196] However, there is no guarantee that a court-appointed expert will be unbiased. For instance, a court-appointed expert may be biased by the school of thought under which he or she was trained.[197] After all, "[s]cientists are human beings, which means that they too are subject to social and personal interests."[198]

Empirical data indicates that jurors do attach great weight to the testimony of a court-appointed expert. For example, a study of outcomes in a series of asbestos litigation revealed that jurors sided with the court-appointed expert in thirteen out of sixteen cases.[199] The judge assigned to the cases remarked: "A court's expert will be a persuasive witness and will have a significant effect upon a jury."[200] The Federal Judicial Center also surveyed judges who had appointed experts about the effect of a court-appointed expert's testimony.[201] Of fifty-eight responses, only two indicated that the result in a case involving the use of a court-appointed expert was inconsistent with the guidance given by the court's expert.[202]

Finally, many litigants and judges feel that court-appointed experts disrupt the adversarial process because it interferes with

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196. Sophia Cope, *Ripe for Revision: A Critique of Federal Rule of Evidence 706 and the Use of Court-Appointed Experts*, 39 GONZ. L. REV. 163, 176 (2004).

197. *See* Reisinger, *supra* note 194, at 236 (explaining that when the court announces an expert "neutral," the jury is likely to believe it, but an expert might be partial simply in the way he was trained). Economics serves as a good example for this type of conflicting opinion. *See, e.g.*, Abbott B. Lipsky Jr., *Antitrust Economics—Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 168–70 (2003) (noting that "[m]any of the salient microeconomic issues underlying the leading antitrust cases of our day could be cited as examples of serious disagreements among contending schools of contemporary antitrust economists and among specific individuals and the modes of analysis they sponsor" and pointing out the difference between traditional economic antitrust models and "post-Chicago" theories).

198. Si-Hung Choy, *Judicial Education After* Markman v. Westview Instruments, Inc.*: The Use of Court-Appointed Experts*, 47 U.C.L.A. L. REV. 1423, 1450 (2000).

199. Reisinger, *supra* note 194, at 236 (citing Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 41 (1991)).

200. *Id.* at 237.

201. Cecil & Willging, *supra* note 182, at 52–56.

202. *Id.* at 52.

party autonomy.[203] When an expert witness is appointed by the court, the parties largely lose their ability to control the trajectory of that witness's testimony at trial.[204] If a trial lawyer cannot properly manage an expert's testimony, there is increased risk that the expert's examination will elicit an unfavorable response.[205] In essence, much of the debate over court-appointed experts is a turf war between judges and trial lawyers.[206] And because many judges have spent careers as trial lawyers, they seem to be more willing to cede this ground. As stated by a judge surveyed by the Federal Judicial Center: "I believe in the adversary system. I was a litigator for thirty years. I don't feel comfortable taking over the case (like a small claims court, without lawyers). I don't know why I would be better equipped than the lawyers to find a top-flight person."[207]

3. Impracticality

Many judges find Rule 706 appointments to be impractical given the constraints of litigation. For instance, judges have often found it difficult to identify the need for an expert in time to make the appointment without delaying the trial. In the Federal Judicial Center survey, just over a dozen judges stated that an effective appointment requires the court's awareness of the need early in the litigation.[208] Since parties rarely suggest that the court make an appointment, a judge may not recognize the need for an independent expert until the eve of the trial.[209] At that point, it is difficult to recruit an expert and make an appointment while fulfilling the procedural requirements of Rule 706. Most judges who have appointed experts report making the selection early in the litigation, usually at the close of discovery.[210] However, some judges have reported making an appointment during trial, or even after the trial ended.[211]

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203. Reisinger, *supra* note 194, at 237.
204. Gross, *supra* note 5, at 1200.
205. *Id.* at 1200–01.
206. *Id.*
207. Cecil & Willging, *supra* note 183, at 1018–19.
208. Cecil & Willging, *supra* note 182, at 22–25.
209. *Id.*
210. *Id.*
211. *See, e.g.*, United States v. Weathers, 618 F.2d 663, 664 n.1 (10th Cir. 1980) (considering a court's post-trial appointment of an expert).

Another practical problem is the cost of court-appointed experts.[212] Rule 706(c) sets forth the means of compensating court-appointed experts. If the expert testifies in a criminal case, the Rule provides that the court determines the amount in whatever sum the court deems reasonable and that it is to be paid by the government as provided by law.[213] In civil cases, the cost of the experts is passed to the parties.[214] Many judges are reluctant to rely on the parties for payment and have stated that they restrict appointment to cases in which both parties consent.[215] One judge stated that lawyers find the appointment of experts in civil cases to be "hard to justify to their client when the client is paying for an expert already," especially when the court-appointed expert may hurt the client's case.[216]

In summary, many judges find Rule 706 appointments to be too impractical. Many judges recognize the need for a neutral expert too late to comply with the procedural requirements of the Rule. Even if the need is recognized, many other judges find it difficult to justify the cost when the parties are already providing their own experts.

4. The Availability of Technical Advisors

Another reason that judges may choose not to appoint an expert witness is the availability of technical advisors. The Supreme Court has recognized that trial courts have the inherent power to appoint persons to advise the court on technical matters that may arise during litigation.[217] The judge's power to appoint technical experts is not practically limited and the decision is subject to review

212. Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS J. 371, 382 (2010) (stating that the most frequently cited reason that state-level trial judges do not appoint experts was the cost to the court and the parties).

213. FED. R. EVID. 706(c).

214. *Id.*

215. Cecil & Willging, *supra* note 182, at 22.

216. *Id.*

217. *Ex Parte* Peterson, 253 U.S. 300, 306–07 (1920).

only for abuse of discretion.[218] The only limit on the power to appoint technical advisors is Article III, which forbids judges from abandoning the judicial function.[219] In *Reilly v. United States*, the First Circuit articulated several procedural safeguards, the violation of which may constitute an abuse of discretion.[220]

First, the *Reilly* court stated that technical advisor appointments should be rare.[221] Appointment should be limited to complex cases where outside expertise will hasten adjudication without disrupting the role of the judge.[222] Thus, a technical advisor should only be appointed where the trial court is faced with problems of unusual difficulty, sophistication, or complexity.[223] These relatively rare requirements mirror those that call for a court-appointed expert. Thus, the use of technical advisors is an alternative to appointing a full-fledged expert.

Still, the technical advisor's role differs from that of an expert witness in several important ways. The technical advisor's function is to act as a sounding board and to educate the judge on complex scientific and technical matters.[224] The technical advisor is not to brief the judge on legal issues, as that responsibility is tasked to the court itself.[225] If a judge allows a technical advisor to overstep these bounds, then the judge "effectively abdicates the Article III role and thereby violates the constitution."[226] Also, the *Reilly* court proposed that a judge inform the parties of the technical advisor's identity before making the appointment.[227] The judge should also give the parties an opportunity to object to the appointment.[228] Additionally, the judge should formulate a written "job description"

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218. Robert L. Hess II, *Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547, 558 (2001).

219. *Id.*

220. Reilly v. United States, 863 F.2d 149, 156–57 (1st Cir. 1988).

221. *Id.*

222. *Id.*

223. *Id.* In *Reilly*, the task of estimating the future earning capacity of an infant negligently injured at birth using complex economic theories satisfied this requirement. *Id.* at 153.

224. *Id.* at 157–58.

225. *Id.* at 158.

226. Hess, *supra* note 218, at 571.

227. *Reilly*, 863 F.2d at 159.

228. *Id.*

which defines the technical advisor's role and duties.[229] The judge should then require the advisor to sign an affidavit affirming compliance with the job description.[230]

Importantly, technical advisors are also different from expert witnesses in that they are not in fact witnesses and do not give testimony.[231] As a result, many of the procedural rules governing expert witness testimony do not apply to technical advisors.[232] For instance, since they do not render expert opinion, parties do not have the right to depose, call, or cross-examine technical advisors.[233] The *Reilly* court also held that technical advisors need not submit a written report.[234]

Because technical advisors do not fall within the ambit of Rule 706 and may consult with judges ex parte without notification of the parties,[235] technical advisors would seem to be a more convenient way for judges to sift through complex technical issues. However, the lack of a clearly defined set of rules to govern the behavior of technical advisors opens the door to their potential misuse.[236]

For example, there are concerns about a judge or jury abdicating its fact-finding role to a technical advisor, potential bias of the advisor, or that a supposedly "neutral" expert could undermine the adversarial process.[237] Specifically, judges with limited expertise in a complex area could conceivably completely delegate their gatekeeping duty to a technical advisor.[238] This would be a clear violation of *Daubert's* requirement that the judge make an independent determination as to the reliability of the proffered

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229. *Id. See* MediaCom Corp. v. Rates Techn., Inc., 4 F. Supp. 2d 17, 37 (Appendix B) (Mass. Dist. Ct. 1998) (outlining the technical advisor's job description).

230. *Reilly*, 863 F.2d at 159–60.

231. Weinstein & Berger, *supra* note 175 § 13.06[1].

232. Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 950 (1997).

233. *Reilly*, 863 F.2d at 156; *Improving Judicial Gatekeeping*, *supra* note 232, at 950.

234. *Reilly*, 863 F.2d at 158–59.

235. Hess, *supra* note 218, at 557–58.

236. *Improving Judicial Gatekeeping*, *supra* note 232, at 950. However, at least one court has endorsed the use of a written report as a proper way to define the limits of a technical advisor's role. *Id.* at 951.

237. *Id.* at 953.

238. *Id.*

evidence.[239] Alternatively, even if a judge properly consults a technical advisor, the advisor will undoubtedly have some kind of bias.[240] This is a particularly worrisome danger because technical advisors, as appointed "neutral" experts, will face less skepticism from the jury than a hired expert. Finally, technical advisors may interfere with the adversarial process by circumventing the parties and supplying evidence directly to the judge.[241]

Some ways to combat these potential dangers include allowing the parties to participate in the selection process, giving the technical advisor a written description of his job and the extent of his duties, and having the technical advisor submit a written report of his discussions with the judge to the parties.[242]

IV. FOREIGN MODELS FOR DEALING WITH EXPERT BIAS

Despite the long recognized problem of partisan testimony from expert witnesses, the implimentation of adequate reforms has proven elusive. Historically, those who have sought to modernize their own legal system have looked to methods used in other legal cultures and adopted their best practices.[243] Thus, despite the failure of past reform efforts in the United States, it may be possible to remove the problem of partisan expert testimony by looking at the models provided by other countries.

A. Typical Civil Law ("Inquisitorial") Systems

1. German Use of Court-Appointed Experts

German civil litigation operates under an inquisitorial system whereby the judge plays a very active role.[244] In Germany, the judge "controls the proceedings, examines the witnesses and is always the

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 955.
243. Robert F. Taylor, *A Comparative Study in Expert Testimony in France and the United States: Philosophical Underpinnings, History Practice and Procedure*, 31 TEX. INT'L L.J. 181, 182 (1996).
244. Timmerbeil, *supra* note 14, at 163.

decision maker."[245] Through the Code of Civil Procedure (ZPO), German courts make a distinction between lay witnesses and court-appointed experts.[246] In fact, experts are not even called witnesses but rather are thought of as judges' aides.[247] The German system operates under the assumption that "credible expertise must be neutral expertise."[248] All experts are expected and required to remain neutral in regard to the parties involved in the litigation.[249]

A German judge may decide to seek the assistance of an expert through his own motion or upon the request of a party to the suit.[250] The judge selects the expert.[251] Usually experts are chosen from a list compiled by the judge himself.[252] The judge's discretion, however, is somewhat limited by ZPO § 404(2), which says that "[i]f experts are officially designated for certain fields of expertise, other persons should be chosen only when special circumstances require."[253] This provision gives priority to officially designated experts for specific fields.[254] These experts are chosen from lists of professionals qualified to serve as experts, which are compiled by official licensing bodies and state governments.[255] These individuals are sworn to render professional and independent expert assistance.[256] The bodies and governments provide judges with regularly updated lists of available experts from which the judge may choose.[257]

Although the court generally takes the initiative in nominating and selecting the expert, the court is required to use any

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245. *Id.*

246. *Id.* at 173 (citing ZIVILPROZEBORDNUNG [ZPO] CODE OF CIVIL PROCEDURE § 402-414 (Ger.)). *See* MAFFEI, *supra* note 21, at 1, 69–70 (referencing statutes in Germany, France, and Italy pertaining to expert evidence).

247. Langbein, *supra* note 8, at 835 (citing KURT JESSNITZER, DER GERICHTLICHE SACHVERSTANDIGE 72–78 (7th ed. 1978)).

248. *Id.* at 837.

249. Timmerbeil, *supra* note 14, at 174.

250. Langbein, *supra* note 8, at 837 (citing ZPO § 404(I)).

251. Timmerbeil, *supra* note 14, at 173; ZPO § 404.

252. Timmerbeil, *supra* note 14, at 173.

253. Langbein, *supra* note 8, at 837.

254. Timmerbeil, *supra* note 14, at 174.

255. Langbein, *supra* note 8, at 837–38. *See* MAFFEI, *supra* note 21, 1, 36–40 (detailing the process of creating lists of experts in various European countries).

256. Langbein, *supra* note 8, at 838 (citing GEWERBEORDNUNG [GEWO] (CODE ON TRADE REGULATION) § 36 (Ger.)).

257. *Id.*

expert agreed upon by the parties.[258] If an expert is appointed without the consent of the parties, either party may seek the expert's recusal.[259] However, the circumstances warranting recusal are very limited.[260] ZPO § 406(1) only allows litigants to challenge an expert's appointment on the narrow grounds available for seeking the recusal of a judge.[261] Experts can only be recused when it appears that they are not neutral.[262] For example, an expert could be recused if she was a friend or relative of a party.[263] The court has authority to accept or deny such a request.[264]

Neutrality of the expert in regard to the parties is borne out through selection of experts by German judges. According to at least one noted scholar on the subject,

> [T]he most important factor predisposing a judge to select an expert is favorable experience with that expert in an earlier case. Experts thus build reputations with the bench. Someone who renders a careful, succinct, and well-substantiated report, and who responds effectively to the subsequent questions of the court and the parties will be remembered when another case arises in his specialty.[265]

When judges have not had previous experience with an appropriate expert, they then turn to the official lists.[266]

Party neutrality is also achieved through the instructions given to the expert. Although the court welcomes suggestions from the parties themselves,[267] it is the court that provides the facts that the expert is directed to investigate,[268] frames the question for the

258. *Id.* at 837 (citing ZPO § 404 (IV)).
259. Timmerbeil, *supra* note 14, at 174; ZPO § 406 (1).
260. Timmerbeil, *supra* note 14, at 174.
261. *Id.* (describing the reference in ZPO § 406(1) to ZPO §§ 42–45 provisions providing potential reasons to recuse a judge).
262. *Id.*
263. *Id.*
264. *Id.*
265. Langbein, *supra* note 8, at 838.
266. *Id.*
267. *Id.* at 839.
268. *Id.*

expert to address,[269] and regulates the extent to which the expert is permitted to contact the parties.[270]

Generally, the court orders an appointed expert to submit a written opinion.[271] Although the parties are usually permitted to file written comments to which the expert is asked to reply, the court can order the expert to appear at trial for further explanation.[272] If the expert is required to appear in court, the judge conducts the initial interrogation.[273] Attorneys for the parties themselves are then each provided an opportunity to pose further questions.[274] Party questioning of the expert is conducted in a polite and non-confrontational manner, quite unlike the cross-examination of experts seen in U.S. courts.[275]

Deferential questioning by the parties is due in part to a prohibition on leading questions in German civil litigation.[276] The non-confrontational atmosphere can also be attributed to the independent and unbiased position of the expert.[277] Because the expert was appointed by the court and received her instructions directly from the judge, "[a]ttacking the expert would be equivalent to criticizing the judge's authority to select and question the expert—and in German civil courts, the judge is always the decision-maker."[278] Therefore, strategic considerations demand that the parties treat the expert as neutral and independent.[279]

The parties in German civil litigation are free to seek and submit to the court the opinion of their own hired witnesses.[280] There are no rules in the ZPO dealing with these party-selected experts,[281] and German courts have held that the opinion of a party-selected expert witness does not have the same value as that of a court-appointed expert.[282] The opinion of a party-selected expert is

269. *Id.*
270. Timmerbeil, *supra* note 14, at 174 (citing ZPO § 404(a)).
271. *Id.* at 175.
272. *Id.*; Langbein, *supra* note 8, at 839.
273. Timmerbeil, *supra* note 14, at 175.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. Langbein, *supra* note 8, at 840.
281. Timmerbeil, *supra* note 14, at 177.
282. *Id.* at 177–78.

not considered evidence, but rather only an assertion of the party.[283] A partisan expert's opinion can be used to discredit the court-appointed expert and can stand as grounds for engaging an additional court-appointed expert.[284] The court, however, is not required to appoint a new expert, and rarely does so in practice.[285]

Although a court must explain why its final decision does not follow the view expressed by a partisan expert,[286] courts generally discount such opinions because they view the opinions of those who have been hired by the parties and discussed the case with counsel to be biased and therefore unreliable.[287] Further, party-selected experts are not examined at trial[288] and their opinions cannot form the basis of the court's final decision.[289]

2. French Use of Court-Appointed Experts

French civil courts also utilize an inquisitorial structure whereby judges maintain strong control over all proceedings.[290] France has a long history of using expert witnesses, dating back to 1667.[291] In the French system, a judge, known as the Judge Delegate, plays an active role in the gathering of pre-trial evidence.[292] This evidence is later submitted to a separate three-judge panel for fact-finding and a ruling.[293] As in Germany, the French civil system of justice is purposely structured to maintain neutrality in the evidence provided by expert witnesses.

Expert neutrality is first advanced through appointment by the court rather than by the parties themselves. A Judge Delegate is

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283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 179.
287. Langbein, *supra* note 8, at 840.
288. Timmerbeil, *supra* note 14, at 178.
289. *Id.*
290. *See* Taylor, *supra* note 243, at 210 (explaining the "active role in finding facts and questioning witnesses" of the Judge Delegate in the French civil system).
291. Browne, *supra* note 2, at 95 n.258. The rules have been constantly evolving and were most recently revised in the 1970s. *Id.* at 95.
292. Taylor, *supra* note 243, at 189.
293. *See id.* at 186, 189 (explaining the process by which the Judge Delegate gathers evidence, which is then submitted to a panel of three professionally trained judges for fact-finding and a decision).

authorized to appoint an expert to assist the three judge panel in its fact-finding role on either its own motion or a motion by one of the parties.[294] In addition, in some circumstances the Judge Delegate may be required by statute to appoint an expert.[295] Although each party may request appointment of an expert, such appointments are a matter of judicial discretion.[296] When such a request is granted, the Judge Delegate almost always chooses the expert without debate by the parties.[297] Further, the judge must clearly indicate the necessity of the expert's mission and the precise issues to be investigated.[298]

Neutrality is also achieved through the manner in which an expert is chosen by the court. As in Germany, French courts maintain regional and national lists of experts.[299] Although it is not required, courts generally utilize the lists in practice because of convenience and a sense of quality control.[300] In addition to the lists, the French legislature has placed strict limits on the choice of experts to be used for issues dealing with copyright and guardianship proceedings.[301] Finally, certain professions, such as chemists, physicians, and automobile mechanics are regulated by their own standards.[302] These professionals may not be chosen as experts unless they meet national qualifying standards for that particular profession.[303]

The Judge Delegate considers objectivity, competence, clarity of expression, and diligence when choosing an expert.[304] Parties may object to the chosen expert or attempt to have an expert

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294. *Id.* at 192–93 (citing N.C.P.C. art. 143).

295. *Id.* at 193 n.101. As an example, Taylor explains that under C. civ. art. 126, persons who receive temporary possession of the personal property of a person who has been missing for ten years or more may petition to have a court-appointed expert visit a building for the purpose of verifying the building's condition. Further, he explains that under C. civ. art. 459, a provision governing guardianship and care of the infirm provides for the sale of business assets and/or real property of a minor, or transfer of similar assets to a partnership or corporation after the property is assessed by a court-appointed expert.

296. Browne, *supra* note 2, at 96 (citing N.C.P.C. art. 232).

297. Taylor, *supra* note 243, at 192.

298. Browne, *supra* note 2, at 98 (citing N.C.P.C. art. 265).

299. *Id.* at 96.

300. Taylor, *supra* note 243, at 195.

301. Browne, *supra* note 2, at 96–97.

302. Taylor, *supra* note 243, at 194–95.

303. *Id.* at 195.

304. *Id.*

removed from the national or regional lists.[305] Valid objections in regard to a particular case are limited to those based on prejudice, bias, or conflict of interest.[306] An expert will only be removed from one of the lists upon a demonstration of incapacity or professional misconduct.[307]

Neutrality is further reinforced through the manner in which the expert conducts her investigation. The parties are entitled to be fully informed regarding the expert's assignment, approaches, and activities.[308] Thus, once an expert has been appointed, the parties are afforded a right to request a hearing to provide comments and suggestions on how the expert should proceed.[309] "For example, the parties may request that the expert visit the scene or interview particular witnesses."[310] Although required to consider these suggestions when formulating the appropriate course of action and to provide a reason for each decision, the expert is under no obligation to adhere to the requests of the parties.[311]

The parties are given a right to be informed of the time and location of significant activities within the expert's investigation so that they may observe the expert in action.[312] Actual attendance by the parties, however, is not mandatory and the expert is under no obligation to postpone an activity due to the absence of a properly informed party.[313] Further, there is no right for the parties to attend activities by the expert which are of a purely technical nature.[314]

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305. *Id.* at 196–97.

306. *Id.* at 196 n.135. *See also* Browne, *supra* note 2, at 97 n.280 (explaining that the grounds on which an expert can be removed are the same as those for which a judge can be removed: "(1) if the judge or his or her spouse has a personal interest in the case; (2) if the judge or his or her spouse is the creditor, debtor, heir or legator of the parties; (3) if the judge or his or her spouse is related to one of the parties closer than the fourth degree; (4) if there is a pending case between the judge or his or her spouse and one or more of the parties; (5) if the judge has ever sat as a judge of either of the parties; (6) if the judge has ever been responsible for the disposition of any property of the parties; (7) if there are any ties between the judge and his spouse and the parties or their spouses; and (8) if there is a relationship between the judge and any of the parties").

307. Taylor, *supra* note 243, at 197.

308. Browne, *supra* note 2, at 99.

309. *Id.*

310. Taylor, *supra* note 243, at 204.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* (citing N.C.P.C. art. 161).

The expert's mission is also defined by neutrality. The expert's guiding principle is an obligation to execute the required activity "with conscience, objectivity, and impartiality."[315] An expert in the French system is an officer of the court and never an agent of the parties.[316] An expert's mission is limited to findings on purely technical matters.[317] He is not permitted to explain the law or the legal effects of his findings.[318] The expert is required to precisely follow the court's directions, answer each question posed by the court completely and accurately, and is generally prohibited from expanding or narrowing the mandate provided by the Judge Delegate.[319]

Neutrality is further maintained by the manner in which an expert conveys his opinion to the court and the parties. Experts in the French civil system are required to file a report detailing their findings with the court[320] and may also be required to make an oral presentation to the parties.[321] When more than one expert has been utilized, the expert report must indicate areas of unanimity[322] and explain the reasons for varying opinions on points of disagreement.[323] The report must include: (1) a preamble, (2) operations of the expert, and (3) the expert's results.[324] The report is fully confidential and therefore is not available to the public.[325] Additionally, though the expert is court appointed, the judge is not required to accept the expert's findings.[326] Finally, the French civil system maintains expert neutrality through its system of compensating experts for their services. "[T]he expert may not accept any remuneration, direct or indirect, from the parties, including gifts or other benefits such as travel or food."[327] Although

315. *Id.* at 205 (quoting N.C.P.C. art. 237).
316. Browne, *supra* note 2, at 99.
317. Taylor, *supra* note 243, at 192.
318. *Id.* (citing N.C.P.C. art. 238).
319. Browne, *supra* note 2, at 99.
320. *Id.* (citing N.C.P.C. art. 282).
321. Taylor, *supra* note 243, at 207 (citing N.C.P.C. art. 282).
322. Browne, *supra* note 2, at 100 (citing N.C.P.C. art. 282).
323. Taylor, *supra* note 243, at 208.
324. Browne, *supra* note 2, at 99–100.
325. *Id.* at 100.
326. *Id.*
327. Taylor, *supra* note 243, at 206 (citing N.C.P.C. art. 248).

funding is actually provided by the parties themselves, it is the court which actually conveys the fee to the expert.[328]

3. Italian Use of Court-Appointed Experts

a. Civil Proceedings

As in the German and French legal systems, Italian civil proceedings are inquisitorial.[329] Consistent with the inquisitorial system, judicial appointment is the exclusive method by which experts may be appointed in an Italian civil case.[330] Although the parties may request a court-appointed expert, the decision to appoint an expert is in the sole discretion of the judge.[331]

A court-appointed expert, or "consulente tecninco d'ufficio" (CTU), is authorized by Article 61 of the Italian Code of Civil Procedure.[332] Much like American technical advisors, the CTU is an auxiliary of the judge, assisting the judge with complex technical matters that may arise during the case.[333] The CTU may not, however, usurp the judge's duty to independently determine the case's outcome.[334] Article 61 also provides that the CTU must be selected from the "Albo dei Periti," which is a register that divides individuals qualified to render technical assistance into various categories depending on their area of expertise.[335]

If a judge finds it necessary to appoint a CTU, the parties must be given leave to hire their own experts to review the work of the court's expert and to provide commentary on that expert's findings.[336] These experts, known as party consultants, are explicitly authorized by Article 201 of the Italian Code of Civil Procedure.[337]

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328. Browne, *supra* note 2, at 100 (citing N.C.P.C. art. 284).

329. SIMONA GROSSI & MARIA CHRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 3 (2010).

330. *Id.* at 17.

331. *Id.*

332. Rahol Kakkar & Paola Cascot, *Overview of Italian Regulation Expert Witnesses*, *available at* http://www.twobirds.com/English/NEWS/ARTICLES/Pages/2006/Overview_Italian_regulation_expert_witnesses.aspx (last visited Sept. 9, 2012).

333. *Id.*

334. *Id.*

335. *Id.*

336. Grossi & Pagni, *supra* note 329, at 17.

337. *Id.*

According to Article 201, party consultants are permitted to accompany parties to any proceeding involving the court's expert in order to comment on the results of any technical investigation or piece of evidence.[338]

If a CTU makes a technical determination in a case, the parties are also entitled to enter their own consultant's report into evidence without any prior evaluation by the judge as to its admissibility or relevance in the case.[339] A consultant's report is then treated like any other exhibit.[340] Once admitted, it is up to the judge to decide whether or not to take it into consideration when deciding the case.[341]

b. Criminal Proceedings

In 1988, the Italian Parliament approved a new Code of Criminal Procedure that was much more adversarial in nature than its predecessor.[342] Under the previous code, the entire fact-finding process was judicially controlled—the judge called witnesses, examined them ex officio, and introduced documents.[343] Under the new code, however, "evidence is received by the party's request" and, thus, each party presents his or her own case by gathering evidence, calling witnesses, and examining them.[344]

However, one aspect of the inquisitorial system that remained untouched by the new code is the treatment of expert-witness testimony.[345] Under both the old and new codes, expert witnesses are always appointed by the court.[346] Additionally, expert witnesses are examined ex officio in court.[347] Because court-appointed experts in Italian criminal cases are examined in court and provide testimonial evidence, they seem to have a more active role in aiding the judge's final decision than experts in civil proceedings.

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338. *Id.*
339. *Id.* at 17–18.
340. *Id.*
341. *Id.*
342. Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L., 227, 244 (2000).
343. *Id.*
344. *Id.*
345. *Id.* at 244–45.
346. *Id.*
347. *Id.*

4. German, French, and Italian Systems Do Not Provide Useful Models for Reform of U.S. Courts

Although Germany, France, and Italy have structured their civil systems in a way that provides protections against the influence of partisan or impartial expert witnesses, these systems do not provide a model upon which adjustments can be made in the United States.

The use of court-appointed neutral expert witnesses may offer an effective check against the possibility of an overly partisan expert fabricating an opinion or dramatically overstating some aspects of his testimony.[348] Court-appointed experts may also be effective when there is a high degree of agreement within the relevant community on the specific question at issue in the case.[349] It is, however, less clear whether court-appointed experts offer meaningful improvement when there are disagreements between experts that reflect legitimate and well-grounded differences of opinion within a professional, technical, or scientific community.[350] In such a situation, the court-appointed expert may take a firm position, creating the appearance of consensus on a point that is actually still open to debate.[351] The attractiveness of simplifying the fact-finding role of the jury (or judge in a bench trial) is surely outweighed by the potential for a "neutral" court-appointed expert to mislead the fact finder into believing his opinion is the only one possible.[352]

Alternatively, the expert may lay out the scientific contours of the debate without taking a position.[353] This situation is no better, as it still leaves the jury in the position of trying to decide an issue on which it lacks the proper expertise.[354]

These general criticisms apply equally to the German, French, and Italian systems discussed above. Under the German

348. Mnookin, *supra* note 4, at 1026.
349. *Id.* at 1021.
350. *Id.* at 1026–27.
351. *Id.* at 1027.
352. *Id.*
353. *Id.*
354. *Id.*

ZPO, a good expert will mention other recognized scientific opinions in her report.[355] Nonetheless, if the expert supports one opinion over the others, she is obviously no longer neutral in respect to other existing opinions, and it is possible she would not mention these other opinions at all.[356]

It is nearly impossible for the parties in German litigation to adequately make up for this deficiency themselves because of the lack of an effective cross-examination.[357] Although the judge may appoint a second expert, he will do so only when he doubts the first expert's opinion.[358] Moreover, a judge is unlikely to express such a doubt.[359] Not only does the judge lack the necessary knowledge or training to effectively evaluate the expert's opinion, but he is also unlikely to abandon the opinion of an expert who he has personally appointed and likely worked with in the past.[360] It is equally unlikely that a judge will abandon his trust in an expert which he has personally appointed, in favor of an opinion rendered by an expert hired and paid for by a party to the suit.[361]

Under the French and Italian systems, a judge is never bound by the opinion of the court-appointed expert. Nonetheless, these systems, like their German counterpart, are flawed because the outcome of the trial seems to necessarily fall on the opinion of the chosen expert, regardless of whether equally valid opinions may have been given by others of equal qualifications. As described by one scholar,

> The appointee will conduct an investigation outside the courtroom, under no formal rules of evidence or relevance, at sessions to which the parties are convoked with full freedom to present their views and those of their experts or other representatives, orally or in writing. The result of the expertise is a report that in principle the judge need not accept, but in the absence of other evidence, it is difficult to see how it

355. Timmerbeil, *supra* note 14, at 180.
356. *Id.*
357. *Id.*
358. *Id.* at 182.
359. *Id.*
360. *Id.*
361. *Id.* at 175–76, 178 (empirical studies showed that the court follows the opinion of the court expert in 95% of the cases).

> could be rejected, provided that the judge is satisfied that the expert has done what he was commissioned to do and that no material procedural irregularities have been committed in the course of the expertise.[362]

Further, U.S. judges are already given powers to appoint expert witnesses that are similar to those held by German, French, and Italian courts, and yet this authority is seldom used. As noted earlier, Federal Rule of Evidence 706 codifies the common law right of judges to appoint expert witnesses to testify in court;[363] it has been used as a model for allowing court-appointed experts in many state courts.[364] Under this rule, the court may select an expert nominated by the parties or choose its own candidate.[365] Courts may also refer to lists of appointed experts in cases involving frequently litigated subjects.[366] The only limitation on this authority is that the witness must consent to the appointment.[367]

Like their German, French, and Italian counterparts, U.S. judges define the scope of a court-appointed expert's duties and will ensure that the expert's findings are reported to the parties.[368] Court-appointed experts may be directly questioned by the judge at trial

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362. Richard W. Hulbert, *Comment on French Civil Procedure*, 45 AM. J. COMP. L. 747, 749 (1997).

363. Tahirih V. Lee, *Court Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 481 (1988).

364. *See* Gross, *supra* note 5, at 1189–90 ("Explicit provisions for court-appointed experts have been adopted . . . in over thirty states and territories . . . Rule 706 of the Federal Rules of Evidence is the model for a majority of the current provisions for the use of court-appointed experts.").

365. *See* FED. R. EVID. 706(a) ("The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witness agreed upon by the parties, and may appoint expert witnesses of its own selection."); Eric Illhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L.REV. 585, 618 (1997).

366. Lee, *supra* note 365, at 619.

367. FED. R. EVID. 706(a) ("An expert witness shall not be appointed by the court unless the witness consents to the act.").

368. *Id.* ("A witness so appointed shall be informed of the witness' duties by the court in writing . . . A witness so appointed shall advise the parties of the witness' findings").

and cross-examined by the parties.[369] The parties are also free to retain and call their own experts to testify.[370] Court-appointed experts are entitled to "reasonable compensation" from court funds or payments ordered by the court from both litigants.[371]

Despite the existence of Rule 706 and its state counterparts, judges are extremely reluctant to utilize their authority to appoint their own experts.[372] To summarize the previous discussion, there have been many explanations for this reluctance. According to one commentator, "Many judges, if not most, have been trial lawyers, and they are suspicious that any expert is truly neutral." [373] Some suggest that judges fear juries will be unduly persuaded by the opinion of the court-appointed expert over those hired by the parties.[374] Others believe judges view court-appointed experts as interfering with the traditional neutrality and objectivity of the judge and the adversarial role of counsel in the American legal system.[375] Still others have suggested that many judges have either not been provided with the resources necessary to locate and select appropriate experts,[376] or are simply unaware that they have the authority to appoint experts.[377]

Regardless of the reasons for judicial unwillingness to utilize the power of expert appointment, this reluctance is pervasive

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369. *Id.* ("[T]he witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party."). *See* Taylor, *supra* note 246, at 212 ("Once a court-appointed expert is selected, he may be called at trial and questioned by the judge.").

370. FED. R. EVID. 706(d) ("Nothing in this rule limits the parties in calling expert witnesses of their own selection.").

371. FED. R. EVID. 706(b) ("Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.").

372. Lee, *supra* note 365, at 480.

373. Liptak, *supra* note 21, at A1.

374. Lee, *supra* note 365, at 495.

375. *Id.* at 496.

376. *See* Gross, *supra* note 5, at 1191 ("Why is this power of appointment so neglected? One possible answer is that Rule 706 and similar provisions are insufficiently structured; they do not define specific areas of expertise for appointment, and they do not help judges locate and select appropriate experts.").

377. Timmerbeil, *supra* note 14, at 168.

throughout the judiciary. According to a study released in 2002 based on surveys of federal judges, despite the enormous number of cases requiring expert testimony, 73.9% of judges had never appointed an expert utilizing Rule 706.[378] Given the reluctance of United States judges to utilize their already existing powers of expert appointment, there would be little benefit to adoption of practices modeled on the German, French, or Italian systems.

So what lessons can we in the United States draw from the civil law system, and what modifications could we make in the court-appointment process workable and more palatable to American lawyers and judges? First, it must be recognized that the "audience" for whom the expert performs in the United States is a jury, not a professional judge. For this reason, the appointed expert in the United States must testify, likely in a narrative form. The appointed expert must be available for the usual cross-examination, which, according to long-accepted U.S. legal doctrine, would expose any intellectual, political, or philosophical bias, as well as errors or weakness in methodology.

Second, the parties, as they can in Europe, must still be able to retain and examine in court their own experts. Hopefully, the partisan experts could find room for significant agreement on many issues when faced with the report of the court-appointed expert. If, after undergoing cross-examination from one or both parties, the court-appointed expert has more credibility than the other experts in the case, then the system has worked. As an alternative to U.S. judges arbitrarily appointing a Rule 706 expert, arbitration practice may provide a sound answer. As in the selection of arbitrators, the parties could be asked to nominate proposed court-appointed experts, providing respective lists where in the parties may agree on certain names. In addition, as in arbitration, the parties' experts could be expected to agree on a neutral court-appointed expert. Because the cost of the neutral court-appointed expert will be borne by the parties, some might argue that the cost of the neutral court-appointed expert will be prohibitive. First, we are not suggesting that the court appoint an expert under Rule 706 in every case. The court should retain the discretion to appoint when the value of the case can tolerate the additional cost and where the issues may be less than straightforward. Moreover, it would make sense that the court would

378. Krafka, *supra* note 97, at 19.

only consider making the appointment after receiving and reviewing the expert reports of the retained experts. This, in turn, might create an incentive for partisan experts to take less extreme positions.

B. Adversarial Legal Systems

Though the civil law system offers reforms which we believe can be adapted to the United States justice system, we recognize that American lawyers and judges may feel some resistance to adopting civil law systems' modes of dealing with experts in our adversarial system. Therefore it would be helpful to turn to the experience of other adversarial systems for guidance. These systems share commonalities with the American system and their practices are likely to be perceived as more easily transferable to United States courts.

1. English System

The English system, as a close analogue to the American system, would appear to provide a useful comparison. In general, opinion evidence is inadmissible unless it falls into one of three exceptions, including the expert opinion evidence exception.[379] This exception admits evidence to "[prove] matters of specialized knowledge."[380] Additionally, experts must have "competence," and the court must investigate the expert's qualifications to prove competence.[381] Still, England has an intermediate evidentiary position compared to the rules of other countries.[382] This means that the general admissibility of evidence is determined by the finder of law, while the weight of the evidence is left up to the finder of fact.[383]

Another important consideration in the English system is the relative availability of experts to the various parties. While some countries have adopted specific rules outlining the availability of experts to each party, England's rules, at least in theory, treat both

379. Browne, *supra* note 2, at 76–77.
380. *Id.* at 77.
381. *Id.* at 78.
382. *Id.* at 79.
383. *Id.* at 79–80.

sides equally.[384] However, forensic experts are typically associated with the prosecution; therefore, in practice, the defense tends to have fewer experts to choose from.[385] Thus, the defense typically has a disadvantage when it comes to the use of expert testimony.[386]

Beyond these general access concerns, there has been a recent history of misuse of scientific evidence in England.[387] In response, an effort to reform the system led to the creation of the "Royal Commission on Criminal Justice" to investigate the misuse of scientific evidence for the purpose of convicting the accused.[388] The Commission made several suggestions, including the establishment of a code of ethical and scientific standards for expert testimony and better instructions on the evidence during trials.[389] The Commission also explicitly rejected the idea of court-appointed experts.[390] Though the Commission's findings were illuminating, they only represented suggestions and not mandatory changes. Some legal scholars criticized the Commission for its lack of skepticism about scientific testimony.[391] The Commission's findings are part of a larger trend in English law; arguably, under the English system, the scientific expert has greater status than her counterpart in the United States because the law does not examine scientific evidence with the same caution.[392]

Finally, England's system of free evaluation of evidence causes some additional problems.[393] Because the tribunal of fact is permitted to attribute any amount of worth to the evidence, it may be misled and end up granting certain evidence more value than is logically justifiable.[394] This problem stems from the lack of a uniform standard for admissibility that would prevent potentially prejudicial expert testimony from ever being presented in court.[395]

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384. *Id.* at 82–83.
385. *Id.* at 83–84.
386. *Id.* at 84.
387. *Id.*
388. *Id.* at 85.
389. *Id.* at 86.
390. *Id.* at 86 n.178 (explaining how a court-appointed expert would represent the dangerous combination of more deference without any additional guarantee of accuracy of the underlying science).
391. *Id.* at 87.
392. *Id.* at 90.
393. *Id.* at 89.
394. *Id.*
395. *Id.*

Thus, some scholars have called for the establishment of specific procedures for conducting standard forensic science tests.[396]

Overall, the multitude of problems surrounding the use of expert witnesses in England seems to rival the shortcomings in the American system. Thus, the English system is not particularly illustrative in the quest to reform the American system. Additionally, while in the United States the expert witness is widely distrusted, the English system seems too deferential to expert testimony. Thus, despite the close connection between the legal systems of the two countries, it seems wise to look elsewhere for workable reforms.

2. Canadian System

a. Federal Court

Given that Canada is another country with a British-inspired legal system, it is useful to explore the Canadian system next. The Canadian Federal Courts Rules do not provide for court-appointed experts in the Trial Division.[397] Federal Court Rule 52.1 provides that the parties to a proceeding are tasked with providing expert witnesses, though the parties may jointly name an expert.[398] Rule 52.6 further provides that a court may order expert witnesses to meet and consult with one another prior to trial in order to "narrow the issues and identify the points on which their views differ."[399]

Although a Canadian federal trial court may not appoint its own expert to testify in a case, Rule 52 provides that a court may appoint an "assessor."[400] Much like technical advisors in the United States, an assessor may "assist the court in understanding technical evidence."[401] However, unlike U.S. technical advisors, assessors are permitted to render opinion and may "provide a written report in a proceeding."[402] Any opinion rendered by an assessor must be provided to the parties, and the parties must be given an opportunity

396. *Id.*

397. *See* FEDERAL COURTS RULES, SOR/98-106 (Can.) (failing to grant the courts power to appoint experts).

398. FEDERAL COURTS RULES, SOR/98-106, R. 52.1 (Can.).

399. FEDERAL COURTS RULES, SOR/98-106, R. 52.6 (Can.).

400. FEDERAL COURTS RULES, SOR/98-106, R. 52 (Can.).

401. *Id.*

402. FEDERAL COURTS RULES, SOR/98-106, R. 52(1)(b) (Can.).

to submit evidence rebutting such an opinion.[403] Rule 52(3) prohibits ex parte communications between a judge and the assessor and provides that all communications between a judge and an assessor be in open court.[404]

b. Provincial Courts

Although the Federal Courts Rules do not provide for court-appointed experts at the federal level, several provincial trial courts allow court-appointed experts. In Alberta, Rule of Court 218(1) provides that a court, upon its own motion or that of any party, may appoint an "independent expert" in any case where independent technical evidence would appear to be required.[405] Rule 218(2) provides that the expert shall, if possible, be a person agreed upon by the parties.[406] If an expert cannot be agreed upon by the parties, then the court may appoint an expert of its own choosing.[407] A court's appointment of an expert does not prevent the parties from calling their own experts.[408]

Similarly, the British Columbia rules provide that a trial court may appoint "one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the proceeding."[409] Once appointed, the expert shall prepare a written report, which is then entered into evidence at trial.[410] The parties may then cross-examine the court-appointed witness at trial.[411] Labrador,[412] Manitoba,[413] Newfoundland,[414] Nunavut,[415] and

403. FEDERAL COURTS RULES, SOR/98-106, R. 52(5) (Can.).
404. FEDERAL COURTS RULES, SOR/98-106, R. 52(3) (Can.).
405. ALBERTA RULES OF COURT, ALTA. REG. 390/68, R. 218(1) (Can.).
406. ALBERTA RULES OF COURT, ALTA. REG. 390/68, R. 218(2) (Can.).
407. *Id.*
408. ALBERTA RULES OF COURT, ALTA. REG. 390/68, R. 218(10) (Can.).
409. BRITISH COLUMBIA SUPREME COURT RULES, B.C. REG. 221/90, R. 32A(1) (Can.).
410. BRITISH COLUMBIA SUPREME COURT RULES, B.C. REG. 221/90, R. 32A(7–8) (Can.).
411. BRITISH COLUMBIA SUPREME COURT RULES, B.C. REG. 221/90, R. 32A(10) (Can.).
412. RULES OF THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR, R. 35 (Can.).
413. MANITOBA COURT OF QUEEN'S BENCH RULES, MAN. REG. 553/88, R. 53.03(1)–(90) (Can.).

Yukon[416] also allow court-appointed experts, and provide a nearly identical set of procedures. In Quebec, the parties may jointly request that the court appoint an expert.[417]

Overall, Canada serves as an example of a mixed approach. While the federal courts do not provide for court-appointed experts, the local courts may choose to appoint their own experts. However, given America's reluctance to embrace court-appointed experts, Canada's other practices are more intriguing avenues for potential American reform. First, in Canada, parties may jointly appoint an expert. While the logistics of how this would work in the American system are unclear, the general idea of a collaborative expert opinion is appealing. A jointly-appointed expert could provide the court with as close to a purely scientific opinion as possible. Also, because each side would independently approve the expert prior to appointment, it would undermine either party's ability to attack the expert's credibility. Second, the Canadian system allows the court to order the experts to meet to identify the issues on which they agree and those on which they disagree. This out-of-court narrowing of the issues seems to promote both efficiency and veracity in expert testimony. This line of thought serves as an ideal introduction to a discussion of the Australian system.

V. AUSTRALIAN USE OF "CONCURRENT EVIDENCE" MAY PROVIDE A MODEL FOR EFFECTIVE REFORM IN U.S. COURTS

Australian courts, like courts in the United States, are grounded in the common law and adversarial traditions.[418] Some of Australia's courts have recently implemented changes in the way expert evidence is prepared and presented; the reforms seek to reduce expert partisanship in the hope of making legal decisions

414. RULES OF THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR, R. 35 (Can.).

415. CIVIL PROCEDURE RULES OF THE NORTHWEST TERRITORIES, R. 278 (Can.).

416. RULES OF COURT FOR THE SUPREME COURT OF YUKON, R. 33 (Can.).

417. QUEBEC CODE OF CIVIL PROCEDURE, R.S.Q. c. C-25, R. 18.1 (Can.).

418. Gary Edmond, *Secrets of the "Hot Tub": Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia*, CIV. JUST. Q. 51, 51, 53 (2008).

more accurate.[419] Concurrent evidence, also known as "hot-tubbing," is one such reform.[420]

Concurrent evidence involves joint testimony of party-selected experts in sessions with far more testimonial latitude than traditionally allowed during adversarial proceedings.[421] This procedure has been grafted onto existing adversarial processes and rules and supported by the application of a new code of conduct for expert witnesses[422] and procedures which require opposing experts to meet prior to litigation and prepare a joint report.[423] This reform is considered relatively uncontroversial in the Australian legal community;[424] and, according to Australian judges, the new procedure has been found to be generally effective and broadly liked.[425] Some commentators, who reject the utility of adopting reforms in the United States centered on the use of court-appointed neutral witnesses, have suggested that the approach taken by these Australian courts could provide a useful model for American reforms.[426]

Despite differences between the American and Australian legal systems, such as the lack of a jury in Australian civil

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419. *Id.* at 51.

420. *Id.*

421. *See* Lisa C. Wood, *Experts Only: Out of the Hot Tub and into Joint Conference*, 22 ANTITRUST 89, 89 (2007) (describing the procedure for concurrent evidence).

422. Edmond, *supra* note 418, at 51 (citing as an example the UNIFORM CIVIL PROCEDURE RULES, sch.7 (N.S.W.) (stating that an expert is not an advocate for a party; an expert's paramount duty is to the court; an expert is required to work cooperatively with other experts and to endeavor to reach agreement; an expert is required to list facts and assumptions on which opinions are based, identify any materials, tests or investigations on which he has relied upon, specify limitations, and indicate if the opinion is inconclusive or requires further research or data)).

423. *Id.*

424. *Id.*

425. Gary Downes, Judge of the Federal Court of Australia and President of the Australian Administrative Appeals Tribunal, Address to the 16th Inter-Pacific Bar Association Conference 2006: The Use of Expert Witnesses in Court and International Arbitration Processes 14 (May 3, 2006), *available at* http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/pdf/UseExpertWitnessesMay2006.pdf.

426. Liptak, *supra* note 21, at A1 ("The future . . . may belong to Australia. 'Hot tubbing . . . is much more interesting than neutrals.'").

litigation,[427] adoption of this technique in the United States is possible and could help alleviate the negative effects of partisan experts previously discussed.

A. Problem of Expert Bias in Australian Courts

Prior to recent reforms, Australian judges and legal commentators expressed similar concerns over a lack of objectivity in the evidence presented by expert witnesses as reported in the American legal system.[428]

Australian courts have traditionally tracked and followed legal reforms in England and Wales.[429] Thus, they took particular note when commentators in England and Wales expressed concern with the proliferation of biased experts and rapid growth of the litigation-support industry in the mid 1990s.[430] A report that led to substantial reforms in English litigation procedures, which is often cited by proponents of concurrent evidence, stated:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.[431]

Concerns about a lack of objectivity by some expert witnesses were echoed by Australian judges. A survey of judges taken as part of a 1999 study found that "bias" and "partisanship" were the most pressing problems with expert evidence in

427. Sanders, *supra* note 59, at 1582.

428. Garry Downes, *Concurrent Evidence in the Administrative Appeals Tribunal: The New South Wales Experience*, AUSTRALASIAN CONF. PLAN. ENVTL. CTS. TRIBUNALS IN HOBART 1 (Feb. 27, 2004), *available at* http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/pdf/concurrent.pdf.

429. Edmond, *supra* note 418, at 53.

430. *Id.*

431. LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995), *available at* http://www.dca.gov.uk/civil/final/index.htm.

Australia.[432] The study also revealed a feeling among Australian judges and legal commentators that the traditional adversarial approach was not always an effective way of drawing out expert opinions.[433] The 1999 report, prepared by the Australian Law Reform Commission, stated:

> It has been claimed that the manner of presentation of expert evidence, through examination and cross-examination, may be confusing and unhelpful to judges .... Present hearing practices do not always allow experts to fully communicate their opinions to the decision maker. In many cases, experts complain that they are not given a chance to explain their written reports, but are exposed immediately to cross-examination by lawyers who have no interest in assisting the judge to understand the experts' views and may have an active interest in obscuring such views. Experts express frustration that they cannot put relevant information before the court.[434]

In order to counter these concerns, Australian judges across a variety of jurisdictions implemented the concurrent evidence procedure.[435]

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432. Edmond, *supra* note 418, at 52–53 (citing I. FRECKELTON, AUSTRALIAN JUDICIAL PERSPECTIVES ON EXPERT EVIDENCE: AN EMPIRICAL STUDY 113 (1999) ("[J]udges who responded to the survey identified partisanship or bias on the part of expert witnesses as an issue about which they were concerned and in respect of which they thought that there needed to be change. They did so directly in their answers and also in their comments about experts' lack of objectivity .... The picture painted by a significant cross-section of respondents was one of worry about an unacceptable culture in sectors of disciplines providing report-writers and witnesses to the courts. The culture, they asserted, does not adequately value and put into practice independence, objectivity or transparency of opinions.")).

433. *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal*, ADMINISTRATIVE APPEALS TRIBUNAL 7 (2005) [hereinafter *Administrative Appeals Tribunal*], *available at* http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf.

434. *Id.*

435. *See* Edmond, *supra* note 418, at 58 (noting that concurrent evidence procedures have been adopted in Australia's Federal Court, the Administrative Appeals Tribunal (AAT), the Land and Environment Court of NSW (LEC), the

B. *The Concurrent Evidence Procedure*

Concurrent evidence, also known as "hot-tubbing," is used in circumstances where party-hired experts disagree about some relevant matter.[436] The procedure allows experts from similar or closely related fields, but who have been hired by opposing parties in litigation, to testify during a joint session.[437] These sessions usually involve two or three experts, although it is possible to allow testimony from a larger group.[438] If need be, courts will also allow several concurrent evidence sessions, each featuring different types of expertise, during the same trial.[439]

During the first stage of a concurrent evidence session, contrary to the traditional adversarial tradition of soliciting expert evidence through formal responses to questions from counsel, expert witnesses are provided with an opportunity to make extended statements, to comment on the evidence of the other expert witness, and to ask questions of other experts.[440] During this stage, the judge suggests topics for discussion, directs the experts' testimony, and will often pose questions for the experts to respond to.[441] In the second stage, counsel from each side is presented with the opportunity to direct questions to the experts in a manner more in line with a traditional adversarial proceeding.[442]

Supreme Court of New South Wales, and the Children's Court of New South Wales).

436. Sanders, *supra* note 59, at 1581.

437. Edmond, *supra* note 418, at 52.

438. *Id.* at 56.

439. *Id.*

440. Sanders, *supra* note 59, at 1581–82.

441. Edmond, *supra* note 418, at 56.

442. Sanders, *supra* note 59, at 1582. In practice this proceeding has been described by a Justice of the Federal Court of Australia as follows: "This procedure involves the parties' experts giving evidence at the same time. Written statements will have been filed prior to trial. After all the lay evidence on both sides has been given, the experts are sworn in and sit in the witness box—or at a suitably large table which is treated notionally as the witness box . . . . A day or so previously, each expert will have filed a brief summary of his or her position in the light of all evidence so far. In the box, the plaintiff's expert will give a brief oral exposition, typically for ten minutes or so. Then the defendant's expert will ask the plaintiff's expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect, a brief colloquium takes place. Finally, each expert gives a brief summary . . . . When all this is completed,

C. *Supplemental Reforms*

In addition to the availability of the concurrent evidence procedure, Australian courts have implemented several supplemental reforms, the most important of which are the use of pre-trial joint meetings leading to the production of a joint report, and the implementation of a formal code of conduct for expert witnesses.[443] Experts in Australia are required to confer before trial, preferably face-to-face, without lawyers on at least one occasion.[444] These meetings are intended to enable experts to identify areas of agreement, resolve or narrow any differences, and then reduce each of their positions to a written joint report that they are required to endorse.[445] In other words, experts are asked to narrow the extent of their disagreement on their own without the influence of counsel.

The rules governing these meetings are designed to prevent the experts from refusing to reach an agreement.[446] An expert in a joint-conference "must exercise his or her independent, professional judgment . . . and must not act on an instruction or request to withhold or avoid agreement. An expert should not assume the role of an advocate for any party during the course of the discussion at the joint-conference."[447]

Experts across all Australian jurisdictions are also required to adhere to formal codes of conduct.[448] These codes generally stipulate that "[a]n expert witness has an overriding duty to assist the [C]ourt on matters relevant to the expert's area of expertise;" "an expert witness is not an advocate for a party;" and "the expert witness's paramount duty is to the [C]ourt and not to the person

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counsel cross-examine and re-examine in the conventional way." Peter Heerey, *Expert Evidence: The Australian Experience*, 7 B. REV. 166, 170 (2002).

443. Edmond, *supra* note 418, at 56.

444. *Id.*

445. *Id.* at 57.

446. *Id.*

447. *Id.*

448. *See Administrative Appeals Tribunal, supra* note 433, at 7 (explaining the guidelines for expert witnesses designed by the Federal Court and the Law Council of Australia).

retaining the expert."[449] These codes are intended to instill in experts "an expectation and practice of objectivity."[450]

D. Benefits of Concurrent Evidence

Concurrent evidence is not without its critics.[451] Nonetheless, there are many indications that the result of its implementation is a rise in the objectivity of party-selected experts. According to one study of its use,

> [T]he process moves somewhat away from lawyers interrogating experts towards a structured professional discussion between peers in the relevant field. The experience in the Land and Environment Court indicates that the nature of the evidence is affected by this feature, and that experts typically make more concessions, and state matters more frankly and reasonably, than they might have done under the traditional type of cross-examination. Similarly, it seems that the questions may tend to be more constructive and helpful than the sort of questions sometimes encountered in traditional cross-examination.[452]

One Australian judge has written that partisanship is reduced by the "physical removal of an expert from his party's camp to the proximity of a (usually) respected colleague."[453] Another report noted that there is "symbolic and practical importance in removing

449. *Id.*

450. Freckelton, *supra* note 432, at 113.

451. *See* Edmond, *supra* note 418, at 76 (arguing that Australia's use of concurrent evidence does not reduce the level of partisanship and that on the whole, the benefits of concurrent evidence have been overstated).

452. *Administrative Appeals Tribunal*, *supra* note 433, at 9 (quoting REPORT 109—EXPERT WITNESSES, NSW LAW REFORM COMMISSION 6.56 (2005), *available at* http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r109toc (last visited Oct. 31 2012) [hereinafter NSW LAW REFORM COMMISSION]).

453. Peter Heerey, *Recent Australian Developments*, 23 CIV. JUS. Q. 386, 391 (2004).

the experts from their position in the camp of the party who called them."[454]

Some Australian judges are said to favor the procedure due to perceived popularity with the experts themselves and their professional organizations.[455] As stated in one report, "The Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court."[456] Because experts are not confined in the procedure to answering questions from counsel, judges believe there is less risk that expert testimony will be distorted by the counsel's skill.[457] Other reported benefits include narrowing the issues in dispute and enhancing the judge's ability to assess expert testimony.[458]

The reported favorable results are further supported by the general popularity of the current evidence procedure amongst Australian judges. According to a study of its use in one Australian jurisdiction, 94.9% of judges in surveyed cases were satisfied with the procedure.[459] Surveyed judges felt the procedure increased the objectivity and quality of expert evidence.[460] These judges also found that the procedures made evidence comparison easier.[461] Further, the judges felt that the procedures enhanced their ability to fulfill their fact-finding role in most cases.[462]

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454. THE AUSTRALIAN LAW REFORM COMMISSION, MANAGING JUSTICE: A REVIEW OF THE FEDERAL CIVIL JUSTICE SYSTEM, Report No 89, 6.117 (1999), *available at* http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html.

455. Lisa C. Wood, *Experts in the Tub*, 21 ANTITRUST 95, 96 (2007).

456. NSW LAW REFORM COMMISSION, *supra* note 452, at 6.117.

457. Wood, *supra* note 455, at 96.

458. *Id.* at 95.

459. *Administrative Appeals Tribunal*, *supra* note 433, at 5.

460. *See id.* (finding that 73.7% of members reported that the objectivity of the evidence presentation was improved and 67.2% of members reported that the quality of expert evidence presented was better due to the use of concurrent evidence procedures).

461. *See id.* (finding that 87.9% of members reported that concurrent evidence procedures made evidence comparison easier).

462. *See id.* (finding that 88.1% of members reported that the decision-making process was enhanced by the use of concurrent evidence procedures).

VI. CONCLUSION

The problem of partisan experts in the United States is both real and troubling. As participants in one of the few systems in the world that relies on partisan experts, American judges and lawyers cry out for change.

We have suggested a number of reforms for testifying experts in the United States based on models drawn from both common law and civil law systems. First, we have suggested a system of court-appointed experts drawn from the civil law tradition with significant modifications, which would harmonize the employment of such experts with the adversarial, lawyer-driven examination protocol. In addition, the experience of the Canadian Provincial courts demonstrates perceived significant improvements within an adversarial model. Finally, the Australian use of concurrent evidence procedures offers a proven mechanism for diminishing expert bias, which can be grafted onto existing adversarial traditions in the United States while also avoiding the difficulties which have prevented effective reform in the past.

It should be acknowledged that important differences exist between the U.S. and Australian legal systems. Notably, most Australian jurisdictions do not use civil juries.[463] Further, because judges are the primary fact-finders in civil litigation, Australian judges have not had to develop an exclusionary jurisprudence designed to prevent civil juries from hearing certain kinds of evidence.[464] Nonetheless, the similarities between the two systems far outweigh the differences and suggest that effective Australian reforms can serve as a model for countering similar problems found in U.S. courts.

Like courts in the United States, Australian courts have maintained common law adversarial legal traditions inherited from England.[465] As part of this common heritage, the U.S. and Australian legal systems allow the use of expert witnesses who are selected, compensated, and prepared by the parties to the litigation.[466] Both countries found that this practice spawned a legal

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463. Sanders, *supra* note 59, at 1582.

464. Edmond, *supra* note 418, at 54.

465. *Id.* at 51, 53.

466. *See supra* Sections II.B. and V.A (explaining the similarities in expert usage within the U.S. and Australian legal systems).

culture in which objective expert evidence was not only lacking, but purposely avoided.[467] As a result, judges, lawyers, and experts in both legal systems expressed fear that experts were often failing in their mission to assist the fact-finder.[468]

Australian legal commentators suggest that experts questioned under concurrent evidence procedures are more willing to make concessions, state matters more frankly and reasonably, and tend to be more constructive and helpful than they would be under traditional adversarial cross-examination.[469] In other words, the use of concurrent evidence in Australia has produced more objective expert testimony that is of greater assistance to the fact-finder. Moreover, concurrent evidence is viewed favorably by Australian judges, as well as by the experts questioned under the procedure.[470]

In addition, concurrent evidence would not be subject to the same pitfalls that have previously prevented effective reform in the United States. Unlike many other proposals, concurrent evidence entails no obvious additional expense to the court. Further, unlike the use of court-appointed experts, concurrent evidence maintains the basic adversarial traditions of a neutral judge, partisan attorneys, and party-selected experts cross-examined by opposing counsel. Thus, concurrent evidence would not mislead the fact-finder by creating the appearance of consensus on points that are still open to debate, nor would it require judges to risk abandoning their traditional position of neutrality and objectivity.

In sum, the U.S. legal community should take note of Australia's use of concurrent evidence procedures and its apparent effectiveness as a check against partisan expert witnesses. Given the similarities between the Australian and American legal traditions, the procedure warrants strong consideration for adoption in U.S. courts.

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467. *See id.* (explaining the partisanship and bias among experts in both legal systems).

468. *Id.*

469. *See supra* note 452 and accompanying text.

470. *See supra* notes 425, 453, 455 and accompanying text.

Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus

Ryan D. Ellis*

I. INTRODUCTION

"[M]isery acquaints a man with strange bed-fellows."

- Shakespeare, *The Tempest*

On May 7, 2012, in an impressive display of political transcendence and cooperation, twenty of the nation's foremost academics and policy advocates—hailing from across the political

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spectrum—spoke out with one voice against a threat to individual and institutional rights on university campuses.[1] This joint effort to oppose the perceived erosion of student and faculty rights made for strange bed-fellows indeed. But what danger could loom so ominously as to induce parties as diverse as a conservative Christian legal network and a progressive feminist organization to join forces in opposition to it?[2] What attack on individual and institutional rights would prompt arch-conservative David Horowitz and former ACLU president Nadine Strossen to ride side-by-side to their rescue?[3] What threat led these scholars and policy advocates to cast aside their political differences, and, if only for a moment, rally together under the banner of campus rights?

The culprit is a policy promulgated by the Department of Education's Office for Civil Rights (OCR) in April 2011.[4] The Department of Education is charged with enforcing Title IX,[5] the objective of which is to eliminate sex-based discrimination in education. Sex-based discrimination can include sexual harassment and sexual violence.[6] In a "Dear Colleague" letter issued on April 4, 2011,[7] OCR stated that, in order to comply with the strictures of Title IX, all colleges and universities that receive federal funding must use the "preponderance of the evidence" standard of evidence when adjudicating claims of sexual harassment and sexual assault in their disciplinary procedures.[8] While OCR's efforts to put an end to sexual harassment and violence on college campuses are

1. Open Letter from Foundation for Individual Rights in Education (FIRE) and nineteen other signatories to Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. Office for Civil Rights (OCR) (May 7, 2012), *available at* http://thefire.org/public/pdfs/34cd41a0d56d8f0b41ecde844c289a6a.pdf?direct (last visited Nov. 4, 2012) [hereinafter Open Letter from FIRE].

2. *See id.* (referring to the Alliance Defense Fund and Feminists for Free Expression, both of which were signatories to the May 7, 2012 letter opposing OCR's April 4, 2011 mandate).

3. *Id.*

4. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, to Colleagues, U.S. Dept. of Educ. Office for Civil Rights (April 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited Nov. 4, 2012) [hereinafter Dear Colleague Letter, April 4, 2011].

5. 20 U.S.C. §§ 1681–82 (2006).

6. Dear Colleague Letter, April 4, 2011, *supra* note 4, at 1 n.2.

7. *See infra* Part II.B (discussing the purpose of OCR "Dear Colleague" letters).

8. Dear Collegue Letter, April 4, 2011, *supra* note 4, at 11.

commendable, the April 4 mandate has been criticized on the grounds that it restricts the autonomy of universities in an unprecedented way and threatens the property and due process rights of students. Furthermore, critics point out that OCR enacted its new mandate with no input from affected institutions, students, or faculty members,[9] a move that arguably violates the notice-and-comment requirements of the Administrative Procedure Act.[10]

To mark the first anniversary of the April 4 mandate, a group of academics and policy advocates sent a letter to OCR arguing that the mandate "damages student due process rights by mandating that institutions employ our judiciary's lowest standard of proof . . . when hearing sexual harassment and sexual assault cases."[11] In their letter, the signatories argue that mandating a preponderance of the evidence standard is dangerous and inequitable because schools vary widely in the quality of their disciplinary proceedings.[12] As a result, students' right to due process is imperiled.[13] This Note evaluates these claims by first examining the gradual decline of educational autonomy at American colleges and universities, culminating with the enactment of the April 4 mandate. Next, it provides the legal justification for the property interest found in one's college education and analyzes the dangers posed to that interest—and to student due process—by the preponderance of the evidence mandate. Finally, this Note identifies one realistic accommodation OCR could make which would help interested parties identify alternative policies that address the issue of sexual harassment on campus without jeopardizing the due process and property rights of students and faculty.

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9. *See id.* at 1 n.1 (explaining that OCR views the "Dear Colleague" letter as "policy guidance"). Such guidance is exempt from the notice-and-comment procedures of the Administrative Procedure Act. *See infra* Part IV (discussing the notice-and-comment requirement of the APA and emphasizing how it should be applied to the OCR mandate).

10. *See infra* Part IV.C (explaining that the OCR should follow the notice-and-comment requirement of the APA as it relates to the preponderance standard in order to avoid constitutional and logistical issues).

11. Open Letter from FIRE, *supra* note 1, at 2.

12. *Id.*

13. *Id.*

II. THE DECLINE OF *IN LOCO PARENTIS*

Until roughly the mid-twentieth century, American universities were given a large degree of authority over their students.[14] Traditionally, a university education was available only to a small, wealthy subset of the population, and students were typically third-party beneficiaries of their parents' contract with the university.[15] That is, a student's parents would send him away to college and foot the bill.[16] As the beneficiary of this charitable arrangement, the early American college student had no right to demand anything of his college or to enforce obligations against it.[17] Over time, this paternal relationship between universities and their charges began to erode as a college education became more accessible to a greater percentage of the population.[18] Instrumental in this transition has been the involvement of the federal and state governments, which give billions of dollars each year to universities.[19] In doing so, governmental entities often place conditions on these monetary grants, structuring the conditions so as to pursue policy goals on campuses and direct the educational purposes of recipient universities.[20] This exchange invariably erodes institutional sovereignty.[21]

A. The Traditional Law of Education

Universities, with their complexities, traditions, and devotion to the search for truth, were traditionally thought to operate best outside of the influence of governmental bodies.[22] Accordingly, legislatures and courts granted universities nearly boundless control over their own daily operations, and until the latter half of the

14. MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION 631–32 (1989) (citing William Kaplin, *Law on the Campus, 1960–1985*, 12 J.C. & U.L. 269 (1985)).

15. Edward J. Bloustein, *The New Student, His Role in American Colleges*, *in* DIMENSIONS OF ACADEMIC FREEDOM 92, 94 (1969).

16. *Id.*

17. *Id.* at 95.

18. *Id.* at 101.

19. *Id.* at 102.

20. *Id.* at 102–03.

21. *Id.*

22. OLIVAS, *supra* note 14, at 631–32.

twentieth century, this deference included almost complete authority over students' lives.[23] Relying on the doctrine of *in loco parentis* ("in the place of a parent"), courts commonly held that the relationship between the university and its students was parental in nature, and that students had almost no recourse when the university violated their rights.[24] For example, the Florida Supreme Court held that college administrators may constrain their students with any rule that their parents could with regard to "mental training, moral and physical discipline . . . so long as such regulations do not violate divine or human law."[25] In essence, the court held that the government had no more of a right to interfere with a university's discipline of its students than it did with a father disciplining his own children.[26]

Perhaps unsurprisingly, there was also no recourse to constitutional law for students at the traditional American university. Early courts held that even state-funded universities could have complete discretion over what was in their students' best interests.[27] Because attending college was considered a privilege rather than a right, a student could not logically claim that his university violated his rights when it took disciplinary action against him.

The traditional model of American higher education law, with its complete deference to the decisions of the university administrator acting *in loco parentis*, began to fade away in the post-war era. As the American economy evolved during the mid-twentieth century, higher education became a necessity for many young people entering the workforce.[28] No longer was higher education viewed only as a luxury for the wealthy. With the implementation of the G.I. Bill, many of the veterans who attended college under the program could be said to have earned the *right* to their educations, and would thus seem to have legal recourse if a university violated that right.[29] However, the primary reason for the

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23. *Id.*

24. *Id.*

25. John B. Stetson Univ. v. Hunt, 102 So. 637, 638 (Fla. 1924).

26. *Id.*

27. *See* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 261 (1934) (holding that attending a state university is a privilege, not a right).

28. OLIVAS, *supra* note 14, at 632.

29. *Id.*

decline of *in loco parentis* has been universities' acceptance of billions of dollars in federal assistance.

B. Federal Intervention, Title IX and the Role of OCR

By accepting federal money, universities, whether public or private, agree to submit to certain requirements imposed by the federal government.[30] As a result, federal grants have become a powerful tool that the federal government regularly uses to bypass constitutional restraints and set university policy. However, despite the willingness of college administrators to accept federal money, they do not always welcome the accompanying regulations with the same enthusiasm.[31] While federal regulations can sometimes accomplish desirable social goods, such as desegregation, many administrators complain that keeping apprised of and compliant with droves of federal regulations can be costly, and is partially to blame for the skyrocketing cost of higher education.[32] Remarked one college president, "We have a gazillion people working on compliance. The government requires us to do it . . . . [F]rom where I sit, it looks like we have an excessive number of people working on this. But if we don't have them we would be in violation of the law."[33]

Despite these sentiments, which seem commonplace among university administrators, few universities have actually refused funds from the federal government.[34] Instead, many public and private universities have bargained away a great deal of their institutional sovereignty in this manner. Despite the universities' consistent willingness to trade autonomy for funds, some scholars warn that the government may endanger some forms of academic freedom by conditioning those funds.[35] Importantly, these scholars note that universities must be afforded a wide degree of academic

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30. Michael Mumper et al., *The Federal Government and Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 113, 131 (Philip G. Altbach et al. eds., 3rd ed. 2011).

31. *Id.* at 132.

32. *Id.*

33. *Id.*

34. *Id.*

35. T.R. McConnell, *Autonomy and Accountability: Some Fundamental Issues*, *in* HIGHER EDUCATION IN AMERICAN SOCIETY 39, 55 (Philip G. Altbach & Robert O. Berdahl eds. rev. ed. 1987).

freedom to pursue educational and research goals, as these freedoms are vital to the intellectual independence that is the hallmark of academia.[36]

Among the federal regulations applicable to colleges and universities receiving federal money, Title IX is one which has had a particularly significant impact on the American university. The Department of Education's OCR is charged with overseeing the enforcement of federal civil rights laws that prohibit discrimination in educational institutions receiving federal financial assistance.[37] Among the laws OCR enforces is Title IX, which prohibits discrimination on the basis of sex by any educational institution or activity receiving federal funding.[38] OCR has been authorized to effectuate Title IX by issuing rules and regulations consistent with the legislation's goal of ending sex-based discrimination in educational programs.[39] If discrimination persists, OCR may initiate proceedings to terminate the federal funding of any institution that does not comply with the rules and regulations promulgated under Title IX.[40]

As necessary, OCR issues statements to alert recipient institutions to changes in Title IX regulations. For example, following two Supreme Court decisions on the subject,[41] OCR revised its guidance on sexual harassment in 2001.[42] In the 2001

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36. *Id.*

37. *About OCR*, U.S. DEP'T OF EDUC. (May 29, 2012), http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last visited Nov. 5, 2012).

38. 20 U.S.C. §§ 1681–82 (2006).

39. 20 U.S.C. § 1681 (2006).

40. 20 U.S.C. § 1682 (2006).

41. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648–50 (1999) (holding that a school may also be liable for peer-on-peer sexual harassment if the school is deliberately indifferent to the sexual harassment and the harassment is so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291 (1998) (holding that schools can be liable for monetary damages if a teacher sexually harasses a student and the school is deliberately indifferent in responding).

42. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE i–ii (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (last visited Nov. 5, 2012) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE].

Guidance, OCR maintained that sexual harassment is a form of sex discrimination because it can deny or limit, on the basis of sex, a student's ability to obtain the benefits of an educational program.[43] Therefore, sexual harassment in the educational environment is a violation of Title IX, and institutions are required to address instances of sexual harassment and take steps to prevent its future occurrence.[44] In the 2001 *Guidance*, OCR outlined the steps a school must take when responding to complaints of sexual harassment.[45] OCR also reminded institutions that they must adopt and publish grievance procedures providing for the "prompt and equitable" resolution of sex discrimination complaints.[46] OCR identified the elements that it uses to evaluate whether an institution's grievance procedures are prompt and equitable.[47] Of the six elements listed, none related to the standard of proof institutions must use to evaluate sexual harassment complaints.[48] Furthermore, recognizing the benefits of some degree of educational autonomy, OCR indicated that schools would be afforded wide latitude in drafting the specifics of their grievance procedures, writing that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, state or local legal requirements, and past experience."[49] Critically, prior to formally adopting the revisions, OCR published its 2001 *Guidance* in the Federal Register and solicited questions and comments from interested parties in compliance with the requirements of the Administrative Procedure Act.[50]

Since the 2001 *Guidance*'s implementation, OCR has, from time to time, publically issued interpretive guidance or policy statements in the form of "Dear Colleague" letters. Although made public, these letters are addressed to administrators at recipient institutions to help them comply with the requirements of Title IX.

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43. *Id.* at 2.

44. *Id.* at iii.

45. *See id.* at 15–19 (outlining the steps a school should take in the event of alleged harassment).

46. *See id.* at 19 (citing 34 C.F.R. § 106.8 (b)).

47. *Id.* at 20.

48. *Id.*

49. *Id.*

50. *See infra* Part IV.A (explaining the notice-and-comment requirement of the APA).

For instance, in an August 4, 2004, "Dear Colleague" letter, OCR highlighted the fact that some institutions were not complying with 34 C.F.R. § 106.8(a), the regulation requiring that each institution designate an employee to coordinate its efforts to comply with Title IX.[51] Similarly, other "Dear Colleague" letters have provided clarification when OCR believed that institutions were not in compliance with existing Title IX regulations.[52] Prior to April 4, 2011, none of the "Dear Colleague" letters interpreting the 2001 *Guidance* made any mention of the standard of proof required for evaluating complaints of sexual harassment or assault.

Before the April 4 mandate, the only instances in which OCR demonstrated a preference for the preponderance of the evidence standard are found in private letters to individual institutions.[53] These letters typically follow Title IX "compliance reviews," which are conducted after OCR has received a noncompliance complaint about an institution.[54] In these compliance review letters, OCR usually recommends improvements that institutions should make in their policies and procedures to better comply with Title IX regulations.[55] In some of these letters, OCR has said that the preponderance of the evidence standard is the equitable standard of proof when evaluating sexual harassment complaints. For example,

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51. Letter from Kenneth Marcus, Deputy Assistant Sec'y for Enforcement for the Office for Civil Rights, to Colleagues (Aug. 4, 2004), *available at* http://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html (last visited Nov. 4, 2012).

52. A collection of "Dear Colleague Letters" may be accessed on the Department of Education website at http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX (last visited Nov. 4, 2012).

53. A collection of compliance review correspondence was recently obtained via a Freedom of Information Act request and is available at http://ncherm.org/resources/legal-resources/ocr-database/ (last visited Nov. 4, 2012).

54. *See, e.g.*, Letter from Carolyn F. Lazaris, Office for Civil Rights, to Lawrence S. Bacow, President, Tufts University (Oct. 9, 2002), *available at* http://www.ncherm.org/documents/17-TuftsUniversity-01022031.pdf (last visited Nov. 4, 2012) (indicating that a Title IX compliance review was initiated after a complainant alleged that the university did not appropriately comply with Title IX in adjudicating the student's case).

55. *See id.* (recommending, for example, that the University in question should remind students that they are entitled to file Title IX complaints and that retaliation against these complaints is prohibited).

during a 1995 investigation of faculty-on-student sexual harassment at Evergreen State College, OCR required the college to change the standard of proof it used from "clear and convincing evidence" to "preponderance of the evidence."[56] Also, in a 2002 compliance review letter to Georgetown University, OCR wrote that in order to have "prompt and equitable grievance procedures," an institution must use a preponderance of the evidence standard when resolving complaints of sexual harassment.[57] According to OCR, because the school had used a clear and convincing evidence standard, it was harder than it should have been to hold offenders responsible for acts of sexual harassment.[58]

However, the standard of proof requirement has not been a universal theme in OCR's compliance letters. For instance, in a 2004 compliance letter to Berklee College of Music, OCR found many problems with the College's sexual harassment grievance procedures, but made no mention of the appropriate standard of proof, seemingly copying the grievance procedure requirements directly from the 2001 *Guidance*.[59] Likewise, in correspondence with the University of Maryland – Baltimore, OCR claimed that the school's grievance procedures were not equitable under Title IX and solicited the University's commitment to address the procedural deficiencies.[60] OCR identified fourteen characteristics of prompt and equitable grievance procedures, not one of them having to do with standard of proof.[61] As an examination of OCR correspondence indicates, prior to the April 4, 2011 mandate, the preponderance of the evidence standard of proof was recommended

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56. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 657 (2009).

57. Letter from Sheralyn Goldbecker, Office for Civil Rights, to Dr. John J. DeGioia, President, Georgetown Univ. (May 5, 2004), *available at* http://ncherm.org/documents/199-GeorgetownUniversity--11032017DeGeoia.pdf (last visited Nov. 4, 2012).

58. *Id.*

59. Letter from Thomas J. Hibino, Office for Civil Rights, to Roger H. Brown, President, Berklee College of Music (Dec. 8, 2004), *available at* http://ncherm.org/documents/23-BerkleeCollegeofMusic-ComplianceReview0102 6001.pdf (last visited Nov. 4, 2012).

60. Letter from Wendella P. Fox, Office for Civil Rights, to Dr. David J. Ramsay, President, Univ. of Md. Baltimore (July 16, 2008), *available at* http://ncherm.org/documents/67-UniversityofMarylandBaltimoreCampus--0307 2121.pdf (last visited Nov. 4, 2012).

61. *Id.*

on a case-by-case basis after OCR had conducted an in-depth compliance review. This policy allowed the agency to consider the individual circumstances of each institution before passing judgment on whether or not its grievance procedures were in compliance with Title IX. Accordingly, it appears that prior to the April 4, 2011, "Dear Colleague" letter, the preponderance of the evidence standard was only recommended in light of particularized circumstances of individual institutions rather than as a general rule.

Before the April 4 letter, and in the spirit of educational autonomy, an institution was afforded discretion to shape its procedures to best comport with its character and educational mission. Accordingly, some schools adopted a preponderance of the evidence standard to adjudicate sexual harassment and sexual assault claims, some adopted a clear and convincing standard, and some chose not to bind themselves to a particular standard, thereby retaining the flexibility to deal with each allegation on a case-by-case basis.[62] The April 4 mandate signaled the abandonment of OCR's individualized approach to its review of school grievance procedures and instead saddled all federally funded colleges with the burden of having to make potentially life-altering determinations of guilt or innocence on little more than a hunch, using our justice system's lowest standard of proof—even in cases involving allegations of sexual assault. OCR's mandate no longer allows investigators to consider the individual circumstances of an institution, such as whether or not it has the necessary resources or personnel to accurately adjudicate sexual harassment and assault charges under a preponderance of the evidence standard or whether the school has other procedures in place that might provide prompt and equitable resolution of claims without using a preponderance of the evidence standard. Despite its well-intentioned attempt to ensure that all colleges promptly and equitably resolve discrimination complaints, critics argue that OCR ignores the possibility of grossly *inequitable* outcomes if charges as serious as sexual assault must be adjudicated

62. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE 4 (2011), *available at* http://thefire.org/public/pdfs/f17fa5caafd96ccdf8523abe56442215.pdf?direct (last visited Nov. 4, 2012).

using society's least certain standard of proof, even at institutions lacking the resources to ensure the accuracy of their judgments.[63]

C. *The April 4 Mandate and Its Rationale*

As mentioned, the April 4, 2011, "Dear Colleague" letter marked a departure from previous OCR policy and from the purely explanatory role that "Dear Colleague" letters had played in the past. In the letter, OCR reiterated the requirement that schools' grievance procedures must be prompt and equitable.[64] However, OCR also sought to establish a new element for determining whether or not procedures were equitable. OCR wrote:

> [I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.,* it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.,* it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools . . . [is] inconsistent with the standard of proof established for violations of civil rights laws, and [is] thus not equitable under Title IX.[65]

OCR reasoned that because the preponderance of the evidence standard is used in Title VII civil rights litigation, and because OCR uses it when resolving complaints against institutions, schools must use the standard when conducting their own investigations of sexual harassment and sexual assault claims.[66]

Some scholars applaud OCR's preponderance of the evidence mandate. One in particular, Nancy Cantalupo of the Georgetown University Law Center, has endorsed the preponderance of the evidence standard as the appropriate one to use in cases of sexual harassment, arguing that it is the closest standard of proof to establishing an even playing field between the victim and the

63. *See generally id.* (demonstrating the harms of the OCR mandate).
64. Dear Colleague Letter, April 4, 2011, *supra* note 4, at 8.
65. *Id.*
66. *Id.*

accused, and is thus the most "equitable" for Title IX purposes.[67] Additionally, she states that using a higher standard would only discourage victims from reporting their attackers.[68] While finding ways to encourage victims to report their attackers is a laudable goal, and worthy of all of our efforts, commentators like Cantalupo seem to forget that Title IX demands "equitable" procedures for all parties involved—victims and accused alike. Furthermore, courts have determined that disciplinary actions at public colleges implicate the property rights of accused students and entitle them to certain due process rights, which may put the Constitution at odds with the April 4 mandate. To determine what process is due at university sexual harassment and sexual assault hearings, and whether OCR's mandate might be invalidated by litigation, one should look to judicial opinions for guidance.

III. EDUCATION AS A PROPERTY RIGHT

The Supreme Court has ruled that students in publically funded schools have property interests in their educations.[69] Accordingly, students facing disciplinary suspension or expulsion from public schools are entitled to due process.[70] In *Goss v. Lopez*, several public high school students were suspended for ten-day periods without first receiving a hearing.[71] The Court reasoned that, although the state was under no obligation to maintain a public school system, the fact that it did meant that it must "recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[72] The Court went on to say that even when a student's property interest in education is

67. Cantalupo, *supra* note 56, at 656.
68. *Id.* at 674–75.
69. Goss v. Lopez, 419 U.S. 565, 574 (1975).
70. *Id.*
71. *Id.* at 569–72.
72. *Id.* at 574.

only temporarily denied, she is entitled to due process, preferably before the suspension commences.[73]

In *Goss*, the Court drew upon the rationale put forth by the Fifth Circuit in what it refers to as "the landmark decision" of *Dixon v. Alabama State Board of Education*.[74] While *Goss* dealt with the due process rights of public high school students, the court in *Dixon* held that due process also entitles students at tax-supported colleges and universities to notice and a hearing prior to expulsion for misconduct.[75] The *Dixon* court set the precedent for the recognition of a public university education as a property right.[76] Indeed, every other circuit court ruling on the issue has also found that students have a property interest in their education that entitles them to a hearing prior to suspension or expulsion.[77] The *Dixon* holding has been reaffirmed as recently as February 2012 by the Eleventh Circuit, which stated in *Barnes v. Zaccari* that "no tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment."[78]

A. What Process Is Due?

Once it is determined that an educational property interest has been implicated by a university disciplinary action, it raises the question: what process is due? Unfortunately, the Supreme Court has not given a direct answer to this question. However, the Court did provide some guidance when it wrote: "At the very minimum . . . students facing suspension and the consequent

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73. *Id.* at 584.

74. *Id.* at 576 n.8.

75. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151 (5th Cir. 1961).

76. *Id.* at 157.

77. Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 633–36 (6th Cir. 2005); Pugel v. Bd. of Trs. of Univ. of Ill., 378 F.3d 659, 663–64 (7th Cir. 2004); Gorman v. Univ. of R.I., 837 F.2d 7, 13–14 (1st Cir. 1988); Nash v. Auburn Univ., 812 F.2d 655, 662–63 (11th Cir. 1987); Harris v. Blake, 798 F.2d 419, 422–23 (10th Cir. 1986); Henson v. Honor Comm. of U. Va., 719 F.2d 69, 73–74 (4th Cir. 1983); Sill v. Pa. State Univ., 462 F.2d 463, 469–70 (3d Cir. 1972); Winnick v. Manning, 460 F.2d 545, 548–49 (2d Cir. 1972); Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1089 (8th Cir. 1969).

78. Barnes v. Zaccari, 669 F.3d 1295, 1305 (11th Cir. 2012).

interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."[79] It also indicated that more serious charges, which lead to more serious penalties (such as extended suspensions or expulsions), may require more formal procedures.[80] The Fifth Circuit in the landmark *Dixon* decision also expressed this sentiment when it wrote, "The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved."[81] Thus, it is fair to conclude that the greater the threat posed to an accused's educational rights in a disciplinary hearing, the more protections they should receive.

At least one federal court has indicated that, in some campus tribunals, a preponderance of the evidence standard may not provide due process—a conclusion which would render the universal mandate found in the April 4 letter unconstitutional.[82] In *Smyth v. Lubbers*, a Michigan federal court reasoned that a campus disciplinary hearing resulting in a two-year suspension could very well have required a higher standard of proof than "preponderance of the evidence" in order to comport with the requirements of due process.[83] The court wrote, "[G]iven the nature of the charges and the serious consequences of conviction, the court believes the higher standard of 'clear and convincing evidence' may be required."[84] The court reasoned that a clear and convincing evidence standard would appropriately balance the due process rights of the accused student with universities' need for an effective disciplinary process.[85] This intermediate standard would afford greater protection to the educational property interests of the student, and may be the most constitutionally sound standard for schools to use when adjudicating certain allegations of sexual harassment, such as sexual assault, which carry severe consequences for convicted students.

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79. Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis added).
80. *Id.* at 584.
81. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961).
82. Smyth v. Lubbers, 398 F. Supp. 777, 797–99 (W.D. Mich. 1975).
83. *Id.* at 799.
84. *Id.*
85. *Id.*

B. *Private Universities*

Although private universities do not face any *constitutional* pressures to afford their students adequate due process rights in disciplinary hearings, such institutions are not immune to *all* pressures to do so. As one professor points out, private colleges and universities have a choice to make: they can either afford their students First Amendment protections, or admit to the public that their students enjoy fewer rights than students at local and state colleges and universities.[86] While a private university cannot be made to stand trial in federal court for due process violations, it may, however, be held to account in the court of public opinion for the same offense.

Private universities can also be taken to court for breach of contract if they fail to live up to the standards they bind themselves to in student handbooks and similar publications. In *Giles v. Howard University*, the Federal District Court for the District of Columbia suggested that standards, procedures, and policies published by the University were contractual in nature and that legal action could be based upon them.[87] The court also ruled that a university should be held to the meaning that it should reasonably expect others to give to its published policies.[88] Thus, if a private university's regulations indicate that a student is entitled to certain procedural protections prior to dismissal, an aggrieved student can enforce those promises under contract law if necessary.

C. *The April 4 Mandate Endangers Individual and Institutional Property Rights*

The April 4, 2011 preponderance of the evidence mandate applies to all campus adjudications of sexual misconduct—including sexual violence. When a student is accused of an act of sexual violence, he or she may face a severe suspension, or perhaps the permanent deprivation of his or her educational property interests—expulsion. The Supreme Court in *Goss* and other courts around the

86. Alan Charles Kors, *Bad Faith: The Politicization of the University* In Loco Parentis, *in* THE IMPERILED ACADEMY 153, 161 (Howard Dickman ed., 1993).

87. 428 F. Supp. 603, 605 (D.C. 1977).

88. *Id.*

country have been clear: the greater the threat to the property interest, the more formal the disciplinary proceedings must be to provide due process. In its April 4 mandate, OCR ignores this tenet of constitutional law and demands that universities treat dissimilar offenses in a similar manner. This policy is incompatible with the holding in *Dixon*, which states "[t]he minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved."[89] Surely, under this oft-cited formulation of the law, it would be reasonable (if not necessary) for an institution to use one standard of proof when adjudicating a claim against a student who is accused of telling sexually insensitive jokes and who faces a week of sensitivity training as punishment, and a different, more demanding standard of proof when adjudicating a claim against an alleged sexual assailant who faces expulsion if convicted. OCR's April 4 mandate, however, eliminates the discretion that institutions once had to make this type of accommodation.

Furthermore, the April 4 mandate tramples on educational autonomy and ignores crucial differences between institutions. While some major universities might have the resources and investigative capacities to ensure accurate disciplinary hearings under the lower preponderance of the evidence standard, other institutions are not as well-endowed and should be afforded the discretion to craft a disciplinary hearing policy that aligns with their educational goals and fiscal realities. OCR's April 4 "Dear Colleague" letter takes a one-size-fits-all approach to campus sexual harassment adjudication and seeks to constrain universities where they once had a great deal of freedom. With its April 4 mandate, OCR seemingly departs from its 2001 *Guidance* which afforded universities a considerable amount of discretion in determining their disciplinary protocols. Indeed, the 2001 *Guidance* even stated, "Procedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience."[90] Unfortunately, the April 4 mandate denies universities the ability to follow the law as

89. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961).

90. REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 42, at 20.

articulated in *Goss* and *Dixon*, and also denies them the ability to grant due process safeguards that are appropriate for the gravity of the offenses that their students are accused of committing.

IV. A SOLUTION: SUBJECT THE APRIL 4 MANDATE TO POST HOC NOTICE-AND-COMMENT

A very modest concession would be for OCR to temporarily cease enforcement of the April 4 policy, and open the mandate up for public comment as prescribed by the Administrative Procedure Act (APA).[91] While no plaintiff has yet challenged the April 4 mandate's validity on APA grounds, commentators argue that the "Dear Colleague" letter was precisely the kind of administrative dictate the framers of the APA hoped to subject to its public scrutiny provision.[92] Regardless of whether or not the APA obliges OCR to seek public comment on its April 4 letter, OCR would be prudent to voluntarily comply with the APA's procedures.

A. The History and Requirements of the APA

The Administrative Procedure Act (APA) of 1946 arose in response to the burgeoning regulatory state of the New Deal, and has permitted the expansion of government authority ever since.[93] The passage of the APA signaled a reluctant compromise between supporters and opponents of the New Deal, reflecting the nation's acceptance of increased government regulation subject to certain checks.[94] Conservatives, who opposed the New Deal, sought to

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91. 5 U.S.C. § 553(c) (2006).

92. *See* Hans Bader, *Department of Education Shreds Presumption of Innocence in April 4 Letter* (Apr. 8, 2011), http://www.examiner.com/article/education-department-shreds-presumption-of-innocence-april-4-letter (summarizing the proposed changes and noting that OCR has violated APA procedures); Robert Smith, *On Sexual Harassment and Title IX* (Aug. 30, 2011), http://www.realclearpolitics.com/articles/2011/08/30/on_sexual_harassment_and_title_ix_111065.html (writing that the April 4 changes were "formulated . . . without hearings, comment periods or other mechanisms aimed at avoiding unintended consequences that could cause more harm than good").

93. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

94. *Id.* at 1559–60.

restrain the expansion of the regulatory state and had initially proposed a series of bills that would greatly limit the power of regulatory agencies.[95] However, liberals controlled the White House and would veto any bill they deemed overly stifling to the New Deal programs they had created.[96] The APA represented a compromise of sorts. While conservatives hoped the APA would create a substantial "bill of rights" for persons and corporations affected by the regulatory state, the APA was adopted on the liberals' terms, and the APA's drafters therefore tailored its language to permit the extensive growth of regulatory agencies seen today.[97]

Nevertheless, one of the most important reforms conservatives incorporated into the APA was the requirement of notice-and-comment rulemaking, which obliges agencies "to solicit and consider public comments on the rules" they promulgate.[98] Most obviously, the notice-and-comment requirement ensures that affected parties will have a chance to air their concerns prior to the adoption of a new regulation. The APA requires rulemaking agencies to comport with basic notions of fairness, and to consider any pertinent information or objections raised by those who are to be bound by the proposed rule.[99]

Courts have also highlighted the important function notice-and-comment rulemaking serves in the regulatory process. The United States Court of Appeals for the District of Columbia Circuit,

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95. *Id.* at 1676.

96. *Id.*

97. *Id.* at 1678–81.

98. *Id.* at 1635. The APA states, in relevant part: "(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . . . (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose . . . . (d) The required publication or service of a substance rule shall be made not less than 30 days before its effective date . . . ." 5 U.S.C. § 553(b)–(d) (2006).

99. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373 (1992).

an authority on administrative law,[100] has pointed out that the notice-and-comment requirement of the APA does not exist solely to make it more difficult for federal agencies to enact regulations, but that the requirement also helps agencies improve proposed regulations and avoid arbitrary and irrational rules by subjecting them to input by affected parties.[101] Furthermore, the public notice-and-comment requirement generates "a well-developed record" which aids in the adjudication of related litigation.[102]

B. What Regulatory Actions Are Subject to Notice-and Comment?

The APA also distinguishes between substantive rules and interpretations or statements of policy.[103] Before implementing a new rule, an agency must subject it to the notice-and-comment procedures of the APA. Statements that do not prescribe a standard, such as informal interpretations, do not trigger the requirement.[104] This exception permits federal agencies to swiftly respond to confusion by issuing interpretive guidance to help affected parties better comply with the laws and regulations enforced by the agencies. This exception allows an agency to operate unbridled by procedural constraints unless it seeks to impose a new rule on affected parties, in which case the agency must first subject the new rule to notice-and-comment.

The text of the APA is of little help in determining what constitutes a legislative rule for the purposes of the notice-and-comment requirement.[105] Accordingly, agencies and affected parties

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100. *See* M. Wood, *D.C. Circuit Has Special History Among Appeals Courts, Roberts Says*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW (Apr. 26, 2005), http://www.law.virginia.edu/html/news/2005_spr/roberts.htm (last visited May 17, 2012) (indicating that, due to the D.C. Circuit's "extensive body of administrative law," it is a preferred forum for administrative and regulatory cases).

101. Sprint Corp. v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1028 (D.C. Cir. 1978).

102. *Sprint*, 315 F.3d at 373.

103. 5 U.S.C. § 553(b)(3)(A) (2006).

104. *Sprint*, 315 F.3d at 373.

105. It is useful to refer to agency rules that are subject to APA notice-and-comment procedures as "legislative rules" because they seek to bind affected parties with the force of law much like an act of the Legislature would. Likewise, it is useful to refer to those agency actions that are excepted from notice-and-comment procedures as "interpretive rules," "interpretive guidance," or "policy

must look to the judiciary for guidance on which actions ought to undergo notice-and-comment procedures. While the Supreme Court has not explicitly prescribed a determinative test for solving this problem, persuasive case law promulgated by the D.C. Circuit indicates that agency statements which impose obligations upon private parties, or which establish mandatory regulatory standards, are legislative and ought to be subject to notice-and-comment procedures.[106] Additionally, some rules which an agency characterizes as "interpretive rules" may actually be legislative in nature if the "interpretation" provides meaning to vague terms of a previously issued regulation, such as "equitable" or "fair."[107] Such rules must be subjected to notice-and-comment under the APA.

The D.C. Circuit is not alone in the way it distinguishes legislative rules from interpretive guidance. Given the D.C. Circuit's de facto expertise in the field of administrative law,[108] many other courts have followed its lead.[109] The rulings of these courts also

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statements." *See* Anthony, *supra* note 99, at 1327 (noting that the proper question to ask concerning whether a document is a legislative rule or not is if the issuing agency intended the documents to be binding).

106. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301–02 (1979) (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)) (noting that an important characteristic of substantive rules, as opposed to interpretive rules, is whether or not the rule "affect[s] individual rights and obligations"); Syncor Int'l. Corp. v. Shalala, 127 F.3d 90, 94–95 (D.C. Cir. 1997) (observing that an agency's policy statements, which are not subject to the notice-and-comment requirement, merely reflect that agency's position on a matter and serve to inform the public on its current understanding of a policy, and that a substantive rule, however, is one which modifies or adds to a legal standard based on the authority delegated to the agency by Congress); McLouth Steel Prod. Corp. v. Thomas, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (ruling that if an agency statement constrains the agency's discretion, then it also creates rights or obligations for affected parties, thereby triggering the notice-and-comment requirement); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (holding that the FDA's action levels are legislative rules subject to the notice-and-comment requirement because the use of the word "will" creates a binding obligation upon the Agency).

107. *Syncor*, 127 F.3d at 94 (citing Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997)).

108. Wood, *supra* note 100.

109. *See, e.g.*, Warshauer v. Solis, 577 F.3d 1330, 1337 (11th Cir. 2009) (quoting *Syncor*, 127 F.3d at 94–95) (remarking that a legislative rule creates new duties, while an interpretive rule "typically reflects an agency's construction of a statute" that does not "*modif[y]* or *add[]* to a legal norm based on the agency's

comport with the distinction between legislative and interpretive rules drawn by the Office of Management and Budget (OMB). In its "Final Bulletin for Agency Good Guidance Practices," the OMB wrote that agency guidance statements are not to be "improperly treated as legally binding documents."[110] To that end, the OMB stated that mere guidance documents "should not include mandatory language such as 'shall,' 'must,' 'required,' or 'requirement,' unless the agency is using these words to describe a statutory or regulatory requirement, or the language . . . will not foreclose consideration . . . of positions advanced by private parties."[111] The OMB recommended that to avoid triggering the notice-and-comment requirement, agencies should include language to indicate that its guidance documents only represent the agency's current thinking and do not purport to bind the public.[112] Thus, when an agency's "guidance document" is couched in mandatory language that imposes an obligation on the public, it is not a true guidance document. Instead, it is a rule that must be subjected to notice-and-comment under the APA.

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own authority") (emphasis in original); Sorenson Commc'ns., Inc. v. FCC, 567 F.3d 1215, 1222–23 (10th Cir. 2009) (holding that an agency's own characterization of whether its action is legislative or interpretive is not dispositive of the issue and that a rule is legislative when it imposes new rights or duties); Manufactured Hous. Inst. v. EPA, 467 F.3d 391, 399 (4th Cir. 2006) (disregarding the EPA's characterization of a certain regulation as non-legislative when it could be shown that the regulation actually did carry the force of law and had legally binding consequences); SBC Inc. v. FCC, 414 F.3d 486, 497 (3d Cir. 2005) (citing *Sprint*, 315 F.3d at 374); N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128, 131 (2d Cir. 2001) (citing White v. Shalala, 7 F.3d 296, 303 (1993)) (defining legislative rules as those which create new duties, and interpretive rules as those which clarify existing duties); Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 628 (5th Cir. 2001) (approving of the D.C. Circuit's distinction between interpretive and substantive rules); Bd. of Trs. of Knox Cnty. Hosp. v. Shalala, 135 F.3d 493, 501 (7th Cir. 1998) (stating that interpretive rules are statements concerning what an administrative officer *thinks* a statute or regulation means).

110. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432–33 (Jan. 25, 2007).

111. *Id.* at 3436.

112. *Id.* at 3437.

C. OCR Should Subject the April 4 Mandate to Notice-and-Comment as a Matter of Law and Policy

OCR would be well-advised to subject its April 4, 2011 preponderance of the evidence mandate to the notice-and-comment provisions of the APA. OCR maintains that it did not impose a new obligation in the April 4 letter because the letter simply clarified a regulation that was already in effect.[113] Consequently, OCR did not subject the contents of the letter, including the standard of proof mandate, to formal rulemaking procedures under the APA. However, courts have noted that little deference is paid to how an agency characterizes its own rule, whereas much is paid to the language of the rule in question.[114] The Supreme Court has held that an agency's regulation "must . . . be the product of certain procedural requisites" found in the APA in order to have the force of law.[115] Indeed, regulations subject to the APA cannot bind the public until they have undergone notice-and-comment as laid out in the APA.[116] The Supreme Court made this even more clear in *Auer v. Robbins*, holding that, "[a] court may certainly be asked by parties . . . to disregard an agency regulation . . . that appears . . . to have been issued in violation of procedural prerequisites, such as the 'notice-and-comment' requirements of the APA."[117] Accordingly, courts have not hesitated to enforce the notice-and-comment requirements of the APA.[118]

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113. Dear Colleague Letter, April 4, 2011, *supra* note 4, at 1 n.1. OCR included a footnote in its April 4, 2011 letter which claimed that the letter was only a "significant guidance document," that it merely informed the public about their rights, and that it did "not add requirements to applicable law."

114. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 312–15 (disagreeing with the Secretary of Labor's characterization of a Department regulation as a "solely . . . interpretive rule[]" and holding that the regulation was not binding since it did not comply with APA requirements); *Manufactured Hous. Inst.*, 467 F.3d at 399 (disregarding an agency's characterization of its regulation as non-legislative when the language of regulation indicated it carried the force of law).

115. *Chrysler Corp.*, 441 U.S. 281 at 301–03.

116. *Id.* at 313.

117. Auer v. Robbins, 519 U.S. 452, 459 (1997).

118. *See, e.g.*, Preminger v. Sec'y of Veterans Affairs, 632 F.3d 1345, 1350 (Fed. Cir. 2011) ("An agency's failure to comply with notice-and-comment procedures, when required, is grounds for invalidating a rule."); N.Y. State Elec. &

With its April 4 "Dear Colleague" letter, OCR imposed an obligation on all institutions receiving federal financial assistance: in order to comply with Title IX, institutions *must* use a preponderance of the evidence standard of proof when evaluating claims of sexual harassment and sexual assault. Regardless of how OCR characterized its letter, the rule marks a substantial change in policy and revokes a liberty that educational institutions once had. Accordingly, it is likely that if an affected party brought suit challenging OCR's characterization of the April 4 letter as interpretive guidance, a court would set aside the preponderance of the evidence mandate until OCR complied with the proper requirements of the APA.

Even if a court were to find that the April 4 mandate was purely interpretive in nature, it would be prudent for OCR, as a matter of policy, to open up the preponderance of the evidence rule to comment by affected parties. With its April 4 "Dear Colleague" letter, OCR intruded into an area of institutional policymaking in which it had never ventured before. Colleges and universities have long been afforded the educational autonomy to shape their own disciplinary procedures to comport with their respective educational missions.[119] University students, professors, and administrators could all benefit from the ability to engage in a public exchange with OCR over the positives and negatives of taking a nationwide, top-down approach to setting collegiate disciplinary policy. OCR itself could also benefit from engaging in a public dialogue with affected parties, as feedback on proposed regulations tends to help agencies better tailor their regulations and avoid excesses that might intrude on institutional and individual rights.

Temporarily rescinding the new policy would also encourage affected colleges and universities to enter the debate and weigh in about the effects of the new mandate in an honest and forthright manner. While some organizations and commentators have openly

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Gas Corp. v. Saranac Power Partners, L.P., 267 F.3d 128, 131 (2d Cir. 2001) ("The APA empowers federal courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law . . . .'" (quoting Zhang v. Slattery, 55 F.3d 732, 744 (2d Cir. 1995)); S. Cal. Aerial Advertisers' Ass'n. v. FAA, 881 F.2d 672, 677 (9th Cir. 1989) ("A substantive rule is invalid if the agency has failed to comply with APA requirements.").

119. *See supra* Part II.A (explaining universities' authority over discipline of students).

voiced their opposition to the mandate, universities themselves have been reluctant to defend their right to exercise control over their disciplinary policies in a way that comports with traditional notions of institutional sovereignty. It is possible that universities currently shy away from challenging OCR on this front because of the wide discretion OCR has in opening compliance investigations against institutions, as well as OCR's ability to begin proceedings to terminate a university's federal funding.[120] By suspending enforcement and subjecting the April 4 mandate to the notice-and-comment procedures of the APA, affected institutions will feel free to voice any misgivings they may have regarding the new policy. Knowing that their federal funding is not in jeopardy, institutions aggrieved by the new policy will be encouraged to challenge the rationale advanced by OCR for the preponderance mandate and engage OCR in the type of pre-enforcement dialogue that the framers of the APA envisioned. Opening up the April 4 mandate to public comment would identify potential compromises, and help OCR draft a policy that addresses the problems of sexual harassment and sexual assault on campus without doing violence to student due process rights.

V. CONCLUSION

As a result of increased federal funding in higher education, the doctrine of *in loco parentis* has declined, and the government has assumed a greater role in the administration of the university campus. The federal government is able to enact its policies on university campuses by handing out billions of dollars in grants and conditioning the money on compliance with certain regulations. On April 4, 2011, the Department of Education's Office for Civil Rights declared that, in order to comply with Title IX, all colleges and universities must use the preponderance of the evidence standard when adjudicating claims of sexual harassment—including allegations of sexual violence. This blanket rule runs the serious risk of violating student property and due process rights, because students

120. 20 U.S.C. § 1682 (2006).

who face expulsion or other serious sanctions may be entitled to more procedural protections than the preponderance standard affords. Accordingly, OCR would be well advised to temporarily cease enforcement of the mandate and subject it to comment by the affected public. A well-documented public dialogue could help the agency formulate better solutions to the sexual harassment and sexual assault problems found on college campuses—solutions that also pose less danger to student rights.

Tricks and Traps of Pre-Arbitration Discovery

Jessica B. Pulliam*

I. INTRODUCTION

Texas is at the forefront of allowing potential litigants to investigate their claims prior to filing suit. The Texas pre-suit discovery rule stands in contrast to the federal rule. The federal regime allows pre-suit discovery only for the purpose of preserving evidence that may otherwise be lost.[1] Academics and commentators have suggested that Texas's approach to pre-suit discovery should be adopted more broadly.[2] They claim that access to investigatory pre-

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1. FED. R. CIV. P. 27.

2. Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 217, 279 (2007).

suit discovery has an important relationship with the access to justice.[3] They also contend that pre-suit investigatory discovery rules lead to early resolution of disputes and may avoid the expense of litigation.[4]

But what happens when the potential dispute is governed by an agreement to arbitrate? Should a party be entitled to invoke the judicial process to investigate potential claims when it has agreed to submit such claims to arbitration?

When the goals of pre-suit investigatory discovery and the right to arbitrate collide, this article argues that the touchstone should always be the intent of the parties to the arbitration agreement. This is consistent with the Federal Arbitration Act, the "primary purpose [of which] is to ensure private agreements to arbitrate are enforced according to their terms, no more, no less."[5]

II. SCOPE OF PRE-SUIT DISCOVERY VARIES ACROSS JURISDICTIONS

Almost all jurisdictions allow potential parties to seek discovery prior to the filing of claims. In most jurisdictions, the rules allowing for such pre-suit discovery are limited to discovery for the purpose of preserving evidence. In a few states, of which Texas is the most representative, parties may petition the court for pre-suit discovery for the broad purpose of investigating a potential claim. A minority of states take the middle-ground approach by allowing investigatory pre-suit discovery for certain limited purposes.

A. Pre-suit discovery only for preservation of evidence

Federal Rule of Civil Procedure 27 typifies the majority approach. Under Rule 27, a party may petition a court for permission to take a deposition "to perpetuate testimony about any

3. *Id.* at 217, 217–18, 278–79.

4. Jeffrey J. Kroll, *The Art and Science of Presuit Discovery*, TRIAL, Mar. 2009, at 28–29, *available at* www.kroll-lawfirm.com/ docs/ trial_presuit_ discovery.pdf.

5. *In re* Olshan Found. Repair Co., 328 S.W.3d 883, 889 (Tex. 2010) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

matter cognizable in a United States court."[6] Federal courts have stated that "[u]nlike other discovery rules, Rule 27(a) allows a party to take depositions *prior* to litigation if it demonstrates an expectation of future litigation, explains the substance of the testimony it expects to elicit and the reasons the testimony is important, and establishes a risk that testimony will be lost if not preserved."[7] Federal courts construe this rule narrowly and allow a pre-suit deposition only when the petitioner shows that the testimony may be lost if not taken immediately.[8] Accordingly, courts have observed that Rule 27 is not intended for use in investigating a potential claim or "as an aid to help counsel frame a complaint."[9]

Most states have adopted a similar rule and have interpreted it accordingly. Many states, including Alaska, Arizona, Arkansas, California, Florida, Iowa, Kansas, Michigan, Minnesota, New Mexico, Rhode Island, and Vermont, have rules that are substantively identical to Rule 27.[10] The rules in some of these states expressly disallow the use of pre-suit depositions for the purpose of discovery. For example, the rule in California states "[o]ne shall not employ the procedures of this chapter for the purpose of either ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made

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6. FED. R. CIV. P. 27(a)(1).

7. Penn Mut. Life Ins. v. United States, 68 F.3d 1371, 1373–74 (D.C. Cir. 1995).

8. *In re* Landry-Bell, 232 F.R.D. 266, 267 (W.D. La. 2005) (stating that Rule 27 cannot be used as a vehicle for pre-suit discovery in order to determine compliance with Rule 11 regarding the filing of frivolous claims).

9. *In re* Yancy, No. MISC.A. 00-1657, 2000 WL 1515179, at *2 (E.D. La. Oct. 11, 2000) (explaining that Rule 27(a) was not designed to help attorneys frame a complaint). *See also* Jackson v. Good Shepherd Servs., 683 F. Supp. 2d 290 (S.D.N.Y. 2009) (holding that a terminated school employee, who had not yet filed Title VII suit against employer, would not be allowed pre-action discovery since there was no risk that testimony of school staff, incident reports, or a videotape of an alleged incident at school would be lost if not preserved, as required to meet the rule for perpetuating evidence prior to filing of an action); *In re* Wharton, No. 88-0535, 1988 WL 134676, at *1 (E.D. Pa. Dec. 13, 1988) (indicating that "it is well settled" that Rule 27(a) is not a tool of discovery for ascertaining facts in order to frame a complaint).

10. ALA. R. CIV. P. 27; ARIZ. R. CIV. P. 27; ARK. R. CIV. P. 27; CAL. CIV. PROC. CODE § 2035.010–2035.060 (West 2011); FLA. R. CIV. P. 1.290; IOWA R. CIV. P. 1.725; KAN. STAT. ANN. § 60-227 (2011); MICH. R. CIV. P. 2.303; MINN. R. CIV. P. 27; N.M. DIST. CT. RCP RULE 1-027; R.I. GEN. LAWS § 9-18-12 (2012); VT. R. CIV. P. 27.

parties to an action not yet filed."[11] In both Iowa and Kansas, the pre-suit discovery rule requires the court to be satisfied not only that the deposition would prevent a failure or delay of justice but also that it is "not for the purpose of discovery."[12]

Other states, including Hawaii, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, and Oklahoma, have adopted rules almost identical to Rule 27, but the rules in these states also allow inspection of documents and/or physical and mental exams.[13]

B. Limited investigatory pre-suit discovery

Some states allow pre-suit discovery concerning a particular subject matter. For example, Colorado Rule of Civil Procedure 27 is similar to the federal rule but also allows a petitioner to bring an action to determine title to property or settle other matters, including birth, death, descent, or heirship prior to the filing of a suit.[14]

Illinois Rule of Civil Proceedings 217 allows a petitioner to preserve testimony regarding land boundaries, marriage or pedigree of any person, as well as the names or former names of portions of places that may bear on future land claims.[15]

New Jersey Rule 4:11-1 is similar to the federal rule except that the court may also grant the deposition to allow the petitioner to comply with a statute requiring within 60 days of the answer an affidavit of merit from an expert stating that there is a reasonable probability that the defendant's negligence caused the injury.[16]

The New York statute allows pre-suit disclosure "to aid in bringing an action, to preserve information or to aid in arbitration"

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11. CAL. CIV. PROC. CODE §§ 2035.010–2035.060 (West 2011).

12. IOWA R. CIV. P. 1.725; KAN. STAT. ANN. § 60-227(3) (2011).

13. HAW. R. CIV. P. 27; IND. R. CIV. P. 27; LA. CODE CIV. P. ANN. art. 1429 (2011); ME. R. CIV. P. 27; MASS. R. CIV. P. 27; MISS. R. CIV. P. 27; MO. R. CIV. P. 57.02; MONT. R. CIV. P. 27; NEB. CT. R. DISC. § 6-327; NEV. R. CIV. P. 27; N.C. R. CIV. P. 27; N.D. R. CIV. P. 27; OKLA. STAT. ANN. tit. 12, § 3227 (2012); OR. R. CIV. P. 37; S.C. R. CIV. P. 27; S.D. CODIFIED LAWS § 15-6-27 (2012); TENN. R. CIV. P. 27.01; UTAH R. CIV. P. 27; WASH. SUPER. CT. CIV. R. 27; W. VA. R. CIV. P. 27; WIS. STAT. § 804.02 (2011); WYO. R. CIV. P. 27.

14. COLO. R. CIV. P. 27.

15. ILL. SUP. CT. R. 217. *See also* ILL. SUP. CT. R. 224 (allowing limited pre-suit discovery to determine the identity of persons who may be responsible for damages).

16. N.J. SUPER. CT. R. 4:11-1.

and permits a court to appoint a referee to take testimony.[17] Though the statute is susceptible to an interpretation that would allow for pre-suit discovery for the purposes of investigating a potential claim, the New York courts have historically interpreted this statute narrowly.[18] Courts refuse to allow its use "by a prospective plaintiff to ascertain whether he has a cause of action at all"[19] or to determine whether "facts exist sufficient to create a meritorious cause of action."[20]

C. Broad investigatory pre-suit discovery

A small number of states allow pre-suit discovery to investigate potential claims.

Ohio has a rule similar to Federal Rule 27 allowing for the preservation of evidence through pre-suit discovery, another rule allowing a party to ascertain the identity of a potential defendant, and yet another rule allowing a party who is "unable to file his complaint . . . without discovery of a fact from the adverse party" to petition a court for such discovery.[21]

Though Florida's rule is, like the federal rule, limited to preservation of evidence,[22] the Florida courts recognize a prospective party's right to bring an equitable bill of discovery "to obtain the disclosure of facts within the defendant's knowledge or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court."[23]

Similarly, Alabama's rule is substantively identical to the federal rule.[24] But the Alabama courts have interpreted the rule broadly to allow for discovery into potential claims.[25]

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17. N.Y. C.P.L.R. § 3102 (MCKINNEY 2011).

18. *See* Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 A.D.2d 346, 347 (N.Y. App. Div. 2000) ("CPLR 3102(c) . . . cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all.").

19. *Id.*

20. *In re* Pelley, 252 N.Y.S.2d 944, 945–46 (N.Y. Cnty. Ct. 1964).

21. OHIO REV. CODE § 2317.48.

22. FLA. R. CIV. P. 1.280.

23. First Nat'l Bank of Miami v. Dade-Broward Co., 171 So. 510, 510–11 (Fla. 1937). *See also In re* Ezell, 446 So.2d 253, 254–56 (Fla. Dist. Ct. App. 1984) (recognizing the right to bring equitable bill of discovery).

24. ALA. R. CIV. P. 27.

Texas has the broadest pre-suit discovery rule. Its rule allows for "taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."[26]

Before a trial court allows Rule 202 discovery, it must find that "the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure."[27] The comments to the rule state that it "is equitable in nature, and a court must not permit it to be used inequitably."[28]

The Supreme Court of Texas has observed that "[t]he intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly" and that "judges should maintain an active oversight role to ensure that [such discovery is] not misused."[29] In another case, that court noted: "Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule."[30]

Though the state's high court has stated that "Rule 202 depositions . . . never have been intended for routine use,"[31] actual use of the rule is no rarity. For example, one academic found that a total of 980 Rule 202 petitions were filed in two of Texas's largest counties within five years of the rule's enactment.[32] In a survey of lawyers, he found that Rule 202 was reported to be used about 40% of the time for the purpose of perpetuating a witness's testimony and around 60% of the time for investigating a potential or anticipated suit.[33]

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25. *See* Young v. Hyundai Motors, 575 F. Supp. 2d 1251, 1253 (M.D. Ala. 2008) (stating that although Rule 27's stated purpose is the perpetuation of testimony, it has been construed to allow pre-suit discovery for the purpose of investigating a potential claim); *Ex parte* Anderson, 644 So.2d 961, 964–65 (Ala. 1994) (explaining that Alabama Rule 27 allows for pre-action discovery that is not contingent on preserving evidence).

26. TEX. R. CIV. P. 202.1.

27. TEX. R. CIV. P. 202.4(a)(2); *In re* Denton, No. 10-08-00255-CV, 2009 WL 471524, at *2 (Tex. App.—Waco Feb. 29, 2009, orig. proceeding) (mem. op.).

28. TEX. R. CIV. P. 202 cmt. 2.

29. *In re* Does 1 and 2, 337 S.W.3d 862, 865 (Tex. 2011) (citations omitted).

30. *In re* Wolfe, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding).

31. *In re* Jorden, 249 S.W.3d 416, 423 (Tex. 2008) (orig. proceeding).

32. Hoffman, *supra* note 2, at 253.

33. *Id.* at 254.

III. THE CONFLICT BETWEEN PRE-SUIT DISCOVERY AND AGREEMENTS TO ARBITRATE

Proponents of broad pre-suit investigatory discovery, such as that available in Texas, express concern over the barriers to file suit, including pleading requirements and the threat of sanctions for filing frivolous claims.[34] They contend that broad pre-suit investigatory discovery is consistent with and may be necessary because of these barriers.[35]

No matter which side one favors in the debate over the proper scope of pre-suit discovery, the question remains whether any such discovery should be allowed when parties to the potential dispute have agreed to arbitrate.

"Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.'"[36] Congress enacted the FAA "in 1925 in response to widespread judicial hostility to arbitration agreements."[37] Such judicial resistance continues more than 75 years later. In response to state court refusal to enforce arbitration agreements in a variety of contexts, the Supreme Court of the United States has in the last two years repeatedly reaffirmed that there is one and only one exception to enforcement of an arbitration agreement—when there is a reason to invalidate that agreement that would be sufficient to revoke any contract.[38]

The standards for enforcing an arbitration agreement when a suit has already been filed are well established. "Courts must place

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34. *Id.* at 245.

35. *Id.* (citing Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions*, Nov. 18, 1998, at G-17, http://www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf).

36. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011) (quoting 9 U.S.C. § 2).

37. *Id.* at 1745.

38. *See* Marmet Health Care Ctr. v. Brown, 132 S. Ct. 1201 (2012) (holding that even arbitration agreements for personal injury and wrongful death claims must be enforced unless there is some reason to invalidate the agreement); CompuCredit v. Greenwood, 132 S. Ct. 665 (2012) (ruling that suits under the Credit Repair Organization Act do not render arbitration agreements unenforceable); *Concepcion*, 131 S. Ct. at 1744 (stating that the FAA makes all arbitration agreements valid and enforceable unless there is a reason in law or equity to render the agreement invalid).

arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms."[39] When a valid arbitration agreement exists, and the claims in the suit fall within the scope of that arbitration agreement, the FAA requires the court to compel arbitration and stay all court proceedings:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[40]

Courts have less experience, however, determining the enforceability of arbitration agreements when the only proceeding before the court is not a lawsuit but is instead a petition for *pre*-suit discovery.

A. Discovery to determine arbitrability

Certain pre-arbitration, court-ordered discovery is typically not controversial when it is limited to aiding arbitration. Arbitrability of a dispute is generally an issue for the court, not an arbitrator.[41] When discovery is necessary, for example, to ascertain whether a valid arbitration agreement exists, such pre-arbitration discovery cannot be said to thwart the intention of the parties to an arbitration agreement. The FAA itself contemplates that such court-supervised pre-arbitration discovery is appropriate. In its provisions allowing a federal district court to enforce an arbitration agreement (in a dispute over which a federal court would have jurisdiction save the arbitration agreement), the FAA states:

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39. *Concepcion*, 131 S. Ct. at 1745 (internal citations omitted).
40. 9 U.S.C. § 3 (2006).
41. *Id.*

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.[42]

State courts have also noted that such pre-arbitration discovery concerning the issue of arbitrability is not inconsistent with their obligation to enforce arbitration agreements just as they would any other contract.[43]

B. Discovery to preserve evidence

A more difficult question concerns whether parties' agreement to arbitrate would prevent limited pre-arbitration discovery for the purpose of evidence preservation.

The leading case concerning pre-arbitration discovery under Federal Rule of Civil Procedure 27 to preserve evidence is *In re Deiulemar Compagnia Di Navigazione*.[44] There, a vessel charterer and the vessel's owner had a contract providing that the vessel would

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42. 9 U.S.C. § 4 (2006). *See also* Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999) ("The FAA provides for discovery and a full trial in connection with a motion to compel arbitration only if 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.'" (citing 9 U.S.C. § 4 (2006))); Alvarez v. T-Mobile, 822 F. Supp. 2d 1081, 1085, 1089 (E.D. Cal. 2011) (granting some discovery to determine arbitrability but denying discovery on substantive unconscionability defense because "it is violative of the spirit of the district judge admonition that discovery is to be speedy and limited"); O.N. Equity Sales Co. v. Cattan, No. V-07-70, 2008 WL 361549, at *5 (S.D. Tex. Feb. 8, 2008) (denying motion for limited discovery to determine arbitrability because "further discovery [is] not needed").

43. *See, e.g.*, *In re* Heritage Bldg. Sys., 185 S.W.3d 539, 542 (Tex. App.—Beaumont 2006, no pet.) ("[T]he FAA contemplates not just a stay of the trial, but a stay of the trial proceedings involving matters other than threshold issues such as whether the parties entered into a valid and enforceable arbitration agreement."). *See also In re* Houston Pipe Line Co., 311 S.W.3d 449, 451 (Tex. 2009) ("Pre-arbitration discovery is expressly authorized under the Texas Arbitration Act when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability.") (citing TEX. CIV. PRAC. & REM. CODE §§ 171.023(b), 171.086 (a)(4), (6) (West 2009)).

44. 198 F.3d 473 (4th Cir. 1999).

be kept in good working order and able to maintain a certain speed.[45] The charterer suspected that the vessel's engine was in disrepair and sought to exercise its right under the contract to inspect the ship while it was docked in Baltimore.[46] The owner denied the charterer's entry onto the ship, and the charterer filed a Rule 27 petition.[47] The owner opposed the motion on the ground that the parties agreed to arbitrate in London any disputes arising under the contract.[48] The district court granted the discovery and the Fourth Circuit affirmed.[49]

Although the Fourth Circuit acknowledged that the federal discovery rules ordinarily do not apply where the parties have agreed to arbitrate, it noted that "some lower courts . . . allow discovery in aid of arbitration 'where the movant can demonstrate extraordinary circumstances,' such as 'where a vessel with crew members possessing particular knowledge of the dispute is about to leave port,' or where there is a 'special need for information which will be lost if an action is not taken immediately.'"[50] The Fourth Circuit acknowledged such a special need in *Deiulemar* because the vessel owner denied the charterer access to the vessel, which was scheduled to leave U.S. waters.[51] The court specifically noted that, because of the rare circumstances, it did "not believe that [its decision would] 'risk a plunge into judicial control over arbitration' by affirming the district court's application of 'extraordinary circumstances.'"[52]

Key factors affecting the Fourth Circuit's ruling included proof that the charterer was not attempting to discover a claim but, instead, knew the substance of the evidence it sought to preserve before it invoked Rule 27.[53] Also critical to the Fourth Circuit's

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45. *Id.* at 477.

46. *Id.* at 477–78.

47. *Id.* at 478.

48. *Id.*

49. *Id.*

50. *Id.* at 479 (citing *In re* Deiulemar Di Navigazone, 153 F.R.D. 592, 593 (E.D. La. 1994)). *See also* Oriental Commercial & Shipping Co. v. Rosseel, 125 F.R.D. 398, 400 (S.D.N.Y. 1989) (indicating that discovery in aid of arbitration is permissible in extraordinary circumstances); Ferro Union Corp. v. SS Ionic Coast, 43 F.R.D. 11, 14 (S.D. Tex. 1967) (same).

51. *In re Deiulemar Compagnia Di Navigazione*, 198 F.3d at 479.

52. *Id.* at 481 n.10 (citing Suarez-Valdez v. Shearson Lehman/Am. Express, Inc., 858 F.2d 648, 649 n.1 (11th Cir. 1988)).

53. *Id.* at 485–86 ("A petitioner must know the substance of the evidence it seeks before it can invoke Rule 27 perpetuation.").

decision was the manner in which the district court had ordered the Rule 27 discovery.[54] The evidence was not taken by a representative of the petitioner and was sealed pending a decision by the arbitrator concerning whether to admit it.[55] This allowed the district court to preserve the arbitrator's ability to decide the admissibility of the evidence and avoided any risk that either party would get a peek at the merits of the case before arbitration.[56]

Courts construing the New York rule allowing for pre-suit discovery "in aid of arbitration" have similarly emphasized that such discovery is proper only to the extent the petitioner can demonstrate extraordinary circumstances in which evidence will be lost if not preserved. For example, in *In re Travelers Indemnity Company v. United Diagnostic Imaging*, the court reversed an order granting a petition to stay an arbitration proceeding in order to conduct discovery "in aid of arbitration."[57] The court observed that the New York rule allowing for "disclosure to aid in arbitration" is to be used "sparingly," only in "extraordinary" circumstances: "The test for ordering disclosure to aid in arbitration is 'necessity,' as opposed to 'convenience.' Thus, court-ordered disclosure to aid in arbitration is justified only where that relief is 'absolutely necessary for the protection of the rights of a party' to the arbitration."[58] Likewise, in *Geico General Insurance Company v. Weislee*, the court denied a petition for pre-arbitration discovery in part because the petitioner did not demonstrate that discovery was "absolutely necessary for the protection of its rights" or that "extraordinary circumstances" exist which necessitate disclosure.[59] The court noted that "the issue of entitlement to such discovery is properly one to be addressed in the arbitration proceeding, [as] 'the matter of disclosure is better handled directly between the parties in the arbitration rather than through resort to the courts.'"[60]

In jurisdictions where the right to pre-suit discovery is limited to the preservation of evidence, courts narrowly circumscribe

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54. *Id.* at 487.

55. *Id.*

56. *Id.* at 486 (noting that the "district court, therefore, did not abuse its discretion in implicitly finding that Deiulemar sought to perpetuate, rather than discover, the evidence . . . ").

57. 899 N.Y.S.2d 641, 641 (N.Y. App. Div. 2010).

58. *Id.*

59. No. 11558/11, 2012 WL 1580941, at *5 (N.Y. Sup. Ct. May 4, 2012).

60. *Id.* at *4 (citations omitted).

the availability of such discovery in the face of an agreement to arbitrate. The *Deiulemar* decision and the New York cases suggest at least three protections on which courts may rely to prevent pre-arbitration discovery from encroaching on the rights of a party to an arbitration agreement: (1) the discovery must be for purposes of preserving known evidence, not investigation; (2) the discovery would be lost and unavailable in arbitration if not preserved; and (3) the discovery must be obtained by someone other than the petitioner and then sealed so that the decision on its admissibility is preserved for the arbitrator.[61]

Even when such protections are in place, however, an order allowing such pre-arbitration discovery still may be at odds with an agreement to arbitrate. For example, parties could agree to arbitrate pursuant to rules allowing for a process by which an arbitrator, as opposed to a court, may oversee the preservation of evidence that may be lost prior to the arbitration proceeding. In all such circumstances, the intent of the parties as expressed in the arbitration agreement should guide the analysis.

C. Investigatory discovery

In jurisdictions allowing for pre-suit investigatory discovery, there is very limited authority discussing the conflict between these rules and arbitration agreements.

In *White v. Equity, Inc.* the Court of Appeals of Ohio reversed the trial court's decision granting a motion for stay pending arbitration in a proceeding combining a petition for discovery and a tort suit for spoliation of evidence.[62] The petitioner was a real estate agent who claimed she may be entitled to commissions from her former agency, Equity.[63] The agent claimed that Equity had denied her access to documents relating to the deals on which she could claim commissions.[64] She acknowledged that her agreement with Equity required determination of her commission claims by arbitration, but she argued she was unable to initiate an arbitration claim without discovery.[65]

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61. *In re* Deiulemar Compagnia Di Navigazione, 198 F.3d at 480, 487–89.
62. 899 N.E.2d 205 (Ohio App. 2005).
63. *Id.* at 207.
64. *Id.*
65. *Id.*

The court addressed the question "whether, before initiating arbitration proceedings, a plaintiff . . . may maintain an auxiliary action to discover facts necessary for pleading her claims in arbitration."[66] Construing the Ohio procedural rules at issue, the court noted that the purpose of those rules was "to allow a party who may have a cause of action to discover the grounds thereof before commencing an action" and to "act[] as a safeguard against charges that a plaintiff filed a frivolous claim where the alleged wrongdoer or third party has the ability to conceal facts that the plaintiff needs to determine the identity of the wrongdoer or exactly what wrong occurred."[67] The court held that "[a]n action for discovery is an auxiliary proceeding, separate from substantive claims referable to arbitration" and reversed the trial court's order staying the matter pending arbitration.[68]

The Texas courts are divided on the same issue that the Ohio court addressed in *White v. Equity*. In *In re Bill Heard Chevrolet*, a petitioner filed a proceeding for pre-suit discovery under Texas Rule of Civil Procedure 202, and the respondent moved to compel arbitration.[69] The trial court deferred ruling on the motion to compel arbitration and ordered that the pre-suit discovery should proceed.[70] The court of appeals reversed and remanded for consideration of the motion to compel arbitration.[71] It held that a "trial court has no discretion to delay the decision on the merits of arbitrability until after discovery" under Rule 202.[72]

In *Patton Boggs LLP v. Moseley*, a different Texas court of appeals took a different approach.[73] A petitioner sought pre-suit discovery under Rule 202, and the respondent both objected to the Rule 202 petition and also filed a motion to compel arbitration.[74] The trial court denied the motion to compel and ordered discovery

66. *Id.* at 210.

67. *Id.* at 211.

68. *Id.*

69. No. 14-05-00744-CV, 2005 WL 2787468, at *1 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.).

70. *Id.*

71. *Id.*

72. *Id.*

73. No. 05-11-01097-CV, 2011 WL 6849065, at *5–7 (Tex. App.—Dallas Dec. 29, 2011, no pet.).

74. *Id.* at *1–2.

under Rule 202.[75] The court of appeals granted mandamus relief with respect to the Rule 202 discovery but dismissed the appeal concerning the motion to compel arbitration for lack of jurisdiction.[76] The court of appeals recognized Rule 202's provision requiring a trial court to find that "the likely benefit of allowing the requested pre-suit discovery to investigate a potential claim outweighs the burden or expense of the procedure."[77] It further noted that the respondent's argument that the potential "claim or claims invoking the arbitration provision of the [parties'] agreement relates to the question of whether the trial court *could* properly make the required finding."[78] But the court stopped short of holding that Rule 202 investigatory discovery is improper when the potential dispute is governed by an arbitration agreement.[79] Instead, the court vacated the trial court's Rule 202 order on the more narrow grounds of the trial court's failure to make the necessary finding at all.[80] With respect to the motion to compel arbitration, however, the court dismissed the appeal for lack of jurisdiction.[81] It held that "[b]ecause the only proceeding before the trial court was a Rule 202 petition, the trial court had no jurisdiction to grant a motion to compel arbitration absent an agreement between the parties that the motion should be granted."[82]

The Ohio and Texas cases reveal that, in states where investigatory pre-suit discovery is recognized, there is a risk that parties to an arbitration agreement may nevertheless end up litigating discovery disputes at the courthouse. In these states, courts overseeing pre-suit discovery proceedings may not only refuse to enforce agreements to arbitrate but may also grant pre-suit discovery despite the parties' agreement to arbitrate. In most circumstances, either result would be contrary to the FAA's goals of "'ensur[ing]

75. *Id.* at *3.
76. *Id.* at *7.
77. *Id.* at *5.
78. *Id.* (emphasis in original).
79. *Id.* at *5–6.
80. *Id.* at *6.
81. *Id.* at *7.
82. *Id.*

that private arbitration agreements are enforced according to their terms.'"[83]

IV. OVERCOMING BARRIERS TO ENFORCING ARBITRATION AGREEMENTS IN THE FACE OF A PETITION FOR PRE-ARBITRATION COURT-ORDERED DISCOVERY

The Supreme Court of the United States has stressed repeatedly the strong policy favoring the enforceability of arbitration agreements. Its cases "place it beyond dispute that the FAA was designed to promote arbitration."[84] It has described the FAA as "embody[ing] [a] national policy favoring arbitration."[85] Making clear that this policy does not bend in the face of state law, it has noted that the "liberal federal policy favoring arbitration agreements" exists "notwithstanding any state substantive or procedural policies to the contrary."[86]

Yet state courts continue to refuse to enforce arbitration agreements despite this strong federal policy favoring arbitration.[87] Given the call for broader availability of pre-suit discovery by some academics and commentators, the pursuit of such discovery may increasingly clash with a court's obligation to enforce arbitration agreements as written. The following discussion examines the factors relevant to enforcement of an arbitration agreement in that context.

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83. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

84. *Id.* at 1749.

85. Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 443 (2006).

86. Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

87. *See* Patton Boggs LLP v. Moseley, No. 05-11-01097-CV, 2011 WL 6849065, at *5, *7 (Tex. App.—Dallas Dec. 29, 2011, no pet.) (holding that, when the only petition before the trial court was a Rule 202 motion, it had no jurisdiction to grant a motion to compel arbitration absent an agreement between the parties). *See also* White v. Equity, 899 N.E.2d 205, 211 (Ohio App. 2005) (reversing a trial court's order staying a matter pending arbitration).

A. *Dealing with the question of jurisdiction*

The first barrier to enforcing an arbitration agreement when no suit has been filed and when a petitioner has only sought pre-suit discovery is the question of the court's jurisdiction in such proceedings. Courts in Texas and Ohio have held that a court's jurisdiction in a proceeding in which a party merely seeks pre-suit discovery is limited to deciding that party's request and does not extend to determining a motion to compel arbitration.[88] These decisions are at odds with the FAA, which states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[89]

The FAA does not limit its application to lawsuits. Instead, the FAA requires federal district courts to enforce arbitration agreements in "any suit *or proceeding*" brought "upon any issue referable to arbitration."[90]

This provision of the FAA specifically mentions federal courts. It does not directly answer the question whether a state court must enforce an arbitration agreement in pre-suit discovery proceedings. To the extent the state procedural rules "stand[] as an obstacle to the accomplishment and execution of the full purposes

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88. *See, e.g.*, *Patton Boggs LLP*, 2011 WL 6849065, at *7 (holding that, when the only proceeding before the trial court was a Rule 202 petition, the court had no jurisdiction to grant a motion to compel arbitration without an agreement between the parties that the motion should be granted); *White*, 899 N.E.2d at 211 (ruling that a petition for pre-suit discovery does not present an issue referable to arbitration, and thus does not provide a basis for staying the petition pending arbitration).

89. 9 U.S.C. § 3 (2006).

90. *Id.* (emphasis added).

and objectives of Congress" in the FAA, such procedural rules are preempted.[91] No court has held, however, whether the FAA preempts a state court's refusal to enforce an arbitration agreement in the context of a proceeding in which a petitioner seeks pre-suit discovery.

In absence of such authority, parties seeking to enforce arbitration agreements may find support in state arbitration statutes.[92] Those statutes may allow a party to file a motion to compel arbitration in the context of a petition for pre-suit discovery. Under the Texas Arbitration Act, when arbitrability is established or undisputed, a court "shall order the parties to arbitrate," and that order must include a stay of "a proceeding that involves an issue subject to arbitration."[93] Nothing in the Texas statute suggests that pre-suit discovery proceedings are immune to motions to compel arbitration and the mandatory stay. To the contrary, like the FAA, the Texas statute does not exclude any proceeding (including those involving requests for pre-suit discovery) from the requirement that a stay must be entered pending arbitration pursuant to a valid arbitration agreement. Nevertheless, at least one Texas court has effectively concluded as much by holding that a court has no jurisdiction to decide an arbitration motion in a pre-suit discovery proceeding, while another Texas court has required that a motion to compel arbitration must be determined in such proceeding.[94]

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91. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477–78 (1989).

92. *See id.* at 472 (holding that the FAA did not prevent application of a California arbitration statute when the parties agreed to arbitrate in accordance with California law).

93. TEX. CIV. PRAC. & REM. CODE §§ 171.021(a), 171.025(a) (emphasis added). *See also In re* Houston Pipe Line Co., 311 S.W.3d 449, 452 (Tex. 2009) ("[T]he trial court abused its discretion by ordering this discovery rather than ruling on the legal issues raised by the motion to compel."); *In re* MHI P'ship, Ltd., 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) ("Delaying a decision on the merits of arbitrability until *after* discovery substantially defeats the policy behind section 171.021's abbreviated procedure, and it violates section 171.021's mandate to decide the issues summarily.") (emphasis in original).

94. *Compare* Patton Boggs LLP v. Moseley, No. 05-11-01097-CV, 2011 WL 6849065, at *7 (Tex. App.—Dallas Dec. 29, 2011, no pet.) (holding that, when the only proceeding before the trial court was a Rule 202 motion, court had no jurisdiction to grant a motion to compel arbitration without an agreement between the parties), *with In re* Bill Heard Chevrolet, No. 14-05-00744-CV, 2005 WL 2787468, at *1 (Tex. App.—Houston [14th Dist.] Oct. 27, 2005, no pet.) (holding

In light of the unsettled nature of the case law, there are two potential options available to a party seeking to enforce an arbitration agreement in the face of a petition for pre-suit discovery. First, that party should consider filing a separate action for enforcement of the arbitration agreement. In that action, the court would have jurisdiction to decide the motion to compel arbitration. The court deciding the motion to compel arbitration may then have jurisdiction to stay the separate proceeding in which the petitioner seeks pre-suit discovery.

Second, parties seeking to enforce an arbitration agreement should evaluate whether removal to federal court is possible. Section 1446(b) of Title 28 of the United States Code states that a notice of removal of a civil action "shall be filed within 30 days after the receipt by the defendant, through service *or otherwise,* of a copy of the initial pleading setting forth the claim for relief upon which such action *or proceeding* is based."[95] Then District Judge Sotomayor held that this language supported the removal of a pre-complaint discovery proceeding. There, the petitioner sought discovery to aid the framing of a complaint against the National Association of Securities Dealers.[96] Removal was proper because the statute contemplated the removal not just of suits, but also of other proceedings, and because an initial pleading in the proceeding provided notice of a claim for violation of the federal securities laws.[97] Removing a pre-suit discovery proceeding on the basis of federal jurisdiction over the claims is not without risk, however. When the primary goal is not to litigate the dispute in federal court but is instead to enforce an agreement to arbitrate, parties may face the argument that they waived the right to arbitrate. This type of waiver argument should not succeed, however, given that the parties

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that the trial court abused its discretion in ordering a Rule 202 deposition prior to ruling on a motion to compel arbitration).

95. 28 U.S.C. § 1446(b) (2006) (emphasis added).

96. Christian, Klein & Cogburn v. Nat'l Ass'n of Sec. Dealers, Inc., 970 F. Supp. 276, 278 (S.D.N.Y. 1997) (Sotomayor, J.) (denying motion for remand).

97. *Id. But see* Young v. Hyundai Motor Mfg. Alabama, LLC, 575 F. Supp. 2d 1251, 1253–54 (M.D. Ala. 2008) (granting motion for remand in a pre-suit discovery proceeding pursuant to the Alabama rule intended to ascertain the proper parties to suit and to determine whether a claim existed); Manhasset Grp. v. Banque Worms, No. 87 Civ. 3336, 1988 WL 102046, at *1 (E.D.N.Y. Sept. 20, 1988) (holding that the state petition for pre-action discovery was not an initial pleading for the purposes of federal removal under § 1446(b)).

to the arbitration agreement need a court to determine arbitrability, enforce the arbitration agreement, and enforce the arbitration award.[98]

B. Establishing that the agreement to arbitrate covers the petitioner's quest for pre-suit discovery

Even when there is no question about a court's jurisdiction to enforce an agreement to arbitrate, there may be a question about whether the arbitration agreement applies to a petition to investigate a potential claim. The party seeking to avoid arbitration may contend, for example, that the arbitration agreement does not apply because there is no claim or controversy. Instead, the petitioner may assert that he or she merely seeks discovery *to determine* whether a claim or controversy exists (all the while conceding that such a potential claim or controversy would be governed by the arbitration agreement).

Such arguments should be met with resistance. Accepting this reasoning would risk making arbitration agreements illusory. One party could prevent the arbitrator from having control over discovery simply by contending that it has not yet determined whether it has a claim. Mere assertions that the petitioner would be better positioned to determine whether to press a claim after pre-suit discovery should not determine whether a court enforces an arbitration agreement. A party is always in a better position to evaluate existing or potential claims after taking the opposing party's deposition or gathering relevant documents.

As always, the guiding principle in determining the applicability of an arbitration agreement should be the parties' intention expressed in the agreement to arbitrate. The most typical arbitration agreements—those calling for arbitration of "any controversy or claim"—are broad.[99]

A "claim" does not mean only a cause of action asserted in a lawsuit. The existence of a claim does not require a party to know all facts necessary for him or her to decide whether he wants to

98. 9 U.S.C. §§ 3–4, 9 (2006).

99. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967).

pursue the claim.[100] Texas courts, for example "ha[ve] never required that a plaintiff know all the essential facts before a cause of action exists."[101]

Furthermore, application of many arbitration agreements extend beyond mere claims to "controversies" and "disputes." A "controversy" encompasses a mere "disagreement or dispute" and does not require the existence of a full-fledged justiciable claim.[102] Courts have held in a variety of contexts that disputes may exist prior to the filing of any lawsuit.[103]

Determining whether a petition for pre-arbitration discovery comes within the scope of an arbitration agreement should not turn on the petitioner's subjective belief about whether it has a claim or its indecision about whether to press one. Instead, whether to enforce an arbitration agreement must turn on objective facts indicating the existence of a claim, controversy, dispute, or whatever the parties agreed to arbitrate. Questions about the existence of such claim, controversy, or dispute must be decided "with a healthy regard for the federal policy favoring arbitration."[104] As courts in Texas have held, "[o]nce an agreement is established, a court should not deny arbitration *unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue."[105]

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100. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (noting that FED. R. CIV. P. 8(a)(2) does not require detailed factual allegations, but that mere labels and conclusions will not suffice).

101. *In re* Jorden, 249 S.W.3d 416, 422 (Tex. 2008).

102. BLACK'S LAW DICTIONARY 354 (8th ed. 2004).

103. *See, e.g.*, Payne v. Edmonson, 712 S.W.2d 793, 798 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e) (explaining that negotiations before suing constituted a dispute); Hundere v. Tracy & Cook, 494 S.W.2d 257, 260–61 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (finding that a dispute existed when a client discharged an attorney over disagreements concerning the proper amount of a fee agreement).

104. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

105. *In re* D. Wilson Const. Co., 196 S.W.3d 774, 783 (Tex. 2006) (citations omitted) (emphasis in original).

C. Addressing the policy rationale behind rules allowing for investigatory pre-suit discovery

The justifications for investigatory pre-suit discovery concern access to justice in situations where a party is unable, without certain pre-suit discovery, to frame a claim that satisfies pleading standards or that avoids sanctions for filing a frivolous suit. Such justifications should not apply, however, where the subject matter of the pre-suit discovery proceeding is governed by a valid arbitration agreement. In other words, when parties have agreed to arbitrate a claim, controversy, or dispute, and the objective facts demonstrate that such claim, controversy, or dispute exists, then there are no policy considerations justifying a refusal to enforce the arbitration agreement.

The FAA does not recognize any reason to refuse enforcing an arbitration agreement other than such reasons that would invalidate any contract. Furthermore, the FAA preempts any state rule that interferes with resolution of a controversy as envisioned in the arbitration agreement.[106] Preemption applies to state laws addressing arbitration specifically.[107] For example, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA preempted California common law decisions finding arbitration clauses in consumer contracts unconscionable.[108] The Court reasoned that state-law rules affecting arbitration rights—such as "rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence"—would be contrary to the FAA's objectives.[109]

Preemption of the FAA also reaches generally applicable state laws impacting arbitration incidentally.[110] For example, in *Preston v. Ferrer*, the Court held that the FAA preempted a

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106. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 359 (2008) ("When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state law lodging primary jurisdiction in another forum, whether judicial or administrative.").

107. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

108. *Id.*

109. *Id.* at 1748.

110. *See, e.g.*, *Preston*, 552 U.S. at 347 (preempting a statute that merely delayed arbitration).

California statute giving the labor commissioner exclusive jurisdiction over disputes involving talent agencies.[111] *Preston* emphasized that even a statute which may have the effect of merely delaying arbitration is preempted.[112] The Court concluded that delaying arbitration is "in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'"[113]

A state procedural or common law rule allowing for pre-arbitration discovery to investigate potential claims that the parties agreed to arbitrate interferes with the resolution of the controversy as the parties intended. Assuming the arbitration agreement has a nexus with interstate commerce, such pre-arbitration discovery rule is preempted by the FAA no matter the policy reasons justifying the state procedural rule. As the Ninth Circuit has recently stated, "the very nature of federal preemption *requires* that state law bend to conflicting federal law—no matter the purpose of the state law."[114]

In situations where the FAA does not apply or a state court is resistant to a preemption argument, other common law arguments exist for denying pre-arbitration investigatory discovery. Although Texas has the most expansive rules allowing for pre-suit investigatory discovery of any other state, there are a number of Texas cases indicating that the justifications for pre-suit discovery do not trump other statutory or policy considerations.

For example, in *In re Jorden*, the Texas Supreme Court considered the conflict between the state's pre-suit discovery rule and the statute requiring an expert report prior to discovery in a "health care liability claim."[115] The court of appeals had held that pre-suit discovery of potential health care claims was proper because a pre-suit discovery petition asserts no "claim."[116] The Texas Supreme Court disagreed, holding that the pre-suit discovery rule must yield to the statute placing limits on discovery in healthcare

111. *Id.* at 349–50.

112. *Id.* at 347.

113. *Id.* at 357 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983)).

114. Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 962 (9th Cir. 2012) (emphasis in original).

115. *In re* Jorden, 249 S.W.3d 416, 420–22 (vacating order allowing Rule 202 deposition).

116. *Id.* at 421.

cases.[117] The Supreme Court rejected the petitioner's arguments that she had not filed any "claim," that the statute governing "health care claim[s]" did not apply, and that pre-suit discovery was necessary to avoid sanctions for filing a frivolous suit.[118] First, the court observed that the proper focus was not on whether the petition seeking discovery constituted a "claim" but on the statute restricting depositions in the anticipated suit.[119] That statute did not limit the definition of "'health care liability claim' to filed suits" and instead focused on the existence of a "cause of action."[120] The statute thus barred a deposition "intended to investigate a potential claim against a health-care provider."[121] Second, the court rejected the policy arguments—purported concerns that without pre-suit discovery, potential plaintiffs and counsel "run the risk of incurring sanctions for filing claims that turn out to be groundless."[122] The court reasoned: "Rule 202 depositions are not now and never have been intended for routine use" and, in any event, "sanctions rules do not require an attorney to be right; they require an attorney to make a reasonable inquiry."[123]

Similarly, the Texas Supreme Court in *In re Wolfe*, held that Rule 202 must not be used as "an end-run around discovery limitations that would govern the anticipated suit."[124] In other words, in determining whether to grant the requested discovery, courts may not look solely to the rule allowing for pre-suit discovery. Courts must also consider whether the discovery would go beyond limits on discovery in the anticipated suit; if so, such pre-suit discovery is improper.[125]

Finally, in *In re Hewlett Packard*, the Austin court of appeals granted mandamus and directed the trial court to vacate its order authorizing Rule 202 depositions, holding that the petitioner failed to show that the benefits of pre-suit discovery outweighed the

117. *Id.* at 422.
118. *Id.* at 422–23.
119. *Id.* at 421–22.
120. *Id.* at 421.
121. *Id.* at 422.
122. *Id.* at 423.
123. *Id.*
124. *In re* Wolfe, 341 S.W.3d 932, 933 (Tex. 2011).
125. *Id.*

substantial burden to the respondent.[126] The petitioner sought depositions of former employees it suspected were unlawfully disclosing trade secrets to a competitor.[127] It argued that the depositions would allow it to evaluate the merits of its claims, potentially sparing both parties the expense of a lawsuit.[128] The respondents countered that the depositions would be a "substantial burden"—not only "intrusive, expensive, and time-consuming," but also requiring disclosure of sensitive trade-secret information.[129] The court agreed, holding that the petitioner's cursory justification could not overcome the substantial burden demonstrated by the respondents, particularly where the policy of protecting trade secrets was implicated.[130] The court reasoned that "[a]llowing companies to conduct pre-suit depositions based solely on the possibility that a lawsuit may be avoided would allow companies to use Rule 202 to gain access to the trade secrets of competitors under the pretext of investigating suspected, but unknown, claims."[131]

The reasoning in these cases applies equally when a court is considering an application for pre-suit discovery to investigate a dispute covered by an arbitration agreement. As in *Jorden*, the court should not focus on whether the petition for pre-suit discovery constitutes a claim or whether such discovery is necessary to avoid filing a frivolous suit. The question is only whether an arbitration agreement exists and covers the dispute at issue. As described in *Wolfe*, pre-suit discovery rules should not be used to circumvent the discovery rules that would apply in an arbitration. And as in *Hewlett Packard*, a party should not be allowed to use pre-suit discovery rules as an end-run around legal obligations arising out of their agreement to arbitrate.

V. CONCLUSION

As the barriers to filing traditional lawsuits increase—

126. *In re* Hewlett Packard, 212 S.W.3d 356, 364 (Tex. App.—Austin 2006, pet. denied).

127. *Id.* at 359.

128. *Id.* at 361.

129. *Id.* at 361–62.

130. *Id.* at 362.

131. *Id.*

whether in the form of pleading requirements or sanctions for filing frivolous claims—calls for expanded pre-suit investigatory discovery will likely continue. The policy justifications for pre-suit investigatory discovery should have no impact, however, on the enforceability of an arbitration agreement. Arbitration agreements represent decisions by parties to remove their disputes from the judicial process. As a part of their agreement to arbitrate, the parties have already negotiated their access to discovery in resolving disputes between them. Accordingly, upon proof of a valid arbitration agreement, courts should enforce such agreements and stay any proceeding—particularly proceedings in which a party to an arbitration agreement seeks court-ordered discovery for any purpose other than to determine the arbitrability of the dispute.

The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials

Madelyn Chortek*

Both state and federal courts have rules of evidence that exist "so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[1] The rules of evidence are shaped by policy reasons, such as fairness,

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1. FED. R. EVID. 102.

and by attempts to improve fact-finding.[2] To that end, evidence may be admissible, inadmissible, or admissible for a limited purpose.[3] While limited purpose evidence and inadmissible evidence are two distinct types of evidence, both are mentally taxing on judges and juries who must disregard pieces of information when making decisions.[4] Since the psychological problem is the same, the term "impermissible information" will be used to describe both types of evidence for simplicity and clarity. If a jury hears impermissible information, the judge will give a limiting instruction.[5] When this instruction is given, or in some cases even if it is not given,[6] the error is considered harmless unless it can be proven otherwise.[7]

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2. *See* MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 12–15 (1997) (making a distinction between intrinsic evidentiary rules, which promote accurate fact-finding, and extrinsic evidentiary rules, which exclude relevant information in order to promote policy interests).

3. *See* FED. R. EVID. 104 ("The court must decide any preliminary question about whether . . . evidence is admissible."); FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

4. *See* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 687 (2000) (explaining that the use of limiting instructions and deliberation can allow juries to moderate the impact of impermissible evidence).

5. *See* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it . . . .").

6. United States v. Christian, 786 F.2d 203, 214 (6th Cir. 1986) (citing United States v. Ojukwa, 712 F.2d 1192, 1194 (7th Cir. 1983); United States v. DeLucca, 630 F.2d 294, 299 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981)) ("In the absence of a request by defense counsel for a limiting instruction, the failure of the trial court to give one is not reversible error.").

7. *See* FED. R. CIV. P. 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order."). *See also* FED. R. CRIM. P. 52 (making a distinction between harmless error and plain error, and noting that unless the error affected a substantial right of the defendant, the error is considered harmless). Appellate review in criminal cases is slightly different because the defendant's rights are constitutionally guaranteed.

Although psychological research concludes otherwise,[8] the United States Supreme Court decides cases based on a strong presumption that juries follow limiting instructions.[9] In *Lakeside v. Oregon*, the Court upheld the trial judge's limiting instruction regarding the defendant's decision not to testify over the defendant's objection.[10] The Court rejected the defendant's argument that the instruction would cause the jury to give more weight to that which he did not want them to consider and called the defendant's argument "dubious," stating that it rested on "speculative assumptions."[11] Similarly, in *Carter v. Kentucky*, which was decided a few years later, the Court held that the trial court should have given a limiting instruction about the defendant's failure to testify.[12] The Court reemphasized its belief in limiting instructions and stated, "We have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court."[13]

Despite the Supreme Court's belief in the jury's ability to follow instructions and ignore impermissible information, the number of jury trials has declined precipitously as a result of increasing skepticism about juries.[14] Lawyers and their clients may have more faith in judges' abilities to ignore impermissible information because judges have practice with such endeavors, generally have more education, and have background knowledge of

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8. *See infra* Part I (discussing psychological processes that explain why jurors are unable to follow limiting instructions).

9. *See* Richardson v. Marsh, 481 U.S. 200, 206 (1987) (discussing the "almost invariable assumption of the law that jurors follow their instructions").

10. 435 U.S. 333, 342 (1978).

11. *Id.* at 340.

12. 450 U.S. 288, 303 (1981).

13. *Id.* at 302 (citing Bruno v. United States, 308 U.S. 287, 294 (1939)).

14. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 18 (2004), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=57 ("[T]o some extent, fear of juries probably has contributed to the dwindling number of jury trials . . . ."). *See also* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 172 (2006) ("[J]ury trials are very much the exception rather than the rule, and this becomes more and more true every day.").

the law.[15] In addition to trusting judges to conduct bench trials and make decisions of both fact and law, some courts have gone even further and loosened evidentiary rules during bench trials because of this belief in judges' superior abilities.[16]

Despite these assumptions, the limited research available shows that judges fall prey to the same errors as jurors.[17] It is even more problematic when judges hear impermissible information for three main reasons: (1) parties may choose a bench trial when they would be better served by a jury trial,[18] (2) appellate courts are highly deferential to findings of fact,[19] and (3) there is less of a record for an appellate court to review.[20] Few scholars have considered the legal implications of this over-reliance on judges, and even fewer have considered them in conjunction with research on juries.

This Note reviews existing research and discusses this problem through the lens of behavioral law and economics ("BLE"). Contrasted with the traditional economic model, where all actors are rational, BLE uses a more realistic conception of human behavior to

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15. *See infra* Part II.A (elaborating further on the widespread faith in judges as fact-finders). *See also* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 113 (1994) ("Judges are generally depicted as masters of their biases, capable of controlling both their feelings and their reaction to whatever may transpire during the course of proceedings."); A. Leo Levin & Harold K. Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905, 906 (1971) ("[T]he judge, a professional experienced in evaluating evidence, may more readily be relied upon to sift and to weigh critically evidence which we fear to entrust to a jury.").

16. *See* DAMASKA, *supra* note 2, at 50 ("The prevailing argument is . . . that seasoned professionals need not shackle themselves to restrictive norms evolved to protect amateurs from certain classes of potentially hazardous information . . . ."); Schauer, *supra* note 14, at 165 ("Numerous American trial judges . . . essentially discard large chunks of the law of evidence when they sit without a jury.").

17. *See infra* Part II.C (discussing available research on judges' abilities to disregard inadmissible evidence).

18. *See infra* Part II.D (considering the legal implications of judges' biases for parties).

19. *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

20. *See* DAMASKA, *supra* note 2, at 51 ("[T]he judge is the sole decision maker, and he need not advance elaborate written reasons for his factual findings.").

examine legal problems and make recommendations.[21] This Note adds to the existing legal scholarship by using BLE research to suggest solutions for both juries and judges. Ultimately, it posits that parties may be better served by trials by juries rather than by judges.

Part I of this Note explains the psychological theories regarding why jurors are unable to follow limiting instructions, gives an overview of mock juror research, and discusses the legal implications. Part II discusses prevailing views of judges, reviews two studies on judges and impermissible information, and, again, considers the legal implications. Part III offers both jury-specific and judge-specific remedies as well as general remedies to counteract this problem. This Note concludes in Part IV by arguing that, despite prevailing assumptions, parties will be better served by jury trials rather than by bench trials.

I. PSYCHOLOGICAL EXPLANATIONS FOR JURORS' INABILITY TO FOLLOW LIMITING INSTRUCTIONS

"Preventing one's inference from overflowing into legally forbidden territory can even be a real psychological feat—if it is psychologically possible at all."[22]

During a jury trial, there are two situations in which a judge will offer a limiting instruction.[23] In the first, a witness or attorney may mention something that the jury cannot consider, such as

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21. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) ("The unifying idea in our analysis is that behavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior . . . .").

22. DAMASKA, *supra* note 2, at 33.

23. *See, e.g.*, FED. R. EVID. 105 (discussing the other type of limiting instruction—limiting the scope of otherwise admissible evidence: "If the court admits evidence that is admissible against a party—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly"); Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (describing one type of limiting instruction—when a jury inadvertently hears inadmissible evidence: "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it . . . ").

hearsay[24] or evidence that may have been excluded due to its prejudicial nature.[25] It is the trial judge's responsibility to prevent the jury from hearing inadmissible evidence to the extent possible,[26] and if the jury accidentally hears such evidence, the trial judge instructs the jury to disregard it.[27] In the second situation, the jury may only consider a piece of evidence for a limited purpose, such as evidence of the defendant's criminal history.[28] In this case, the past criminal history may be introduced as evidence of motive or intent, but it cannot be used to show the defendant's bad character or propensity to commit bad acts.[29] With this type of evidence, if requested, the judge must give an instruction to the jury that they can only consider the information for a limited purpose.[30]

A. Psychological Explanations for Juror Behavior

There are three major theories focused on why jurors fail to ignore inadmissible information, which will be discussed in turn: motivation-based theory, ironic mental processes, and mental contamination.

1. Motivation-Based Theory

Motivation-based theory, or reactance theory, is a social theory that researchers believe may explain why juries do not disregard impermissible information.[31] Reactance theory says that

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24. FED. R. EVID. 802.

25. FED. R. EVID. 403 (permitting a trial judge to exclude relevant evidence because "its probative value is substantially outweighed by the danger of unfair prejudice . . . ").

26. *See* FED. R. EVID. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

27. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 77 (1990).

28. FED. R. EVID. 404(b).

29. *Id.*

30. FED. R. EVID. 105.

31. *See* Barbara A. Spellman, Response, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. PENNUMBRA 1, 3–4 (2007), *available at* http://www.pennumbra.com/responses/03-2007/Spellman.pdf ("Thus, 'reactance' suggests that jurors would be unwilling to disregard evidence precisely because a judge tells them they *must* do so.") (emphasis in original).

when a juror hears an admonition or limiting instruction, he views it as an attempt to restrict his freedom.[32] As a result of this constraint, the juror is motivated to reassert his freedom and will consider the evidence specifically because the judge has told him to disregard it.[33] The idea behind this theory is that people are unwilling, rather than unable, to disregard that which they have been told to ignore.[34]

2. Ironic Mental Processes

Professor Daniel Wegner's theory of ironic mental processes explains that "individuals who attempt to suppress specific thoughts may fail precisely because of the effort they engage in to suppress those thoughts."[35] In other words, when a juror tries to suppress a thought or a piece of information, he monitors himself in order to make sure he is successful; however, the act of mental monitoring keeps the forbidden information available.[36] Furthermore, efforts to suppress the impermissible thought may actually increase thoughts about that topic (a "boomerang effect").[37] Unlike the motivation-based theory, the premise of this theory is that jurors are unable to disregard the information rather than simply unwilling to disregard it.[38]

3. Mental Contamination

Mental contamination is also premised on the idea that jurors are unable, rather than unwilling, to disregard that which they have been told to forget.[39] According to this theory, when jurors hear a piece of information, such information "contaminates" their thoughts in a way that persists even after they become aware that the

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32. *Id.* at 3; Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics,* 87 VA. L. REV. 1857, 1865 (2001).

33. Spellman, *supra* note 31, at 3–4; Diamond & Vidmar, *supra* note 32, at 1865.

34. Diamond & Vidmar, *supra* note 32, at 1865.

35. *Id.*

36. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1262 (2005).

37. *Id.* at 1263.

38. Spellman, *supra* note 31, at 4.

39. *Id.*

information may be problematic.[40] Mental contamination is particularly worrisome because "[t]he brain does not store information in isolated units, but in a connected whole . . . . People might not even realize how new information has affected their judgment and are thus ill-equipped to contain its influence."[41] Therefore, even though jurors may try to suppress these impermissible thoughts, the information will still affect their judgment.[42]

Several concepts fall under the general umbrella of mental contamination, including belief perseverance. Belief perseverance theory says that people incorporate new information into the knowledge they already possess.[43] It is hard to undo this incorporation even if the person later finds out that the information is false.[44]

A similar but separate theory is the halo effect. The halo effect captures the idea that when jurors hear unfavorable information about a person, they will infer other negative characteristics about that person.[45] The halo effect can be particularly problematic if jurors impermissibly hear about a defendant's past criminal record or bad acts; they may then infer that the defendant is guilty of the particular charged act.[46]

Finally, the hindsight bias also falls under the general mental contamination umbrella. The hindsight bias explains the tendency of a person to learn about a certain event or occurrence and then perceive the event as more likely or predictable than he would have thought it was ex ante.[47] For instance, in a negligence case, the jury

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40. Wistrich et al., *supra* note 36, at 1264.

41. *Id.* at 1264–65.

42. *Id.* at 1265.

43. *See id.* at 1267 (describing the belief perseverance process). *See also* Spellman, *supra* note 31, at 4 (discussing "story coherence," the idea that when people learn information that helps them make sense of other information, the information that pulls other things together becomes particularly difficult to forget).

44. Spellman, *supra* note 31, at 4.

45. *See Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L.J. 763, 777 (1961) [hereinafter *Other Crimes Evidence*] (citing a University of Chicago study indicating that jurors do not segregate evidence introduced for impeachment purposes).

46. *Id.*

47. Wistrich et al., *supra* note 36, at 1269.

might believe the harm was more reasonably foreseeable based on their knowledge that the harm actually occurred.

B. Mock Juror Research

The foregoing theories offer normative explanations for why jurors act in certain ways, and many psychologists have tested these theories in the context of limiting instructions. While the research on juries is too vast to cover in this Note, a brief overview shows the prevailing conclusion that jurors are unable to disregard impermissible information.

With a few exceptions, researchers are not allowed to observe or record actual jury deliberations.[48] As a result, the research on juries comes from simulations, post-trial interviews, surveys, observing shadow juries, and field experiments.[49] While some commentators question whether real jury members actually behave in ways consistent with mock jurors,[50] the limited research available on real juries confirms conclusions based on these simulations and surveys.[51]

The University of Chicago Jury Project was one of the first experiments on juries and admonitions.[52] This research concluded that jurors did not follow limiting instructions to consider evidence only for impeachment purposes; instead, the jurors concluded that the defendant was simply a bad man.[53] This research has been replicated in the context of illegally obtained criminal evidence,[54] in civil cases,[55] and in cases involving joinder,[56] where information

48. *See* Diamond & Vidmar, *supra* note 32, at 1866–68 (describing two instances in the past 30 years in which researchers have been allowed in the deliberation room).

49. *Id.* at 1868.

50. *Id.* at 1869.

51. *See id.* at 1866–68 (explaining results from the Arizona Jury Project, where the Arizona Supreme Court sanctioned videotaping and allowed researchers to view the tapes).

52. Tanford, *supra* note 27, at 86.

53. *See Other Crimes Evidence*, *supra* note 45, at 777 (demonstrating the halo effect).

54. *See* Tanford, *supra* note 27, at 86 (describing a study where the conviction rate increased by 35% when jurors were told to disregard evidence; however, when the evidence was introduced without comment the conviction rate only increased by 26%).

55. *Id.* at 87.

about one defendant spills over to the other, despite instructions to the contrary.

Some studies suggest that a limiting instruction has a "boomerang effect," where the information has more importance than if the judge had offered no limiting instruction.[57] A study by Saul M. Kassin and Samuel R. Sommers found that jurors were more likely to convict when they heard an inadmissible piece of information.[58] They further found that explaining to the jury why the evidence was inadmissible decreased conviction rates when the evidence was inadmissible due to reliability concerns.[59] However, they found that explanations based on due process concerns were less effective in getting the jury to disregard the information.[60] While explanations did not completely eliminate the boomerang effect, the effect was mitigated.[61] Kassin and Sommers concluded that jurors care more about justice than about due process,[62] that limiting instructions can have a boomerang effect,[63] and that although jurors cannot completely follow limiting instructions, explanations about inadmissibility can reduce that effect.[64]

While there have been a few studies that support the proposition that limiting instructions are effective in getting jurors to disregard impermissible information,[65] on the whole, there is consensus that "when people attempt to ignore inadmissible information of which they are aware in making decisions or arriving at judgments . . . they frequently will be unsuccessful."[66]

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56. *Id.*

57. *See* Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERS. & SOC. PSYCHOL. BULL. 1046, 1047 (1997) (giving an overview of the research).

58. *Id.* at 1049.

59. *Id.*

60. *Id.* at 1049–50.

61. *Id.* at 1049.

62. *Id.* at 1051.

63. *Id.* at 1053.

64. *Id.* at 1050.

65. *See id.* at 1047 (detailing studies that conclude people can disregard testimony that is later discredited). *See also* Wistrich et al., *supra* note 36, at 1274 ("Still [other studies] indicate that mock jurors can completely ignore information deemed inadmissible.").

66. Wistrich et al., *supra* note 36, at 1275.

C. Legal Implications

These jury failures have serious legal implications. Between 1958 and 1990 appellate courts approved use of limiting instructions in 21,000 cases, which translates to a 95% approval rate.[67] Trial judges and appellate courts must be extremely deferential to jury findings of fact.[68] Therefore, even though there is consensus that a jury will disregard these instructions and will either consider evidence it should not consider or do so in a way it should not consider it, the injured party has little hope of a remedy, as long as the jury's verdict was reasonable.[69]

As a result, lawyers advocating for parties who have been harmed by impermissible information face an untenable decision. The lawyer may object, in which case he must argue the specific grounds for his objection (why the evidence should be excluded or why a limiting instruction should be given).[70] In this case, the lawyer preserves error for appellate review,[71] but by objecting the lawyer may have drawn more attention to that which he does not want considered.[72] If the lawyer loses the case, he can argue on appeal that the impermissible information constituted error, but he is unlikely to succeed on this claim, given this precedential confidence in juries' abilities.[73] Conversely, the lawyer can choose to remain silent. In this case, the effect of the information on the jury is lessened, but if the lawyer loses, he cannot argue on appeal that the inadmissible evidence constituted error.[74]

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67. Tanford, *supra* note 27, at 95.

68. *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

69. *See* FED. R. CIV. P. 52(a)(6) (stating that the trial judge may only set aside the jury verdict if it is clearly erroneous).

70. *See* FED. R. EVID. 103(a)(1) (requiring a timely objection and a statement of the specific grounds for the objection).

71. *See* FED. R. EVID. 103(a)(1)(A) (requiring timely objection in order to preserve a claim of error).

72. *See supra* Part I.B (detailing the Kassin and Sommers study of the "boomerang effect").

73. *See supra* notes 10–13 and accompanying text (demonstrating precedential confidence in juries' abilities).

74. *See* Wilson v. Williams, 182 F.3d 562, 568 (7th Cir. 1999) (stating that if a timely objection is not raised, the reviewing court may only overturn the decision

Because of difficult decisions like the one illustrated above (and for other reasons), lawyers may decide that they are better served by trying their cases before a judge. However, as the section below discusses, judges may not be any better than juries at avoiding these psychological pitfalls, and in fact, the parties may be worse off as a result.

II. RESEARCH ON JUDGES AND LEGAL IMPLICATIONS FOR PARTIES

While there is increasing skepticism and distrust of juries, there is a widespread assumption that judges are better than juries at avoiding cognitive pitfalls.[75] The Supreme Court has not gone so far as to say judges are better, but it has presumed that judges are at least equally as capable. In *Harris v. Riviera*, the Court explained, "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries [to ignore information] . . . surely we must presume that they follow their own instructions when they are acting as factfinders."[76] Even more problematic than the fact that there is very little research to support this assumption,[77] many judges go further and loosen evidentiary rules (or ignore them altogether) when they sit without a jury.[78] If judges are actually no better than juries at following evidentiary rules, then exposing judges to impermissible information will be even more problematic than it is for juries

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if there was plain error, meaning a "miscarriage of justice"). *See also* FED. R. EVID. 103(e) (granting the court authority to take notice of plain error when a substantial right is affected).

75. *See* Landsman & Rakos, *supra* note 15, at 117 ("In both rhetoric and reality, 'mature' judges are treated as immune to bias and beyond the need for any sort of protection during either pretrial or trial proceedings.").

76. 454 U.S. 339, 346 (1981).

77. *See infra* Part II.C (giving an overview of existing literature).

78. *See* DAMASKA, *supra* note 2, at 50 (discussing the "weakening of the Anglo-American exclusionary regime in juryless trials"); Landsman & Rakos, *supra* note 15, at 117 ("When a judge sits without a jury, the rules of evidence are relaxed to the point of non-application."); Schauer, *supra* note 14, at 166 ("[M]any judges persistently treat the law of evidence as a counterproductive encumbrance to be jettisoned whenever possible.").

because the procedural safeguards of evidence law are eliminated.[79] This section discusses reasons why judges are presumed to be better, why they may actually be worse, the existing legal research available, and the legal implications for parties.

A. Reasons Judges May Be Better than Juries

There are many explanations why judges may be better than juries. As one legal scholar summarized the argument:

> [W]e assume that judges are less prone than juries to the cognitive and decision-making failures we worry about in jurors, possibly because judges are smarter, possibly because they are better educated, possibly because of their greater experience in hearing testimony and finding facts, and almost certainly because of their legal training and legal role-internalization.[80]

This argument has intuitive appeal. First, Kassin and Sommers found that juries were better able to follow instructions when they knew the reason behind the evidentiary exclusion.[81] Judges have background knowledge of the law, and they presumably know the reasons for the evidentiary rule; therefore, one would guess that generally, judges would be better able to ignore information they know they are supposed to ignore. Second, just as children are instructed when they are young, one might wonder if "practice makes perfect" in this context. Most people will serve on a jury once or twice, if ever, in their lifetimes. Judges, on the other hand, decide roughly as many trials as juries do[82] and will therefore have more opportunities to practice ignoring this information.

These rationales for judges' superior abilities only make sense in the context of the motivation-based theory. With better

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79. *See* Schauer, *supra* note 14, at 166 ("Numerous American trial judges . . . essentially discard large chunks of the law of evidence when they sit without a jury.").

80. *Id.* at 188.

81. Kassin & Sommers, *supra* note 57, at 1049.

82. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 781 (2001).

understanding of the law and more experience, judges may not feel that their freedoms are infringed upon in the same way that jurors do, or they may not be as motivated to reassert their freedom because they understand the reasons for the infringement. However, these reasons give no explanation for why judges would be better than juries according to ironic process theory or mental contamination, as both of those theories are premised on the idea that the task of ignoring acquired information is psychologically impossible.[83]

B. Reasons Judges May Be Worse than Juries

While it is unclear whether the differences between judges and juries will make judges better than juries in this area of evidence law, there are factors that may actually make judges worse. Judges may be worse than juries because they fall prey to the over-optimism bias and the egocentric bias, they act alone, and they are exposed to even more impermissible information than juries are.

1. Over-Optimism Bias and Egocentric Bias

People overestimate themselves and their abilities.[84] This overestimation plays out in different ways. First, the "above-average" effect refers to the fact that people on average believe that they are above average;[85] however, it is mathematically impossible for everyone to be above average. Researchers have replicated findings of the above-average effect in many different groups, such as college students, business leaders, and bungee jumpers.[86] In a survey of 155 judges, 87.7% of the judges surveyed "believed that at least half of their peers had higher reversal rates on appeal."[87] Again, it is mathematically impossible for over half of the judges to be better than the other 50%; some must be in the bottom half. This

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83. *See supra* Parts I.A.2 & I.A.3 (describing how attempts to suppress thoughts actually increase thoughts about the topic (ironic process theory) and how impermissible information affects other permissible information (mental contamination theory)).

84. David Dunning, Chip Heath & Jerry M. Suls, *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 PSYCHOL. SCI. PUB. INTEREST, no. 3, Dec. 2004, at 72.

85. *Id.*

86. *See id.* (reviewing research on the above-average effect).

87. Guthrie et al., *supra* note 82, at 814.

survey, while small in its sample, suggests that, in general, most judges believe they are above-average judges and that they will not be reversed on appeal.[88]

Second, people are overconfident in their judgments and fall prey to "overestimating the chances that their decisions about the present are sound."[89] Researchers have replicated this effect across a wide array of populations, such as college students, surgical trainees diagnosing x-rays, and clinical psychologists making diagnostic assessments.[90] If judges are overconfident in their decisions, they will think they are better than they are at ignoring impermissible information, and therefore, they may not try as hard to monitor their decision-making processes. Judges' overconfidence also can account for the fact that they sometimes ignore rules of evidence altogether.[91] If they believe they are superior at ignoring information, they may choose not to follow rules that they view as being established for lay jurors who do not posses the same level of skill. Additionally, judges may not recuse themselves when it is appropriate because they believe that they can make good decisions.[92]

Third, people make self-assessments that are egocentric, meaning they have inflated perceptions of their knowledge and cognitive abilities.[93] Researchers have correlated self-assessments of a skill against objective performance in many different cases, and most often the correlation is modest to meager.[94] A low correlation means that there is a wide disparity between perception and reality.[95]

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88. *Id.*

89. Dunning et al., *supra* note 84, at 73.

90. *Id.*

91. *See supra* note 78 and accompanying text (explaining how judges relax or disregard the rules of evidence).

92. Justice Scalia may serve as an appropriate example. Justice Scalia went on a duck-hunting trip with Dick Cheney three weeks after the Supreme Court agreed to hear a case where Cheney was a defendant. Justice Scalia refused to recuse himself and implied that he could disregard any bias since the case involved Cheney in an "official capacity" rather than a "personal capacity." Michael Janofsky, *Scalia's Trip with Cheney Raises Questions of Impartiality*, N.Y. TIMES, Feb. 6, 2004, at A14.

93. Dunning et al., *supra* note 84, at 71.

94. *See id.* at 71–73 (describing several different studies on self-assessments versus objective skills and finding weak correlations in almost all instances).

95. *Id.*

People also interpret information in a way that is self-serving.[96] Individuals will "engage in confirmatory mental searches for evidence that supports a theory they want to believe."[97] In the context of judges, a judge may interpret the fact that his decisions are not reversed as validation that he can ignore impermissible information. In reality, however, an appellate court may affirm a decision because they view an error as harmless rather than non-occurring.[98] The judge may view the appellate court's decision as validation of his superior abilities when, in fact, no such validation exists.

2. Judges Act Alone

When judges sit without a jury, they decide cases on their own.[99] Researchers have found that the process of discussion with others may moderate the impact of impermissible information.[100] Studies have compared aggregate jury verdicts and individual jury verdicts and found that when incriminating inadmissible evidence was presented, convictions were higher in individual jury verdicts.[101] Judges do not have an opportunity for de-biasing through discussion with others; therefore, judges may be more affected by impermissible information than jurors whose group deliberation and decision making may mitigate the evidence's damaging effects.

3. Judges See More Inadmissible Information than Juries

When a judge sits with a jury, the judge makes all legal and procedural rulings, and the jury makes the findings of fact.[102] When

96. Guthrie et al., *supra* note 82, at 812.

97. *Id.*

98. *See* FED. R. CIV. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

99. *See* FED. R. CIV. P. 39(b) ("Issues on which a jury trial is not properly demanded are to be tried by the court.").

100. Lieberman & Arndt, *supra* note 4, at 687.

101. *Id.*

102. *See* FED. R. CIV. P. 49 (stating that verdicts by jury decide issues of fact); FED. R. EVID. 104(a) (stating that a court decides what evidence is admissible).

a judge sits without a jury, the judge must do both.[103] During jury trials, there are procedures in place that attempt to limit the jury's exposure to inadmissible evidence such as in camera hearings and pre-trial motions.[104] In a bench trial, a judge must first make a decision about whether he can consider the evidence or not and then he must make the ultimate decision.[105] One argument for eliminating evidence law when judges sit without juries is the legal realist message "that even judges make their intermediate or nonultimate determinations with some awareness of how these [admissibility] determinations will affect their own view of who, at the end of the day, ought to win the case."[106] When judges first make rulings on admissibility and then make findings of fact, there are more opportunities for impermissible information to have an effect on the ultimate decision.

C. Existing Research on Judicial Decision-Making

While there are many studies on juries and limiting instructions, there are far fewer studies on the effect of inadmissible evidence and limited-purpose evidence on judicial decision-making.[107] Two studies, however, are fairly instructive and support the hypothesis that judges are at least equal to, if not worse than, jurors in their abilities to ignore certain information.

1. Landsman and Rakos Study

Landsman and Rakos surveyed a pool of 88 judges attending a judicial conference and 104 potential jurors waiting to be called for

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103. FED. R. CIV. P. 52.

104. *See* FED. R. EVID. 103(d) (requiring that precautions be taken so as to avoid the jury's exposure to inadmissible evidence).

105. *See* FED. R. EVID. 104(a) ("The court must decide . . . whether a witness is qualified, a privilege exists, or evidence is admissible."); FED. R. CIV. P. 52(a)(1) ("[W]ithout a jury . . . the court must find the facts . . . .").

106. Schauer, *supra* note 14, at 192.

107. *See* Guthrie et al., *supra* note 82, at 781–82 ("[F]ew systematic studies of judicial decision making exist . . . . Few have dealt with the sources of judicial error."). *See also* Schauer, *supra* note 14, at 188 ("[W]e still wait for experiments holding constant the nature of the evidence and manipulating (in the technical sense) the education, intelligence, role, and training of the fact finder in order to determine whether what we know and assume about jurors might apply to judges as well.").

voir dire.[108] They gave the survey takers one of three versions of a product liability case.[109] In the first survey, the subjects were not exposed to any potentially biasing material; in the second, they were exposed to the biasing material with a judicial decision to exclude it; and in the third, they were exposed to the material with a judicial decision to admit it.[110] These researchers found a significant effect comparing the verdicts of judges who were exposed and those who were not,[111] which means that the biasing material affected judges' decisions. They found the same effect for juries.[112] Most importantly, they found no difference between jury decisions and judicial decisions.[113] Both groups were equally affected by exposure to the biasing material.[114]

While this study is quite illustrative, it does have limitations. First, the judges themselves did not make admissibility rulings, and this fact could have exaggerated their psychological reactance.[115] Second, the jurors were instructed about the exclusion or admissibility of the biasing material in a way that was inconsistent with the way in which it would be presented at trial.[116] Jurors in the inadmissible information category were given a paragraph detailing the information and why it was inadmissible.[117] This would not happen in a trial, and it may have drawn more juror attention to the inadmissible evidence. Nevertheless, the study does have value as it illustrates that this juror problem can, and might, extend to judges.[118]

2. The Wistrich et al. Study

The Wistrich et al. study was much more expansive than the previous study. Researchers surveyed 265 judges at five different

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108. Landsman & Rakos, *supra* note 15, at 120.
109. *Id.*
110. *Id.*
111. *Id.* at 122.
112. *Id.*
113. *Id.* at 125.
114. *Id.*
115. Wistrich et al., *supra* note 36, at 1279.
116. To view the experimental prompt, see Landsman & Rakos, *supra* note 15, at 122 (dedicating a paragraph to the biasing material and explaining why it was or was not admitted).
117. Landsman & Rakos, *supra* note 15, at 122.
118. *Id.* at 125.

judicial conferences.[119] In the control group, the judges reviewed a fact pattern and made a substantive ruling.[120] In the experimental group, each judge first made an admissibility ruling on a piece of information and then had to make the substantive ruling.[121] In this regard, the study was more realistic than the Landsman and Rakos study, where admissibility was given.[122]

The researchers tested the judges in seven different scenarios[123] (which involved different types of inadmissible evidence): 1) settlement demands during a pretrial conference;[124] 2) information subject to the attorney-client privilege reviewed by the judge in camera;[125] 3) inadmissible sexual history in a case involving sexual assault;[126] 4) a presumptively inadmissible criminal record in a civil case;[127] 5) information obtained from a post-conviction cooperation agreement;[128] 6) the outcome of a search involving a probable cause determination;[129] and 7) a criminal

119. Wistrich et al., *supra* note 36, at 1279–80.

120. *Id.* at 1283–84.

121. *Id.* at 1284.

122. *See* Landsman & Rakos, *supra* note 15, at 120–21 (demonstrating that admissibility was given to the judges in the study).

123. *Id.* at 1283.

124. Compromise offers and negotiations are inadmissible. *See* FED. R. EVID. 408 (listing inadmissible forms of evidence).

125. The Federal Rules incorporate privileges elsewhere enumerated. *See* FED. R. EVID. 501 (stating that common law governs a claim of privilege unless otherwise provided for in the United States constitution, a federal statute, rules prescribed by the Supreme Court, or, in a civil case, state law).

126. Evidence of a victim's sexual history is inadmissible in a sexual assault case, both criminal and civil. *See* FED. R. EVID. 412 (prohibiting evidence of a victim's sexual history in a sexual assault case).

127. *See* FED. R. EVID. 404(b)(1) (prohibiting the use of a criminal record to prove character and to show an individual acted in accordance with that character on a particular occasion).

128. The federal sentencing guidelines prohibit the use of incriminating information provided by the defendant as part of a cooperation agreement. *See* U.S.S.G. 1B1.8 (2004) (prohibiting the use of incriminating information provided by the defendant as part of a cooperation agreement).

129. The Fourth Amendment prohibits unreasonable searches and seizures. Weeks v. United States, 232 U.S. 383, 393 (1914). The U.S. Supreme Court has held that the fruits of prohibited seizures are inadmissible under the Fourth Amendment. *Id.*

confession obtained after the defendant invoked his right to counsel.[130]

Looking at the study as a whole, the researchers found a significant difference between the control and experimental groups, meaning that the impermissible information affected judicial decisions.[131] The researchers further found that judges were more likely to make errors ignoring information when they were less likely to be reviewed.[132] This result is particularly problematic for parties because they were more affected by the information and the decision was more likely to be final. According to this study, judges fall prey to the same psychological pitfalls as jurors.[133]

Nevertheless, some findings were reassuring. The researchers found the judges better able to ignore impermissible information in the sixth and seventh scenarios,[134] where the reason the evidence was inadmissible was based on constitutional law.[135] If the reason for the exclusion was more salient to the judges, they could have been more motivated to follow the rule, which is consistent with the findings by Kassin and Sommers.[136] In fact, a few judges did recognize that they should recuse themselves in certain instances.[137] The fact that the judges made this recognition could mean that over-optimism may not be as much of a problem.

While this study was instructive, it may not necessarily replicate real courtroom results. First, in real courtroom settings, there would be much more development of fact and detail than what the judges were given in the prompts.[138] In a real trial, judges may be better at ignoring impermissible information because there are

130. The Fifth Amendment's protection against self-incrimination provides procedural safeguards. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966). The fruits of a police interrogation, which continues after a suspect requests an attorney, are inadmissible under the Fifth Amendment. *Id.*

131. Wistrich et al., *supra* note 36, at 1323.

132. *Id.* at 1324.

133. *Id.* at 1323.

134. *Id.* at 1316, 1321.

135. *Id.* at 1324.

136. *See supra* notes 58–63 and accompanying text (describing how Kassin and Sommers found the effect of inadmissible information to be smaller when jurors knew the reason for the exclusion).

137. Wistrich et al., *supra* note 36, at 1297.

138. Each scenario was only one to two pages long. *See, e.g.*, *id.* at 1332–44 (giving examples of multiple scenarios where facts and details were much more developed in real courtroom settings).

more facts for them to consider. Second, in the study the judges could only base their decisions on a piece of paper.[139] Appellate deference to fact-finding is premised on the idea that physically being in the courtroom is important and pertinent to evaluation and credibility determinations.[140] Perhaps judges are more motivated to get the decision correct when they actually see the parties in front of them. Finally, this study did not consider limited-purpose evidence, but as previously explained the mental processes are the same.[141] Despite these limitations, this study provides a strong presumption that judges cannot deliberately disregard information any better than anyone else.[142]

D. Legal Implications

In some respects, bench trials may be easier than jury trials because both the parties and the judge do not have to worry about making sure the jury is shielded from information. However, the converse is that the judge sees the inadmissible information and then makes a decision, which, as illustrated above, is equally problematic.[143] Furthermore, there are judge-specific problems.

First, the appellate record for review is smaller than the record in a jury trial. The judge must make separate conclusions of law and findings of fact,[144] but the factual findings do not need to be explained or detailed.[145] Therefore, it may be harder for an appellate court to discern whether a piece of information had an inadmissible influence. Second, appellate courts are less likely to reverse cases due to evidentiary error.[146] Even if they do, they are hesitant to

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139. *See id.* at 1344–45 (providing a copy of the transcript given to judges).

140. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) ("The authority of an appellate court . . . is circumscribed by the deference it must give to the decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.").

141. *See* Lieberman & Arndt, *supra* note 4, at 687.

142. Wistrich et al., *supra* note 36, at 1323.

143. *Id.* at 1323 (noting that "judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases").

144. FED. R. CIV. P. 52(a)(1).

145. *See* DAMASKA, *supra* note 2, at 128 ("[T]rial judges are not obligated to give detailed reasons for their findings.").

146. *See* Margaret Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894 (1992) ("Although more than twenty thousand cases a year were tried in the federal courts in the twenty-four

critique the conduct of the trial court.[147] If appellate courts do not inform trial judges of their errors, then trial judges will never understand that they may not be as successful at fact-finding as they believe. Finally, although this Note has shown that judges cannot follow evidentiary rules in the same manner as juries, the prevailing view is still that judges are superior. If judges do not understand the problem, they will not have any motivation to change their behavior.

III. SOLUTIONS

As the two previous sections have illustrated, impermissible information is problematic for jurors and judges alike. However, given the current state of the law and the Supreme Court's precedent,[148] parties who are affected by such impermissible information have few options to remedy the outcomes of these effects. This section discusses specific remedies for both juries and judges and discusses a few general remedies. Because the procedural aspects and the psychological issues are different with respect to these two groups, the remedies should be tailored according to the trier of fact.

A. Jury-Specific Remedies

The Federal Rules of Evidence already attempt to shield the jury from as much impermissible information as possible;[149] however, once the jury actually hears the information, the only thing the judge can do is give a limiting instruction (assuming the information was not so egregious as to cause a mistrial).[150] While

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month period between July 1, 1988 and June 30, 1990, I could find only thirty cases decided in 1990 in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial.").

147. *See id.* at 904 ("Appellate courts clearly are far more reticent in discussing the conduct of the trial court.").

148. *See supra* notes 10–12 and accompanying text (discussing Supreme Court precedent that affirmed the supposed efficacy of limiting instructions).

149. *See, e.g.*, FED. R. EVID. 103(d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

150. *See* United States v. Mannie, 509 F.3d 851, 857 (7th Cir. 2007) (holding that the defendant was denied a fair trial because the trial judge's limiting

some of these solutions are more feasible than others, they all attempt to give judges and lawyers tools besides the basically ineffective limiting instruction.

First, judges could change the instructions they give to juries before the trial has begun. Judges should instruct juries to ignore what they heard before a sustained objection. Additionally, in criminal cases the judge should instruct the jury that any past criminal record, if it exists, is not evidence of the defendant's guilt, nor is the defendant's failure to testify. These forewarnings can eliminate a potential boomerang effect. Psychological research indicates that a forewarning about prejudicial information may reduce a subject's susceptibility to that information.[151] This solution may decrease mental contamination. Mental contamination theory says that the brain incorporates new information into the already existing schema, versus storing information in isolated units.[152] If the juror hears the forewarning first, he will then incorporate that warning into the way he processes the rest of the information he hears at trial, and he may be less likely to be affected by impermissible information. This solution, however, would not mitigate any potential effects due to reactance theory because the juror's freedom is still infringed.[153] Also, it would not affect ironic mental processes because the juror must still go through the mental monitoring process.[154]

Second, appellate courts could change the rules about preserving error. If the court rules to admit evidence, Rule 103 requires a timely and specific objection so that the court has an opportunity to correct possible errors and so that the scope of possible appeals is limited.[155] In the context of impermissible information, however, the purpose behind requiring a specific objection is not served. As it has been shown, limiting instructions do not correct the error, and a party against whom impermissible

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instruction was insufficient to overcome the prejudice caused by a codefendant's repeated and violent outbursts).

151. Tanford, *supra* note 27, at 108.

152. *See supra* Part I.A.3 (explaining the mental contamination theory).

153. *See supra* Part I.A.1 ("Reactance theory says that when a juror hears an admonition or limiting instruction, he views it as an attempt to restrict his freedom.").

154. *See* Wistrich et al., *supra* note 36, at 1262 (describing the ironic mental process).

155. 1-103 FEDERAL RULES OF EVIDENCE MANUAL 103.02.

information has been offered will almost certainly appeal.[156] Instead, once a lawyer makes a general objection to impermissible evidence, the error could be preserved for appeal automatically without an instruction to the jury. This change would not affect objections to problems such as leading questions since a leading question can easily be remedied in trial. Instead, this rule would specifically apply in instances where a limiting instruction would be necessary. As a result, lawyers would not be required to choose between objecting and creating a boomerang effect.[157] Furthermore, if the boomerang effect is eliminated in this way, parties might receive more favorable verdicts at the outset and the need to appeal might be reduced. Because the jurors would still hear the information, this solution would not fix the mental contamination aspect of the problem; however, jurors would not engage in ironic mental processing because there would not be a limiting instruction telling them to forget the information. The potential effects of reactance theory would also be diminished since jurors would not hear the instruction and then feel the need to defy it.

Third, appellate courts could impose heavy sanctions on lawyers who mention impermissible information, either personally or through examination of a witness. Additionally, if one party mentions impermissible information, an even more drastic measure could be that the other party receives a "wild card" and can present one piece of inadmissible evidence against the opposing party in order to level the playing field.[158] While this latter idea would raise serious concerns about the potential to completely undermine both the reliability and the fairness policies behind the rules, lawyers would have strong motivation to ensure impermissible information never reaches the jury in the first place. If the jury hears only

156. *See supra* Part I (describing a juror's inability to follow limiting instructions and the legal implications of this inability).

157. *See supra* Part I.C (describing the untenable decision lawyers must make when juries hear inadmissible evidence).

158. In some cases, the doctrine of curative admissibility or "opening the door" provides that when one party introduces inadmissible evidence, the other party has a right to introduce inadmissible evidence to rebut or explain what has been introduced. *See* Gov't of V.I. v. Archibald, 987 F.2d 180, 187 (1993) (citing C. MCCORMICK, ON EVIDENCE § 57 (4th ed. 1992)). In this case, however, the solution goes further by suggesting that counsel harmed by inadmissible evidence can introduce *any* piece of inadmissible evidence, rather than simply a response to what has already been introduced.

admissible evidence, then there is no concern about potential prejudicial effects.

B. Judge-Specific Remedies

Remedies for judges are more difficult because judges must see the impermissible information and make admissibility rulings. Accordingly, remedies for judges are focused on methods to increase judges' awareness and motivation to get the decision right.

The first and most obvious solution is to simply inform judges that they are wrong and that they cannot ignore impermissible information any better than juries. Sharing this information with judges would not make them better at avoiding mental contamination or ironic mental processes; however, judges would at least have more motivation to make sure they only consider permissible evidence. While this solution seems like a quick fix, psychologists have tested many different types of interventions aimed at mitigating the effects of bias, known as de-biasing techniques,[159] and they are usually unsuccessful.[160] Additionally, researchers have found that even if people do learn a general principle about a particular bias, they may not apply that principle in particular situations.[161] In other words, "[e]ven if people learn the relevant statistical truths of their environment, they may continue to make errors in their judgment and decision making in every single case."[162] While de-biasing would be the easiest solution, it does not seem to merit spending the judicial time and resources because it is generally so ineffective.

Some researchers have found that having subjects question their decisions by explicitly making them consider counterarguments can be an effective de-biasing technique.[163] In one experiment, researchers found that they reduced subjects' overconfidence when they had the subjects list counterarguments.[164] Courts could require a judge conducting a bench trial, before he renders his verdict, to list

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159. Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997).

160. *Id.*

161. Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 31 (1998).

162. *Id.*

163. Babcock et al., *supra* note 159, at 916.

164. *Id.*

all of the ways that impermissible information could have affected his judgment. Afterwards, if the judge still believes the impermissible information had no effect, he may render his verdict. While this may be an effective way to de-bias judges, it may make the impermissible information even more salient and influential. Furthermore, this solution would only be effective if judges devoted serious time and mental energy to the task. They may view the exercise as paternalistic and a waste of time, and as a result they may become even more confident in their abilities.

Finally, judges could be subjected to random, non-binding peer review. A panel of judges would review the record with all the impermissible information redacted and they would render a verdict. Courts could make the results of these reviews available to other judges or practicing attorneys. This solution would be effective in two ways. First, this solution could explicitly show judges that they are not as good as they think they are. Second, when people receive assessments that are inconsistent with their social values, they feel shame.[165] Shame is a very powerful emotion because it "forces a downward redefinition of oneself, and causes the shamed person to feel transformed into something less than her prior, idealized image."[166] One important condition of shame is the existence of an audience that is important to the person and will condemn and devalue the person who is shamed.[167] This process exploits a fear of abandonment or isolation from the group.[168] Because shame is a psychologically unpleasant state,[169] people want to preserve their social status and avoid shame.[170] Publishing information to a judge's peers about his or her decision-making failures is likely to make the judge feel shame. Because judges will want to avoid the

165. *See* Margaret E. Kemeny, Tara L. Gruenewald & Sally S. Dickerson, *Shame as the Emotional Response to Threat to the Social Self: Implications for Behavior, Physiology, and Health*, 15 PSYCH. INQUIRY 153, 154 (2004) (explaining that when one's social self is threatened, shame is likely to result).

166. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1901 (1991).

167. *Id.* at 1901–02.

168. *Id.* at 1902.

169. *See* Kemeny et al., *supra* note 165, at 154 (describing shame as characterized by "feelings of being small and inferior . . . social isolation, feelings of rejection, a desire to hide, and feelings of self-consciousness coupled with feelings of low power and low status").

170. *See id.* at 155 (explaining the importance of social status maintenance, and shame as a response to a threat thereto).

public shame of making wrong decisions, they will be more motivated to make sure that impermissible information does not play a role in their decision making.

This remedy can be instituted in a way that would not be prohibitively costly. Depending on the cohesiveness of the community and its importance to the individual, shame can be a strong deterrent effect.[171] Given that judges likely fall victim to over-optimism and egocentric biases,[172] they may be more motivated to maintain positive images of themselves, and they will be deterred by this solution, even if they are not reviewed on appeal. This solution can be quite effective even if there is low probability of a judge ever being reviewed. By keeping the probability of review low, the financial and time costs of this program for judges will stay low.

C. Remedies for Both Judges and Juries

The foregoing remedies were either jury-specific or judge-specific, but there are also potential solutions that would apply equally to both. While they may seem best on their face, these blanket solutions are costly and may be less effective than remedies that are specifically tailored. Because of such concerns, some blanket solutions will be briefly discussed but not fully developed.

First, courts could change the appellate standard of review in favor of a more skeptical approach when impermissible information is involved. When first determining whether an error even exists, appellate courts review trial court decisions under an "abuse of discretion" standard, where "[n]o error occurs unless the trial judge misunderstood the law or unreasonably applied the rule to the facts in deciding upon admissibility."[173] By changing the standard of review, appellate courts could review admissibility decisions with a more realistic conception of how evidence affects judicial decision making and with knowledge that limiting instructions are basically ineffective. For example, under this stricter standard of review, an

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171. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 753 (1998).

172. *See supra* Part II.B.1 (explaining the biases and how judges may fall prey to them).

173. Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 22 (2006).

appellate court could reverse a case with highly prejudicial limited-purpose evidence. Even if there was no technical abuse of discretion, the court could find error based on its knowledge that it is highly likely the trier of fact (whether that be judge or jury) ignored limiting instructions and considered the evidence in an impermissible way.

Though appealing on its face, this approach is problematic. Changing the standard of review to one more amenable to finding error might invite more appeals and reduce the certainty and finality of trial court verdicts. This outcome could impose heavy costs on the judicial system and on parties in terms of legal fees, the costs of continuing litigation, and the cost of unresolved disputes. Furthermore, increased latitude in appellate review combined with the necessity of case-by-case determinations could create vast discrepancies in the law. These discrepancies would be problematic for trial courts looking to precedent when making decisions and for parties trying to anticipate the outcome of their disputes. Finally, while the more relaxed standard of review would only apply to cases with impermissible information, it could have vast and unforeseen spillover effects to other areas of evidence law.

Another related but distinct solution is to change the default rules concerning error in these cases. Even if an appellate court finds an evidentiary error, it is very unlikely that the error will be grounds for reversal.[174] Many evidentiary errors are not grounds for reversal unless it can be proved that a substantial right of the party was affected.[175] Instead, the rules could be changed so that evidentiary errors with impermissible information are grounds for reversal unless it can be proved that the error had no effect on the verdict. In other words, the default would become that the error was harmful unless it could be proved otherwise. Default rules are powerful tools in behavioral law.[176] Generally, it has been proven that "[t]he simplest effect of switching the default rule will therefore be to increase the likelihood that it will end up where it was initially

174. *See* Berger, *supra* note 146, at 894 (explaining findings that in 1990 only thirty cases out of approximately 20,000 were reversed on appeal because of evidentiary errors).

175. *See supra* note 7 and accompanying text (explaining appellate review of evidentiary errors in civil and criminal cases).

176. *See generally* Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106 (2002) (explaining how default rules in contract law can affect preferences and behavior).

placed."[177] In this case, changing the default rule will require the courts to more carefully consider the impact of impermissible information and will lead to more reversals.

While this solution seems to fix the problem, like the first solution, this option's costs substantially outweigh the benefits it confers. This solution could lead to more appeals and thus more of a tax on the appellate system, less finality in verdicts, and generally more costs. Furthermore, changing the default rule about error could lead to too many false positives, resulting in reversals in cases that need not be reversed. Finally, this change in the rule might have unforeseen and widespread effects on other areas of evidence law.

Because the problems are different in the judge and jury situations, and because blanket solutions are prohibitively costly and may not adequately solve the problem, tailored remedies according to the trier of fact are the best and most realistic solutions to this problem.

IV. CONCLUSION

Despite widespread belief in the feasibility of ignoring pieces of information, neither judges nor juries seem capable of accomplishing this task. Jurors fall prey to reactance theory, ironic mental processes, and mental contamination, and impermissible information has an effect on their decisions. This Note has illustrated that judges are no better than juries at accomplishing this feat, and they may, in fact, be worse, since they may fall prey to egocentric biases, act alone, and make both evidentiary decisions and the final decision. While some of the foregoing-proposed solutions are more feasible than others, they all recognize the existence of this problem and attempt to create procedural responses. At the very least, they are better than the current status quo because they actually recognize the existence of a problem.

Given that current Supreme Court precedent supports the use of limiting instructions and affirms a belief in their efficacy, it is unclear when, or even if, the law will ever change. Even without change, it is important for practitioners to understand this dilemma and recognize that it applies equally in bench trials and trials by jury.

177. *Id.* at 119.

Parties should consider that perhaps they would be better served by jury trials. First, the problem may occur less often because there are mechanisms to shield the jury, such as in camera review and motions in limine. Second, as mentioned previously, the act of deliberation may reduce the effect of the impermissible information.[178] Third, jury trials avoid some of the pitfalls associated with judges such as judicial over-optimism and the loosening of evidentiary rules. Finally, jury-specific solutions may be easier to implement and more effective than the judge-specific solutions.

Ultimately, there are many factors that influence the decision of whether to try a case before a judge or a jury. However, contrary to prevailing popular opinion, judges may be just as unreliable and problematic as juries. In some instances, especially if there are evidentiary concerns, parties may be better served by a jury trial.

178. *See supra* notes 100–101 and accompanying text (describing research on deliberation and its effect on verdicts).

Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle

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I. INTRODUCTION

Jayson Charles entered the United States for the first time as a legal permanent resident from Trinidad and Tobago in 1975.[1] In 1981, he pled guilty to a charge of grand larceny under then New York Statute § 155.30(1), was convicted, and was sentenced to five years of probation. This is Mr. Charles's only criminal conviction. Prior to 1996, Mr. Charles's conviction for grand larceny posed no real risk at all to his immigration status. He was not deportable; his crime did not constitute an aggravated felony at the time[2] and, although it was likely a crime involving moral turpitude, the criminal conduct occurred more than 5 years after his admission into the

1. Mr. Charles' facts are a fictionalized composite of multiple real immigrants, and his experience is representative, but he is not an actual person.

2. *See, e.g.*, Immigration and Nationality Act ("INA") § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994) ("The term 'aggravated felony' means murder, any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in § 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in § 921 of such title, any offense described in § 1956 of title 18, United States Code (relating to laundering of monetary instruments), or any crime of violence (as defined in § 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act."); INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (1994) (providing that any alien convicted of an aggravated felony at any time after entry is deportable).

United States.[3] So long as any trips he took outside of the United States were "brief, casual, and innocent," he was also not excludable on his return.[4] While he would have been excludable based on his conviction for a crime involving moral turpitude had he been "seeking admission" into the United States in the first instance, he was deemed not subject to the grounds of exclusion because he was returning as a legal permanent resident.[5]

For almost thirty years after his criminal conviction (almost thirty-five after his arrival as a legal permanent resident), Mr. Charles built his life in the United States. He had four United States citizen children, established a long-term relationship with the United States citizen mother of the youngest two children, and worked hard to support his family. The immigration laws changed in 1996,[6] deeming legal permanent residents who had committed crimes involving moral turpitude to be "seeking admission" no matter how brief and innocent their departure from the United States,[7] but Mr. Charles's life did not. Mr. Charles continued to live and work and care for his family in the United States, and even took two short trips to see his elderly and ailing mother in Trinidad and Tobago without incident.

It was not until Mr. Charles took a two day cruise to the Bahamas with his family in November 2009 that the 1996 law, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), had any effect on him. Upon his return to the United States, he was stopped, sent to deferred inspection, and ultimately issued a Notice to Appear placing him in removal proceedings as an arriving alien who was inadmissible because of a conviction for a crime involving moral turpitude. Although Mr. Charles would not

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3. *See, e.g.*, INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (stating that certain noncitizens who have been convicted of a crime of moral turpitude within five years of their date of entry are deportable).

4. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

5. *Id. See also, e.g.*, INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994) (stating that lawful permanent residents "shall not be regarded as making an entry into the United States" upon their return from foreign trips except under specific circumstances); INA § 212, 8 U.S.C. § 1182 (1994) (listing grounds of exclusion).

6. *See* Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) (making substantial changes to both the substance and procedure of U.S. immigration law).

7. IIRIRA § 301(a)(13)(C)(v); INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

have been subject to deportation or exclusion at the time of his plea agreement and conviction in 1982, or for more than a decade thereafter, the government was now alleging that he was removable based on the changes in the law that occurred in 1996. The Department of Homeland Security argued that, pursuant to amendments made by IIRIRA to § 101(a)(13) of the Immigration and Nationality Act ("INA"),[8] Mr. Charles, despite his legal status as a permanent resident, was now "seeking admission" because of his grand larceny conviction, a crime involving moral turpitude. Moreover, because of this crime involving moral turpitude, he was inadmissible and therefore removable from the United States.

From Mr. Charles's standpoint, or indeed in the view of many non-legally trained observers, this seems unfair—how could a new law change the consequences of something that has already happened and cannot be changed? From a legal perspective, however, the question of whether the relevant change to the immigration laws made by IIRIRA can be applied retroactively to conduct occurring prior to the effective date of that Act in 1996 is a more complex one.

The federal courts, including the Supreme Court, have repeatedly struggled with the question of retroactivity in civil cases generally[9] and in the immigration context specifically.[10] Today, more than fifteen years after IIRIRA took effect, questions regarding

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8. *See* IIRIRA § 301(a)(13)(C)(v); INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

9. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004) (holding that Congress intended for the Foreign Sovereign Immunities Act to apply to all cases regardless of when the underlying conduct occurred); Martin v. Hadix, 527 U.S. 343 (1999) (finding that provisions of the Prison Litigation Reform Act limiting attorneys' fees could not be applied to work that predated the Act); Hughes Aircraft Co. v. United States, *ex rel.* Schumer, 520 U.S. 939 (1997) (holding that an amendment to the False Claims Act did not apply retroactively to conduct occurring before its effective date); Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that provisions of the Civil Rights Act of 1991 providing for a trial by jury to determine compensatory and punitive damages could not be applied to harrassment that predated the Act).

10. *See, e.g.*, Fernandez-Vargas v. Gonzales, 548 U.S. 30, 33–34 (2006) (holding that IIRIRA's amendments to INA § 241(a)(5), governing the reinstatement of removal orders for those who reenter the United States illegally, may be applied to all noncitizens present in the United States regardless of the date of reentry); Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 317 (2001) (holding that the repeal of INA § 212(c) cannot be applied to noncitizens who pled guilty to criminal charges prior to the repeal).

its retroactive application remain unresolved and subject to different answers depending on the court considering them. The exact question presented in Mr. Charles's case, whether the amended § 101(a)(13) of the INA can be applied retroactively to legal permanent residents who pled guilty to the criminal offense triggering its applicability prior to IIRIRA, has caused a split among the federal circuit courts.[11] The Supreme Court granted certiorari in one of these cases, *Vartelas v. Holder*, to resolve that split during the October 2011 Term.[12]

In *Vartelas*, the Supreme Court considered the following question: whether the current version of seeking admission in INA § 101(a)(13) can be retroactively applied to individuals who engaged in conduct that, at the time, would not have had immigration consequences but today renders them removable.[13] This Article will utilize that question as a case study for the application of the civil

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11. *Compare* Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004), *and* Camins v. Gonzales, 500 F.3d 872 (9th Cir. 2007), *with* Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *rev'd*, 132 S. Ct. 1479 (2012) (*Olatunji* and *Camins* held that retroactive application of amended § 101(a)(13) of the INA was impermissible; the Second Circuit, in *Vartelas*, held it permissible to apply the section retroactively).

12. 132 S. Ct. 70 (2011).

13. *Vartelas* framed the question before the Supreme Court as: "Is [INA § 101(a)(13)(C)(v)], which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?" Brief for Petitioner at i, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). The Attorney General, while focusing on the commission of the crime rather than the guilty plea, does not contest the focus on the retroactive application of IIRIRA's definition of admission. It is worth noting, however, that this is not the only way of presenting the issue at stake. Others have argued that the plain language of the current version of INA § 101(a)(13)(C) in combination with the constitutional underpinnings of Supreme Court cases interpreting the definition of entry in the pre-IIRIRA version of INA 101(a)(13) suggest that that jurisprudence should also be applied to the new definition of admission. *See, e.g.*, *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1067–78 (BIA 1998) (Rosenberg, J., dissenting); Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Petitioner at 5, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). *See also infra* Part IV(A) (further discussing *Collado-Munoz*, 21 I. & N. Dec. 1061). Such an interpretation would largely, if not entirely, obviate the need to consider the question of retroactivity. This Article expresses no opinion on possible alternative formulations of the question presented in *Vartelas*, but takes the issue as raised for purposes of considering questions of retroactivity in the immigration context.

retroactivity analysis in immigration cases. Part II will briefly introduce the concept of retroactivity as it has previously been applied in civil, and particularly in immigration, cases. Part III will address the structural and substantive changes made by the Illegal Immigration Reform and Immigrant Responsibility Act that led to this situation. Part IV will examine how other courts, including the Board of Immigration Appeals and various circuit courts of appeal, have addressed the question. Finally, in Part V, the Article will, using the Supreme Court's consideration of this issue in *Vartelas v. Holder*, propose a solution to the current incoherence of the civil retroactivity doctrine and application in immigration cases. This Article will argue that the courts' analysis of the question presented in *Vartelas* and in all questions of retroactivity in immigration cases should be informed by a principle that construes all ambiguity in favor of the noncitizen.

II. RETROACTIVITY

A. Theory

The term "retroactive" is defined as "extending in scope or effect to matters that have occurred in the past."[14] Deciding whether or not a law can be applied retroactively is essentially the decision of which law to apply: the law in effect at the time in the past when some relevant conduct occurred or the law in effect at some defined future date.[15]

The concept of retroactivity today proceeds from a presumption that laws should operate prospectively. Courts have gone so far as to make statements such as: "Where, as here, Congress has not clearly spoken as to a statute's temporal application, we begin with a 'presumption against retroactive legislation' that is 'deeply rooted in our nation's jurisprudence.'"[16] This explanation is often treated as an assumption, or a concept that flows from the

14. BLACK'S LAW DICTIONARY 1432 (9th ed. 2009).

15. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994) ("[T]he controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.").

16. *Olatunji*, 387 F.3d at 389 (quoting *Landgraf*, 511 U.S. at 265).

"natural" order of our legal system; because, however, from a practical perspective most laws have at least some retroactive effect, it is more accurately described as a presumption, or a principle that we have adopted as true because of our beliefs and values regarding our legal system.

Retroactivity, as a principle of our legal system, is the idea that the negative consequences of applying a new law to conduct already completed are potentially both dangerous and significant; thus, such an application should occur only in certain limited and extraordinary circumstances. Otherwise stated, retroactivity should be the exception rather than the rule. The norm of anti-retroactivity also helps to protect against legislative overreaching; it is a check against Congress's otherwise unconstrained power that could be used to further personal interests or punish unpopular groups or individuals.[17]

This presumption against retroactivity has been explained as having its roots in the Constitution.[18] Several constitutional provisions bar specific types of retroactive laws: the Ex Post Facto Clause prohibits retroactive criminal legislation,[19] the prohibition on bills of attainder bars legislation declaring an individual or group guilty of a past crime without the benefit of a trial,[20] and the Contracts Clause restricts states from passing laws that retroactively impair rights under a contract.[21] These provisions are all clearly limited in scope and do not explicitly prohibit retroactive application of statutes.[22] They have, however, been described as supporting the general presumption against retroactivity that underpins the Supreme Court's jurisprudence on the retroactivity of civil statutes. Other sections of the Constitution—in particular the Takings Clause[23] and the Due Process Clause[24]—likewise lend support to the general

17. *See, e.g.*, *Landgraf*, 511 U.S. at 266–67.

18. *Landgraf*, 511 U.S. at 266.

19. U.S. CONST. art. I, § 9, cl. 3 (barring the federal government from passing ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (barring the state governments from passing any ex post facto laws).

20. U.S. CONST. art. I, §§ 9–10.

21. U.S. CONST. art. I, § 10, cl. 1.

22. *Id.*

23. U.S. CONST. amend. V.

24. *Id.* *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects, must

presumption against laws that add new consequences to past actions or otherwise disrupt settled expectations.

The Ex Post Facto Clause, one of these constitutional underpinnings, has been held to apply only to criminal laws, barring retroactive criminal legislation, but not to civil laws.[25] There is, however, a significant overlap between civil and criminal retroactivity analysis. Principles applied in the civil retroactivity analysis are drawn heavily from ex post facto jurisprudence.[26]

Despite the seeming simplicity of retroactivity, it has been the subject of much litigation and many Supreme Court cases. As a practical matter, it is difficult for Congress to pass any legislation without having some effect on past events or conduct. Due to the many competing factors and influences on them, as well as the actual complexity and uncertainty of the retroactivity analysis, Congress often passes laws without fully considering their potential retroactive effect.

B. Civil Retroactivity in General

The seminal case regarding retroactivity in the civil context is *Landgraf v. USI Film Products.*[27] Barbara Landgraf sued her employer USI Film Products claiming she was sexually harassed while at work.[28] At the time the harassment occurred, Ms. Landgraf

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meet the test of due process, and the justifications for the latter may not suffice for the former.").

25. U.S. CONST. art. I, § 9, cl. 3; Collins v. Youngblood, 497 U.S. 37, 41 (1990); Calder v. Bull, 3 U.S. 386, 390–91, 394 (1798).

26. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 324 (2001) ("As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law."); Hughes Aircraft Co. v. United States, *ex rel.* Schumer, 520 U.S. 939, 948 (1997) (citing criminal cases in holding that a civil statute could not be applied retroactively); Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 n.20, 269 n.23, 275 n.28, 282 n.35, 285 n.37 (1994) (discussing the appearances in the Constitution of an antiretroactivity principle, including in the Ex Post Facto Clause, and citing several ex post facto cases in support of its civil retroactivity analysis); Brief for Petitioner at 22–23, Vartelas v. Holder, No. 10-1211 (Nov. 15, 2011).

27. 511 U.S. 244 (1994).

28. *Landgraf*, 511 U.S. at 247–48. The Court in *Landgraf* assumed that the facts as found by the lower courts were true for purposes of its analysis; this Article will therefore do the same. 511 U.S. at 250 ("Accordingly, for purposes of our decision, we assume that the District Court and the Court of Appeals properly

was eligible only for equitable relief as determined at a bench trial.[29] By the time her appeal was heard in the Court of Appeals, under amendments to the Civil Rights Act of 1991, an individual in Ms. Landgraf's same circumstances would have been eligible for a jury trial to determine compensatory and punitive damages.[30] The Court found that these amendments could not be applied retroactively to Ms. Landgraf because Congress had not clearly stated an intention for them to apply retroactively and to apply them to the past conduct in Ms. Landgraf's case would impose additional burdens on past conduct, thereby impacting the rights and planning of private parties.[31]

The United States Supreme Court used *Landgraf* to articulate a two-step test for determining whether a federal civil statute applies retroactively.[32] At step one of what has now come to be known as the *Landgraf* analysis, a court considering a question of retroactive application in a civil case must first "determine whether Congress has expressly prescribed the statute's proper reach."[33] This step stems directly from the presumption against retroactive legislation and the problems inherent in it. As the Court in *Landgraf* stated, "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[34]

If the statute does not have an express command, courts must proceed to the second step of the *Landgraf* analysis.[35] At this second step, "the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[36] In other words, the court must determine "whether the new provision attaches new legal consequences to events completed

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applied the law in effect at the time of the discriminatory conduct and that the relevant findings of fact were correct.").

29. *Id.* at 247–49.
30. *Id.*
31. *Id.* at 280–86.
32. *Id.* at 280.
33. *Landgraf*, 511 U.S. at 280.
34. *Id.* at 268, 272–73.
35. *Id.* at 280.
36. *Id.*

before its enactment."[37] This test has deep roots in American legal history, stemming from Justice Story's formulation from a case decided in the early 1800s.[38] The *Landgraf* Court recognized that this test will not always result in a clear, determinate outcome and offered additional guidance for adjudicators engaging in this second step of the retroactivity analysis.[39] Among other driving principles, it suggested that the analysis should be informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations."[40]

Subsequent Supreme Court cases expanded on this basic definition, each offering its own formulations and guidance within the same basic premise.[41] Of particular importance, the Court in *INS v. St. Cyr* clarified that each element of Justice Story's formula was alone sufficient to prohibit a statute's retroactive application.[42] That is, a statute that "takes away or impairs vested rights acquired under existing laws," or "creates a new obligation," or "imposes a new duty," or "attaches a new disability, in respect to transactions or considerations already past," cannot be applied retroactively.[43] It is not necessary to demonstrate that all four conditions exist for legislation to be deemed retroactive.[44]

There is also at least one alternate interpretation of the second step of the *Landgraf* analysis, originating in Justice Scalia's

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37. *Id.* at 270–71.

38. Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (No. 13,156) ("[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.").

39. *See Landgraf*, 511 U.S. at 270.

40. *Id. See also id.* at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

41. *See, e.g.*, Hughes Aircraft Co. v. United States, *ex rel.* Shumer, 520 U.S. 939, 947 (1997) ("[T]he Court has used various formulations to describe the 'functional conceptio[n] of legislative retroactivity,' and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation.") (quoting *Landgraf*, 511 U.S. at 269)).

42. INS v. St. Cyr, 533 U.S. 289, 321 n.46 (2001).

43. Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (No. 13,156).

44. *See* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44 n.10 (2006); *St. Cyr*, 533 U.S. at 321 n.46; Brief for Petitioner at 5–6, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

concurring opinion in *Landgraf*,[45] that has played a prominent role in the Supreme Court's (as well as the lower federal courts') jurisprudence on civil retroactivity. Justice Scalia suggests that, by incorporating Justice Story's formulation of the civil retroactivity analysis, the Court is focused on the wrong criteria.[46] Instead of being concerned with whether the new law affects "vested rights," or is a substantive or procedural amendment, Justice Scalia would direct the Court to determine the relevant activity that the rule is intended to regulate.[47] If that activity was completed prior to the effective date of the new law, the new law cannot be applied retroactively to it absent clear direction to do so from Congress.[48] This test has been incorporated, both explicitly[49] and implicitly,[50] in other cases raising a question of the retroactivity of a civil statute.

C. In the Immigration Context

There is a long history of the application of civil retroactivity analysis in immigration cases.[51] Parties will occasionally argue that

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45. *Landgraf*, 511 U.S. at 290–94 (Scalia, J., concurring).

46. *Id.* at 291.

47. *Id. See also* Martin v. Hadix, 527 U.S. 343, 363 (1999) ("The critical issue . . . is not whether the rule affects 'vested rights' . . . but rather what is the relevant activity that the rule regulates.").

48. *See, e.g.*, *Fernandez-Vargas*, 548 U.S. at 41 ("The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively . . . for we require a clear statement [from Congress] for that."); *St. Cyr*, 533 U.S. at 316 ("A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result."); *Martin*, 527 U.S. at 354 ("This language falls short of demonstrating a 'clear congressional intent' favoring retroactive application . . . in other words, of the 'unambiguous directive' or 'express command' that the statute is to be applied retroactively." (quoting *Landgraf*, 511 U.S. at 263, 280)); *Landgraf*, 511 U.S. at 291 ("Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered.") (Scalia, J., concurring).

49. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 698 n.17 (2004) ("Our approach to retroactivity in this case thus parallels that advocated by Justice Scalia in his concurrence in *Landgraf*."). *See also* Transcript of Oral Argument at 8, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

50. *See, e.g.*, *Fernandez-Vargas*, 548 U.S. at 46 ("What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect.").

51. *Cf. Landgraf*, 511 U.S. at 271 (discussing a case in the immigration context in support of the premise that the presumption against retroactive

the plenary power doctrine should bar the ability of the courts to find that immigration legislation cannot be applied retroactively, but this argument has historically been rejected.[52] Functionally speaking, this is a logical conclusion. Application of the *Landgraf* analysis does not limit Congress's immigration powers in any significant respect; it simply demands that Congress make a clear and unambiguous statement when it wishes for its legislation to apply to conduct completed before the law's enactment.[53] Retroactivity questions raised in immigration cases, then, have been treated substantively no differently than retroactivity questions raised in any other civil context.

As early as the late 1800s, the Supreme Court in *Chew Heong v. United States* considered whether to permit retroactive application of the "Chinese Restriction Act" of 1882.[54] The Court held that the provision at issue, which required Chinese citizens seeking to reenter the United States to have a certificate prepared prior to their departure from this country, could not be applied retroactively to bar the reentry of a Chinese man who had departed from the United States before the Chinese Restriction Act took effect.[55] Since that time, retroactivity-based challenges have been raised at a number of junctures involving significant transformations in the United States immigration laws.

Changes in immigration law, perhaps even more so than in many other areas of the law, are strongly motivated by political pressures and expediencies.[56] The modifications made to the laws in this area can be drastic, too frequent, and sometimes abrupt, resulting in a complicated system that does not always operate smoothly or fit together well. In a field of law where individual interests are so

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legislation is not limited to cases involving "new provisions affecting contractual or property rights").

52. *Cf. St. Cyr*, 533 U.S. at 324 (rejecting INS's argument that application of a law of deportation can never have a retroactive effect). *See also* Reply Brief for Petitioner at 5–6, 9, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) (arguing that Congress's plenary power over entry and deportation does not justify retroactivity).

53. *Landgraf*, 511 U.S. at 291.

54. Chew Heong v. United States, 112 U.S. 536 (1884).

55. *Id* at 559–60. *See also Landgraf*, 511 U.S. at 271–72 (discussing the case facts and holding of *Chew Heong*).

56. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3–4 (1998) (discussing the use of race in immigration law).

important and the consequences can be as life-defining as immigration, such changes raise significant retroactivity concerns. After any significant immigration-related act of Congress, retroactivity challenges to that Act will occur. The modern Supreme Court has confronted such challenges in the wake of the amendments to U.S. immigration laws made in 1996 and 1997 by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA.[57]

1. INA § 212(c) Relief—*INS v. St. Cyr* and the Aftermath

One change made by IIRIRA was to repeal section 212(c) of the INA, a section which had previously provided relief from exclusion or deportation for certain long term legal permanent residents with criminal convictions.[58] Many challenged the retroactive application of this repeal, including a Haitian citizen, Enrico St. Cyr, whose case was eventually heard by the Supreme Court.[59] Mr. St. Cyr had entered the United States as a legal permanent resident in 1986.[60] He pled guilty to a controlled substance violation of Connecticut law in March 1996, prior to AEDPA and IIRIRA, but was not placed into removal proceedings until April 10, 1997, after both statutes, including the repeal of the former section 212(c), took effect.[61]

Mr. St. Cyr argued that because he would have been eligible for relief under INA § 212(c) at the time of his guilty plea, the repeal of § 212(c) could not be retroactively applied to him.[62] After an extended examination of its jurisdiction, the Supreme Court applied

57. *See infra* Part II.C (discussing how the Court addressed AEDPA and IIRIRA).

58. INA § 212(c) (1994) ("Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)).").

59. INS v. St. Cyr, 533 U.S. 289 (2001).

60. *Id.* at 293.

61. *Id.* at 292.

62. *Id.* at 315.

the *Landgraf* analysis to the circumstances of Mr. St. Cyr's case.[63] At step one of that analysis, the Court found that Congress had not clearly expressed an intent for the repeal of § 212(c) to apply retroactively.[64] Because the repeal of § 212(c) attached "a new disability" to past conduct, a guilty plea, and noncitizens would have relied on the availability of this relief in their decision to take such a plea, the Court further held that the repeal could not survive step two of the *Landgraf* analysis.[65] The Court therefore concluded that the opportunity to request relief under the former § 212(c) must remain available to noncitizens who, like Mr. St. Cyr, were trying to waive criminal convictions that resulted from guilty pleas entered into before AEDPA and IIRIRA took effect and would have been eligible for such relief at the time of their plea.[66] *St. Cyr* was a tremendously important decision in the immigration context, but it also left many unanswered questions.

The role of reliance in the retroactivity analysis has long been an issue in immigration cases, but that issue came into specific focus and prominence after the Supreme Court's decision in *St. Cyr*.[67] Some courts have recognized explicitly that the part to be played by reliance has not yet been decided by the Supreme Court.[68] Reliance has been variously described as a necessary[69] or a sufficient[70] or an irrelevant[71] factor in finding that a statute should not be applied retroactively at the second step of the *Landgraf* analysis. Even among courts that agree that reliance is a required element, there is

63. *Id.*

64. *Id.* at 316–20.

65. *Id.* at 321–24.

66. *Id.* at 326.

67. Reliance is also a contested issue in civil retroactivity analysis outside the immigration context. *See, e.g.*, Olatunji v. Ashcroft, 387 F.3d 383, 390–91 (4th Cir. 2004) (discussing applicability of reliance in the retroactivity inquiry in cases concerning the Civil Rights Act of 1991, the False Claims Act, and others).

68. *See, e.g., id.* at 389 ("Whether, under the *Landgraf* framework, an aggrieved party must demonstrate some form of reliance on a prior statute in order to establish that a later-enacted statute is impermissibly retroactive has not been resolved by the Supreme Court.").

69. *See, e.g.*, Ponnapula v. Ashcroft, 373 F.3d 480, 494 (3d Cir. 2004) (framing the retroactivity question as "what aliens–if any–who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief").

70. *See, e.g.*, Hernandez de Anderson v. Gonzales, 497 F.3d 927, 938, 940–941 (9th Cir. 2007).

71. *See, e.g., Olatunji*, 387 F.3d at 394.

not a consensus on what kind of reliance that means. Some courts have required that the reliance be objectively reasonable,[72] while others have required the individual noncitizen to demonstrate subjective reliance.[73] The Supreme Court suggested in a footnote in an immigration case decided earlier in the same term as *Vartelas* that it might consider the minimum standard to be objectively reasonable reliance, but the issue remained far from definitively resolved prior to the Court's decision in *Vartelas*.[74]

In the wake of *St. Cyr*, this question of reliance was raised in cases exploring the limits of the Supreme Court's decision in that case. Many of these cases dealt with noncitizens who had been convicted after trial rather than pursuant to a plea of guilty like St. Cyr.[75] Perhaps not surprisingly, a great deal of inconsistency and incoherence arose among the decisions of the various courts. One good example of this muddle arises in the case law of the Fourth Circuit. In 2002, the Fourth Circuit in *Chambers v. Reno* held that the repeal of the former INA § 212(c) *could* be retroactively applied to a noncitizen convicted at trial because the noncitizen did not demonstrate reliance interests in the old law comparable to those at issue in *St. Cyr*.[76] The *Chambers* decision does recognize that reliance might not be a required element pursuant to the Supreme

72. *See, e.g.*, Martinez v. INS, 523 F.3d 365, 385 (2d Cir. 2008).

73. *See, e.g.*, Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir. 2007) ("[T]his circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance . . . .").

74. *See* Judulang v. Holder, 132 S. Ct. 476, 489 n.12 (2011) ("[W]e likewise reject Judulang's argument that Blake and Brieva-Perez were impermissibly retroactive. To succeed on that theory, Judulang would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which Blake and Brieva-Perez departed." (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994))).

75. *See generally* Anjum Gupta, *Detrimental Reliance on Detrimental Reliance: The Courts' Conflicting Standards for the Retroactive Application of New Laws to Past Acts*, RUTGERS L. REV. COMMENTARIES, Dec. 27, 2011 at 3–6 (discussing the circuit split over the interpretation of *St. Cyr*; explaining one view that reads the case as requiring a showing of reliance, but does not view a guilty plea as an exclusive way to show reliance; and explaining the other view that reads the case as not requiring a showing of reliance, but that reliance can be a consideration in determining whether retroactive application for a new law attaches new legal consequences to past acts).

76. Chambers v. Reno, 307 F.3d 284, 293 (4th Cir. 2002).

Court's civil retroactivity case law,[77] but ultimately finds in a relatively conclusory fashion that this point is not outcome determinative for Mr. Chambers.[78] In 2007, the Fourth Circuit published another case addressing essentially the same question.[79] This decision, *Mbea v. Gonzales*, echoes the court in *Chambers* without specifically discussing the role of reliance in the retroactivity analysis.[80] *Mbea*, like *Chambers*, holds that another noncitizen who elected to go to trial prior to IIRIRA does not have a claim that the repeal of § 212(c) should not be retroactively applied to him.[81]

Mbea might appear to be a straightforward application of prior precedent were it not for an intervening decision of the Fourth Circuit. In the interim between *Chambers* and *Mbea*, the Fourth Circuit decided *Olatunji v. Ashcroft*, a case concerning the retroactive application of the definition of admission at the heart of this Article.[82] In *Olatunji*, the court held clearly and explicitly "that the consideration of reliance is irrelevant to statutory retroactivity analysis."[83] The panel in *Mbea* does not discuss or even cite to the circuit's prior decision in *Olatunji*, much less attempt to distinguish or reconcile the cases.[84] Within even a single circuit, then, and in a relatively narrow context, retroactivity and reliance are disputed concepts.

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77. *Id.* at 292–93 ("In view of these observations by the Court about retroactivity, we have acknowledged that an alien's failure to demonstrate reliance on pre-IIRIRA law might not foreclose a claim that the post-IIRIRA version of the INA operates retroactively.").

78. *Id.* at 293.

79. Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007).

80. *Id.* at 280–82.

81. *Id.*

82. Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004).

83. *Id.* at 393. *See also id.* at 389 ("A careful review of both the basis for the judicially-imposed presumption against retroactivity and the Supreme Court's retroactivity jurisprudence shows that the fact that IIRIRA has attached new legal consequences to Olatunji's guilty plea is, alone, sufficient to sustain his claim, and that no form of reliance is necessary."). For additional discussion of the Fourth Circuit's decision in *Olatunji*, see *infra* Part IV.B.1 and text accompanying notes 151–170.

84. *Mbea*, 482 F.3d at 276. It does not appear that either en banc reconsideration or certiorari were sought in *Mbea*. The Court in *Olatunji* did attempt to deal with *Chambers*, focusing on the panel's statement there that reliance might not be a necessary element of a civil retroactivity analysis. *Olatunji*, 387 F.3d at 391–93.

The decisions in other circuits only add to this confusion.[85] Circuits other than the Fourth Circuit also experience intra-circuit conflicts and inconsistencies on the issue.[86] Some circuits agree that actual individualized reliance is necessary, but disagree about what conduct is necessary to demonstrate that reliance.[87] Other circuits set the bar lower, finding objectively reasonable reliance to be sufficient.[88] Still others hold that reliance is not required at all and is

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85. *See* Gupta, *supra* note 75, at 3–6 (discussing the widely variant recent circuit court decisions regarding the legality of retroactive immigration laws).

86. *Compare* Ponnapula v. Ashcroft, 373 F.3d 480, 491–93 (3d Cir. 2004) (holding that actual individual reliance is not required but suggesting, at a minimum, that objective reliance is), *with* Atkinson v. Att'y Gen., 479 F.3d 222, 231 (3d Cir. 2007) ("For the above reasons, we conclude that reliance is but one consideration in assessing whether a statute attaches new legal consequences to past events .... Nowhere in the Supreme Court's jurisprudence ... has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry."). Note, however, that the court in *Atkinson* does not acknowledge this conflict and purports to reconcile its decision with the decision in *Ponnapula*. *Atkinson*, 479 F.3d at 227–28, 231.

87. *See, e.g.*, Nadal-Ginard v. Holder, 558 F.3d 61, 70 n.9 (1st Cir. 2009) (holding that proceeding to a jury trial did not, in itself, constitute sufficient actual reliance and declining to decide what, if any, conduct after trial might constitute such reliance); Esquivel v. Mukasey, 543 F.3d 919, 922 (7th Cir. 2008) (holding that "those who affirmatively abandoned rights or admitted guilt in reliance on § 212(c) relief" could demonstrate actual reliance); Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir. 2007) (holding that proceeding to trial does not constitute reliance but affirmatively postponing the filing of an application for relief under the former section 212(c) does); Wilson v Gonzales, 471 F.3d 111, 122 (2d Cir. 2006) (requiring petitioners to make an individualized showing of reasonable reliance on § 212(c), rather than requiring them to demonstrate mere knowledge of its availability, to demonstrate reliance based on postponing filing an application for relief).

88. *See, e.g.*, Ferguson v. U.S. Att'y Gen., 563 F.3d 1254, 1271 n.28 (11th Cir. 2009) ("Joining the majority of circuits, we decline to extend *St. Cyr* to aliens who were convicted after a trial because such aliens' decisions to go to trial do not satisfy *St. Cyr's* reliance requirement."); Hernandez de Anderson v. Gonzales, 497 F.3d 927, 940–41 (9th Cir. 2007) (finding the 10th Circuit's reasoning persuasive in holding that objectively reasonable reliance is sufficient to demonstrate retroactivity); Hem v. Maurer, 458 F.3d 1185, 1197 (10th Cir. 2006) ("We now hold for three reasons that objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim."); Thaqi v. Jenifer, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect").

instead simply one factor to be considered in the totality of the retroactivity analysis.[89]

2. Other Subjects

Retroactivity challenges have also been raised regarding other amendments made by AEDPA and IIRIRA. One of the more prominent is the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*.[90] Mr. Fernandez-Vargas was a citizen of Mexico who had last illegally reentered the United States in 1982, after he was deported for immigration (not criminal) violations.[91] He contended that IIRIRA's amendments to the provisions of the INA dealing with reinstatement could not be applied retroactively to him because he had reentered the United States long before IIRIRA was promulgated and those provisions took effect.[92] The Supreme Court held that, because being present without legal status in the United States was a continuing course of conduct that persisted even after IIRIRA's effective date, there was no retroactivity problem in applying IIRIRA's amended reinstatement provisions to Mr. Fernandez-Vargas.[93]

Like the question of the retroactive application of the repeal of § 212(c), this issue regarding the retroactive application of IIRIRA's provisions related to reinstatement led to substantial disagreement on many levels among the federal circuits.[94] While the Supreme Court's decision addressed the immediate issue of resolving this circuit split as to Mr. Fernandez-Vargas's relatively narrow facts, it did little to nothing to clarify the standard for conducting a civil retroactivity analysis in an immigration case

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89. *See, e.g.*, Lovan v. Holder, 574 F.3d 990, 993–94 (8th Cir. 2009) ("requiring actual reliance in each case runs contrary to the Supreme Court's retroactivity analysis in *Landgraf*. . . .").

90. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

91. *Id.* at 35.

92. *Id.* at 33–35. The amendments expanded the categories of those who could be subjected to reinstatement and reduced the forms of relief that such reinstated noncitizens could request. *Id.*

93. *Id.* at 33 ("We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.").

94. *See, e.g.*, *id.* at 36 n.5 (discussing the circuit split that led the Court to grant certiorari).

generally. The Supreme Court began its analysis in *Fernandez-Vargas* professedly grounded in the majority opinion of *Landgraf v. USI Film Products*[95] and discussed its earlier decision in *St. Cyr* at length.[96] Its focus in *Fernandez-Vargas*, however, on the activity being regulated is a shift away from the reliance concerns that have preoccupied the courts in the § 212(c) context and in fact more closely resembles the conduct test from Scalia's concurrence in *Landgraf*.[97] The Court does not, however, explicitly address this shift or justify why it believes the factual and legal circumstances at issue merit a different approach.[98] It is, however, interesting that the Court seems to consider Mr. Fernandez-Vargas's past immigration violations to be more serious and detrimental transgressions than at least some of the criminal convictions of legal permanent residents at issue in the § 212(c) context.

This section's review of civil retroactivity questions in immigration cases is intended as an introduction to the case study of the retroactive application of IIRIRA's definition of admission presented in sections III and IV below and the arguments made in the final section of this Article. It is by no means meant to be a comprehensive discussion of this issue.[99] It should be clear, however, from just this brief survey that the standards in this area are truly confusing. Despite the fact that each of these cases purports to rely on the same two step analysis and guiding principles originating from the Supreme Court's decision in *Landgraf*, the results diverge radically. As the sheer number of publically available cases grows, the doctrine of civil retroactivity, at least in the immigration context, has become less and less coherent.

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95. *Id.* at 38.

96. *Id.*

97. Landgraf v. USI Film Prods., 511 U.S. 244, 290–94 (1994) (Scalia, J., concurring). *See also supra* text accompanying notes 45–50 (discussing Scalia's position that the Court should determine the activity that the rule intends to regulate in order to conduct a retroactivity analysis).

98. *Fernandez-Vargas*, 548 U.S. at 45–46.

99. For in-depth analyses of questions of retroactivity in the immigration context, see Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002); Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743 (2003); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

III. ENTRY, THE FLEUTI DOCTRINE, AND SEEKING ADMISSION UNDER INA § 101(a)(13)

A. Entry and the Fleuti Doctrine

Prior to 1996 and IIRIRA, whether or not a noncitizen had made an "entry" into the United States determined what substantive law and procedural protections governed that noncitizen's status and presence in the United States. Initially, entry was a judicially defined concept, at its simplest and most straightforward meaning "any coming of an alien from a foreign country into the United States."[100] In 1952, Congress codified a somewhat more complex definition of entry in the Immigration and Nationality Act of 1952 ("INA"), the basis for our immigration laws today. The then-section 101(a)(13) read:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . .[101]

The Supreme Court in *Rosenberg v. Fleuti* found that Congress's aim in codifying a definition of "entry" had been to ameliorate some of the more harsh judicial interpretations of the term.[102] As a result, it found that the "intent" requirement in INA section 101(a)(13) meant that a legal permanent resident could only be considered to be making a new entry when he or she had intended

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100. United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933).

101. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1952).

102. Rosenberg v. Fleuti, 374 U.S. 449, 457–58 (1963). *But see id.* at 465–66 (Clark, J., dissenting) (stating that the statute had merely codified precedent).

"to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[103] Whether or not a trip outside the United States was "meaningfully interruptive" was to be measured by its length, purpose, need for travel documents, and other factors to be developed by the subsequent case law.[104]

Fleuti came to stand for the doctrine that departures from the United States that were "innocent, casual, and brief" did not trigger the consequences of a new entry for legal permanent residents.[105] While the Court in *Fleuti* framed its ruling as flowing directly from Congress's intent and the natural language of the statute, later commenters described the Court's holding as a significant departure from the previous meaning of the term "entry."[106] Nevertheless, the *Fleuti* doctrine became an entrenched and accepted principle of immigration law.[107]

Subsequent cases have added additional factors relevant to the determination of whether a trip abroad was "innocent, casual, and brief." In addition to the length and purpose of the trip[108] and the arrangements it required,[109] courts have considered the frequency of

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103. *Id.* at 462.

104. *Id.*

105. *Id.* at 461; Mendoza v. INS, 16 F.3d 335, 336 (9th Cir. 1993).

106. *See, e.g.*, 6 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 71.03(6)(b) (Matthew Bender, rev. ed. 2011).

107. *See, e.g., id.*

108. *See* Jubilado v. United States, 819 F.2d 210, 213–14 (9th Cir. 1987) (holding that a three month departure where the purpose was to tie up affairs and move family to the United States did not meaningfully interrupt permanent resident status); Dabone v. Karn, 763 F.2d 593, 596 (3d Cir. 1985) (holding that a trip of two months to multiple countries for business purposes was not casual and brief); Munoz- Casarez v. INS, 511 F.2d 947, 948 (5th Cir. 1975) (holding that a one month trip to visit ill family in Mexico meaningfully interrupted legal permanent residence); Lozano-Giron v. INS, 506 F.2d 1073, 1078–79 (7th Cir. 1974) (holding that a trip of 27 days with a substantial amount of foreign currency for the purpose of getting married was not brief, casual, and innocent); *In re* Salazar, 17 I. & N. Dec. 167, 168 (BIA 1979) (considering length of time (five months) and activities during departure (visiting family and sightseeing) as factors to conclude departure was meaningfully interruptive of permanent resident status); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 220 (Att'y Gen. 1972) (holding that trips of 30 and 35 days to visit family were brief, casual, and innocent).

109. *See, e.g., In re* Janati-Ataie, 14 I. & N. Dec. 216, 222 (BIA 1972) (holding that since travel documents were required, return was an entry); *In re* Nakoi, 14 I. & N. Dec. 208, 212 (BIA 1972) (holding that a contract for foreign employment made return an entry); *In re* Quintanilla-Quintanilla, 11 I. & N. Dec.

trips made,[110] any associated violations of immigration[111] or criminal laws,[112] and the noncitizen's family, employment, and community ties to the United States as compared to ties to and the situation in the country of proposed deportation.[113] While these analyses are by

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432, 454 (BIA 1965) (holding that a return was not an entry when no special travel documents were required).

110. *See, e.g.*, Kabongo v. INS, 837 F.2d 753, 757 (6th Cir. 1988) (holding that regular trips for school were entries); *In re* Cardenas Pinedo, 10 I. & N. Dec. 341, 343 (BIA 1963) (holding that a single visit for a few hours was not an entry).

111. *See, e.g.*, Leal-Rodriguez v. INS, 990 F.2d 939, 946–47 (7th Cir. 1993) (holding the *Fleuti* doctrine does not apply to entries without inspection); Laredo-Miranda v. INS, 555 F.2d 1242, 1245 n.6 (5th Cir. 1977) (finding that avoiding inspection at a border crossing, where the petitioner also assisted other noncitizens in entering without inspection, was one factor in determining that the petitioner's trip abroad was not innocent); Ferraro v. INS, 535 F.2d 208, 210 (2d Cir. 1976) (remanding to the Board of Immigration Appeals for consideration of the effect of a lawful permanent resident's entry without inspection); Aleman-Fiero v. INS, 481 F.2d 601, 601–02 (5th Cir. 1973) (per curiam) (holding that departure when appeal of a deportation order was pending was not "of the brief, casual and temporary nature described in" *Fleuti*); Bufalino v. INS, 473 F.2d 728, 731 (3d Cir. 1973) (holding that entry based on conscious misrepresentation of United States citizenship was not innocent); *In re* Mundall, 18 I. & N. Dec. 467, 470 (BIA 1983) (holding that *Fleuti* does not apply where noncitizen was never a lawful permanent resident).

112. *See, e.g.*, *Laredo-Miranda*, 555 F.2d at 1246 (holding that re-entry while assisting other noncitizens to enter without inspection is not innocent); Longoria-Castenada v. INS, 548 F.2d 233, 237 (8th Cir. 1977) (holding that the *Fleuti* doctrine did not apply to departure for the purpose of furthering a plan to assist noncitizens to enter the United States illegally); Palatian v. INS, 502 F.2d 1091, 1093 (9th Cir. 1974) (holding that narcotics smuggling while reentering the United States rendered an absence not innocent); Vargas-Banuelos v. INS, 466 F.2d 1371, 1374 (5th Cir. 1972) (holding that agreeing to help other noncitizens enter the United States illegally, where the intent to do so was not formed until after leaving the United States, did not meaningfully interrupt permanent resident status); *In re* Acosta, 14 I. & N. Dec. 666, 669 (BIA 1974) (finding that a trip to Mexico where the respondent was convicted of assault and served a six week jail sentence interrupted permanent resident status); *In re* Wood, 12 I. & N. Dec. 170, 176–77 (BIA 1967) (holding that a departure that resulted in convictions for conspiracy to commit forgery and conspiracy to utter was not brief, casual and innocent); *In re* Alvarez-Verduzco, 11 I. & N. Dec. 625, 627 (BIA 1966) (holding that reentry while smuggling heroin meaningfully interrupted permanent resident status); *In re* Scherbank, 10 I. & N. Dec. 522, 524 (BIA 1964) (holding that departures related to cheating at gambling and related criminal charges meaningfully interrupted the respondent's permanent residence).

113. *See, e.g.*, Lozano-Giron v. INS, 506 F.2d 1073, 1077–78 (7th Cir. 1974) ("[A]nother group of relevant factors would undoubtedly center around the

definition very fact specific,[114] a brief trip outside the United States involving no criminal or otherwise proscribed activities was rarely if ever considered to trigger a new entry.[115] Legal permanent residents, then, even those like Mr. Charles with criminal convictions that might make them excludable were they to be considered to be making a new entry, could safely take such trips in reliance on the fact that they would be protected by the *Fleuti* doctrine.

B. Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress enacted sweeping changes to immigration law generally in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[116] IIRIRA transformed both the substance and the structure of immigration law and proceedings, creating perhaps the most substantial alterations to this area of the law in U.S. history. It was passed in a context of increasingly anti-immigrant sentiment, and its changes were, for the most part, designed to make it more difficult for noncitizens to obtain and keep legal status in the United States.

1. Seeking Admission Under INA § 101(a)(13)

The current version of INA section 101(a)(13) originated with IIRIRA. The definition of entry that the section had previously contained was deleted and was replaced with a definition of admission: "The terms 'admission' and 'admitted' mean, with

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effect of the uprooting caused by deportation, that is, how long the alien had been a permanent resident of the United States, whether he had a wife and children living with him, whether he owned a business establishment or a home or other real estate in the United States, the nature of the environment to which he would be deported, and his relation to that environment.").

114. *Cf.* 6 GORDON ET AL., *supra* note 106, § 71.03(6)(b) (describing the *Fleuti* factors as "somewhat nebulous criteria").

115. *See, e.g.*, *id.* ("Following the *Fleuti* decision a brief absence by a lawful permanent resident alien usually has not resulted in an entry for deportation purposes." (citing Itzcovitz v. Selective Serv., 447 F.2d 888, 891 n.8 (2d Cir. 1971))); Zimmerman v. Lehmann, 339 F. 2d 943 (7th Cir. 1965); *In re* Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (BIA 1965); *In re* Yoo, 10 I. & N. Dec. 376 (BIA 1963); *In re* Cardenas-Pinedo, 10 I. & N. Dec. 341 (BIA 1963).

116. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[117] Congress was not attempting to redefine the term entry with this amendment to the statute. In fact, "entry" remains a relevant term used in many other parts of the INA and the related federal regulations.[118] Rather, with this amendment, Congress was signaling a shift in focus, from the mere fact of a physical "entry" to a lawful inspection and "admission" by immigration officers.

This shift in focus had the effect of subjecting more noncitizens to charges of inadmissibility rather than charges of deportability and ultimately made more noncitizens removable from the United States. Prior to IIRIRA, individuals who successfully entered without inspection were considered to have made an entry pursuant to the then-version of INA section 101(a)(13) and were thus subjected to deportation charges and procedures.[119] Subsequent to IIRIRA, these individuals have not been "admitted" and are therefore subject to charges of inadmissibility.[120] Furthermore, charges of inadmissibility come with fewer procedural protections than charges of deportability,[121] and the grounds of inadmissibility are generally

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117. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006).

118. Most obviously, the terms "entry" or "enter" are used twice in the definition of admission itself. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006) ("lawful *entry*") (emphasis added); INA § 101(a)(13)(C)(vi), 8 U.S.C. § 1101(a)(13)(C)(vi) (2006) ("attempted to *enter*") (emphasis added). *See also, e.g.*, INA § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2006) ("allowed *entry*") (emphasis added); INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) ("*entry* into the United States") (emphasis added); INA § 275, 8 U.S.C. § 1325 ("*enters* or attempts to *enter*") (emphasis added); 1 GORDON ET AL., *supra* note 106, § 9.04 n.8, § 64.01 n.4.

119. *See, e.g.*, Mora v. Mukasey, 550 F.3d 231, 235 (2d Cir. 2008); 1 GORDON ET AL., *supra* note 106, § 1.03(2)(b).

120. *See, e.g.*, INA § 235(a)(1), 8 U.S.C. § 1225 (a)(1); INA § 101 (a)(13), 8 U.S.C. § 1101(a)(13) (defining "admission" as "lawful entry of the alien into the United States after inspection and authorization by an immigration officer"); INA § 212(a), 8 U.S.C. § 1182(a) (listing the various reasons for inadmissibility). *See also* 1 GORDON ET AL., *supra* note 106, § 1.03(2)(b) (discussing the shift in focus from entry to admission).

121. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). *But see* Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953) (finding legal permanent residents entitled to greater due process protections even when seeking entry). *See also* 1 GORDON ET AL., *supra* note 106, § 9.05.

broader than the grounds of deportability.[122] Overall, then, the shift furthered Congress's stated purpose in IIRIRA of cracking down on "illegal immigration."

IIRIRA's amendments to INA section 101(a)(13) also included provisions specifically addressing when a legal permanent resident would be considered to be seeking admission.[123] Under the current version of the statute, a returning lawful permanent resident is "seeking admission" only under certain circumstances, when:

> the alien – (i) has abandoned or relinquished that status; (ii) has been absent from the United States for a continuous period in excess of 180 days; (iii) has engaged in illegal activity after having departed the United States; (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings; (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a); or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.[124]

Many noncitizens who trigger the application of this definition fall within subsection (v) because they have "committed an offense identified in section 212(a)(2)."[125] Those offenses identified in INA section 212(a)(2) certainly include crimes involving moral turpitude and multiple criminal convictions with aggregate sentences of imprisonment for five years or more.[126] A

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122. *Compare* INA § 212(a), 8 U.S.C. § 1182(a), *with* INA § 237(a), 8 U.S.C. § 1227(a).

123. Illegal Immigration Reform Act of 1996, Pub. L. No. 104-208, § 301(a)(13)(C), 110 Stat. 3009-3546, 3009-3575.

124. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

125. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2006).

126. INA § 212(a)(2)(A), (B), 8 U.S.C. § 1182(a)(2)(A), (B) (2006). Offenses "identified in section 212(a)(2)" for purposes of INA §101(a)(13)(C)(v) also likely include trafficking in a controlled substance, engaging in prostitution or

"crime involving moral turpitude" is a term of art in immigration law that, because it is not defined in the statute or regulations, has been left to interpretation through case law. As a result, it has a relatively soft definition, but it is generally understood to mean a crime involving "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[127] From a practical perspective, individuals with criminal convictions are particularly likely to be targeted when attempting reentry into the United States. Because it is common to run identifying information of an individual at the "border" through various databases including some containing information about criminal history, it is both more convenient to catch these individuals when they are presenting themselves for inspection than when they are going about their daily lives within the United States and easier to identify individuals with a prior criminal record than those falling within some of the other subcategories of INA subsection 101(a)(13)(C).

Fleuti and IIRIRA's new definition of which legal permanent residents are seeking admission are not coextensive.[128] In some categories, individuals who likely would have been deemed to be seeking entry under *Fleuti* are protected under IIRIRA. For example, departures of up to 180 days (six months) do not necessitate a new admission pursuant to subsection (ii) of the IIRIRA definition, but a multi-month trip would have likely triggered a new entry under *Fleuti*. In other respects, however, the post-IIRIRA section 101(a)(13) subjects more reentering legal permanent residents to removal proceedings than would have been captured under *Fleuti*.[129] Mr. Charles's case is one example—the Department

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other commercialized vice, violating religious freedom, trafficking in persons, and money laundering. INA § 212(a)(2)(C), (D), (G), (H), (I), 8 U.S.C. § 1182(a)(2)(C), (D), (G), (H), (I) (2006). While these categories are not necessarily offenses in the traditional sense of a violation of the criminal laws, they are wrongdoings included within INA § 212(a)(2) and are therefore likely within the scope of INA § 101(a)(13)(C)(v).

127. *In re* Silva-Treviño, 24 I. & N. Dec. 687, 689 n.1 (AG 2008).

128. *Cf. In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1065 (BIA 1998) ("Congress has now amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine, as that doctrine developed following the Supreme Court's 1963 decision.").

129. This is a further example of the phenomenon discussed above in Part III.B.1 of expanding the number of noncitizens subject to charges of

of Homeland Security alleges that noncitizens like Mr. Charles fall within subsection (v) because they have been convicted of a crime involving moral turpitude, an offense identified in INA § 212(a)(2)(A)(i), but such a crime unconnected to the departure from the United States would not have caused a new entry under *Fleuti*.[130]

IIRIRA did not fundamentally alter the consequences of seeking entry or admission. Any noncitizen seeking admission today is required to demonstrate that he or she is not inadmissible under INA § 212, just as was previously required of a noncitizen seeking entry. Other structural changes made by IIRIRA, however, changed the manner in which this determination is made.

2. Other Structural Changes

The other structural changes made by IIRIRA substantially altered immigration procedures. Prior to IIRIRA, there were two forms of proceedings that could result in a noncitizen's inability to enter or remain in the United States. Decisions about whether a noncitizen could enter the United States were made in exclusion proceedings, while decisions about whether a noncitizen who had already entered could remain legally in the United States were made in deportation proceedings.[131]

IIRIRA combined these two separate sets of substantive and procedural rules into a single form of proceedings, called removal proceedings.[132] A distinction similar to that between exclusion and deportation, however, was still maintained. Noncitizens seeking admission (like those previously seeking entry) must demonstrate that they are not inadmissible under § 212 of the Immigration and Nationality Act; noncitizens who have already been admitted (like

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inadmissibility and therefore the number of removable noncitizens. *See supra* notes 119–122 and accompanying text.

130. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2006). For more differences between the coverage of *Fleuti* and the new IIRIRA definition, see 5 GORDON ET AL., *supra* note 106, § 64.01 n.5.

131. *See* Landon v. Plasencia, 459 U.S. 21, 25 (1982) ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

132. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 392, 110 Stat. 3009, 589 (1996).

those previously who had already entered) must demonstrate that they are not deportable under § 237.[133] Noncitizens found to be either inadmissible or deportable will be "removed."[134]

3. IIRIRA's Effective Date

IIRIRA provided that its effective date would be "the first day of the first month beginning more than 180 days after the date of the enactment," which meant that its changes took effect on April 1, 1997.[135] The effective date section specified that IIRIRA's amendments were not to be applied in deportation or exclusion proceedings pending prior to that date.[136] This effective date, however, applied primarily to the procedural portions of the statute, as a method for transitioning to the new procedures.[137] In fact, several substantive amendments specifically identified different temporal applications.[138]

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133. *Id.* § 304, 110 Stat. 3009, 593; INA § 240(e)(2), 8 U.S.C. § 1229a(e)(2) (2006).

134. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 593 (1996); INA § 240, 8 U.S.C. § 1229a (2006).

135. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 309(a), 110 Stat. 3009, 625 (1996).

136. *Id.*

137. *See* INS v. St. Cyr, 533 U.S. 289, 318 (2001) (citing H.R. CONF. REP. No. 104-828, at 222 (1996)) ("Section 309(c)(1) of the IIRIRA is best read as merely setting out the procedural rules to be applied in removal proceedings pending on the effective date of the statute.").

138. *See, e.g.*, Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 321(b), 110 Stat. 3009 (1996) (stating that the amendment of the definition of "aggravated felony" applies with respect to "conviction[s] . . . entered before, on, or after" the statute's enactment date); § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred . . . ."); § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act."); § 342(b) (adding that incitement of terrorist activity as a ground for exclusion "shall apply to incitement regardless of when it occurs"); § 344(c) (adding that false claims of U.S. citizenship as ground for removal "shall apply to representations made on or after the date" of enactment); § 347(c) (rendering excludable or deportable any noncitizen who votes unlawfully "before, on, or after the date" of enactment); § 348(b) (providing that automatic denial of discretionary waiver from exclusion "shall be effective on the date of the enactment . . . and shall apply in the case of any alien who is in exclusion or deportation proceedings

IV. RETROACTIVITY AND ADMISSION UNDER INA § 101(a)(13)

Despite the fact that IIRIRA was passed and took effect around fifteen years ago, questions with regard to its proper reach remain. While the effect of IIRIRA on the *Fleuti* doctrine began to be considered relatively quickly after IIRIRA took effect in April 1997, the full contours of this inquiry took some time to develop and be explored. Until the Supreme Court's decision in *Vartelas*, the retroactive application of the "new" definition of admission in § 101(a)(13) of the INA was one of the remaining unresolved issues. In part because subsection (v) of INA 101(a)(13)(C) most clearly involves some past conduct, these claims are raised most frequently by noncitizens like Mr. Charles who are reentering the United States after having been convicted of what are arguably crimes involving moral turpitude.

A. Initial Consideration of INA § 101(a)(13)

Shortly after the new definition of admission created by IIRIRA took effect, the Board of Immigration Appeals ("BIA" or "the Board") in *In re Collado-Munoz* held that the *Fleuti* doctrine did "not survive the enactment of the IIRIRA."[139] Collado-Munoz was a legal permanent resident who attempted to reenter the United States after a two-week visit to the Dominican Republic on April 7, 1997,

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as of such date unless a final administrative order in such proceedings has been entered as of such date"); § 350(b) (adding domestic violence and stalking as grounds for deportation, stating that the amendment "shall apply to convictions, or violations of court orders, occurring after the date" of enactment); § 351(c) (discussing deportation for smuggling and providing that amendments "shall apply to applications for waivers filed before, on, or after the date" of enactment); § 352(b) (adding renouncement of citizenship to avoid taxation as a ground for exclusion, stating that amendments "shall apply to individuals who renounce United States citizenship on or after the date" of enactment); § 380(c) (noting that civil penalties on noncitizens for failure to depart "shall apply to actions occurring on or after" effective date); § 384(d)(2) (adding that penalties for disclosure of information shall apply to "offenses occurring on or after the date" of enactment); § 531(b) (noting that public charge considerations as a ground for exclusion "shall apply to applications submitted on or after such date"); § 604(c) (noting that the new asylum provision "shall apply to applications for asylum filed on or after the first day of the first month beginning more than 180 days after the date" of enactment). *See also St. Cyr*, 533 U.S. at 319–20 (2001).

139. *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1065 (BIA 1998).

just six days after IIRIRA took effect.[140] The Board held that, regardless of the nature and length of his departure, he was properly found to be seeking a new admission under INA §101(a)(13)(C)(v) because he fell within INA § 212(a)(2) due to a 1974 conviction for sexual abuse of a minor.[141] Collado-Munoz apparently did not raise, and the Board did not explicitly consider, however, the question of the retroactive application of INA § 101(a)(13).[142] The Board's decision was based on its finding that the *Fleuti* exception for "innocent, casual, and brief" departures was not incorporated into the new definition of admission pursuant to the plain language of the statute.[143]

Several circuit courts of appeal—the First, Third, and Fifth—agreed with the BIA that IIRIRA abrogated the *Fleuti* doctrine.[144] For some years, this was as far as the inquiry progressed. The basic premise that IIRIRA abrogated *Fleuti* remained essentially unquestioned.[145] Courts did not adopt Board Member Rosenberg's dissenting opinion in *Collado-Munoz* incorporating the Fleuti doctrine into the new definition of admission.[146] They also did not, however, consider whether their contrary interpretation, that IIRIRA did away with the *Fleuti* doctrine, might make the application of at least some portions of INA § 101(a)(13) impermissibly retroactive when applied to conduct pre-dating IIRIRA. In addition, neither the BIA nor the circuit courts considered whether the *Fleuti* doctrine

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140. *Id.* at 1062–63.

141. *Id.* at 1062, 1066.

142. Even Board Member Rosenberg, in dissent, would have held that IIRIRA did not abrogate the *Fleuti* doctrine, not that the new INA § 101(a)(13) could not be retroactively applied. *Id.* at 1067–78.

143. *Id.* at 1064.

144. *See, e.g.*, DeVega v. Gonzales, 503 F.3d 45, 48 n.4 (1st Cir. 2007) (holding that passage of IIRIRA abrogated the *Fleuti* doctrine); Malagon de Fuentes v. Gonzales, 462 F.3d 498, 501 (5th Cir. 2006) (holding the *Fleuti* doctrine no longer applicable, citing two other circuits); Tineo v. Ashcroft, 350 F.3d 382, 384 (3d Cir. 2003) (holding that the *Fleuti* doctrine was "repealed by implication" with passage of IIRIRA).

145. *Cf.* Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Petitioner at 15, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) ("Lower courts have incorrectly assumed that [IIRIRA's] amendment supersedes *Fleuti*, without properly grappling with that decision's constitutional underpinnings.").

146. *Collado-Munoz*, 21 I. & N. Dec. at 1067–78. *See, e.g.*, Tineo v. Ashcroft, 350 F.3d 382, 390, 396–97 (3d Cir. 2003) (holding that lower courts should follow the BIA's decision in *Collado-Munoz*).

might continue to apply to those sections of the Immigration and Nationality Act that still used the term "entry."[147] In the meantime, legal permanent residents continued to be charged as inadmissible, detained, and removed from the United States on the basis of criminal convictions occurring prior to IIRIRA.

B. Consideration of the Retroactive Application of INA § 101(a)(13)

The first published case considering the retroactive application of the definition of admission in § 101(a)(13) of the INA did not appear until 2004.[148] Only three Circuit Courts of Appeal have explicitly considered the question. Two—the Fourth and the Ninth—found IIRIRA's definition of admission to be impermissibly retroactive under at least some circumstances.[149] One—the Second—found that it could be applied retroactively under the circumstances presented.[150] The First, Third, and Fifth Circuits, the circuits that held that IIRIRA abrogated the *Fleuti* doctrine, have still not considered whether such a position might, under at least some circumstances, be impermissibly retroactive. The remaining circuits—the Sixth, Seventh, Eighth, Tenth, and Eleventh—have not ruled on the issue in a published decision, although, as discussed below, some of them have acknowledged the question in cases ultimately decided on other bases. This broad divergence in approach, analysis, and result provides yet another example of the incoherence of the civil–retroactivity analysis in immigration cases.

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147. *Compare Collado-Munoz*, 21 I. & N. at 1065 (BIA 1998) (referring to "the no longer existent definition of 'entry' in the Act"), *with supra* note 118 and accompanying text (listing the sections of the Act that, post-IIRIRA, still use the term "enter" or "entry"). Because *Rosenberg v. Fleuti* relied at least in part on the intent language in the definition of entry in the former version of INA § 101(a)(13) as the basis for its "innocent, casual, and brief" exception, this would likely not have changed outcomes, given the number of courts interpreting *Fleuti* narrowly. *See* Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) (relying on the intent language in the definition of "entry" in the former version of INA § 101(a)(13)).

148. Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004). *Cf.* Camins v. Gonzalez, 500 F.3d 872, 882 (9th Cir. 2007) ("We are aware of only one appellate case, *Olatunji v. Ashcroft*, that has dealt directly with this question." (internal citation omitted)).

149. *Camins*, 500 F.3d 872; *Olatunji*, 387 F.3d 383.

150. Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *rev'd*, 132 S. Ct. 1479 (2012).

1. Circuits Finding that INA § 101(a)(13) Cannot Be Retroactively Applied

Both the Ninth and the Fourth Circuit Courts of Appeal have held that the definition of admission added by § 301(a)(13) of IIRIRA cannot be applied retroactively to an individual who reasonably relied on the concept that he would not be subject to expulsion from the United States on account of his guilty plea.[151] The noncitizen before the Fourth Circuit, Clifford Olatunji, was a Nigerian citizen who had been a legal permanent resident of the United States for more than a decade at the time of the appellate court proceedings.[152] In 1998, when attempting to reenter the United States after a nine-day trip to London, he was stopped and charged as seeking admission and inadmissible due to a 1994 guilty plea and conviction for theft of government property.[153] Rodolfo Camins, the noncitizen before the Ninth Circuit, was a citizen of the Philippines who had been a legal resident of the United States since 1988.[154] In 1996, he pled guilty to and was convicted of sexual battery.[155] He was charged as seeking admission and inadmissible in 2001 upon his return from a three-week trip to the Philippines to see his sick mother.[156]

Both Olatunji and Camins were ordered removed by their respective Immigration Judges and appealed unsuccessfully to the Board of Immigration Appeals.[157] Before their corresponding circuit courts, both argued that the previous version of INA § 101(a)(13) and the *Fleuti* doctrine, rather than the post-IIRIRA definition of admission, should be applied because of their pre-IIRIRA guilty pleas.[158] The Ninth Circuit, as in the previous line of cases following *Collado-Munoz*, first found that IIRIRA abrogated the

151. *Camins*, 500 F.3d at 882; *Olatunji*, 387 F.3d at 398.
152. *Olatunji*, 387 F.3d at 386.
153. *Id.*
154. *Camins*, 500 F.3d at 875.
155. *Id.*
156. *Id.*
157. *Camins*, 500 F.3d at 875–76; *Olatunji*, 387 F.3d at 386. Camins sought relief from removal under the former INA § 212(c). *Camins*, 500 F.3d at 875–76. Olatunji apparently did not seek relief from removal and likely would not have been statutorily eligible for §212(c) relief in any event. *Olatunji*, 387 F.3d at 386.
158. *Camins*, 500 F.3d at 875–76; *Olatunji*, 387 F.3d at 388.

Fleuti doctrine.[159] Unlike the previous decisions, however, the Ninth Circuit did not stop its analysis there, but instead went on to consider the retroactive application of IIRIRA's new definition of admission.[160] The Fourth Circuit began its substantive inquiry with the retroactivity question.[161]

Beginning with step one of the *Landgraf* analysis, both the Fourth and the Ninth Circuits held that there is no evidence of "clear congressional intent" that INA § 101(a)(13) should apply retroactively.[162] The Supreme Court in *St. Cyr* held that IIRIRA's effective date provision was insufficiently clear and unambiguous to assure "that Congress . . . has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[163] Since that time, this step of the analysis for those sections of IIRIRA without their own individual temporal–reach provisions has been essentially uncontested.[164]

The Fourth and Ninth Circuits also reached the same conclusion at the second step of the *Landgraf* analysis—the new definition of admission at INA § 101(a)(13)(C)(v) cannot be applied retroactively to noncitizens who pled guilty and were convicted of the offense triggering the application of the new definition prior to the effective date of IIRIRA.[165] Both Circuits focused on the fact that IIRIRA's new definition of admission attached new legal consequences to a past action, a guilty plea and resulting conviction, by automatically classifying noncitizens with such a conviction as seeking admission and thereby exposing them to a charge of

159. *Camins*, 500 F.3d at 880.

160. *Id.*

161. *Olatunji*, 387 F.3d at 388.

162. *Camins*, 500 F. 3d at 882; *Olatunji*, 387 F. 3d at 389, 393.

163. INS v. St. Cyr , 533 U.S. 289, 322 (2001) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272–73 (1994)). *See also Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

164. *See, e.g.*, *Camins*, 500 F.3d at 882 ("The Fourth Circuit held in *Olatunji*, and the government concedes here, that there is no evidence of 'clear congressional intent' that IIRIRA § 301(a)(13) apply retroactively."); *Olatunji*, 387 F.3d at 389 n.3 ("The Government has conceded that the relevant portions of IIRIRA do not contain 'effective date' or 'temporal reach' provisions and that 'the Court must reach the second step of the Landgraf test.'").

165. *Camins*, 500 F.3d at 885; *Olatunji*, 387 F.3d at 396.

inadmissibility upon return to the United States no matter how innocent, casual, and brief the travel.[166]

The Fourth and the Ninth Circuits do, however, differ in the legal standard that they apply and in how they reach this result. The Fourth Circuit held that "reliance, in any form, is irrelevant to the retroactivity inquiry,"[167] while the Ninth Circuit held that a guilty plea was sufficient evidence of objectively reasonable reliance on the old law.[168] This difference in analysis does have consequences. The Ninth Circuit held in a subsequent unpublished opinion, *Myers v. Holder*, that a noncitizen who was convicted after trial prior to IIRIRA rather than as the result of a guilty plea did not have the same reliance interests and therefore could not demonstrate that the new definition of admission should not be retroactively applied to him.[169] The Fourth Circuit has not considered this question in a published opinion; however, since it explicitly found that reliance was not a necessary factor, it would likely hold the opposite—that the post-IIRIRA version of INA § 101(a)(13) could not be applied to such a noncitizen.[170]

2. Circuits Allowing INA § 101(a)(13) to Be Applied Retroactively

The Second Circuit has disagreed with the Ninth and Fourth Circuits in *Vartelas v. Holder*.[171] Mr. Vartelas is a legal permanent resident whose factual situation closely resembles that of Mr. Olatunji and Mr. Camins. He is a Greek citizen who has been a legal permanent resident since 1989.[172] In 1994, he was convicted under federal law of conspiracy to make or possess a counterfeit security

166. *Camins*, 500 F.3d at 885; *Olatunji*, 387 F. 3d at 396.

167. *Olatunji*, 387 F.3d at 396.

168. *Camins*, 500 F.3d at 884.

169. Myers v. Holder, 409 Fed. App'x. 69, 70 (9th Cir. 2010).

170. *But see* Mbea v. Gonzales, 482 F.3d 276, 278 (4th Cir. 2007) (requiring reliance in the context of noncitizens convicted after a trial prior to the effective date of IIRIRA who alleged that the repeal of INA § 212(c) should not be retroactively applied to them); Chambers v. Reno, 307 F.3d 284, 293 (4th Cir. 2002) (holding that the repeal of INA § 212(c) could be applied to the petitioner who was convicted after trial prior to the repeal).

171. Vartelas v. Holder, 620 F.3d 108, 120 (2d Cir. 2010).

172. *Id.* at 110.

based on his guilty plea.[173] In early 2003, more than a decade after he committed the actions that were the basis for his criminal conviction, he was stopped when trying to reenter the United States after a seven–day trip to Greece to assist his parents with their family business there and was ultimately issued a notice to appear charging him as seeking admission and inadmissible because he had been convicted of a crime involving moral turpitude.[174]

Mr. Vartelas's procedural posture was somewhat unique, which to some degree sets his case apart from those of Mr. Olatunji and Mr. Camins. Mr. Vartelas apparently did not raise the argument regarding the retroactive application of INA § 101(a)(13)(C)(v) to him in his initial proceedings before the Immigration Judge or in his initial appeal before the Board of Immigration Appeals.[175] Instead, the argument was raised for the first time in a motion to reopen before the Board of Immigration Appeals alleging that Mr. Vartelas's initial counsel was ineffective for failing to raise the argument in the first instance.[176] The Board denied the motion, and only the denial of the motion was appealed to the Second Circuit.[177] It is the Second Circuit's denial of this petition for review that was recently considered by the Supreme Court.[178] While it might be expected that these distinct procedural issues would make this an unlikely case to be granted certiorari or would affect the Supreme Court's consideration of the issues presented because of the additional layers of legal analysis they pose, they were not raised as real issues in briefing, during oral argument, or in the Supreme Court's decision.[179]

The Second Circuit did not disagree with the Fourth and Ninth Circuits regarding step one of the *Landgraf* analysis, also

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173. *Id.*

174. *Id.* at 111; Brief of Petitioner at 10, Vartelas v. Holder, 132 S. Ct. 70 (2012) (No. 10-1211).

175. *Vartelas*, 620 F.3d at 111–12.

176. *Id.* at 110, 112–13.

177. *Id.* The Board's denial of Mr. Vartelas' appeal from the Immigration Judge's initial removal order was apparently never the subject of a petition for review to the Second Circuit. *Id.* at 112.

178. Vartelas v. Holder, 132 S. Ct. 1479 (2012).

179. The procedural posture and question of ineffective assistance of counsel were raised on remand to the Second Circuit, where the Court remanded to the Board of Immigration Appeals to answer that question in the first instance in light of the Supreme Court's decision regarding retroactivity. *See* Vartelas v. Holder, 689 F.3d 121, 124 (2d Cir. 2012).

finding that Congress in enacting IIRIRA did not expressly prescribe the temporal reach of INA § 101(a)(13)(C).[180] The Second Circuit did disagree, however, when it reached step two of the *Landgraf* analysis. It held that INA § 101(a)(13)(C)(v) could be applied to Mr. Vartelas even though his criminal conduct and conviction predated IIRIRA.[181] The panel in *Vartelas*, like the Ninth Circuit in *Camins*, found that reliance is a necessary component of the civil retroactivity analysis.[182] The court then focused on the commission of the crime, instead of on the guilty plea or conviction, based on the use of the term "committed" in INA § 101(a)(13)(C) and rejected the notion that a noncitizen could reasonably rely on provisions of the immigration laws when he commits a crime.[183]

Following the Second Circuit's decision denying the petition for review in *Vartelas v. Holder*, Mr. Vartelas filed a pro se petition for a writ of certiorari with the United States Supreme Court.[184] The question presented at this stage was phrased as:

> Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes LPR of his right, under Rosenberg v. Fleuti, 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?[185]

Among the reasons raised in support of the argument that the Supreme Court should hear the case was the circuit split discussed above.[186] Mr. Vartelas emphasized that this case took place "in a context—immigration law—where nation-wide uniformity is particularly important."[187] The government, in responding to the petition, did not contest that the circuit split, or the general

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180. *Vartelas*, 620 F.3d at 117.
181. *Id.* at 121.
182. *Id.* at 118.
183. *Id.* at 120.
184. Petition for Writ of Certiorari, Vartelas v. Holder, 132 S. Ct. 70 (Sept. 27, 2011) (No. 10-1211), 2011 WL 1321242.
185. *Id.* at *ii.
186. *Id.* at *5–8.
187. *Id.* at *5.

contradictions in approach, analysis, and law, existed; instead, the government argued that review by the Supreme Court would be "premature." [188] In support, the government pointed out that the Second Circuit explicitly addressed the Supreme Court's decision in *Fernandez-Vargas*, which was issued subsequent to the Fourth's decision in *Olatunji* and was not addressed by the Ninth in *Camins*, and that the Fourth and Ninth Circuits had not yet had a chance to respond to the Second Circuit's switch in focus to the commission of the crime from a plea of guilty or conviction.[189]

Despite the government's arguments, the Supreme Court granted certiorari on September 27, 2011;[190] oral argument was held on January 18, 2012.[191] The Court's decision, issued on March 28, 2012, will be discussed in section V below.

3. Other Courts

Prior to the Supreme Court's decision in *Vartelas*, no circuit other than the Second, Fourth, and Ninth had issued a decision whose result turned on the question of whether INA § 101(a)(13)(C) may be retroactively applied to some conduct predating IIRIRA. The Eleventh Circuit, however, recognized this as a valid question in a case ultimately decided on other grounds. In *Richardson v. Reno*, the court described the application of the new definition in § 101(a)(13)(C) to Mr. Richardson, a Haitian citizen who had pled guilty to trafficking in cocaine prior to IIRIRA, but did not consider the constitutional issue of retroactive application to a pre-1996 plea or hold that this application was proper or improper because it found that it did not have habeas jurisdiction.[192] The First, Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have not spoken to the question at all. The Board of Immigration Appeals acknowledged that the Supreme Court decision in *Vartelas* could affect its

188. Brief for the Respondent in Opposition at 14, Vartelas v. Holder, 132 S. Ct. 70 (2011) (No. 10-1211).

189. *Id.*

190. Vartelas v. Holder, 132 S. Ct. 70 (Sept. 27, 2011).

191. Transcript of Oral Argument, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

192. Richardson v. Reno, 162 F.3d 1338, 1342–48, 1378–79 (11th Cir. 1998), *vacated*, 526 U.S. 1142 (1999).

decisions, but did not reconsider its position as set out in *Collado-Munoz*.[193]

V. SUPREME COURT CONSIDERATION IN *VARTELAS V. HOLDER*—AN OPPORTUNITY TO RESOLVE THE CONFLICT?

A. Imposing a Guiding Principle—Protect the Noncitizen

It should be clear from the discussion above of circuit court decisions addressing the retroactive application of IIRIRA's new definition of admission at INA § 101(a)(13)(C) and other questions of retroactivity in immigration cases that these cases are incoherent when one attempts to view them as a settled, or even developing, body of law. The divergence occurs not just at the margins, or in particularly difficult cases, but at the heart of the civil retroactivity analysis in immigration cases. Circuits disagree repeatedly not only

193. *In re* Rivens, 25 I. & N. Dec. 623, 625 n.1 (BIA 2011) ("We note that the Supreme Court recently granted certiorari on the question whether the definition of 'admission' in section 101(a)(13)(C) of the Act applies to a returning lawful permanent resident who committed an offense identified in section 212(a) before the effective date of section 101(a)(13)(C). The outcome of that case could potentially affect the respondent's inadmissibility for his 1992 offense of offering a false instrument, but it would not seem to have relevance with respect to his 2000 accessory after the fact offense." (internal citation omitted)). Subsequent to the Supreme Court's decision in *Vartelas*, the BIA presumably must reconsider *Collado-Munoz* insofar as it is inconsistent and apply the law as set forth in *Vartelas*, but it has not yet considered the issue in any depth. *See, e.g.*, *In re* Valenzuela Felix, 26 I. & N. Dec. 53, 59 n. 6 (BIA 2012) ("We observe that the Supreme Court issued *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) subsequent to the Immigration Judge's decision in this case. The Supreme Court applied the 'antiretroactivity principle' there to hold that a returning lawful permanent resident could not be regarded as seeking admission under section 101(a)(13) of the Act where his conviction for an offense under section 212(a)(2) predated the effective date of the IIRIRA. *Id.* at 1487–92. Rather, the Supreme Court required an evaluation of the alien's application for admission under the *Fleuti* doctrine, pursuant to which a lawful permanent resident could make brief, casual, and innocent departures outside the United States without being classified as an alien seeking entry upon return. While the respondent argues that this case would apply to his 1991 conviction for possession of cocaine—an issue we do not decide—he does not claim that it would apply to his 2010 bulk cash smuggling conviction, which obviously postdates the effective date of the IIRIRA."); *In re* Fernandez-Taveras, 25 I. & N. Dec. 834, 836 (BIA 2012).

with each other but also with themselves. This uncertainty is particularly problematic because it is occurring within a doctrine, civil retroactivity, that is itself about protecting settled expectations and within a context, immigration, where the consequences of disrupting those settled expectations can be particularly severe.

The incoherence results from inherent ambiguity in the *Landgraf* analysis. There are many aspects of the presumption and the Supreme Court and lower federal courts subsequent jurisprudence that will always be open to interpretation and even manipulation. It cannot be cured without fundamentally altering the centuries-old analysis itself or by prescribing clear and definite guiding principles. This Article argues that the best solution in the immigration context is to employ a variant of the principle of lenity from the criminal realm. The courts' analysis in *Vartelas* and in all questions of civil retroactivity in immigration cases should be informed by a principle of construing all ambiguity in favor of the noncitizen.[194]

There is much justification for imposing such a strong guiding principle on the civil retroactivity analysis in the immigration context. Although immigration law and proceedings have long been held to be civil and not criminal, there is also agreement that immigration is different. Support in the case law for a canon construing ambiguities in favor of legal permanent residents, and even of other noncitizens, already exists. Such a principle is deeply grounded in the rationale underlying the *Landgraf* analysis. Most importantly, assuming that the principle could be applied truly and faithfully,[195] it would cure the problem of incoherence noted throughout this Article.

194. The existence of such a problem in civil retroactivity outside the immigration context and any potential solutions are beyond the scope of this Article.

195. This is, of course, a significant and somewhat unlikely assumption.

1. Immigration Is Different

a. Immigration Is Civil, not Criminal

Courts have virtually uniformly held that immigration proceedings are civil, and not criminal, in nature.[196] The courts have focused on several factors in their explanations of this position. First, and likely most importantly, the Supreme Court has emphasized that deportation, despite appearances, is not a punishment but is rather merely a vehicle for carrying out the government's immigration laws.[197] Since long before our current immigration laws were in force, the Court has made statements like "deportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."[198] Second, courts have concentrated on the position that immigration proceedings result in a determination of status instead of an adjudication of criminal guilt or innocence.[199]

Because immigration proceedings are not criminal, many of the individual protections afforded to those charged with a crime do not attach to noncitizens seeking an immigration status or defending against removal proceedings.[200] For example, noncitizens have no

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196. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."); IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 284–85 (12th ed. 2010–2011) (stating that "deportation is a civil, not criminal, proceeding" and providing an annotated collection of the cases and bodies of law that have contributed to the development of this doctrine).

197. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment.").

198. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

199. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The proceeding before a United States judge . . . is simply the ascertainment by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country.").

200. *See, e.g.*, KURZBAN, *supra* note 196, 284–85 (listing the individual protections that courts have held do not apply in removal proceedings because immigration is civil in nature; these individual protections include: the Ex Post

absolute right to counsel at government expense in immigration proceedings.[201] The protection against double jeopardy, or the right not to be tried or punished twice for the same offense, does not apply.[202] Most relevantly for the purposes of this Article, the bar against ex post facto laws does not apply.[203]

Facto Clause, the Bill of Attainder Clause, the Sixth Amendment right to counsel, and the protection against double jeopardy).

201. *Compare* U.S. CONST. amend. VI *with* INA § 292 (demonstrating that the Constitution gives an absolute right to counsel in a criminal proceeding even at the government's expense; whereas, in an immigration proceeding, there is a "privilege" of being represented by counsel at no expense to the government). *See also, e.g.*, Morales-Izquierdo v. Gonzales, 486 F.3d 484, 497 (9th Cir. 2007) (holding that there is no absolute right to effective counsel in immigration proceedings because such proceedings are civil rather than criminal); Stroe v. INS, 256 F.3d 498, 499–500 (7th Cir. 2001) (same); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988) (same); Mantell v. INS, 798 F.2d 124, 127 (5th Cir. 1986) (same). *But cf. In re* Compean, 24 I. & N. Dec. 710, 714, 716–26 (AG 2009), *vacated* 25 I. & N. Dec. 1 (AG June 3, 2009) (holding that noncitizens in removal proceedings have no Fifth Amendment or Sixth Amendment right to counsel).

202. U.S. CONST. amend. V. *See also, e.g.*, Seale v. INS, 323 F.3d 150, 159 (1st Cir. 2003) ("It is well established that neither the Ex Post Facto Clause nor the Double Jeopardy Clause is applicable to deportation proceedings."); De La Teja v. United States, 321 F.3d 1357, 1364–65 (11th Cir. 2003) (stating that the Double Jeopardy Clause applies only to "essentially criminal proceedings" and deportation is a "purely civil proceeding"); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) (holding that the Double Jeopardy Clause has no application to deportation proceedings because they are civil and not criminal in nature); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993) (confirming that the Ninth Circuit has "repeatedly held . . . that deportation is a civil action" and not subject to double jeopardy claims).

203. U.S. CONST. art. I, § 9, cl. 3. *See also, e.g.*, Collins v. Youngblood, 497 U.S. 37, 41–51 (1990) (discussing the contours of the applicability of the Ex Post Facto Clause); Lehmann v. U.S., 353 U.S. 685, 690–91 (1957) (Black, J., concurring) (encouraging the Court to reconsider the inapplicability of the Ex Post Facto Clause to the laws governing deportability); Marcello v. Bonds, 349 U.S. 302, 314 (1955) (declining to "depart from our recent decisions holding that the prohibition of the *ex post facto* clause does not apply to deportation"); Harisiades v. Shaughnessy, 342 U.S. 580, 593–96 (1952) (noting the longstanding precedent that the ex post facto prohibition does not apply to civil disabilities such as deportation); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 131–32 (2d Cir. 2005) ("[T]he *Ex Post Facto* Clause only applies to penal legislation and deportation proceedings have consistently been characterized as civil in nature."); Csekinek v. INS, 391 F.3d 819, 823–24 (6th Cir. 2004) ("The Supreme Court has thus definitively stated that the Ex Post Facto Clause does not apply to [civil] proceedings"); Perez v. Elwood, 294 F.3d 552, 557 (3d Cir. 2002) (noting that deportation is not punishment for past crimes and thus is not subject to ex post

b. *Despite Being Civil in Nature, Immigration Proceedings Have Particularly Serious Consequences*

While courts have firmly held that immigration proceedings are civil, they have recognized the exceptional nature and consequences of those proceedings. The Supreme Court has, on multiple occasions, acknowledged just how severe and drastic an outcome of deportation may be: "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."[204] The Court has gone so far as to label removal from the United States "the equivalent of banishment or exile" and to admit that it is, at least functionally, a penalty for breaking the immigration laws.[205]

The line between civil and criminal in the immigration context has been blurred even further recently with the Supreme Court's decision in *Padilla v. Kentucky*.[206] Historically, deportation was treated as a collateral consequence of a criminal conviction, which meant that defense counsel had no duty to warn their clients of the immigration consequences of the criminal charges they faced or agreed to plead guilty to.[207] The Supreme Court stepped away from the direct versus collateral dichotomy, and instead recognized the practical reality that immigration and criminal proceedings are

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facto protections); Hamama v. INS, 78 F.3d 233, 237 (6th Cir. 1996) ("The case law . . . makes it abundantly clear that ex post facto principles do not apply in deportation proceedings."); Scheidemann v. INS, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996) (rejecting petitioner's claim of a violation of the Ex Post Facto Clause because it does not apply to deportation proceedings); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) (confirming that the Ex Post Facto Clause applies only to the retrospective application of criminal laws and not civil deportation proceedings).

204. Woodby v. INS, 385 U.S. 276, 285 (1966). *See also* Fong Haw Tang v. Phelan, 333 U.S. 6, 10 (1948).

205. Fong Haw Tang v. Phelan, 333 U.S. 6, 10 (1948).

206. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

207. *See, e.g.*, Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008) ("Collateral consequences are outside the scope of representation required by the 6th Amendment and failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.").

substantially intermeshed and removal from the United States is a critical consequence to noncitizen criminal defendants.[208] The Court held that a criminal attorney's failure to warn his or her noncitizen client of the immigration consequences of a criminal plea constitutes ineffective assistance of counsel and may, if prejudice can be shown, warrant a vacatur of the plea.[209] This practical focus on the functional nature of immigration consequences is instructive; it demonstrates that the Court is willing to recognize the unusual nature of immigration and its consequences.

Immigration proceedings and deportation are in fact different for all of the reasons discussed above. This truth helps to justify treating them differently. In fact, courts frequently reference the "unique nature of deportation" as justification for doing just that.[210] There is, therefore, no reason not to consider treating immigration differently in the context of the civil–retroactivity analysis.

2. A Principle of Lenity

a. Some Guiding Principle Is Necessary

The *Landgraf* analysis alone is not enough to provide real guidance to courts considering issues of civil retroactivity. Even without looking beyond the Court's decision in *Landgraf*, the *Landgraf* analysis itself is at least somewhat internally inconsistent. The Court identifies many negatives to allowing legislation to be applied retroactively, particularly when considering step two of the analysis: the disruption of settled expectations, lack of notice regarding new duties or consequences, and increased or new liability for past conduct, among others.[211] If we take seriously these problems and the assertion of a strong historical presumption against retroactive legislation, should we allow that presumption to be overridden at step one by a simple congressional statement alone?

The Court justifies this position with the explanation that the requirement of a clear statement ensures that Congress will make thoughtful decisions about when the benefits of retroactive

208. *Padilla*, 130 S. Ct. at 1481–82; Chaidez v. United States, No. 11-820, slip op. at 9 (Feb. 20, 2013).

209. *Id.* at 1478.

210. *Id.* at 1481.

211. Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).

application outweigh the detriments.[212] This rationale, however, may reflect an overly optimistic and unrealistic view of the legislative process. Furthermore it does not address the concerns regarding congressional overreaching against "unpopular groups or individuals" that also ground the presumption against retroactivity. It could be argued that, given the inherent issues with the retroactive application of legislation, courts should always have some kind of check, or ability to hold that a provision cannot be applied retroactively, even where Congress has made a direct and clear statement of its intent for that provision to apply to past events.[213]

Accepting the *Landgraf* analysis as adequate, however, still does not remove all of the issues with incoherence. The Supreme Court in *Landgraf* explicitly recognizes that there will be uncertainty in the application of the two-step process and that retroactivity will necessarily require an individualized, case-by-case analysis.[214] In explaining this issue, the Court states:

> The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.[215]

In fact, this problem is even greater than was recognized by the *Landgraf* Court—disagreement has occurred not just in the hard cases, but in virtually all cases.[216] The "process of judgment" that

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212. *Id.* at 272–73.

213. *Cf.*, *e.g.*, *id.* at 267 n.20 (comparing legislative versus judicial competencies).

214. *Id.* at 269–70.

215. *Id.* at 270. The Court in *Landgraf* goes on to say that "retroactivity is a matter on which judges tend to have sound instinct[s] and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* (internal quotations and citations omitted). As discussed above, however, in practice, judges' instincts have proven to differ and these considerations have provided insufficient guidance.

216. *See supra* Part IV.B and accompanying notes 148–192.

courts are supposed to engage in has resulted in different, sometimes radically different, results even given similar facts and law.

Landgraf and subsequent cases emphasize that the retroactivity analysis "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'"[217] Even this simple statement of the rule, however, demonstrates that the test is a very soft one. Courts must ask and can reasonably come to different answers on multiple questions: Which event is the relevant one? When is an event completed as opposed to ongoing? What sort of legal consequences will be sufficient to trigger a holding that the new provision cannot be applied to the past event? The actual analysis as it is applied has even more opportunity for interpretation and manipulation. Many elements of the analysis can easily be interpreted in multiple directions, depending on the individual judge's values and the outcome he or she wants to reach. Regardless of whether the analytical choices are driven by salutary or concerning motives, the sheer number of possibilities presents problems.

The Supreme Court's decision in *Fernandez-Vargas* provides one clear example of this indeterminacy. *Fernandez-Vargas* held that the relevant event for purposes of the retroactivity analysis was Mr. Fernandez-Vargas's continuing presence without authorization in the United States.[218] The Court just as easily, however, could have selected Mr. Fernandez-Vargas's actual reentry as the pertinent conduct. No clear principle directed its decision in this respect. This selection was, however, likely outcome determinative—the reentry itself occurred well prior to the effective date of IIRIRA, while the continuing presence occurred after that date.

The Second Circuit's decision and the parties' merits briefs before the Supreme Court in *Vartelas v. Holder* offer more examples of just how soft a test the *Landgraf* analysis is.[219] The Second Circuit focused on the commission of the criminal offense that triggers IIRIRA's new definition of admission on reentry as the

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217. Martin v. Hadix, 527 U.S. 343, 357–58 (1999) (quoting *Landgraf*, 511 U.S. at 270).

218. Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 43–44 (2006).

219. Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010); Brief for Petitioner, Vartelas v. Holder, No. 10-1211 (Nov. 15, 2011); Brief for Respondent, Vartelas v. Holder, No. 10-1211 (Dec. 16, 2011).

relevant past conduct for the retroactivity analysis, unlike the Fourth and Ninth Circuits, which focused on the plea and conviction.[220] Again, the courts had little to no guidance on which event should be selected, and, given the circuit split that resulted, the choice of event likely heavily influenced the ultimate outcome.

The Second Circuit does not explicitly reference Justice Scalia's conduct-focused test in its decision, but the test's impact on the court's analysis is obvious, and both parties specifically address it in their briefs to the Supreme Court.[221] In fact, when applying this test in its brief, the government argues for a potential third triggering event—Mr. Vartelas's trip outside the United States that resulted in his being placed into removal proceedings.[222] Justice Scalia's alternative, or supplemental, test adds an additional layer of uncertainty to the civil–retroactivity analysis, regardless of whether or not that test is explicitly referred to by the courts.

The incoherence and indeterminacy present in the existing immigration-related civil–retroactivity jurisprudence clearly demonstrate the need for an additional guiding principle aimed at reconciling the divergent decisions.

b. *A Principle of Lenity for Noncitizens Is Justified Under the Supreme Court's Existing Retroactivity Jurisprudence*

The same existing immigration-related civil–retroactivity jurisprudence justifies the selection of a guiding principle aimed at protecting the noncitizens subject to the immigration laws. In addition to the problem of attaching new consequences to past conduct, retroactive statutes raise special concerns for "unpopular groups or individuals." The Supreme Court in *Landgraf* held that these special concerns provide an additional rationale underlying the presumption against retroactivity: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and

220. *See* Vartelas v. Holder, 620 F.3d 108, 119–20 (2d Cir. 2010); Camins v. Gonzales, 500 F.3d 872, 882–83 (9th Cir. 2007); Olatunji v. Ashcroft, 387 F.3d 383, 398 (4th Cir. 2004).

221. Brief for Petitioner at 32, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211); Brief for Respondent at 37–38, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

222. Brief for Respondent at 36, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[223]

Immigrants are the very definition of such an unpopular group requiring special protection and consideration. Legislation regulating immigration has historically been passed at times of both high levels of immigration and high levels of public sentiment against the current groups of immigrants.[224] These circumstances put exceptionally strong political pressure on Congress to act in a way that exacts retribution on these noncitizens for their status and their perceived wrongs against the United States. Because noncitizens cannot vote, their abilities to protect themselves against this adverse legislation are significantly reduced.[225]

The Supreme Court in *Landgraf* also suggests that it is appropriate to consider the context and subject matter in conducting a retroactivity analysis of a civil statute. In finding that the provisions of the Civil Rights Act of 1991 could not be applied retroactively, it noted that the provisions "share key characteristics of criminal sanctions."[226] Because the immigration and deportation contexts also share significant similarities with criminal sanctions, additional support is provided for the argument that a special rule may be adopted in the immigration context.

The rule of lenity in the criminal context is the doctrine that a court, in interpreting a criminal statute, should construe all ambiguities in favor of the criminal defendant.[227] Its existence and application are intended to protect the rights of those accused of a crime, a concededly vulnerable and disfavored group subject to legal proceedings with serious and far-reaching consequences and

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223. Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

224. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 4–11 (1998) (discussing ways in which Congress's plenary power over immigration has been used to discriminate against immigrant groups "identified as undesirable"); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEXAS L. REV. 1615, 1626–28 (2000) (noting a "positive . . . correlation between high-volume immigration and public hostility toward immigrants").

225. INS v. St. Cyr, 533 U.S. 289, 315 n.39 (2001).

226. *Landgraf*, 511 U.S. at 281.

227. BLACK'S LAW DICTIONARY 1449 (9th ed. 2009).

therefore in need of particular legal protection.[228] This is remarkably analogous to the situation that the Supreme Court has already acknowledged to exist for noncitizens, particularly those potentially subject to retroactive legislation, and suggests that the adoption of a variant of the rule of lenity in this context is an appropriate response.

c. *The Supreme Court Should Adopt a Canon of Construing Ambiguities in Favor of Noncitizens*

The Supreme Court should adopt a principle similar to the rule of lenity in the context of the retroactivity of immigration legislation. This principle can be most clearly expressed as a canon of construing ambiguities, in the legislation and during the analytical test and process, in favor of the noncitizen. Otherwise stated, this canon would direct courts, at least when conducting a civil–retroactivity analysis in the immigration context, to interpret the statute and to conduct its approach to the *Landgraf* analysis in the light most favorable to the immigrant.

Major immigration treatises already recognize this principle.[229] More importantly, there is also already support in the case law of the federal courts for such a canon. The Supreme Court has noted and relied on a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[230] Even the immigration agencies acknowledge that this principle may exist.[231]

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228. *See, e.g.*, United States v. Gibbens, 25 F.3d 28, 35–36 (1st Cir. 1994).

229. *See, e.g.*, 1 GORDON ET AL., *supra* note 106, § 9.05(2) ("And courts—as with the rule of lenity in criminal law—must read ambiguous deportation statutes or regulations in the light most favorable to the alien.").

230. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). *See, e.g.*, INS v. Errico, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); Costello v. INS, 376 U.S. 120, 128 (1964) (explaining that accepted principles of statutory construction in immigration law require the court to resolve doubt in favor of the noncitizen). *Cf.* United States v. Campos-Serrano, 404 U.S. 293, 297–300 (1971) (applying the principle of strict construction of criminal statutes in an immigration context).

231. *See, e.g.*, *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1077 (BIA 1998) (Rosenberg, B.M., dissenting) ("If at all ambiguous, deportation statutes must be read to favor the noncitizen."); *In re* N-J-B, 21 I. & N. Dec. 812, 840 (BIA 1997) (Rosenberg, B.M., dissenting) (taking the position that the Board of Immigration

In his merits brief, Mr. Vartelas argued for a weaker version of this canon, construing legal ambiguities within the civil retroactivity analysis of an immigration statute in favor only of legal permanent residents, not all noncitizens.[232] While there is some basis in immigration law generally for distinguishing between the rights and protections afforded to legal permanent residents as opposed to all noncitizens (including those without any legal status in the United States), courts should not import that dichotomy in this context. The existing support in the case law and the commentary do not make this distinction, and the reasons discussed above for providing special protection to noncitizens in this context offer no rational support for one. In fact, differentiating between legal permanent residents and other noncitizens in this canon would likely only increase the inconsistencies within the civil–retroactivity cases in the immigration context and therefore thwart the goal of adopting such a principle in the first place.

B. The Supreme Court's Decision in Vartelas

Applying a canon of construing all ambiguities in the civil–retroactivity analysis in favor of the noncitizen would have had significant implications for the Supreme Court's decision in *Vartelas v. Holder*. At the broadest level, such application would likely result in a decision favorable to Mr. Vartelas. While the Supreme Court did not explicitly rely on such a canon, the Court did reach the same result, holding that the post-IIRIRA definition of when a legal permanent resident will be deemed to be seeking admission in INA § 101(a)(13)(C)(v) cannot be applied retroactively to Mr. Vartelas and that his travel therefore remains governed by the *Fleuti* doctrine.[233]

In reaching its decision, the Supreme Court agreed with the lower courts that had considered the issue in the first step of the

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Appeals has historically resolved ambiguities in statutory construction in favor of the noncitizen).

232. Brief of Petitioner at 52–53, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). *Cf.* Brief for Respondent at 40–42, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) (arguing against the application of even a weakened version of this canon). Because Mr. Vartelas is likely to be treated as a legal permanent resident, there is no reason for him to make a more expansive argument.

233. Vartelas v. Holder, 132 S. Ct. 1479, 1491 (2012).

Landgraf analysis, that "Congress did not expressly prescribe the temporal reach of the IIRIRA provision in question."[234] At the second step of the analysis, the Court went on to find that § 301 of IIRIRA attached a new disability, the inability to travel without risking permanent removal from the United States, to past conduct and therefore cannot be applied to convictions predating the statute.[235] Perhaps most importantly, in reaching this decision, the Court held that reliance, while a factor that may support reading a law as operating prospectively only, is not absolutely required to find that a law cannot have retroactive effect.[236] The strong presumption against retroactive application of new laws in the Court's previous case law was an important motivating factor for this aspect of the Court's decision.[237]

While the Court never explicitly raised any kind of principle of construing ambiguities in favor of legal permanent residents or noncitizens generally, such considerations appear to have influenced the result and may have even been implicitly invoked in the decision itself. The factors supporting such a canon as discussed in section 2.C above were evident in several places throughout the Court's decision.[238] The severity of permanent removal from the United States as a consequence was emphasized as relevant: "[P]ermanent residents situated as Vartelas is now face potential banishment. We have several times recognized the severity of that sanction."[239] The Court specifically acknowledged the inability to travel and the separation from home and family as relevant and serious hardships.[240] The Court on several occasions drew support from or cited to criminal cases, lending support to the position that immigration is different and the boundaries between civil and

234. *Id.* at 1487.

235. *Id.* at 1487–88.

236. *Id.* at 1490–91.

237. *Id.* at 1491 ("'It is a strange presumption,' the Third Circuit commented, 'that arises only on . . . a showing [of] actual reliance.'") (quoting Ponnapula v. Ashcroft, 373 F.3d 480, 491 (3d Cir. 2004)).

238. As earlier discussed in relation to the Briefs, see *supra* note 232 and accompanying text, the Court focused specifically on legal permanent residents and not on noncitizens generally, but this can be easily accounted for by the fact that Vartelas was treated as a legal permanent resident. The factors discussed apply equally to all noncitizens, regardless of whether or not they have legal permanent residence.

239. *Vartelas*, 132 S. Ct. at 1487.

240. *Id.* at 1485, 1487–88.

criminal in the immigration context are becoming increasingly blurred.[241] Unfortunately, however, the Court never explicitly stated the role that these factors played in its decision-making process.

While the Supreme Court's decision in *Vartelas* is a laudable development in clarifying the retroactivity analysis in immigration cases, it does not go far enough to resolve the current muddle of the case law in this area or to prevent such confusion from occurring again in the future. Looking at the details of the civil retroactivity analysis necessary to reach the conclusion that the new version of INA § 101(a)(13)(C)(v) cannot be applied to Mr. Vartelas, there are several important ambiguities likely to trigger application of a principle protecting the noncitizen. First, the canon would direct the Supreme Court to choose Mr. Vartelas's plea of guilty and resulting conviction as the relevant past event as opposed to the commission of that crime or his most recent departure from the United States that resulted in him being placed in removal proceedings. Second, the canon would guide the Court to identify Mr. Vartelas's inability to travel outside the United States without risking detention, removal proceedings, and actual removal as a new, post-IIRIRA disability now imposed as a result of that past event rather than focusing on Mr. Vartelas's decision to depart from the United States post-IIRIRA.

The Court in *Vartelas* did in fact reach exactly these same two conclusions,[242] and future courts considering exactly this issue for someone in precisely Mr. Vartelas's situation will of course be bound by this result. However, the Court provided only limited, and insufficient, rationale for *why* it answered these questions in the way that it did. Without this rationale, its decision does not do as much as it could to guide courts considering other questions of civil retroactivity in the immigration context.[243] Relying only implicitly

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241. *See, e.g.*, *id.* at 1487 (citing *Padilla*, 559 U.S. at 44) (using certain prosecutions under the Racketeer Influenced and Corrupt Organizations Act as an example without noting the criminal context).

242. *Id.* at 1490–92.

243. One exception might be the issue of availability of waivers under former INA § 212(c), where disagreement among the courts has focused primarily on the role of reliance at the second step of the *Landgraf* analysis. *See, e.g.*, Khammany v. Holder, No. 06-73333, 2012 U.S. App. LEXIS 16865, at *2–3 (9th Cir. Aug. 13, 2012) (remanding in light of *Vartelas*'s discussion of the role of a reliance inquiry when the antiretroactivity principle is invoked); Patel v. Holder, No. 04-71459, 2012 U.S. App. LEXIS 16863, at *1 (9th Cir. Aug. 13, 2012)

on factors underlying a potential protective canon is not enough to guide future courts; it is too easy for courts to ignore or manipulate these facets of a decision. Explicitly stating that it was relying on a canon of construing any and all ambiguities during a civil retroactivity analysis in favor of the noncitizen would have bound future courts to do the same.

Although it is too soon to fully assess the impact of *Vartelas*,[244] it is already clear that confusion and inconsistency in courts' treatment of questions of civil retroactivity in immigration cases will continue. One indication of this comes from Justice Scalia's dissent (joined by Justices Alito and Thomas) in *Vartelas* itself. First, Justice Scalia chooses to focus on the decision to travel outside the United States rather than some aspect of the crime as the relevant controlling event.[245] While such a choice in future cases concerning the retroactivity of IIRIRA's definition of admission is foreclosed, similar choices in other questions of civil retroactivity are not because of the limited guidance in the Court's opinion.

Second, and perhaps more fundamentally, Justice Scalia treats retroactivity as solely a question of Congress's intent regarding the temporal application of a statute, devoid of any consideration of fairness.[246] In his view, it would appear that the second step of the *Landgraf* analysis is simply a means for divining congressional intent when Congress has not made an explicit statement in the statute itself.[247] This alternative test of civil retroactivity has in at least two other instances been raised in decisions of the Supreme Court and is on occasion invoked by litigants and lower courts.[248] If the Court in *Vartelas* had applied a canon construing ambiguities in favor of the noncitizen, and thereby reinforced the importance of fairness in the civil retroactivity analysis at least in the immigration context, this avenue would have been more firmly foreclosed in

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(same); Garcia-Olivarria v. Holder, No. 07-72631, 2012 U.S. App. LEXIS 9689, at *1 (9th Cir. May 10, 2012) (same).

244. As of September 8, 2012, the Supreme Court's decision in *Vartelas* has only been cited in seven cases where the court was considering a question of civil retroactivity in the immigration context.

245. *Vartelas*, 132 S. Ct. at 1493 (Scalia, J., dissenting).

246. *Id.* at 1492–93, 1495–96.

247. *See id.* at 1495.

248. *See* Martin v. Hadix, 527 U.S. 343, 362–63 (1999) (Scalia, J., concurring in part and concurring in judgment); Landgraf v. USI Film Prods., 511 U.S. 244, 291 (1994) (Scalia, J., concurring in judgment).

future cases. As it stands, Justice Scalia's alternative test may remain available to increase the incoherence of the civil retroactivity doctrine.

A second example comes from a pair of Fifth and Sixth Circuit decisions issued after the Supreme Court's decision in *Vartelas*. These decisions considered the retroactivity of another amendment made by IIRIRA, the addition of the stop-time rule, which governs when the seven years of continuous residence required for cancellation of removal for legal permanent residents will stop accruing.[249] The Fifth Circuit held that *Vartelas* did not require it to reconsider a prior decision holding that the stop-time rule could be applied retroactively because Congress had explicitly so provided.[250] The Sixth Circuit likewise held that *Vartelas* supported its conclusion that the stop-time rule could be applied retroactively, but for a completely different reason—because it did not attach a new disability to past conduct.[251] The fact that the Supreme Court's decision in *Vartelas* can be used to support two such different positions on the retroactive application of the same section of the law is a clear illustration that the Court could have done more to resolve the uncertainty in this area of the law.

As additional time passes, and new cases applying a civil retroactivity analysis in the immigration context make their way through the circuit courts of appeal, it is likely that the need for additional guidance will become only more apparent. A canon directing the courts to construe ambiguities in favor of the noncitizen would provide that lacking direction.

VI. CONCLUSION

The problem of the retroactive application of immigration statutes is not likely to go away. Even today, almost fifteen years after IIRIRA took effect, there remain a number of ongoing

249. INA § 240A(d)(1), 8 U.S.C. § 1229b (2006). A complete consideration of the retroactive application of the stop time rule is beyond the scope of this Article.

250. Sanchez v. Holder, No. 11-60540, 2012 U.S. App. LEXIS 13273, at *2–4 (5th Cir. June 28, 2012) (referring to Heaven v. Gonzales, 473 F.3d 167, 171 (5th Cir. 2006)).

251. Methasani v. Holder, No. 10-3914, 2012 U.S. App. LEXIS 17895, at *7 (6th Cir. Aug. 21, 2012).

retroactivity-based challenges to the legislation and the question of whether particular provisions may be retroactively applied remains seriously unsettled. Furthermore, it is highly likely that there will continue to be new immigration legislation that will continue to raise new retroactivity questions. The passage of new immigration laws that amend the existing Immigration and Nationality Act did not stop with IIRIRA,[252] and even now, comprehensive immigration reform and other potential immigration legislation, such as a federal Dream Act, continue to be discussed. This makes resolving the current inconsistency and uncertainty in the doctrine and application of civil retroactivity in immigration cases an issue of particular importance, if the serious impact of these changes in the law on the lives of individual noncitizens like Mr. Charles and their families did not already do so.

For all of the reasons discussed here, adopting a canon of construing all ambiguities in the civil retroactivity analysis in favor of the noncitizen is the most effective and supported strategy to begin to reconcile the existing incoherence.

252. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, § 119 Stat. 302 (2005) (amending various provisions of the INA).