INTERSTATE RECOGNITION OF SAME-SEX PARENTS IN THE WAKE OF GAY MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS

Deborah L. Forman

[pages 1–81]

Abstract: This Article examines the parental rights of a same-sex partner/spouse who is neither biologically related to, nor an adoptive parent of, a child being raised by the couple. Using a hypothetical example of a same-sex couple with one child, this Article explores whether the parental rights granted to a non-biological parent by marriage, civil union, or domestic partnership can and will survive a move to another state that does not explicitly recognize such same-sex relationships. Relying on statutory and common law precedents, this Article argues that even in those jurisdictions that have enacted a mini-Defense of Marriage Act, parental rights likely can survive the invalidation of a same-sex relationship because the Uniform Parentage Act, precedents regarding the legitimacy of children, and general choice of law principles all provide potent arguments for advocates seeking to preserve the parental rights of the same-sex partner.

THE PRIVATE IS PUBLIC: THE RELEVANCE OF PRIVATE ACTORS IN DEFINING THE FOURTH AMENDMENT

Sam Kamin

[pages 83–147]

Abstract: Because the Fourth Amendment regulates only governmental conduct, the behavior of private actors is almost wholly absent from academic Fourth Amendment literature. This Article argues that this exclusive focus on official conduct is myopic. Because the U.S. Supreme Court often looks to the conduct of private actors to determine the scope of permissible government conduct, a Fourth Amendment approach that ignores the invasions engaged in by these private actors is likely to concede questions regarding important civil liberties before the government even acts. This Article traces the development of Fourth Amendment jurisprudence, explaining the origins of the Court’s current focus on private conduct. It then describes the current state of private intrusions upon privacy, arguing that emerging technologies have facilitated an exponential growth in the capacity of private actors to obtain and process private information. This expansion in private searching will likely lead courts to uphold similar invasions of privacy when government agents engage in the same kind of conduct. Finally, this Article proposes legal, legislative, and practical solutions to the current privacy crisis, and
reluctantly concludes that only individual, practical steps are likely to produce effective privacy expansions in the near term.

NOTES

A RUDE AWAKENING: WHAT TO DO WITH THE SLEEPWALKING DEFENSE?

Mike Horn

[pages 149–182]

Abstract: Some sleepwalkers commit acts of violence, or even murder, in their sleep. Courts must decide what to do with criminal defendants who raise a defense of sleepwalking. A brief review of common law reveals that courts apply the defense inconsistently under various doctrines of justification and excuse. Sleepwalking is a unique medical phenomenon, and courts are poorly equipped to evaluate claims of sleepwalking under existing common law defenses. This Note proposes a single sleepwalking defense based on a balancing test that integrates the medical understanding of sleepwalking.

THE SELECTIVE USE OF ADMINISTRATIVE REGULATIONS IN CREATING RIGHTS ENFORCEABLE THROUGH § 1983 ACTIONS

John A. McBrine

[pages 183–214]

Abstract: For over 125 years, 42 U.S.C. § 1983 has provided a means for plaintiffs to bring a cause of action against any person acting under color of state law who deprives them of their rights. Since the U.S. Supreme Court expanded § 1983 to encompass remedies for violations of rights secured by federal laws, federal circuit courts of appeals have disagreed whether federal agency regulations, in addition to federal statutes, can create rights enforceable under § 1983. This Note explores this debate, as well as the Court’s treatment of federal regulations and the evolution of the Court’s approach to recognizing individual rights under § 1983. This Note argues that those regulations that create cognizable rights, that possess the full force and effect of law, and that deserve judicial deference should be eligible to create § 1983 interests. This Note also argues that both our modern administrative state and public policy considerations support the derivation of § 1983 interests from federal regulations.

ADOPTING THE EEOC DETERRENCE APPROACH TO THE ADVERSE EMPLOYMENT ACTION PRONG IN A PRIMA FACIE CASE FOR TITLE VII RETALIATION

Joan M. Savage

[pages 215–250]
Abstract: Section 704(a) of Title VII of the Civil Rights Act of 1964 protects employees who oppose what they consider to be workplace discrimination from subsequent employer retaliation. The retaliation provision, however, does not delineate the types of discriminatory acts that an employer is prohibited from taking. Thus, the federal circuit courts of appeals are divided on what types of acts rise to the level of adverse action such that an employee plaintiff may establish a prima facie case of retaliation. The U.S. Supreme Court has stated that the purpose of the retaliation provision is to maintain unfettered access to Title VII’s remedial mechanisms. This Note argues that the most appropriate way to do this is to ensure that all retaliatory acts that would likely deter an employee from filing a discrimination charge or otherwise opposing discriminatory activity should be prohibited.
INTERSTATE RECOGNITION OF SAME-SEX PARENTS IN THE WAKE OF GAY MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS

Deborah L. Forman*

Abstract: This Article examines the parental rights of a same-sex partner/spouse who is neither biologically related to, nor an adoptive parent of, a child being raised by the couple. Using a hypothetical example of a same-sex couple with one child, this Article explores whether the parental rights granted to a non-biological parent by marriage, civil union, or domestic partnership can and will survive a move to another state that does not explicitly recognize such same-sex relationships. Relying on statutory and common law precedents, this Article argues that even in those jurisdictions that have enacted a mini-Defense of Marriage Act, parental rights likely can survive the invalidation of a same-sex relationship because the Uniform Parentage Act, precedents regarding the legitimacy of children, and general choice of law principles all provide potent arguments for advocates seeking to preserve the parental rights of the same-sex partner.

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Author’s Note: It is axiomatic that the law is constantly changing, and readers of law reviews are well aware that new cases, statutes, and events regularly intervene between the time of Article submission and actual publication. I mention this phenomenon here because rarely has a topic generated the dramatic and rapid activity we are witnessing in the battle over gay marriage. This Article was submitted for publication at the end of May 2004, and reflects the state of the law at that time. Since then, the first case involving an interstate dispute over parental rights granted to a lesbian co-parent under Vermont’s civil union statute is pending before a Virginia appellate court. See Calvin R. Trice, Appeal Filed in Custody Case; Woman’s Lawyers Say Va. Should Not Have Jurisdiction in Dispute, RICHMOND TIMES-DISPATCH, Dec. 9, 2004, at B4, 2004 WLNR 14119989. Furthermore, the November 2004 election brought the number of states with Defense of Marriage Acts (“DOMA”) to forty-one. See NAT’L GAY & LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S. (2005), available at http://www.thetaskforce.org/downloads/mariagemap.pdf. It was impossible to address adequately these and other developments during the editorial process. A full discussion of these developments as they pertain to the interstate recognition of same-sex parents will appear in a future article.
INTRODUCTION

On May 17, 2004, as the United States marked the fiftieth anniversary of the landmark civil rights case, Brown v. Board of Education, gays and lesbians across the country celebrated a civil rights victory of their own.\(^1\) That day, Massachusetts became the first state to allow same-sex couples to marry.\(^2\) The day capped a stunning eighteen months that undoubtedly mark a watershed for gay rights. In the summer of 2003, the U.S. Supreme Court struck down the Texas criminal sodomy statute as a violation of due process in Lawrence v. Texas.\(^3\) Meanwhile, a series of Canadian court cases legalized same-sex marriage in the most populous provinces in that country.\(^4\) A few months later, on November 18, 2003, the Massachusetts Supreme Judicial Court declared in Goodridge v. Department of Public Health that the law restricting marriage to individuals of the opposite sex was a violation of equal protection under its constitution and instructed the Massachusetts legislature to remedy the violation within six months.\(^5\) Nor did the pace of change slow in 2004. The Massachusetts decision sparked a grassroots movement for the legalization of gay marriage in

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\(^1\) 347 U.S. 483, 495 (1954).


\(^5\) 798 N.E.2d 941, 948, 970 (Mass. 2003). In response to Goodridge v. Department of Health, Massachusetts legislators initially considered enacting a civil union or domestic partnership statute. See Cheryl Wetzstein, Legislators Discuss Gay “Marriage”: Massachusetts Leaders Favor Civil Union Law, WASH. TIMES, Dec. 1, 2003, at A4. An advisory opinion from the justices of the Supreme Judicial Court of Massachusetts, however, in response to questions submitted by the Massachusetts Senate, made clear that the proposed civil union bill still would violate the equal protection and due process clauses of the Massachusetts Constitution. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569–72 (Mass. 2004). In light of the opinion, the Massachusetts legislature passed an amendment to the constitution limiting marriage to a man and a woman and establishing civil unions. Massachusetts law, however, requires re-enactment of the amendment by next year’s legislature, followed by voter ratification, so it cannot become effective prior to November 2006. Elizabeth Mehren, Last-Ditch Bid to Stop Gay Marriage, L.A. TIMES, Apr. 16, 2004, at A16.
cities across the country, as mayors in San Francisco, California; Benton County and Portland, Oregon; King County, Washington; Sandoval County, New Mexico; and New Paltz, New York began issuing marriage licenses to same-sex couples, some even while under threat of prosecution for violating existing laws limiting marriage to opposite-sex couples. Proponents of same-sex marriage also filed lawsuits in several of these states, challenging bans on same-sex marriage as unconstitutional.

These dramatic changes in the rights and status of gays, particularly in the area of family law, did not spring forth out of whole cloth. In fact, a series of cases in the preceding decade laid the foundation for these momentous decisions. In 1993, Hawaii became the first state to declare the denial of a marriage license to two people of the same sex unconstitutional. In *Baehr v. Lewin*, the Hawaii Supreme Court held that the petitioners, several same-sex couples wishing to marry but denied a license by the state, had demonstrated that the marriage restriction was facially unconstitutional gender discrimination under the Hawaii Constitution. On remand, the trial court ruled that the state had failed to meet its burden of showing that the restriction limiting marriage to opposite-sex couples was necessary to achieve any compelling interest, thus paving the way for same-sex couples to marry.

While the appeal of the trial court’s ruling was pending, the Hawaii legislature responded by amending its constitution to limit mar-

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riage to members of the opposite sex. 10 Consequently, no same-sex couples ever had the opportunity to marry in Hawaii. Nonetheless, the response to the Baehr cases was swift and emphatic: Congress passed the federal Defense of Marriage Act (“DOMA”) in 1996, defining marriage for all federal laws, rules, and regulations as “a legal union between one man and one woman as husband and wife” and providing that no state need give effect to “a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.” 11 Further, approximately eighty percent of the states enacted a variety of so-called “mini-DOMAs,” statutes or constitutional amendments which, at a minimum, declare marriage to be a union solely of individuals of the opposite sex and refuse to recognize marriages between individuals of the same sex from other states. 12

Meanwhile, in 1999, in State v. Baker, the Vermont Supreme Court held that denying same-sex couples the benefits of marriage violated the Common Benefits Clause of the Vermont Constitution. 13 The court stopped short of requiring that same-sex couples be allowed to marry and invited the legislature to devise an alternative system that would provide the same benefits as marriage to same-sex couples. 14

13 744 A.2d 864, 867 (Vt. 1999).
14 Id.
The Vermont legislature responded by enacting the civil union statute, which allows same-sex couples to enter into a state-sanctioned civil union—a status providing all the rights and privileges of marriage under state law.\textsuperscript{15}

Although Vermont’s civil union statute explicitly reaffirmed that “marriage’ means the legally recognized union of one man and one woman,” it went significantly further than any other law up to that time in granting same-sex couples the equivalent rights, benefits, and responsibilities as married couples.\textsuperscript{16} In the fall of 2003, California enacted a law nearly as comprehensive: the California Domestic Partner Rights and Responsibilities Act, commonly referred to as A.B. 205.\textsuperscript{17}

These dramatic and far-reaching developments raise a host of challenging legal questions involving the interpretation of the meaning and scope of these laws within their home states and especially their enforceability or recognition by other states. Although numerous scholars have addressed the validity of the federal DOMA and the choice of law dilemmas posed by same-sex marriage, courts only recently have begun to grapple with whether the rights afforded by Vermont’s civil union statute will be recognized when the parties to that union move to another state and seek enforcement there.\textsuperscript{18} No court has yet decided whether an actual marriage by two people of

\textsuperscript{16} Id. § 1201(4).
\textsuperscript{17} Cal. Fam. Code §§ 297–299.6.
the same sex will be recognized outside of the state or country where the marriage was performed.¹⁹

Marriage and the alternative systems recently created for same-sex couples provide extensive rights, benefits, and responsibilities for the parties to those unions. In this Article, I am concerned with one subset of those rights and responsibilities: those granting parental status to the partner/spouse who is neither biologically related to nor an adoptive parent of a child being raised by the couple. More specifically, this Article will explore whether parental rights afforded by marriage or one of these alternative systems will survive a move to another state which does not explicitly provide for recognition of these relationships.²⁰

Estimates of the number of children being raised by gay or lesbian parents run from six million to fourteen million.²¹ Demographers estimate that thirty-four percent of lesbian couples and twenty-two percent of gay male couples are raising children.²² Some of those couples are raising children from prior marriages of one or both of the partners, or children who were born or adopted by one partner prior to beginning a relationship with the current partner. Others decided jointly to become parents, either through adoption or by artificial insemination for lesbian couples or surrogacy for gay men.

Undoubtedly, many same-sex couples with children, like their heterosexual counterparts, will move one or more times during the course of their relationship. Although awareness of the uncertainties of enforcement of their marital or partnership rights might lead to lesser mobility among this population, states can expect that at some point in the not too distant future, partners from Vermont, California, Massachusetts, and Canada will seek to enforce aspects of their partnership or marriage in the courts of other jurisdictions. Indeed, sev-

¹⁹ One city, San Jose, California, has voted to recognize marriages of gay employees who marry elsewhere, though a Christian legal group has filed suit to block the action. Harriet Chiang, The Battle over Same-Sex Marriage: Group Sues San Jose to Stop Family Benefits, S.F. CHRON., May 14, 2004, at B3, 2004 WLNR 7629092.

²⁰ The only state to provide explicitly for recognition of rights granted to same-sex partners by other states is California. See CAL. FAM. CODE §§ 297–299.6.


eral appellate decisions have resulted already from efforts to gain interstate recognition of a civil union since the statute was enacted in 2001.\textsuperscript{23} No cases have been decided yet involving parental rights acquired under these systems, but it is inevitable that such cases will arise.\textsuperscript{24} How will the courts respond? How should they?

This Article seeks to answer both of these questions according to state statutory and common law. The answers to these questions are of the utmost importance for the partners in these relationships and for the children being raised in these families. Parents who have loved, nurtured, and supported their children are at risk of being stripped of their parental rights should they move, and their children are at risk of being completely cut off from a parent to whom they are deeply attached and on whom they have depended. It is my hope that this Article can serve as a resource and a blueprint for advocates who will be litigating this issue in the future.

To assist us in our task, I have created the following hypothetical to provide a framework for analyzing a state’s obligation or ability to recognize and to enforce parental rights provided to same-sex partners through marriage or one of the alternative systems by another state or country: Andrea and Sarah have been involved in a committed lesbian relationship for four years. They have lived together for the past two years and have decided to start a family through the use of artificial insemination.\textsuperscript{25} The couple agrees that Andrea will be inseminated with sperm from an anonymous donor and bear the child. They also agree that after a three-month maternity leave, Andrea will return to work as an attorney, while Sarah, a nurse who makes considerably less than Andrea, will quit her job and stay home to care for the

\textsuperscript{23} See Rosengarten, 804 A.2d at 184; Burns, 560 S.E.2d at 49; Langan, 765 N.Y.S.2d at 422.
\textsuperscript{24} See Author’s Note supra at *.
\textsuperscript{25} I am focusing on lesbian parents who conceive by artificial insemination for two reasons. First, gay or lesbian couples who choose adoption in California, Massachusetts, or Vermont almost certainly will complete the adoption jointly, because courts generally will not approve an adoption by a married couple without both spouses’ consent. See Mark Strasser, Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results, 5 J.L. & Fam. Stud. 297, 314–15 (2003). Second, gay men who choose to create a family through surrogacy likewise will usually need to go through an adoption or other proceeding, as the non-biologically related parent would when a heterosexual couple uses a surrogate. See In re Adoption of K.F.H. & K.F.H., 844 S.W.2d 343, 344–45 (Ark. 1993) (finding surrogate mother’s consent to adoption by child’s father’s wife unnecessary because of failure to communicate with child); Adoption of Matthew B., 232 Cal. App. 3d 1239, 1251 (Ct. App. 1991) (holding that surrogate not allowed to revoke consent to adoption by wife of child’s father); Doe v. Doe, 710 A.2d 1297, 1301, 1317 (Conn. 1998) (finding wife of husband who conceived child with surrogate by artificial insemination was not child’s parent in the absence of adoption).
Baby. Prior to undergoing the insemination, Andrea and Sarah decide to solemnize their relationship, as permitted by the jurisdiction in which they live. Andrea ultimately becomes pregnant and gives birth to a baby girl, Madeleine. When Madeleine is four, a new job opportunity for Andrea prompts the family to move to another jurisdiction. One year later, Andrea and Sarah decide to end the relationship.

What legal rights, if any, would Sarah have to custody or visitation with Madeleine under this scenario? In the pages that follow, I will consider whether and how the answer to that question varies if Andrea and Sarah originally solemnized their relationship by marrying in Massachusetts or Canada or by entering into a civil union in Vermont or registering as domestic partners in California under A.B. 205. I begin, in Part I, by analyzing the nature of the parental rights afforded by each system to the non-biological parent—the parent in Sarah’s position. In Part II, I consider arguments for recognition of those parental rights in other jurisdictions. I analyze first if Andrea and Sarah have married in Massachusetts or Canada, beginning with jurisdictions that have not enacted a DOMA and continuing with jurisdictions which have enacted DOMAs. I will argue that, although parental rights likely can be secured in the non-DOMA jurisdictions through recognition of the marriage, more creative lawyering will be required in the DOMA jurisdictions. In these states, even if the courts refuse to recognize the same-sex marriage, advocates for same-sex parents nonetheless will be able to make a variety of arguments for recognition of their parental rights, including application of the Uniform Parentage Act (the “UPA”), recognition of the “incident” of parental status, if not of the marriage itself, and reliance on precedents governing choice of law in cases disputing legitimacy and more generally. I next discuss how the analysis would change if Andrea and Sarah entered into a Vermont civil union or a California domestic partnership, rather than marrying. In Part III, I consider opportunities and obstacles to seeking custody or visitation as a third party. Finally, in Part IV, I suggest some strategic alternatives to solidify a same-sex partner’s parental rights.

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26 See infra notes 32–78 and accompanying text.
27 See infra notes 80–439 and accompanying text.
28 See infra notes 82–389 and accompanying text.
29 See infra notes 391–439 and accompanying text.
30 See infra notes 441–452 and accompanying text.
31 See infra notes 453–467 and accompanying text.
I. PARENTAL RIGHTS FOR SAME-SEX PARTNERS

A. Under Marriage

1. Massachusetts

If Andrea and Sarah lived in Massachusetts and were to marry there, Sarah would enjoy the same parental rights as a husband in her position would. Massachusetts, like most states, provides that a husband who consents to his wife’s artificial insemination becomes for all purposes, the father of any children resulting from the procedure. Thus, Sarah would be considered Madeleine’s legal parent and would have a right to seek custody and visitation in the event of a divorce.

2. Canada

Canada applies a more expansive rule. A man who consents to the artificial insemination of his wife or cohabiting partner is considered the legal father of any children born of the procedure. Thus, as in Massachusetts, if Andrea and Sarah were to marry in Canada, Sarah would be considered Madeline’s legal parent.

B. Under the Domestic Partnership or Civil Union

Both California’s A.B. 205 and Vermont’s civil union statute grant same-sex partners the same parental rights as spouses. Although these provisions might seem at first glance to ensure that same-sex partners enjoy equal rights to custody, visitation, and child support as the biological parent, that assertion is open to interpretation, at least in Vermont. These statutes do not provide more rights than the partners would obtain were they married, and spouses who are not biologically related to their children do not always enjoy rights equivalent to those of the biological parent. As no cases have yet decided the scope of parental rights under these statutes, we will need to consider precedent from analogous areas of the law in each of these states, namely statutes and cases concerning husbands who are not biologically related to the children born during the marriage.

1. California

The California Partner Rights and Responsibilities Act provides that “[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.”\(^{35}\) In California, as in Massachusetts, the rights of a spouse to a child conceived by artificial insemination with the spouse’s consent are clear. Under section 7613 of the California Family Code, a husband who consents to the artificial insemination of his wife with donor semen under the supervision of a licensed physician is treated in law as if he was the natural father.\(^ {36}\) Thus, if Andrea and Sarah lived in California and registered as domestic partners under A.B. 205, Sarah could be assured of full parental rights as long as she and Andrea complied with the statute by using a physician to perform the insemination.\(^ {37}\)

2. Vermont

The rights of a same-sex parent in Sarah’s position are less clear if she and Andrea lived in Vermont and entered into a civil union there. The civil union statute provides as follows:

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.\(^ {38}\)

Unfortunately, Vermont has no statute defining the parental rights of a spouse when the wife is artificially inseminated. It seems likely that if a court faced a custody or visitation dispute between parties to a civil union, it would follow the lead of the many other states which have adopted the rule making the husband the legal father where the wife was artificially inseminated.\(^ {39}\) Many of those states have statutes estab-

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\(^{35}\) Cal. Fam. Code § 297.5(d).

\(^{36}\) Cal. Fam. Code § 7613(a); see In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (holding that wife who consented to implantation of embryo created with donated egg and sperm in surrogate is treated as natural parent based on artificial insemination statute).

\(^{37}\) Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 531 (Ct. App. 1986) (holding that failure to use physician for artificial insemination, as required by statute, meant a sperm donor had standing in a paternity action).


lishing the rights and responsibilities of the husband; others have reached a similar result through case law, relying on public policy or estoppel principles.\textsuperscript{40} Indeed, courts have imposed child support obligations on former husbands who did not consent in writing to the procedure during the marriage, even though a statute required it.\textsuperscript{41}

In the absence of clear authority, however, advocates should be prepared to argue in favor of full parental rights based on existing statutory authority. Section 308(4) of title 15 of Vermont’s domestic relations statute provides that a person is “rebuttably presumed to be the natural parent” if the child is born while the husband and wife are married.\textsuperscript{42} Since parties to a civil union enjoy the same rights as married persons in Vermont, Sarah would enjoy a rebuttable presumption that she is Madeleine’s parent. The question, of course, remains: under what circumstances could that presumption be rebutted?

Vermont has relatively scant authority dealing with challenges to claims of parental status by spouses who are not biologically related to their children. Statutes allowing for an action to be brought by various parties to establish parentage and to determine paternity through genetic testing suggest that a negative finding by a paternity test could rebut the presumption provided by section 308 of title 15 of the Vermont statutes.\textsuperscript{43}

Case law implicitly supports the notion that the marital presumption of paternity can be rebutted by evidence demonstrating that the husband is not the biological father of the child. In 2001, in \textit{Jones v.}\textsuperscript{40} See Michael J. Yaworsky, Annotation, \textit{Rights and Obligations Resulting from Human Artificial Insemination}, 83 A.L.R. 4th 295, 301 (1991). Michael J. Yaworsky stated the following:

Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any child born as a result of the insemination, for all purposes. Where this result is not dictated by statute, it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel.


\textsuperscript{43} \textit{See id.} \S 293 (allowing party to a support action to challenge the presumption of legal parentage provided by \S 308); \textit{id.} \S 302 (permitting actions to establish parentage); \textit{id.} \S 304 (allowing motion to require genetic testing); \textit{cf. id.} \S 308(1) (noting that the rebuttable presumption remains if the alleged parent does not submit to genetic testing without good cause if ordered).
Murphy, the Vermont Supreme Court considered a challenge to a court order assigning paternity to the biological father of a child born to a woman married to another man. The couple’s divorce order had named the husband and wife as the child’s parents. A stipulation entered into shortly thereafter stated that blood tests showed unequivocally that the husband could not have fathered the child. The mother filed a paternity action against the biological father, Richard Murphy, the next day, but did not move to amend the divorce judgment until the time for doing so (the nisi period) already had expired. The trial court nonetheless amended the divorce decree and found that Murphy was the child’s father. Murphy appealed, and the Vermont Supreme Court reversed, finding that the trial court had erroneously issued two conflicting rulings regarding paternity, because the decree was not amended in a timely fashion. The court’s decision implies, however, that had the motion to amend the divorce order been brought within the nisi period, it would have been granted and the husband would have been relieved of all his parental rights and responsibilities.

Although the Jones court reversed the declaration of parentage against the biological father because of the conflicting divorce decree, it took pains to distinguish an earlier case. In Godin v. Godin, the court refused to allow a former husband to re-open a divorce decree many years later, upon learning that he was not the biological father of the child he had believed to be his daughter. The Godin court affirmed the trial court’s order finding that the divorce decree was res judicata,

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45 Id.
46 Id.
47 Id.
48 Id.
49 Jones, 772 A.2d at 504, 506.
50 See id. at 506–07 (Dooley, J., concurring). Justice John A. Dooley stated the following in his concurrence:

The mother of the child now has the virtually unfettered choice whether to obtain child support from the biological father or her former husband . . . . If, for example, the mother decides that her former husband’s demands for visitation are unacceptable, she can disclose that he is not the biological father and bring a paternity action . . . . I suspect that a stipulated relief from the divorce judgment will be granted as a matter of course if there is an outstanding parentage order against the biological father.

Id. (Dooley, J., concurring).
51 Id. at 505–06.
52 725 A.2d 904, 905 (Vt. 1998).
rejecting the ex-husband’s argument that the wife, who knew another man was the biological father, had perpetrated a fraud on the court.\textsuperscript{53} In reaching this conclusion, the court relied substantially on “fundamental policy concerns that require finality of paternity adjudications,” specifically, the rebuttable presumption of parentage established by section 308 of title 15 of the Vermont statutes.\textsuperscript{54} The court rooted section 308 of title 15 of the Vermont statutes in the conclusive presumption of paternity, a long-standing doctrine holding that a child is conclusively presumed to be the child of the marriage unless the husband was physically incapable of fathering the child.\textsuperscript{55} The court described the presumption as “one of the strongest and most persuasive known to the law.”\textsuperscript{56} The court continued by enumerating several modern-day policies supporting adherence to the presumption, including protecting children from illegitimacy, preserving their emotional and financial security, and maintaining the stability of the family unit as well as “the continuity . . . and psychological security of an established parent-child relationship.”\textsuperscript{57} The court described the state’s interest in ensuring the financial and emotional well-being of children by preserving this parent-child relationship as “direct and strong” and declared that “it must remain paramount.”\textsuperscript{58} In the court’s view, it was “readily apparent that a parent-child relationship was formed, and it is that relationship, and not the results of a genetic test, that must control.”\textsuperscript{59} Moreover, the court acknowledged that these concerns take on even greater significance today “as family structures become more fluid and the means of conception become ever more varied.”\textsuperscript{60}

As Justice John A. Dooley pointed out in his dissent, however, section 308 of title 15 of the Vermont statutes is a rebuttable presumption which operates “only to assign the burden of production.”\textsuperscript{61} Once a party presents evidence rebutting the presumption—that the parent in question is not biologically related to the child—the presumption ceases to have effect, and the trier of fact must determine the fact at

\textsuperscript{53} Id. at 905–06.
\textsuperscript{54} Id. at 909; see Vt. Stat. Ann. tit. 15, § 308 (2002).
\textsuperscript{55} Godin, 725 A.2d at 909; see Vt. Stat. Ann. tit. 15, § 308.
\textsuperscript{57} Id. at 909–10.
\textsuperscript{58} Id. at 910.
\textsuperscript{59} Id. at 911.
\textsuperscript{60} Id. at 912.
\textsuperscript{61} Godin, 725 A.2d at 915 (Dooley, J., dissenting).
issue based on the evidence rather than the presumption. Justice Dooley disagreed with the majority’s policy analysis as well. In his view, the majority’s approach perpetuated a legal fiction in place of the biological reality which “results in a host of inequities for the child, the presumptive father (the husband), and the alleged father.” He also was concerned that the majority’s approach rewarded the mother for her fraudulent behavior. Nor did he see the need to protect the family unit when the marriage had been dissolved many years earlier.

Although the Godin case would not be directly controlling in our hypothetical, the majority’s reasoning lends strong support to Sarah’s claims under the civil union. The policies of ensuring financial and psychological security for the child apply equally in our case and indeed are arguably stronger here. In our hypothetical, Andrea and Sarah conceived the child by artificial insemination with sperm from an anonymous donor. Consequently, if the non-biological parent’s status is challenged successfully, the child will be left with one parent without recourse to support from another biological parent. Nor do Justice Dooley’s objections undercut Sarah’s argument. Although he may have a point about the typical functioning of the rebuttable presumption (though not one that garnered support of the majority in Godin), section 308 of the Vermont statutes contains references to the accuracy of genetic testing and clearly is designed to address the problem of uncertain paternity. Likewise his policy concerns do not apply in the case of same-sex partners—no fraud is being perpetrated, no legal fiction substituted for a biological reality. The child is not being deprived of the right to know her “true” parent. All parties know that one parent is not biologically related.

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62 Id. at 915 (Dooley, J., dissenting).
63 Id. at 915–16 (Dooley, J., dissenting).
64 Id. at 916 (Dooley, J., dissenting).
65 Id. (Dooley, J., dissenting).
66 See Godin, 725 A.2d at 909–10.
67 See id. at 911 n.3. The court made the following observation:

This is not a case where a third party is seeking to establish paternity and assume support of the child, or where support is being sought from a third-party putative father. A finding of nonpaternity in this case would essentially leave the child without the benefit of a father-child relationship, and the economic and emotional well-being that accompanies it.

Id. Anonymous sperm donors typically retain no parental rights or responsibilities. Yaworsky, supra note 40, at 320–21.
Thus, although the language of section 308 and the ability of a husband to contest his paternity under certain circumstances might suggest that the presumption in favor of Sarah’s parentage could be rebutted merely by proving she was not the biological parent of Madeleine, such a result would be strikingly at odds with the underlying purposes of section 308 and the civil union statute. Because same-sex partners, in most instances, would not both be biologically related to the child, allowing the biological partner to rebut the presumption of parentage for the non-biological parent would make the parental rights granted by the civil union statute largely illusory, at least in disputes between the partners.69

It seems highly doubtful that the legislature intended such an outcome.70 The words of the Vermont Supreme Court in Adoptions of B.L.V.B. & E.L.V.B. apply equally here: “[t]o deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.”71 Either section 308, as applied to parties to a civil union, requires giving conclusive effect to the presumption of parentage, or the court should follow the general rule regarding children born of married women by artificial insemination.

In the very unlikely event that a court denied full parental status to Sarah, at a minimum, she would have rights equivalent to those of a stepparent. Unfortunately, a stepparent’s right to custody or visitation appears quite limited under Vermont law. Section 293 of title 15 of the Vermont statutes allows stepparents living separately to petition the court for a decree regarding parental rights, responsibilities, and contact, but that provision as of yet has not been interpreted to pro-

69 Some lesbian couples are taking advantage of assisted reproductive techniques to ensure that each partner has a biological tie to the child. One partner provides the egg, which is fertilized in vitro and then implanted in the other partner, who carries the fetus to term and gives birth to the child. Nat’l Ctr. for Lesbian Rights, Legal Recognition of LGBT Families 5–6 (2002), available at http://www.nclrights.org/publications/pubs/lgbtfamilies092402.pdf; Ryiah Lilith, Student Author, The G.I.F.T. of Two Biological and Legal Mothers, 9 Am. U. J. Gender Soc. Pol’y & L. 207, 209–10, 216–17 (2001); cf. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 139 (Ct. App. 2004), superseded by 97 P.3d 72 (Cal. 2004) (finding lesbian who donated egg to partner was donor, not parent, because both intended only partner who gave birth to be legal parent).

70 See Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993) (describing Lubinsky v. Fair Haven Zoning Bd., 527 A.2d 227, 228 (Vt. 1986)) (noting that Lubinsky holds that the “intent of [a] statute is derived from consideration not only of language, but from [the] entire enactment, its reason, purpose and consequence, and on presumption that no unjust or unreasonable result was intended”).

71 Id. at 1275.
vide a right to visitation by a stepparent once the marriage is dissolved.\textsuperscript{72} Dicta in a case rejecting a pre-civil union claim by a lesbian to visitation with her partner’s adopted child is ambiguous at best.\textsuperscript{73} In \textit{Paquette v. Paquette}, the Vermont Supreme Court did consider the ability of a stepparent to seek custody of his stepson in a divorce.\textsuperscript{74} The court first found that section 293 gave the court the power to award custody to a stepparent while the parties were still married under certain circumstances.\textsuperscript{75} The court next interpreted a provision of Vermont’s child custody statute, section 652 of title 15 of the Vermont statutes, to allow a stepparent to petition for custody in a divorce proceeding, but only under limited circumstances.\textsuperscript{76} In deference to the parent’s fundamental constitutional right to custody, and the concomitant presumption that custody with the parent is in the best interests of the child, the court concluded that a stepparent could obtain custody only if he or she acted \textit{in loco parentis} to the child and demonstrated by clear and convincing evidence that either the parent was unfit or that extraordinary circumstances justified the award of custody in the best interests of the child.\textsuperscript{77} If \textit{Paquette} allows a stepparent to seek custody in a divorce, albeit under limited circumstances, surely a petition for visitation could be filed. We can expect, however, that the stepparent seeking visitation would have to make a similar showing to justify awarding visitation over the objections of a parent.\textsuperscript{78}

In summary, as long as Andrea and Sarah remain in their home state or country—whether Massachusetts, Canada, Vermont, or California—Sarah likely will be able to seek custody and/or visitation with Madeleine on an equal footing with Andrea. Although there are admittedly some vulnerabilities in Sarah’s position in Vermont, the bet-

\textsuperscript{73} Titchenal v. Dexter, 693 A.2d 682, 685, 687 (Vt. 1997) (noting that visitation rights were limited to married biological parents until legislature enacted grandparent statute, but also citing Vt. Stat. Ann. tit. 15, § 293, granting stepparents, among others, the right to petition family court regarding parental rights and responsibilities).
\textsuperscript{74} 499 A.2d 23, 25 (Vt. 1985).
\textsuperscript{75} Id. at 25–26; see Vt. Stat. Ann. tit. 15, § 293.
\textsuperscript{77} Paquette, 499 A.2d at 29–30.
\textsuperscript{78} Although one commentator suggests that a best interests showing would be sufficient, the U.S. Supreme Court’s decision in \textit{Troxel v. Granville}, 530 U.S. 57 (2000), likely compels a higher standard, similar to the \textit{Paquette} standard, regardless of a state’s prior precedents. See Jill Jourdan, \textit{The Effects of Civil Unions on Vermont Children}, Vt. B.J., Mar. 28, 2002, at 32, 34, available at http://www.vtbar.org/ezstatic/data/vtbar/journal/mar_2002/Jourdan.pdf (supporting sufficiency of best interests showing); \textit{infra} notes 441–452 and accompanying text (discussing third-party claims for custody or visitation).
ter interpretation of the civil union statute would recognize her as a legal parent. In California, the result seems certain. In the next Part, I explore the portability of these parental rights.\textsuperscript{79} What happens to Sarah’s parental rights if Andrea and Sarah moved out of state when Madeleine was four?

II. \textbf{Recognition of Same-Sex Partners’ Parental Rights in Other Jurisdictions}

The most obvious way to frame the question regarding the validity of Sarah’s parental rights in other jurisdictions is to ask whether the marriage, civil union, or domestic partnership will be recognized in the new state. But while the question may be straightforward, the answer is anything but. Interstate recognition of same-sex marriages, civil unions, and domestic partnerships arguably implicates the scope and meaning of the Full Faith and Credit Clause of the Constitution; the scope, meaning, and constitutionality of the federal DOMA; and the scope, meaning, and constitutionality of a patchwork of mini-DOMAs of varying types, all laid on top of a plethora of common law and statutory principles used by individual states to determine choice of law questions. In short, there is a complete lack of uniformity and the trend appears to be moving toward increasing diversity, as some states seek to equalize the family law rights of gays and lesbians and other states react with backlash toward that progress. Numerous scholars already have begun to address many of the questions surrounding interstate recognition of same-sex marriages, unions, and domestic partnerships, with no consensus on the answers or the reasoning supporting the answers.\textsuperscript{80} Other observers have remarked that

\textsuperscript{79} See infra notes 80–439 and accompanying text.

\textsuperscript{80} Compare generally Strasser, supra note 18 (arguing that DOMA is unconstitutional under the Full Faith and Credit Clause and states must recognize same-sex marriages), with Whitten, supra note 18 (arguing that DOMA not unconstitutional under the Full Faith and Credit Clause). See generally Cox, supra note 18 (exploring the choice of law questions arising in litigation over the validity of same-sex marriages upon return to the state of domicile); Henson, supra note 18 (arguing that the Full Faith and Credit and Due Process Clauses require recognition of at least the incidents of marriage and that the public policy exceptions in choice of law cases should be narrowed); Rensberger, supra note 18; \textit{Constitutional Constraints}, supra note 18 (providing a survey of the debate over constitutional constraints on refusals to recognize same-sex marriages); Keane, supra note 18 (arguing that the Full Faith and Credit Clause, the right of interstate travel, the fundamental interest in marriage, and conflict of law policies favor recognition of same-sex marriages in foreign states); Sawyer, supra note 18 (arguing that California policy requires recognition of the benefits granted to those who enter into a Vermont civil union).
“chaos” is likely to ensue once parties to these relationships attempt to enforce them elsewhere.\textsuperscript{81}

I do not aspire in this Article to provide a comprehensive analysis of all of the questions raised by the advent of same-sex marriage and the alternative regimes, nor any conclusive answers regarding the question of interstate recognition of same-sex marriages, civil unions, or domestic partnerships generally. Rather, I focus in the following Section specifically on the issue of recognition of the parental rights of a same-sex partner like Sarah under statutory and common law principles, and I move beyond the arguments premised on rules governing interstate recognition of marriages.

A. Recognition of Parental Rights if the Couple Marries in Massachusetts or Canada

The validity of a marriage contracted in another state or country traditionally has been governed by the rule of \textit{lex loci}\textsuperscript{82}—a marriage that is valid where it was performed will be held valid everywhere.\textsuperscript{82} A strong presumption in favor of recognizing marriages exists, and many states have statutes codifying the rule.\textsuperscript{83} However, under the general conflicts rule of \textit{lex loci}, the forum state may choose not to recognize such a marriage if it would offend the strong public policy of the forum state or, in some cases, if it was an evasionary marriage.\textsuperscript{84} In an evasionary marriage, the parties purposely marry in a state other than the one in which they live to avoid a prohibition on the marriage in their home state. They then return and resume residence in the home state. Sarah

\begin{footnotesize}
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\item \textit{Id. at B6; see David Crary, State-by-State Battle on Gay Marriage To Be Complex, Nasty, SAN DIEGO UNION-TRIB., Nov. 28, 2003, at A21, 2003 WLNR 13451072} (quoting Mark Strasser of Capital University Law School as stating, “All of this will be a mess”).
\item \textit{Restatement (Second) of Conflict of Laws § 283(2) (1971); Restatement of Conflict of Laws §§ 121, 129 (1934); Henson, supra note 18, at 560–61 n.32; 52 Am. Jur. 2d Marriage § 64 (2000).}
\item \textit{See Cox, supra note 18, at 1064–74.}
\item \textit{Restatement (Second) of Conflict of Laws § 283(2); Restatement of Conflict of Laws §§ 121, 129; Cox, supra note 18, at 1067–68, 1074–82 (discussing evasionary marriage statutes); Henson, supra note 18, at 560–61 & n.32; 52 Am. Jur. 2d Marriage, supra note 82, §§ 63–64.}
\end{itemize}
\end{footnotesize}
and Andrea’s marriage qualifies as a migratory marriage, rather than an evasionary marriage, because the parties married or registered as partners in the state in which they were then domiciled and intended to remain.85

The public policy exception obviously presents the biggest hurdle to achieving recognition of the marriage outside of Massachusetts or Canada. The widespread adoption of state DOMAs compounds the problem.86 These laws fall into roughly three categories: (1) laws prohibiting same-sex marriage and denying recognition to same-sex marriages validly contracted in other states (hereinafter “category one”);87 (2) laws that go beyond category one to explicitly deny recognition of any claim for a right, benefit, or responsibility based on the marriage (hereinafter “category two”);88 and (3) so-called “super-DOMAs,” which not only deny recognition of all of the above, but expressly prohibit recognition of benefits provided by alternate marriage regimes such as civil unions or domestic partnerships.89 These laws would seem at first

85 See Constitutional Constraints, supra note 18, at 2038.
glance to resolve the question at hand in all but the nine jurisdictions (other than Vermont or Massachusetts) which do not have a DOMA. However there are a number of bases for challenging that conclusion in Sarah’s case, as we will see later. We begin, though, by considering arguments Sarah might raise in the states without a DOMA.

1. Recognition of Parental Rights in Non-DOMA Jurisdictions

The jurisdictions currently without any statutory provisions denying recognition to same-sex marriages contracted elsewhere or declaring such marriages against public policy include Connecticut, Maryland, New Jersey, New Mexico, New York, Rhode Island, Wisconsin, Wyoming, and the District of Columbia. These jurisdictions follow the general conflicts rule regarding marriages stated above, with some variations, so a same-sex partner seeking parental rights after the relationship has ended will argue that the forum jurisdiction should recognize the marriage because the marriage is neither against public policy nor an attempt to evade the forum’s laws. Sarah would have strong arguments to make in favor of recognition of the marriage in each of these jurisdictions. As a general matter, a court considering whether an out-of-state marriage violates the forum state’s public policy begins by recognizing that a strong presumption exists in favor of validating marriages. Next, the court likely will exam-

relationship” entered into to achieve a same-sex marriage. The timing of the amendment argues against this interpretation, because it was adopted in 1997, three years before Vermont enacted its civil union statute.

90 See infra notes 128–389 and accompanying text.
91 See Nat’l GAY & LESBIAN TASK FORCE, supra note 12. Massachusetts and Vermont also fall within this category. In this Section, however, Sarah is seeking to have her Massachusetts marriage recognized elsewhere. Because Vermont allows civil unions, and, unlike California, has no contradictory DOMA ostensibly prohibiting recognition of same-sex marriages contracted elsewhere, Vermont undoubtedly would recognize the rights afforded by the Massachusetts marriage.


93 See Franklin v. Lee, 62 N.E. 78, 83 (Ind. App. 1901) (noting that the “presumption in favor of marriage . . . is one of the strongest known to the law”); Restatement (Second)
ine related legislation and judicial decisions to ascertain the forum state’s policy toward same-sex marriages. In Sarah’s favor, each of these states has laws banning discrimination based on sexual orientation. New Jersey and the District of Columbia have adopted domestic partnership ordinances which, although not as comprehensive as Vermont’s or California’s ordinances, provide gay and lesbian partners substantive legal benefits including rights to healthcare benefits and, in New Jersey, additional rights to pensions, insurance, and certain tax benefits comparable to those enjoyed by spouses, among others.

New York has extended rights to same-sex partners through judicial decisions. Indeed, New York was the first state to recognize a partner in a Vermont civil union as a “spouse” for purposes of suing for wrongful death in New York in *Langan v. St. Vincent’s Hospital.* In doing so, the *Langan* court relied on precisely these kinds of statutory pronouncements. The court bolstered its decision by citing laws prohibiting discrimination against gays and lesbians in employment, education, and housing, and including same-sex partners among those entitled to compensation from the September 11, 2001, victim compensation fund. It also relied on a landmark decision by the New York Court of Appeals which recognized a long-term, same-sex partner as “family” for purposes of the New York City rent control ordinance. In addition, the court relied on *In re Jacob,* a decision allowing second parent adoptions by same-sex partners, even though

of Conflict of Laws § 283 cmt. h (1971); Cox, *supra* note 18, at 1098; *see also* Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents,* 16 QUINNIPIAC L. REV. 105, 126 (1996) (discussing cases in which “the policy of preserving existing marriages overrode the policy against [racial] intermarriage”).


97 765 N.Y.S.2d at 420–22.

98 *Id.* at 415–16, 420–21.

99 *Id.* at 415–16.

100 *Id.* at 415 (citing Braschi, 543 N.E.2d at 55).
the adoption statute, if read literally, would have required the biological parent to relinquish all parental rights.\textsuperscript{101}

\textit{Jacob} should carry particular weight in Sarah’s case, because it directly reflects the state’s policy toward same-sex parenting.\textsuperscript{102} There, the court found that permitting a same-sex partner to adopt her partner’s biological child would further the purpose behind the New York adoption statutes—to foster the child’s best interests—by allowing “the two adults who actually function as [the] child’s parents to become the child’s legal parents.”\textsuperscript{103} Likewise, in our hypothetical case, recognizing the marriage from Massachusetts or Canada would ensure that Madeleine would not be cut off from one of her parents.

Andrea might counter that \textit{Alison D. v. Virginia M.} argues against recognition of the marriage.\textsuperscript{104} In \textit{Alison D.}, the New York Court of Appeals found a lesbian co-parent lacked standing under section 70 of the New York Domestic Relations Law to seek visitation.\textsuperscript{105} However, the court’s unwillingness to give a broad reading to this statute seems insufficient to overcome the other precedent and statutory authority favoring recognition of the marriage. Moreover, the \textit{Alison D.} court’s concern with unleashing unfettered judicial discretion to recognize claims by individuals who had acted in a parental capacity would not be implicated by validation of the marriage.

A number of other states in this category also have extended rights related to parenting to same-sex partners. Like New York, both Connecticut and New Jersey allow second-parent adoptions by same-sex partners.\textsuperscript{106} Connecticut, Maryland, New Jersey, New Mexico, Rhode Island, and Wisconsin also have granted rights to same-sex partners who have co-parented children in the absence of an adoption.\textsuperscript{107}

\textsuperscript{101} Id. at 416 (citing In re \textit{Jacob}, 660 N.E.2d 397 (N.Y. 1995)).
\textsuperscript{102} See 660 N.E.2d at 399.
\textsuperscript{103} Id.
\textsuperscript{104} See generally 572 N.E.2d 27 (N.Y. 1991).
\textsuperscript{105} Id. at 29.
Although the law strongly supports recognition of the marriage in most of these states, achieving marital recognition in Connecticut and Maryland could prove more difficult. These states have statutory language undercutting the claim for same-sex marriage recognition. Maryland’s public accommodations statute, which prohibits discrimination based upon sexual orientation, specifically states that the act “may not be construed to authorize or validate a marriage between two individuals of the same sex.” Likewise, Connecticut’s anti-discrimination statute provides that nothing in those sections be construed “to authorize the recognition of or the right of marriage between persons of the same sex.” Maryland defines marriage as a union of a man and a woman, and Connecticut expressly states that “the current public policy of the state . . . is now limited to a marriage between a man and a woman.”

These statutes might well mean merely that courts cannot use these laws to find a right to same-sex marriage within Maryland or Connecticut, as the Vermont Supreme Court did in *Baker*, however, legislative history and case law in Connecticut have persuaded one court of a broader interpretation. In *Rosengarten v. Downes*, the Connecticut Appellate Court considered a petition by a party to a Vermont civil union to dissolve the relationship. The lower court denied the petition, finding that the court lacked jurisdiction because the petition did not involve a marriage or a “matter relating to family

H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995) (recognizing that lesbian co-parent had standing to seek to establish mother-child relationship and to obtain visitation); *cf.* Gestl v. Frederick, 754 A.2d 1087, 1103 (Md. Ct. Spec. App. 2000) (finding that Maryland court had jurisdiction, as opposed to Tennessee court, because lesbian co-parent could obtain custody in Maryland by showing extraordinary circumstances); Barnae v. Barnae, 943 P.2d 1036, 1041 (N.M. Ct. App. 1997) (holding that New Mexico was convenient forum for hearing lesbian co-parent’s claim to custody and timesharing).

Indeed, in these jurisdictions, Sarah would appear to have standing to seek visitation with Madeleine, regardless of whether she and Andrea had married in Massachusetts or Canada, because she acted as a *de facto* parent or *in loco parentis* to Madeleine and because the marriage, whether valid or not, arguably represents an agreement between the parties that Sarah obtain parental rights. These precedents, however, do not obviate the need for recognition of rights flowing from the marriage because even these states may not consider the non-biological parent on an equal footing with the biological parent. *See infra* notes 453–467 and accompanying text.

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113 Id. at 172.
In affirming the trial court’s decision, the appellate court cited legislative history behind a change in the state’s adoption statutes, which evidenced a concern that allowing same-sex adoption might lead a Connecticut court to require civil unions, as permitting such adoptions had in Vermont. This background supports an interpretation that still would not necessarily preclude recognition of an out-of-state same-sex marriage. The court found other legislative history, however, that works against recognition. Debate on the adoption bill suggested that the legislature refrained from enacting a DOMA because legislators believed it was unnecessary given the statements contained in these statutes.

Precedents regarding validation of out-of-state marriages in Connecticut and Maryland are inconclusive. Although Connecticut courts have invalidated an out-of-state marriage between an uncle and a niece and a bigamous marriage, both of those kinds of marriages involved conduct which was criminal. Moreover, Maryland has validated an uncle-niece marriage. Both jurisdictions have recognized common law marriages entered into elsewhere.

With the possible exceptions, then, of Maryland and Connecticut, it seems highly likely that the non-DOMA states would find the same-sex marriage to violate strong public policy. The non-DOMA states would seem to have little interest in denying recognition of the marriage, particularly in our scenario, when the parties made no attempt to evade the forum’s marital restriction. Courts are much more reluctant to invalidate migratory marriages than evasionary

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114 Id. at 175.
115 Id. at 181.
116 Id. at 181–82.
117 Rosengarten, 802 A.2d at 181–82. If a court were to follow Rosengarten and to refuse to recognize the marriage in Connecticut, that ruling would not necessarily preclude a same-sex partner from seeking to obtain recognition of his or her parental rights by other means. See infra notes 128–389 and accompanying text.
121 Although commentators have opined in the past that the existence of anti-sodomy laws in a particular state might indicate that same-sex marriage was against public policy, the U.S. Supreme Court’s decision in Lawrence v. Texas declared such statutes unconstitutional. See generally 539 U.S. 558 (2003). Thus any statutes that remain on the books could not be used to establish a policy against same-sex marriage recognition.
marriages, although it has been done. Indeed, section 283 of the Restatement (Second) of Conflict of Laws ("Second Restatement") provides that "a marriage which satisfies the requirement of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." Comment k of section 283 of the Second Restatement indicates that as of the drafting of the section, "a marriage had only been invalidated when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter." This distinction between migratory and evasionary marriages held true, for the most part, even in miscegenation cases where parties sought to have an interracial marriage recognized in a jurisdiction which prohibited such marriages to the point of criminalizing them. The need to protect the parties' expectations and prevent one party from summarily choosing to escape marital obligations by moving to another jurisdiction compels recognition of migratory marriages. By contrast, when both parties knowingly marry in a state in which they are not domiciled, purposely to avoid restrictions in their home state, they are arguably on notice of the vulnerability of the marriage and the policies for recognition are weaker.

Thus, in our hypothetical, Sarah has compelling arguments in favor of recognition of a marriage that neither offends public policy in most of the non-DOMA states nor involves an attempt to evade the forum state's laws. Once the marriage is recognized, she would have all

122 See Constitutional Constraints, supra note 18, at 2040, 2041–42; Mark Strasser, For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages, 66 U. Cin. L. Rev. 339, 340, 367–70 (1998). The problem of interstate recognition of evasionary same-sex marriages contracted in Massachusetts may be moot. Governor Mitt Romney notified the governors and attorneys general of the other forty-nine states that Massachusetts will not issue licenses to same-sex couples from their states based on a 1913 law enacted when Massachusetts recognized interracial marriages, but other states did not. Elizabeth Mehren, Massachusetts Limits Gay Marriages, L.A. Times, Apr. 30, 2004, at A11. Challenge to the limitation as discriminatory seems highly likely.
123 Restatement (Second) of Conflict of Laws § 283(2) (1971) (emphasis added).
124 Id. § 283(2) cmt. k.
125 See Koppelman, supra note 93, at 119–26 (discussing validity of non-evasive, interracial marriages); P.H. Vartanian, Annotation, Recognition of Foreign Marriage as Affected by Local Miscegenation Law, 3 A.L.R.2d 240, § 5 (1949).
126 Strasser, supra note 122, at 349.
127 It remains to be seen whether courts will limit application of the DOMAs to evasionary marriages; none of the statutes on their face distinguish between migratory and evasionary marriages.
the legal rights outlined in Part I and would be able to pursue custody and/or visitation with Madeleine. However a same-sex partner in Sarah’s position most likely will need to look to other bases for securing her parental rights in the jurisdictions discussed in the next Section.

2. Recognition of Parental Rights in DOMA Jurisdictions

Although the ambiguous statutory language in Maryland and Connecticut may give courts in those states grounds to deny recognition to a foreign same-sex marriage, the remaining eighty percent of the states have clearly declared their unwillingness to validate an out-of-state, same-sex marriage. Although the statutes vary, all expressly state at a minimum that same-sex marriages either will not be recognized or are against public policy. Thus Sarah would seem to be foreclosed from arguing for validation of her marriage under choice of law principles. However, the state DOMAs should not prevent Sarah from gaining recognition of her parental rights. The key to accomplishing that goal will be to convince the court that it has jurisdiction to hear the case, that the co-parent (spouse) has standing to bring it, and that she has standing to bring it as a parent. For only as a parent will she clearly and definitively be entitled to have the custody question decided based on the best interests of the child.

a. Jurisdiction and Standing

Most custody and visitation disputes come to court in connection with a divorce or a paternity action. In states with a DOMA, because the court would not recognize the marriage, it may have no jurisdiction to consider a divorce of the parties. Indeed, this type of jurisdictional problem provided the basis for a Connecticut appellate court to dismiss a petition for dissolution of a Vermont civil union brought in

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128 See supra notes 87–89 and accompanying text (summarizing statutory language).
129 I am assuming for purposes of discussion that the DOMAs in each state would be valid. I do not consider here arguments for invalidating those statutes.
130 For a discussion of the difficulties inherent in seeking visitation or custody as a non-parent third party, see infra notes 453–467 and accompanying text.
Connecticut. In *Rosengarten*, a party to a Vermont civil union sought to dissolve the union in Connecticut. The trial court dismissed the action on the grounds that it had no jurisdiction because the civil union was neither a marriage nor a “matter relating to family relations” under the jurisdictional statutes. The appellate court affirmed.

Fortunately, however, courts typically have broad jurisdiction to adjudicate disputes concerning children, including custody, visitation, and child support, when the parents are not married. Even in *Rosengarten*, the court indicated that the superior court would have had jurisdiction under a “catchall” jurisdictional provision, if the civil union case had involved children.

Not all courts would necessarily agree. For example, in *Curiale v. Reagan*, a California appellate court found it lacked subject matter jurisdiction to consider a visitation claim brought by a lesbian co-parent. The court could only adjudicate a custody claim if it had a proper proceeding before it, such as a dissolution, guardianship, or dependency action. In the court’s view, the petitioner lacked standing to initiate any of those proceedings. However, in *Nancy S. v.*

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131 *Rosengarten*, 802 A.2d at 184.
132 *Id.* at 172.
133 *Id.*
134 *Id.* at 184.
137 272 Cal. Rptr. 520, 522 (Ct. App. 1990); see West v. Superior Court, 69 Cal. Rptr. 2d 160, 164 (Ct. App. 1997). In a 3–2 decision in 1997, the Vermont Supreme Court likewise rejected a lesbian co-parent’s claim to visitation based on lack of jurisdiction. Titchenal v. Dexter, 693 A.2d 682, 689–90 (Vt. 1997).
138 *Curiale*, 272 Cal. Rptr. at 522.
139 *Id.*
Michele G., another California appellate court rejected this conclusion, noting that “[a] court . . . lacks ‘jurisdiction’ only if it has no power to render a decision over the dispute.”\textsuperscript{140} Because the petitioner claimed she was a parent, the court had jurisdiction to decide her status under the UPA, though the court ultimately rejected her claim for lack of standing.\textsuperscript{141}

In the end, most courts would likely find jurisdiction to hear Sarah’s claim, but standing might prove the more formidable obstacle. A same-sex parent in Sarah’s position must have standing to petition the court for custody or visitation. Although at common law, standing can be established by showing that the petitioner “has some real interest in the action,”\textsuperscript{142} custody and related disputes are generally governed by statute. Such statutes typically provide that a child custody proceeding can be initiated by a parent.\textsuperscript{143} In some states, Sarah might have to commence an additional legal proceeding to establish maternity. For example, Arizona allows a parent to initiate a custody proceeding by filing for dissolution of a marriage or legal separation or by filing a proceeding to establish maternity.\textsuperscript{144} However, Arizona also defines “legal parent” as one who is related by blood or adoption.\textsuperscript{145} Regardless of the nature of the proceedings she must bring, Sarah will have to persuade the court that she is a parent under the relevant statute, even if she is not biologically related to Madeleine. The crux of my argument calls for recognition of parental status flowing from the marriage, even if the DOMA declares the marriage void. The following Sections will explore how a marriage declared invalid nonetheless can serve as the basis for establishing standing as a parent.

\begin{footnotesize}
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\item \textsuperscript{140} 279 Cal. Rptr. 212, 215 n.2 (Ct. App. 1991).
\item \textsuperscript{141} Id. at 215–19; see Thomas v. Thomas, 49 P.3d 306, 307–08 (Ariz. Ct. App. 2002) (finding that trial court had jurisdiction to hear partner’s petition for custody when partner had acted \textit{in loco parentis}).
\item \textsuperscript{143} See, e.g., ALASKA STAT. § 25.20.060(a) (Michie 2002); ARIZ. REV. STAT. ANN. § 25-401 (West 2000); DEL. CODE ANN. tit. 13, § 721(a) (1999); 750 ILL. COMP. STAT. ANN. 5/601(b)(1) (West Supp. 2004); IND. CODE ANN. § 31-17-2-3 (Michie 2003); MONT. CODE ANN. § 40-4-211(4)(a) (2003); NEV. REV. STAT. ANN. 125.510 (Michie 2004); N.C. GEN. STAT. § 50-13.1 (2003); 23 PA. CONS. STAT. ANN. § 5312 (West 2001); TENN. CODE ANN. § 36-6-510 (2001).
\item \textsuperscript{144} ARIZ. REV. STAT. ANN. § 25-401(B)(1)(b), (B)(3) (West Supp. 2004).
\item \textsuperscript{145} Id. § 25-415(G)(2).
\end{itemize}
\end{footnotesize}
b. Parental Rights Under the UPA

At least ten states with “category one” DOMAs have adopted the UPA, including the provision that “[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship.”\textsuperscript{146} In these states, Sarah can argue that the marriage, even if rendered invalid by the forum state’s DOMA, establishes her status as a mother under the UPA and qualifies her to seek custody as a parent. The language of this provision and the comparable paternity provision suggest a broad scope that courts have been slow to embrace, preferring to limit standing essentially to parents related by biology, adoption, or, for men, marriage.\textsuperscript{147} Indeed, a number of judicial decisions have dismissed claims for custody or visitation by a lesbian co-parent based on lack of standing, finding that the partner did not meet the statutory definition of parent.\textsuperscript{148} These cases are all


\textsuperscript{148} \textit{E.g.}, K.M. v. E.G., 13 Cal. Rptr. 3d 136, 139 (Ct. App. 2004) (finding that lesbian co-parent not a parent under the UPA), \textit{superseded by} 97 P.3d 72 (Cal. 2004); \textit{In re Guardianship of Z.C.W.}, 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999) (noting that courts of appeal have determined a lesbian parent neither biologically nor adoptively related is not entitled to custody); \textit{Nancy S.}, 279 Cal. Rptr. at 219 (holding that lesbian partner not a parent under the UPA); \textit{Bonfield}, 780 N.E.2d at 246–47 (finding that same-sex partner not a “parent” under the state’s parentage act, but allowing partner and parent to enter into shared custody agreement); \textit{State ex rel. D.R.M.}, 34 P.3d 887, 891–92 (Wash. Ct. App. 2001) (finding that lesbian co-parent not a parent under UPA); \textit{cf.} McGuiffin v. Overton, 542 N.W.2d 288,
distinguishable from our hypothetical, though, because in none of them had the partners legally married anywhere.\textsuperscript{149}

This distinction is significant because the UPA makes statutes related to establishing paternity applicable to establishing maternity, insofar as practicable.\textsuperscript{150} Indeed, the statutes addressing how a mother can establish a parent-child relationship provide that the relationship can be established by proof of the woman having given birth “or pur-

\textsuperscript{149} Moreover, as we shall see, courts are beginning to read the UPA more expansively to recognize a co-parent’s standing. See infra notes 217–237 and accompanying text (discussing Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000)). Two Washington cases, in dicta, suggested that the UPA might have provided an avenue for a lesbian co-parent to seek visitation. \textit{Parentage of L.B.}, 89 P.3d at 278–79, 285; \textit{D.R.M.}, 34 P.3d at 892. \textit{Parentage of L.B.} held, however, that a newer version of the UPA did not give a lesbian co-parent standing, 89 P.3d at 278–79, 285. \textit{Parentage of L.B.} and other courts have recognized a partner’s right to pursue custody or visitation even in the absence of marriage on a variety of other theories though. \textit{E.g.}, \textit{In re Guardianship of Olivia J.}, 101 Cal. Rptr. 2d 364, 368 ( Ct. App. 2000) (noting that a relative or any other person may file for guardianship, though such a non-parent must show detriment to the child if he or she stays with the parent); \textit{In re Hirenia C.}, 22 Cal. Rptr. 2d 443, 448–50 ( Ct. App. 1993) (allowing claims by \textit{de facto} parents or persons “with an interest” in the child); \textit{Laspinas-Williams}, 742 A.2d at 843 (noting that state statute allows “any person” to seek visitation of a minor child); S.F. v. M.D., 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (allowing those deemed to be \textit{de facto} parents to pursue visitation); LaChapelle v. Mitten, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000) (noting that “the welfare of the child takes precedence” in determining custody); Russell v. Bridgens, 647 N.W.2d 56, 65 (Neb. 2002) (Gerrard, J., concurring) (noting that the \textit{in loco parentis} doctrine allows a co-parent or partner to pursue custody); V.C., 748 A.2d at 550 (allowing claims by those found to be psychological parents); A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. App. 1992) (allowing such claims if in the best interests of the child); T.B. v. L.R.M., 786 A.2d 913, 914 (Pa. 2001) (applying the doctrine of \textit{in loco parentis} to grant standing for custody or visitation); 89 P.3d at 285 (allowing common law claims of \textit{de facto} or psychological parentage); \textit{H.S.H.-K.}, 533 N.W.2d at 435 (allowing petitions for visitation when the petitioner has a parent-like relationship with the child and a “significant triggering event” justifies the state’s involvement); \textit{cf.} Chambers v. Chambers, No. CN00-09493, 2002 WL 1940145, at *10 (Del. Fam. Ct. Feb. 5, 2002) (deeming lesbian co-parent a parent under Delaware child support statute and finding that she was equitably estopped from denying support obligation); \textit{Barnae}, 945 P.2d at 1039–41 (suggesting that in analysis of interstate jurisdictional dispute, co-parent would have standing in New Mexico to seek timesharing and custody); Karin T. v. Michael T., 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985) (holding that woman who posed as a man, married a woman, and consented to artificial insemination was a parent responsible for child support for resulting children).

\textsuperscript{150} See supra note 146.
suant to the provisions of this chapter.” The UPA provides that a man is presumed to be the father if he and the child’s mother “attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid” and, if the marriage was declared invalid by a court, the child was born within 300 days of that determination or, if the marriage is invalid without a court order, the child was born within 300 days of the termination of cohabitation. In our hypothetical, the parties did attempt to marry, the marriage would be invalid in these DOMA jurisdictions, and the child was born within 300 days of the termination of cohabitation. In essence, Sarah would, by “parity of reasoning,” use these provisions to establish herself as a presumed mother.

Courts already have relied on this type of analysis to establish parental rights for mothers who are not biologically related to their children. The first case to do so was *In re Marriage of Buzzanca*. *Buzzanca* involved claims surrounding a child who was born with the assistance of reproductive technology. John and Luanne Buzzanca arranged for a surrogate to carry to term a child conceived with donor sperm and donor egg. Shortly before the birth of the child, Jaycee, John and Luanne separated. John subsequently refused to pay child support on the ground that he was not Jaycee’s father. The trial court agreed, ruling that because neither he nor Luanne were biologically related to Jaycee, neither was a legal parent. The

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154 *Buzzanca*, 72 Cal. Rptr. 2d at 282.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Buzzanca*, 72 Cal. Rptr. 2d at 282.

160 *Id.*
California Court of Appeal reversed, rejecting a result that rendered the child “a legal orphan.”\textsuperscript{161} It held that John was the father based on an analogy to the artificial insemination statute which declares that a husband who consents to the insemination of his wife is the legal father of the resulting child.\textsuperscript{162} Like artificial insemination, the in vitro fertilization which the Buzzancas planned for and initiated was a medical procedure causing the procreation of a child and thus rendering the Buzzancas the parents, regardless of their lack of biological tie to Jaycee.\textsuperscript{163} In Luanne’s case, the court specifically relied on the UPA provision allowing a mother-child relationship to be established by proof of giving birth “or under this part.”\textsuperscript{164} In the court’s view, this provision allowed application of the UPA’s artificial insemination provision to Luanne to establish maternity.\textsuperscript{165}

Subsequent cases support our argument even more directly. In \textit{In re Karen C.}, the California Court of Appeal held that a woman who had held a child out as her own was a presumed mother, and her child, Karen, the subject of a dependency proceeding, had standing to bring an action to establish a mother-child relationship under California’s UPA.\textsuperscript{166} Karen’s biological parents had given her to Leticia, the presumed mother, shortly after Karen’s birth.\textsuperscript{167} At the hospital, the birth mother had identified herself as Leticia, so that Leticia’s name would be on the birth certificate.\textsuperscript{168} Leticia thereafter raised Karen as her own, allowing Karen to believe she had been adopted.\textsuperscript{169}

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 284, 293–94.
\item \textsuperscript{162} \textit{Id.} at 284–88.
\item \textsuperscript{163} \textit{Id.} at 282. Although not decided under the UPA, \textit{Karin T. v. Michael T.} used similar reasoning to hold a woman responsible for child support. 484 N.Y.S.2d at 784. The woman, Marlene, had posed as a man, Michael, and married Karin. \textit{Id.} at 781. Michael subsequently signed a consent to the artificial insemination of Karin. \textit{Id.} at 782. Two children were born to the couple by this method. \textit{Id.} at 781–82. Upon separation, Karin sought child support. \textit{Id.} at 781. The court granted the petition, even though a proceeding to void the marriage was pending, on the grounds that Michael’s signing of the consent brought the children into the world “as if done biologically.” \textit{Id.} at 784; \textit{accord Chambers}, 2002 WL 1940145, at *10 (lesbian co-parent’s involvement in artificial insemination of partner “while biologically not providing the genetic material necessary to conceive this child, constituted a symbolic act of procreation”).
\item \textsuperscript{164} Buzzanca, 72 Cal. Rptr. 2d at 284.
\item \textsuperscript{165} \textit{Id.} at 288. Building on Buzzanca, lesbian co-parents in California have sought and obtained declarations of parentage under the UPA when one partner has consented to the artificial insemination of the other and both intend to raise the child together. \textit{Nat’l Ctr. for Lesbian Rights, supra} note 69, at 5–6.
\item \textsuperscript{166} 124 Cal. Rptr. 2d 677, 679, 681 (Ct. App. 2002).
\item \textsuperscript{167} \textit{Id.} at 678.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\end{itemize}
These facts came to light when Karen was ten and became a depend-
ent of the court due to Leticia’s abuse and neglect.\textsuperscript{170} Karen peti-
tioned the court to determine that a mother-child relationship existed
with Leticia.\textsuperscript{171} The juvenile court denied the request on the grounds
that Leticia was neither a birth nor genetic mother.\textsuperscript{172}

On appeal, the court declared Leticia a presumed mother.\textsuperscript{173} The
court reached this conclusion by applying the presumptions contained
in section 7611 of the California Family Code, which deal with pater-
nity.\textsuperscript{174} The court recognized that a paternity judgment represents not
solely a reflection of genetics, but rather “a mixture of a search for ge-
netic truth and the implementation of the strong public policies favor-
ing marriage and family stability, and disfavoring labels of illegiti-
macy.”\textsuperscript{175} Thus, a judgment of paternity could be, in the court’s words,
“a decretal fiction”—a fiction created by decree.\textsuperscript{176} The court went on
to conclude that these principles “should apply equally to women.”\textsuperscript{177}

The analysis did not end there, however, because section 7612(a)
of the California Family Code allows these parentage presumptions to
be rebutted “in an appropriate action by clear and convincing evi-
dence.”\textsuperscript{178} The question remained in Karen C. whether this was an ap-
propriate action for rebutting the presumption.\textsuperscript{179} The court re-
manded the case to the juvenile court for a determination on that
issue.\textsuperscript{180} The analysis of that question would include public policy con-
siderations, such as whether the courts should allow a form of \textit{de facto}
adoption that bypassed all legal formalities.\textsuperscript{181}

The question for us, then, is whether our hypothetical case pre-
sents “an appropriate action” for rebuttal of the presumption of
motherhood created by the invalid same-sex marriage. Other cases
can help to guide us in this analysis.

In \textit{In re Nicholas H.}, the California Supreme Court held that a man
who was not biologically related to the child he helped to raise none-

\begin{footnotes}
\footnote{170}{\textit{Id.}}
\footnote{171}{\textit{Karen C.}, 124 Cal. Rptr. 2d at 678.}
\footnote{172}{\textit{Id.}}
\footnote{173}{\textit{Id.} at 679.}
\footnote{174}{\textit{Id.} at 679–81.}
\footnote{175}{\textit{Id.} at 680.}
\footnote{176}{\textit{Karen C.}, 124 Cal. Rptr. 2d at 680.}
\footnote{177}{\textit{Id.} at 681.}
\footnote{178}{\textsc{Cal. Fam. Code} § 7612(a) (West 2004); \textit{Karen C.}, 124 Cal. Rptr. 2d at 680.}
\footnote{179}{\textit{Karen C.}, 124 Cal. Rptr. 2d at 681.}
\footnote{180}{\textit{Id.}}
\footnote{181}{\textit{Id.} at 683.}
\end{footnotes}
theless would be considered a “presumed father” entitled to custody.182 The presumed father, Thomas, had lived with the boy, Nicholas, and his mother, Kimberly, on and off over a period of several years, beginning while Kimberly was pregnant with Nicholas.183 Nicholas’s birth certificate identified Thomas as the father.184 Thomas provided financial support for Nicholas and throughout the years acted as his father.185 Kimberly had a history of drug use and violence, including an arrest and jail time for felony assault.186 Shortly after her release, the police placed Nicholas in the custody of the Alameda County Social Services Agency.187 In a dependency proceeding, the juvenile court placed Nicholas with Thomas and ordered family reunification services for Kimberly.188 On appeal, the court of appeals held that the presumption of paternity supporting placement with Thomas was rebutted by Thomas’s admission that he was not Nicholas’s biological father.189 The California Supreme Court reversed, holding that this was not an “appropriate action” to rebut the presumption of parentage provided by the statute.190 In reaching this conclusion, the court relied on previous cases which had held that “the extant father-child relationship is to be preserved at the cost of biological ties.”191 The court emphasized that the social relationship between the father and child was “much more important” to the child than biological paternity.192 However the court also distinguished cases involving competing claims by candidates vying for parental rights.193 In Nicholas H., if the court had allowed rebuttal of Thomas’s presumed father status, Nicholas would have been left with no father and a troubled mother.194

182 46 P.3d 932, 941 (Cal. 2002).
183 Id. at 934–35.
184 Id. at 935.
185 Id.
186 Id. at 934–35.
187 Nicolas H., 46 P.3d at 934–35.
188 Id. at 936.
189 Id.
190 Id. at 941.
191 Id. at 938 (citing Michelle W. v. Ronald W., 703 P.2d 88, 93 (Cal. 1985); Comino v. Kelley, 30 Cal. Rptr. 2d 728, 731 (Ct. App. 1994)).
193 Id. at 936.
194 Id. Nicholas’s purported biological father, a man named Jason, had never come forward and the Alameda County Social Services Agency was unable to locate him or establish his paternity. Id. at 933, 935.
In *In re Salvador M.*, a California appellate court applied the *Nicholas H.* analysis to a presumed mother case.\(^{195}\) There, the court declared a woman to be a presumed mother of a child she was raising even though the two were not biologically related.\(^{196}\) Once again, the issue arose in a dependency case.\(^{197}\) The petitioner, Monica, was the half-sister of Salvador, the subject of the dependency proceeding.\(^{198}\) Monica was eighteen when Salvador was born and already had a child of her own.\(^{199}\) She and their mother, Rosa, cared for both children, and Monica continued to care for Salvador after Rosa was killed when Salvador was three.\(^{200}\) Five years later, Monica was arrested on drug charges, and social services took Salvador into protective custody.\(^{201}\) Monica admitted to the social worker that she was Salvador’s sister, although Salvador believed she was his mother.\(^{202}\) Monica filed a motion for *de facto* parent status and to establish maternity.\(^{203}\) The appellate court found that, although Monica had confided to school officials that she was Salvador’s sister, she otherwise had held him out to the world as her son, qualifying her for presumed mother status under section 7611 of the California Family Code.\(^{204}\) Unlike in *Karen C.*, the court did not require a remand on the rebuttal question; it ruled that this was not an appropriate action to rebut the presumption.\(^{205}\) The court observed that “[t]he paternity presumptions are driven, not by biological paternity, but by the state’s interest in the welfare of the child and the integrity of the family.”\(^{206}\) An existing parent-child relationship “is ‘considerably more palpable than the biological relationship of actual paternity’ and ‘should not be lightly dissolved.’”\(^{207}\) The court found no justification for severing the “deeply-rooted mother/child bond” in contravention of the state’s interest in preserving the family relationship.\(^{208}\)

\(^{195}\) *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708–09 (Ct. App. 2003).

\(^{196}\) *Id.* at 709.

\(^{197}\) *Id.* at 707.

\(^{198}\) *Id.* at 706.

\(^{199}\) *Id.*

\(^{200}\) *Salvador M.*, 4 Cal. Rptr. 3d at 706.

\(^{201}\) *Id.* at 706–07.

\(^{202}\) *Id.* at 707.

\(^{203}\) *Id.*

\(^{204}\) *Id.* at 708–09.

\(^{205}\) *Salvador M.*, 4 Cal. Rptr. 3d at 709; *Karen C.*, 124 Cal. Rptr. 2d at 681.

\(^{206}\) *Salvador M.*, 4 Cal. Rptr. 3d at 708.

\(^{207}\) *Id.* (quoting *Nicholas H.*, 46 P.3d at 938).

\(^{208}\) *Id.* at 709.
The policies supporting findings of presumed parenthood in Nicholas H. and Salvador M., as well as Buzzanca, apply with equal or greater force in the case of a same-sex partner seeking to maintain the parental status acquired by virtue of the same-sex marriage. In our hypothetical case, Sarah has an existing parent-child relationship with Madeleine; indeed, she has acted as Madeleine’s primary caretaker since infancy. Their “deeply-rooted” attachment deserves protection and is essential to Madeleine’s well-being. To allow the denial of Sarah’s parental status would deprive Madeleine of her second parent with no alternative candidate available to fill that role.

Some might argue, however, that these precedents are distinguishable. After all, Nicholas H. and Salvador M. involved dependency proceedings, not custody cases between two fit parents, and the Nicholas H. court explicitly differentiated cases in which “another candidate is vying for parental rights and seeks to rebut a § 7611(d) presumption in order to perfect his claim.” Andrea undoubtedly would claim to be such a candidate.

However, the existence of another fit parent does not lessen the devastating impact on Madeleine of destroying Sarah’s parental rights. Courts have noted the tremendous harm that can occur to the child when one parent has the power to summarily sever the child’s relationship with the other, non-biological, parent. A Pennsylvania court made the following observation:

In this era of artificial insemination, surrogate parenting and in-vitro fertilization, legal rights of a non-biological parent may become fixed by virtue of the parties’ actions and the developmental relationship of the child with the parent. To permit one parent to revoke the parentage of the other parent, once these rights have been legally determined . . . invites chaos to the child’s emotional well-being and legal status.
Moreover, cases outside the dependency context likewise have acknowledged the importance, indeed the primacy, of the social relationship and the parent-child bond, even at the expense of biological ties. In numerous cases pitting biological fathers against non-biological fathers who were married to or cohabiting with the mother at the time of conception or birth of the child, the courts have declared that a presumption of parenthood based on biology does not necessarily trump presumed parenthood based on other circumstances. In several cases, the court ultimately sided with the non-biological fathers. Likewise, courts have refused to let biology control in cases even closer to our hypothetical, in which a wife tried to disestablish the paternity of her husband during a divorce, Buzzanca, of course, extended this notion even further. There, the court recognized parental status created by initiating the in vitro fertilization and surrogacy arrangement, even in the absence of an existing

the relationships, one with a known biological parent and the other with an acknowledged, though, in fact, non-biological, parent, progress at the same time, does not render either less viable.”

639 A.2d at 1086 (quoting Monroe v. Monroe, 621 A.2d 898, 906 (Md. 1993)).

212 E.g., Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, 538–39 (Ct. App. 1995); N.A.H. v. S.L.S., 9 P.3d 354, 363-64 (Colo. 2000); Doe v. Doe, 52 P.3d 255, 262 (Haw. 2002); Witso v. Overby, 627 N.W.2d 63, 69 (Minn. 2001); In re Welfare of C.M.G., 516 N.W.2d 555, 560 (Minn. Ct. App. 1994); cf. Monroe, 621 A.2d at 904–05 (holding that court must consider variety of factors, including best interests of the child, before ordering blood tests requested by mother to disestablish paternity of husband).

213 E.g., Michelle W. v. Ronald W., 703 P.2d 88, 95 (Cal. 1985); C.M.G., 516 N.W.2d at 561. The California Supreme Court also sided with the non-biological father in the appeal of a dependency petition presenting conflicting presumptions of paternity. In re Jesusa V., 85 P.3d 2, 6 (Cal. 2004).

parent-child relationship. Parental status could be created without genetic tie, merely by intending to become a parent.

The idea of using paternity provisions to establish legal motherhood arose in a context closest to our hypothetical in Rubano v. DiCenzo. In Rubano, a lesbian co-parent sought visitation with her former partner’s biological child, conceived by artificial insemination during the relationship. After the couple separated, Maureen Rubano filed a petition to establish her de facto parent status and to obtain visitation. She and DiCenzo subsequently agreed to permanent visitation, and the family court entered an order to that effect. DiCenzo reneged on the agreement; Rubano sought to enforce it. The family court sought guidance from the Rhode Island Supreme Court as to whether it had jurisdiction to enter the visitation order and whether the non-biological partner had standing to petition for visitation. The court answered both questions in the affirmative.

Initially, the court rejected Rubano’s claim for jurisdiction based on “equitable matters arising out of the family relationship” because the family court jurisdiction statute applied only to petitions for divorce or separate maintenance. However, the court found two other independent bases supporting jurisdiction in the family court. It began by evaluating the family court’s jurisdiction under Rhode Island’s Uniform Law on Paternity (“ULP”). The ULP tracks the UPA language discussed earlier, allowing “any interested party” to petition to establish a mother-child relationship and making applica-

215Buzzanca, 72 Cal. Rptr. 2d at 293–94.
216Id. at 282; see Thomas, 49 P.3d at 307–09 (holding that mother’s former domestic partner who acted in loco parentis could seek custody of child); In re Jerry P., 116 Cal. Rptr. 2d 123, 125 (Ct. App.) (holding that man never married to mother nor genetically related to child has constitutional right to establish presumed father status when mother or third parties blocked ability to receive child into his home, if he makes substantial efforts to assume parental responsibilities), superseded by 46 P.3d 331 (Cal.), review dismissed and cause remanded by 53 P.3d 133 (Cal. 2002).
217See 759 A.2d at 970.
218Id. at 961.
219Id. at 962.
220Id.
221Id. at 962–63.
222Rubano, 759 A.2d at 963.
223Id. at 965, 967.
224Id. at 965.
225Id. at 965–72.
226Id. at 966.
ble the paternity statutes “insofar as practicable.” An earlier Rhode Island case, *Pettinato v. Pettinato*, had affirmed an award of custody to a non-biological father, deemed a *de facto* father by the court, over the mother’s objections, finding that the mother was estopped from challenging the parental relationship. The court applied the same reasoning to Rubano’s claim, declaring her an “interested party” under the ULP, because she had functioned as a parent, even though she was not biologically related to the child. The court next found a separate and additional ground for family court jurisdiction. Rubano’s claim for visitation fell within “matters relating to adults who shall be involved with paternity of children born out of wedlock.” In a footnote, the court noted the obvious—that the word “paternity” typically denoted fatherhood, but also that the legislature had instructed that statutes be construed in a gender-neutral manner. Rubano was “involved with” the child’s paternity because she and DiCenzo jointly planned to bear and to raise the child, because she helped to arrange the insemination procedure and paid for it, because the child’s last name was a hyphenated version of both their surnames, and because Rubano helped raise the child for four years. Thus, the court found two bases for jurisdiction sufficient to grant her standing to seek adjudication of her parental claims.

Clearly, the *Rubano* decision strongly bolsters Sarah’s claim in our hypothetical. She, like Rubano, participated in the planning of the insemination and acted as a parent—indeed, she was the primary caretaker for Madeleine. Of course, *Rubano* would grant Sarah standing to pursue visitation regardless of whether she had ever married Andrea. The marriage, even if deemed invalid because of a DOMA,
nonetheless further buttresses Sarah’s claim for *de facto* parent status by giving her a clearly defined alternative basis for standing.\(^{235}\) The California presumed mother cases and the Rhode Island Supreme Court’s willingness to apply the paternity statutes to a same-sex mother’s claim provide an avenue for other UPA states to recognize the rights of a same-sex spouse, even if their DOMAs prohibit recognition of the marriage.

Some may claim that these cases stretch the application of the UPA too far.\(^{236}\) However, they are consistent with the UPA’s purpose: the UPA seeks to eliminate discrimination against illegitimate children.\(^{237}\) As the Hawaii Supreme Court observed, “The fundamental purposes of [the UPA] are ‘to provide substantive legal equality for all children regardless of the marital status of their parents’ and to protect the rights and ensure the obligations of parents of children born out of wedlock.’”\(^{238}\) Children being raised by same-sex couples are to a large degree a new breed of illegitimates, suffering a fate similar to their predecessors born to unwed mothers in prior generations. Both groups have been deprived of a host of rights, benefits, and protections, not the least of which is a continuing relationship with both parents, based solely on their parents’ marital status or lack thereof.\(^{239}\)

The UPA offers one way to ameliorate the children’s position without running afoul of a DOMA. But a court in a UPA state reluctant to tread this path, as well as courts in non-UPA states, can still recognize the parental rights bestowed on the co-parent by the marriage on a variety of other theories, as the next Section details.

\(^{235}\) Unlike Rubano, Sarah cannot rely on a written agreement entered into after the relationship dissolved, as Rubano did in seeking to assert her visitation rights. *Id.* at 961–63. Moreover, *Rubano* only considered a claim for visitation, though its reasoning would seem to allow a suit for custody as well. *See id.* at 965–77.

\(^{236}\) *See id.* at 981–82 (Bourcier, J., concurring and dissenting).

\(^{237}\) *K.M.*, 13 Cal. Rptr. 3d at 141; Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (Ct. App. 2000); *Doe*, 52 P.3d at 261–62.

\(^{238}\) *Doe*, 52 P.3d at 261 (quoting H.R. 8-190, Reg. Sess., at 1019 (Haw. 1975)).

c. Parental Rights as an Incident of the Marriage

Sarah can argue first that her claim does not require recognition of the marriage per se. Rather, a court could, and should, recognize one particular incident of the marriage—her status as Madeleine’s parent. A number of scholars suggest that courts have the power to distinguish treatment of the marriage from treatment of the incidents of the marriage.240 Case law also supports this approach. For example, in In re Dalip Singh Bir’s Estate, a California appellate court allowed multiple wives to a polygamous marriage, contracted in India, to inherit from their husband, the decedent, who was domiciled in California for some years leading up to and at the time of his death.241 The trial court ruled that under the laws and public policy of California, only the first wife of the decedent would be recognized.242 The appellate court reversed, holding that the public policy which troubled the trial court would be relevant only if the wives had attempted to cohabitate with their husband in California.243 By contrast, “where only the question of descent of property is involved, public policy is not affected.”244

Miller v. Lucks took a similar approach in a miscegenation case.245 There, the decedent, a black woman, had married a white man in Mississippi.246 To avoid prosecution under Mississippi’s anti-miscegenation law, the couple fled to Illinois, where they married again, legally.247 The husband later claimed to be his wife’s sole heir in a probate proceeding

240 Cox, supra note 18, at 1062 n.168 (recognizing the power of the courts to distinguish treatment of the marriage from treatment of the incidents of marriage, but arguing against application of the doctrine in same-sex marriage cases); J. David Fine, The Application of Issue-Analysis to Choice of Law Involving Family Law Matters in the United States, 26 LOY. L. REV. 31, 33–34 (1980); Scott Fruehwald, Choice of Law and Same-Sex Marriage, 51 FLA. L. REV. 799, 841–42 (1999); Mark Strasser, Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due, 28 RUTGERS L.J. 313, 363–64 (1997). The first Restatement of Conflict of Laws provision addressing choice of law in questions of marriage validity leaves room for a state to refuse to recognize a marriage which “offends a community’s moral sense,” but it also recognizes the harshness of denying an incident of marriage to a legally married couple and urges recognition “unless enjoyment of that incident ‘violently offends the moral sense of the community.’” Cox, supra note 18, at 1085 (quoting Charles W. Taintor, II, Marriage in the Conflict of Laws, 9 VAND. L. REV. 607, 615 (1956)) (emphasis added).
242 Id. at 499.
243 Id. at 502.
244 Id.
245 36 So. 2d 140, 142 (Miss. 1948).
246 Id. at 141.
247 Id.
brought in Mississippi.\(^{248}\) The court agreed to recognize the marriage only for purposes of inheritance.\(^{249}\) Even though interracial marriage was a criminal offense and prohibited by the state constitution at the time, the court found that the purpose of the statute was to prevent an interracial couple from living together.\(^{250}\) Allowing the husband to inherit would not violate this policy.\(^{251}\)

These precedents carry particular weight because they involved forms of marriage—polygamous and interracial—that were prohibited widely, in the case of the former, and very strongly opposed, in the case of the latter. Indeed, in his research on the miscegenation precedents, Andrew Koppelman describes the public policy against miscegenation as “exceedingly strong.”\(^{252}\) In *State v. Ross*, the North Carolina Supreme Court described an interracial marriage as “revolting,” yet nonetheless recognized the marriage of the parties, legally contracted in South Carolina.\(^{253}\)

Two questions arise, then: what is the purpose behind the statutes refusing to recognize same-sex marriages and would recognition of Sarah’s parental status violate this policy? Were we actually litigating this case in a particular jurisdiction, we undoubtedly would delve into other sources, including legislative history, to ascertain the policy behind that state’s DOMA. It is enough for our purposes here to canvas the possible justifications for the statutes. Some state DOMAs have codified a statement of purpose.\(^{254}\) For example, Alabama’s Marriage Protection Act states the following:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children.

\(^{248}\) *Id.*

\(^{249}\) *Id.* at 142.

\(^{250}\) Miller, 36 So. 2d at 142.

\(^{251}\) *Id.*

\(^{252}\) Koppelman, *supra* note 93, at 109.

\(^{253}\) 76 N.C. 242, 246–47 (1877). Indeed, in language that echoes the arguments against same-sex marriage, “the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural.” Baehr v. Lewin, 852 P.2d 44, 63 (Haw.) (citing *Loving v. Virginia*, 388 U.S. 1, 3 (1967)), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

Marriage is a sacred covenant, solemnized between a man and a woman.\textsuperscript{255}

Tennessee states it somewhat differently:

Tennessee’s marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.\textsuperscript{256}

Washington’s statute defining marriage as “a civil contract between a male and a female” contains findings affirming a Washington appellate court decision that denied persons of the same sex the right to marry.\textsuperscript{257} The findings state that “[i]t is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution.”\textsuperscript{258} Other mini-DOMAs contain similar explanations.\textsuperscript{259}

These statements indicate that the DOMAs’ chief purpose is to protect and to preserve the separate and exalted status of “marriage” as an institution historically comprised of a man and a woman. The DOMAs do not necessarily manifest a desire to prohibit same-sex partners from obtaining some of the benefits of marriage through other means. The example of California is instructive. In 2000, Californians overwhelmingly voted to approve Proposition 22, declaring that only marriage between a man and a woman would be valid in the state.\textsuperscript{260} Yet three years later, the legislature enacted A.B. 205, a com-

\begin{footnotes}
\item[255] \textsc{Ala. Code} § 30-1-19(b), (c) (internal numbering omitted).
\item[256] \textsc{Tenn. Code Ann.} § 36-3-113(a).
\item[258] \textit{Id.} (Historical and Statutory Notes: Intent (quoting S.H.B. 1130, ch. 1, § 2, 55th Leg., Reg. Sess. (Wash. 1998) (enacted to amend §§ 26.04.010–020)).
\end{footnotes}

Hawaii’s statutes reveal a similar, though less pronounced, dichotomy. See Haw. Rev. Stat. Ann. §§ 572-1, -3 (Michie 1999). Section 572C-2 of the Hawaii Revised Statutes states the following:

The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits . . . that are contingent upon that status . . . . However, the legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited . . . from marrying. For example . . . two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

- Id. § 572C-2. Pennsylvania evidences a similar perspective through court decisions. Its domestic relations statute stated that it is “the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman” and goes on to deny recognition to same-sex marriages from other jurisdictions. 23 Pa. Cons. Stat. Ann. § 1704. Concurrently, however, the Pennsylvania Supreme Court has recognized a lesbian partner’s right to seek visitation with the biological child of her partner. See T.B., 786 A.2d at 914. It has also allowed for the possibility of second parent adoptions by same-sex partners. See In re Adoption of R.B.F. and R.C.F., 803 A.2d 1195, 1201–02 (Pa. 2002).

What some dismiss as protecting “merely” the word marriage is actually 90 percent of the loaf. If a married couple no longer consists of a husband and wife, we lose the shared meaning of the word; we lose the ability to speak the idea in public and be understood. Such ideas are what culture is made of. . . . The opponents of marriage understand what many of its friends do not: Capturing the word is the key to deconstructing the institution.
last line of the Tennessee statement, referencing the rights and privileges of marriage, would not bar Sarah inexorably from pursuing recognition of the marriage as a basis for parental rights, because parental rights apply to unmarried as well as married persons. They are not “unique and exclusive” to marriage.

Other reasons for prohibiting recognition of same-sex marriage might include expressing moral disapproval of those relationships or animus toward gays and lesbians. Of course, statutes enacted for these purposes may well prove unconstitutional under *Lawrence v. Texas* and *Romer v. Evans*. Putting aside this constitutional challenge, Sarah could argue, even here, that recognizing her parental rights after the relationship has ended does not express approval of the relationship, because it does not encourage the parties to remain together. Nor does it confer on the parties uniquely spousal benefits. It merely protects the parent-child relationship that has formed, which is consistent with the policy in virtually every state of promoting the best interests of the child. Likewise, although these statutes may express prejudice toward gays and lesbians, the overwhelming majority of states today recognize that gays and lesbians can be good parents and will not deprive a gay or lesbian parent of custody or visitation solely based on their sexual orientation.

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- 265 See *Lawrence*, 539 U.S. at 576–79; *Romer*, 517 U.S. at 635. In *Lawrence*, the U.S. Supreme Court struck down Texas’s anti-sodomy statute, finding that it violated the Due Process Clause because it furthered “no legitimate state interest” which could “justify its intrusion into the personal and private life of the individual.” 539 U.S. at 578. Moral objections to homosexual sodomy would not suffice. *Id.* at 582–83 (O’Connor, J., concurring). Furthermore, Justice Sandra Day O’Connor, concurring, observed that “we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.” *Id.* at 582 (O’Connor, J., concurring). In *Romer*, the Court struck down an amendment to Colorado’s constitution which deprived gays and lesbians of protection under state anti-discrimination laws as a violation of equal protection. 517 U.S. at 623. The provision, “born of animosity toward the class of persons affected,” bore no rational relation to a legitimate state interest. *Id.* at 634–35. See generally Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 New Eng. L. Rev. 263 (1997) (arguing that the equal protection component of the Fifth Amendment’s Due Process Clause, in light of the *Romer* decision, renders the federal DOMA unconstitutional).
- 266 See infra note 335 and accompanying text (citing and discussing statutory authority concerning the best interest of the child standard and the familial relationship).
- 267 See infra notes 341–343 and accompanying text (discussing state approaches to custody determinations, including the nexus test).
d. Parental Rights Based on Legitimation

Alternatively, a same-sex partner could eschew asking the court to grant her parental status as an incident to the marriage. Rather, she would argue that the marriage, whether void in the forum jurisdiction or not, served to legitimate the child born into the relationship and thereby created a legal parent-child relationship. Under this approach, Sarah would argue that the choice of law rules governing parent-child relationships, and legitimacy in particular, should govern the question of her right to seek custody of and visitation with Madeleine.

It has been the case since at least the Roman civil law that marriage conferred legitimacy on children born while the mother was married.\(^\text{268}\) Indeed, this rule generally was interpreted to establish a conclusive presumption of paternity in the husband of the mother; until fairly recent times, only proof of impotence or non-access could rebut the presumption.\(^\text{269}\) Therefore, husbands who were not in fact the biological fathers of their children nonetheless were considered to be the legal fathers of those children for all purposes. Even in modern times, this presumption persists and has withstood constitutional challenge.\(^\text{270}\) Children born out-of-wedlock may be considered illegitimate and have no legal relationship with their father.\(^\text{271}\) Their status can change, however, under certain circumstances. Typically, a father can legitimate his children by later marrying the mother or by certain other legitimating acts, such as acknowledging the child in writing.\(^\text{272}\) These methods of legitimation vary from state to state. Regardless of the method, legitimation creates a parent-child relationship in the eyes of the law which did not exist previously.\(^\text{273}\) Once created, that relationship carries with it all the rights, privileges, and


\(^\text{271}\) Armstrong, *supra* note 268, at 373.


\(^\text{273}\) Smith v. Mitchell, 202 S.W.2d 979, 981 (Tenn. 1947); *Restatement (Second) of Conflict of Laws* § 287 cmt. a (1971).
responsibilities of legal parenthood, including the right to custody and visitation.\(^{274}\)

Sarah’s task will be to convince the forum state to recognize the status of legitimacy and the parent-child relationship created by the same-sex marriage, even if it will not recognize the marriage. Precedent supports this approach. In *Peirce v. Peirce*, the Illinois Supreme Court considered a petition to inherit brought by the son of the decedent’s second wife.\(^ {275}\) The decedent married the petitioner’s mother while he was still married to his first wife; his second wife was unaware of his preexisting marriage.\(^ {276}\) Although the decedent later divorced his first wife, he did not go through a subsequent formal marriage ceremony with his second wife.\(^ {277}\) The petitioner claimed to be legitimate based on the common law marriage that existed in Nevada after the decedent’s divorce from his first wife.\(^ {278}\) The Illinois Supreme Court agreed, even though Illinois law did not recognize common law marriages contracted in other jurisdictions.\(^ {279}\) The court stated the following:

We are not called upon to recognize the common law or however designated marriage of Era Peirce and deceased in Nevada as valid, contrary to the public policy of this State. We do, however, recognize the effect of the attainment of marital status under the laws of Nevada in so far as it operates to make the children legitimate.\(^ {280}\)

A Pennsylvania case, *In re George Estate*, made the point even more strongly, in a case involving a child of a bigamous marriage, who had been legitimated in Ohio, seeking to take under a trust being administered in Pennsylvania:


\(^{275}\) 39 N.E.2d 990, 991 (Ill. 1942).

\(^{276}\) Id.

\(^{277}\) Id. at 991–92.

\(^{278}\) Id. at 992.

\(^{279}\) Id. at 993.

\(^{280}\) *Peirce*, 39 N.E.2d at 993; see Succession of Caballero v. Executor, 24 La. Ann. 573, 577 (1872) (recognizing legitimation of child born to interracial couple married in Havana but residing in Louisiana); *cf.* Franklin, 62 N.E. at 83 (citing Teter v. Teter, 101 Ind. 129, 137 (1884), and stating that “the presumption in favor of marriage and the legitimacy of children is one of the strongest known to the law, and in favor of a child asserting its legitimacy this presumption applies with peculiar force”).
[A] recognition of the legitimacy of Mrs. Downey does not per se involve a recognition of the lawfulness of the acts of the parents or approve of their wrongdoing. The Ohio statute certainly does not condone the parents’ conduct. A fortiori a recognition of the status of a child born of a bigamous union does not involve a recognition of the lawfulness of the conduct of the parents. The statute concerns itself simply and exclusively with the rights of innocent children.281

The pertinence of this language to our case is clear: a court in a DOMA jurisdiction can view the child as legitimate, and thus the same-sex partner as a legal parent, without recognizing or validating the marriage or condoning the relationship.282

In some states, Sarah would be able to rely on statutes that address this issue. For example, Illinois prohibits marriage between two individuals of the same sex, but also provides that “children born or adopted of a prohibited or common law marriage are legitimate.”283 Likewise, Montana declares same-sex marriage prohibited, but also provides that “[c]hildren born of a prohibited marriage are legitimate.”284 Of course, Andrea might argue that such statutes would not apply because Madeleine was not “born of” the marriage because both parents are not biologically related to her. On the other hand, by that reasoning, children who were conceived by artificial insemination with the putative husband’s consent also would not be children “born of the marriage” if the marriage were declared invalid, an interpretation courts seem unlikely to adopt. Moreover, the law has long recognized parenthood created by marriage, rather than biology, in establishing paternity.285

In the absence of specific statutory instruction, courts will look to the choice of law principles operative in their jurisdiction. Although a variety of choice of law regimes exists, as we shall see shortly, the question of legitimacy, like marriage, appears to have developed its own rules apart from the general system governing choice of law in a par-

282 See id.
283 750 ILL. COMP. STAT. ANN. 5/212(a)(5), (c) (West 1999). This provision was enacted subsequent to Peirce.
285 See supra note 147 and accompanying text.
ticular state. In most jurisdictions, the legitimacy of the child is determined by the rule of "the personal law of the child" rather than the law where the property is located. Identifying the personal law of the child can become quite complicated. Indeed, the American Law Reports annotation on the subject identifies at least ten possibilities; however, any of these approaches would lead to the same result in our hypothetical. The personal law of the child for determining the status of legitimacy and thus the existence of the parent-child relationship would be the place where the marriage took place, because that is also the place where Andrea and Sarah were domiciled and Madeleine was born. The Second Restatement leads to the same result, declaring that

[t]he child will usually be held legitimate if this would be his status under the local law of the state where either (a) the parent was domiciled when the child’s status of legitimacy is claimed to have been created or (b) the child was domiciled when the parent acknowledged the child as his own.\(^\text{289}\)

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\(^{286}\) See Restatement (Second) of Conflict of Laws § 6(2) cmt. c (1971) (noting that courts have evolved rules accommodating the conflicting values of the general rule in certain areas); Estate of Ortiz, 383 N.Y.S.2d 502, 503 (Surrog. Ct. 1976) (applying the prevailing rule that place of a child’s birth determines legitimacy, but using a “center of gravity” or “interest analysis” test for tort and contract disputes).

\(^{287}\) C.C. Marvel, Annotation, Conflict of Laws as to Legitimacy or Legitimation or as to Rights of Illegitimates, as Affecting Descent and Distribution of Decedent’s Estate, 87 A.L.R.2d 1274 § 2(a) (1963). Compare In re Blanco Estate, 323 N.W.2d 671, 676 (Mich. Ct. App. 1982) (applying “minority rule” which applies law of situs, rather than personal law, to determine who can inherit), and Marvel, supra, § 5, with In re Estate of Dauenhauer, 535 P.2d 1005, 1006 (Mont. 1975) (citing Restatement (Second) of Conflict of Laws § 6, 287–288 (1971); Restatement of Conflict of Laws §§ 137–141 (1934)).

\(^{288}\) The American Law Reports annotation lists the following approaches to identifying the personal law of the child:

1. The state in which the marriage is celebrated[,]
2. The state in which the father or mother is domiciled (a) at the time of the intermarriage or (b) at the time of the birth of the child[,]
3. The state of the birth of the child or (where the alleged ground of legitimation is acknowledgment of the child without intermarriage)[,]
4. The state in which the acts of acknowledgment were performed[,]
5. The state of the domicil of the father at the time he performed those acts[,]
6. The state of domicil of the father at the time of the child’s birth[,]
7. The state of the child’s birth or (when the alleged ground of illegitimacy is the invalidity of the marriage, of the parents)[,]
8. The state where the marriage was celebrated[,]
9. The state where the parents were domiciled at the time of celebration[,]
10. The state where the child was born.

Marvel, supra note 287, § 2(a).

\(^{289}\) Restatement (Second) of Conflict of Laws § 287(2) (1971).
The rule does leave room for the forum jurisdiction to decline to apply the personal law of the child if it would “contravene . . . public policy or offend against good morals.” However, courts typically have found that recognition of the status of legitimacy does not offend public policy, even if the marriage would do so, and even in cases involving widely disapproved forms of marriage like bigamy and interracial marriage. The case of *George Estate*, quoted above, addressed this contention. The court there recognized the legitimacy of a daughter born of a bigamous marriage, who would have been considered legitimate in the state of her birth, Ohio, though not if she had been born in the forum state, Pennsylvania. The court identified important policies underlying this result, recognizing a “larger and more far-reaching consideration of public policy” was at stake. It hesitated to ignore the status acquired by Mrs. Downey at birth . . . except under the pressures of much stronger considerations than any existing in this case. . . . [For t]he matter of personal status, lawfully acquired in one jurisdiction, is a thing which ought not to be lightly interfered with or ignored.

The court provided the following explanation:

“It would be in the highest degree inconvenient if a status of this sort, once established, were liable to fluctuation and change with time, place, or circumstance. Hence, when these relations are once established by the proper law, they remain, in general, fixed and unchangeable, into whatsoever countries the parties may wander, or wheresoever the question may arise.”

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290 *George Estate*, 4 Pa. D. & C.2d at 337.
293 Id. at 339.
294 Id.
295 Id.
296 Id. (quoting *Raleigh C. Minor, Conflict of Laws, or Private International Law* 212 (1901)).
Granted, we are seeking here not to maintain the status of legitimacy for inheritance purposes, but to afford the parent and child the opportunity to continue their relationship. Some might argue these purposes are distinguishable, and that “stronger considerations” justify a state in refusing to recognize the status created by a same-sex marriage to support a claim for custody or visitation. But what would those considerations be? Possibilities include protecting the biological parent from claims by a partner which infringe upon the parent’s constitutional right to control her child’s upbringing and expressing the state’s disapproval of same-sex marriage. The first concern does not carry weight because one parent does not enjoy superior rights to the child’s other parent,\(^{297}\) and our claim is that the marriage created a full-fledged parent-child relationship which survives regardless of the validity of the marriage. By this reasoning, \textit{Troxel v. Granville} should not constitute an unassailable barrier to this approach.\(^{298}\) In \textit{Troxel}, the U.S. Supreme Court struck down a Washington third-party visitation statute which permitted “[a]ny person” to petition for visitation “at any time.”\(^{299}\) In a plurality opinion, the Court found the “breathtakingly overbroad” statute to infringe the parent’s fundamental right to rear her children.\(^{300}\) After the death of her children’s father, to whom she was never married, Tommy Granville and the paternal grandparents, the Troxels, failed to agree on the grandparents’ visitation.\(^{301}\) The grandparents petitioned for visitation under the statute, and the trial court granted the petition, finding that visitation was in the children’s best interests.\(^{302}\) In the plurality’s view, parents are presumed to act in their children’s best interests, and their views regarding visitation are entitled to “special weight.”\(^{303}\) The plurality also emphasized that Granville had offered to allow some continued visitation, rather than cut the grandparents off from the children completely.\(^{304}\)

The fractured nature of the \textit{Troxel} decision as well as the narrowness of its holding have created much uncertainty about the parame-

\(^{298}\) \textit{See generally 530 U.S. 57 (2000).}
\(^{299}\) \textit{Id. at 67–68.}
\(^{300}\) \textit{Id.}
\(^{301}\) \textit{Id. at 60–61.}
\(^{302}\) \textit{Id. at 61.}
\(^{303}\) \textit{Troxel, 530 U.S. at 69–70.}
\(^{304}\) \textit{Id. at 71.}
ters of third-party visitation. Our claim here, though, is that Sarah seeks custody or visitation not as a third party, but as a co-equal parent based on the parent-child relationship created by the marriage, even if invalidated. Indeed, if the marriage renders Sarah a parent, the state has just as much interest in protecting her constitutional rights as Andrea’s, suggesting that recognition of Sarah’s rights, rather than obliteration of them, would better serve the state’s goal. Moreover, the primary concern of the Troxel plurality—the risk of an unwarranted intrusion into the parents’ fundamental right to make decisions regarding their children—simply is not implicated in this situation. In our hypothetical case, the biological parent already has ceded her exclusive parental role by marrying her partner, conceiving a child, and raising the child together. As the Rhode Island Supreme Court noted in recognizing standing of a lesbian co-parent to enforce a visitation agreement with the biological mother in Rubano, “Di-Cenzo rendered her own parental rights with respect to this boy less exclusive and less exclusory than they otherwise would have been had she not by word and deed allowed Rubano to establish a parental bond with the child and then agreed to allow reasonable visitation.” By contrast, Tommy Granville never had agreed to nor had encouraged the Troxels’ assumption of a parental role with her children, nor had they assumed such a role. As Nancy Polikoff has observed,


306 See Rideout v. Riendeau, 761 A.2d 291, 303 (Me. 2000) (finding constitutional the awarding of visitation to grandparents acting as parents based on best interests standard); Liebner v. Simcox, 834 A.2d 606, 612 (Pa. Super. Ct. 2003) (concluding Troxel not controlling when person acting in loco parentis seeks visitation); Rubano, 759 A.2d at 974–77 (holding that biological parent’s agreement to have lesbian partner assume de facto parent status supported standing for partner to seek visitation). But see In re Nelson, 825 A.2d 501, 504 (N.H. 2003) (declining to equate third person acting in loco parentis with natural or adoptive parent).

307 See Parentage of L.B., 89 P.3d at 285 (noting that when legal parent consents to and fosters another’s development of parent-child relationship, parent’s constitutional rights not infringed).

308 759 A.2d at 976.

309 In addition, Granville had not terminated all visitation with the Troxels. In the typical co-parenting dispute, one parent has cut off all visitation with the other. See supra notes 125–127 (citing cases).
Troxel does not define parenthood nor affect the ability of states to do so. Legally unrecognized lesbian mothers are parents. Such recognition obviates any possible “third party” problem within the meaning of Troxel; it guarantees equal status for both parents, not a lesser status that confers lesser rights and responsibilities.310

The argument is even stronger in our situation, for our co-parent was a legally recognized parent in her home state. Consequently, recognizing Sarah’s parental rights does not offend the policy of protecting a parent’s fundamental rights.

The second possible concern—expressing disapproval of gay relationships—even if permissible, cannot outweigh the critical need for certainty in this area.311 Indeed, the arguments in favor of recognizing the status of legitimacy and the parent-child relationship are much more compelling in this context than in the question of inheritance. In those cases, only money is at stake. In these cases, failure to recognize the relationship likely will leave both a child and a parent emotionally scarred, in addition to depriving the child of the crucial and more tangible benefits of the parent-child relationship, such as child support, health benefits, and the right to inherit from the second parent.

e. Parental Rights Under the Choice of Law Regimes

Many of these arguments also apply if we move beyond the legitimation cases to consider the analysis under broader choice of law systems. Our task would be made simpler if states adhered to one particular approach in deciding choice of law questions. Unfortunately, no such consensus exists. States may apply one of at least four different approaches to deciding these questions.312

The first Restatement of the Conflict of Laws (“First Restatement”) sets forth rigid, mechanical rules for deciding choice of law questions in an effort to establish guidelines outside the forum’s substantive law.313

310 Nancy D. Polikoff, The Impact of Troxel v. Granville on Lesbian and Gay Parents, 32 Rutgers L.J. 825, 834 (2001); see Dolgin, supra note 305, at 401–02 (describing cases of de facto parents as “easily distinguished” from Troxel).
311 See supra notes 265–267 and accompanying text (discussing animus toward gays as a justification for denying recognition to the marriage); infra notes 340–343 and accompanying text (discussing shift in family law toward acceptance of gay parents generally).
312 Scholars have grouped the states in different ways. Compare Cox, supra note 18, at 1083–97 (identifying four approaches), with Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1115–16 (1987) (identifying six approaches currently in use).
313 Cox, supra note 18, at 1084.
These guidelines were based on a “vested rights” theory which saw the forum court’s role as “enforc[ing] existing rights created under that foreign law.” Followed by approximately fifteen states, the First Restatement provides that the forum state should apply the law of the place “where the key event leading to the plaintiff’s cause of action occurred.” In this case, the key event was the creation of the parent-child relationship, albeit through the marriage. Under the First Restatement, states may refuse to enforce another state’s law which violated the forum state’s public policy, but the policy analysis above would apply here as well and should lead to the conclusion that recognition of parental rights does not offend public policy.

The Second Restatement, followed by approximately half the states, sets forth a multifactorial analysis to determine choice of law. In the absence of statutory directive, the court seeks to identify the state with the most significant relationship by considering the following:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

How do these factors apply to the recognition of the same-sex partner’s parental rights in a jurisdiction which does not otherwise recognize the marriage?

One need of the interstate and international systems in this context is to ensure a system that works well and that fosters “harmonious relations between states.” A rule that requires recognition of parental rights granted by one state, in another, would facilitate these goals by providing uniformity. Some might argue, though, that it would undermine harmonious relations by forcing states opposed to same-sex

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314 Id.
315 Id. at 1083–84.
317 Fruehwald, supra note 240, at 818.
318 See supra notes 294–310 and accompanying text.
319 Cox, supra note 18, at 1096.
320 Restatement (Second) of Conflict of Laws § 6(2) (1971).
321 Id. § 6.2 cmt. d.
marriage to allow it. While that argument might have some force in questions involving the validity of the marriage per se, it has much less currency when dealing with the parental rights question. In the latter case, while most states do not recognize same-sex partners as legal parents, neither do they have statutes explicitly expressing a policy against such rights.

We have already discussed two possible relevant policies of the forum—protecting the biological parent’s rights and disapproving of same-sex relationships. In addition, the forum might have an interest in avoiding unequal treatment of its domiciles. The forum would be awarding parental rights to a same-sex partner who had married in Massachusetts or Canada, but now lived in the forum, while citizens of the forum could not obtain similar rights. This disparity might encourage more evasionary marriages, as citizens of the forum state seek to acquire parental rights by marrying in Massachusetts or Canada.

The next factor considers the relevant policies and interests of other interested states. In our hypothetical, the state where the marriage took place and where all parties were domiciled at the time and remained for some time thereafter certainly would qualify as another interested state. Massachusetts’s policy in allowing same-sex marriage is clear—to ensure equality for its citizens under the Massachusetts Constitution.

The court stated the following:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

Moreover, the court specifically highlighted the disadvantages that the same-sex marriage ban works on children:

Excluding same-sex couples from civil marriage . . . prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of “a stable family structure in which children will be reared, educated, and socialized.”

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322 See supra note 320 and accompanying text.
323 Goodridge, 798 N.E.2d at 949.
324 Id. at 968.
. . . It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.\textsuperscript{325}

Similar concerns motivated the Canadian courts to legalize same-sex marriages.\textsuperscript{326} In ruling that the ban on same-sex marriage violated the equality rights of same-sex couples under the Canadian Charter of Rights and Freedoms, the Ontario Court of Appeal found that excluding same-sex couples from the “fundamental social institution” of marriage discriminates because it “perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.”\textsuperscript{327} The court further noted that same-sex couples have children and that they “should be able to benefit from the same stabilizing institution as their opposite-sex counterparts.”\textsuperscript{328}

Some might argue that once the parties leave Massachusetts or Canada and make their domicile elsewhere, the interest of those jurisdictions wanes. In fact, the jurisdiction’s interests are more enduring. First, Massachusetts’s and Canada’s interest in securing equality for their citizens supports interstate recognition of the partner’s parental rights because an opposite-sex spouse in the same position would enjoy such rights.\textsuperscript{329} Second, Massachusetts and Canada, as stated above, have a strong interest in the welfare of children within their jurisdiction, and continuing uncertainty regarding the durability of parental rights afforded by marriage to a same-sex couple would not further children’s best interests.\textsuperscript{330} Partners whose rights are vulnerable might refrain from fully assuming their parental role, for fear that their rights could be easily abrogated by a move elsewhere. In addition, uncertainty puts the child at risk of abandonment by the partner, without repercussions. A partner who had been the sole support for a child born into the marriage, for example, could deliberately move to a state that does not recognize the marriage and thereby potentially insulate herself from

\textsuperscript{325} Id. at 964 (citation omitted) (quoting id. at 325 (Cordy, J., dissenting)).


\textsuperscript{327} Id.

\textsuperscript{328} Id. at 567.

\textsuperscript{329} See Opinions of the Justices, 802 N.E.2d at 576 (Sosman, J., dissenting) (pointing out that lack of recognition in other jurisdictions “is a difference that gives rise to a vast assortment of highly tangible, concrete consequences” which means same-sex couples who marry will continue to have “a different status”).

\textsuperscript{330} See supra notes 325–328 and accompanying text.
claims for child support. A child might even find herself orphaned if the biological parent died and the forum state refused to recognize the partner as a parent.

The next factor—the protection of justified expectations—argues strongly in favor of recognizing parental rights. On the one hand, someone who is deemed a legal parent under the law surely would expect to maintain that status, regardless of where she lived. On the other hand, the precariousness of same-sex marriage in light of the federal DOMA, the state DOMAs, and a proposed amendment to the Constitution might suggest that any expectations regarding interstate recognition of rights afforded by the marriage would not be justified.

While this argument might have some currency for the parents, it fails to address the expectations that are most critical here—the child’s. A child of a same-sex marriage would likely have no inkling that the status of one of her parents could be challenged if she moved to another state.

The child’s needs likewise lie at the heart of the next factor—the underlying policies of the field of law. First, in every state, one can find declarations that the “best interests of the child” are paramount in a variety of contexts concerning the parent-child relationship.
Second, most, if not all, states have expressed a policy in favor of “frequent and continuing contact with both parents.” Third, family law seeks to promote stability and continuity of family relationships. Fourth, family law prefers two parents, rather than one, when possible. Fifth, family law aims to encourage parental responsibility.


Every state has laws providing that both parents have an obligation to provide financial support, and parents who willfully fail to provide such support or otherwise neglect or abuse their children can be subject to criminal penalties.  

The only policies that potentially undercut the claim for recognition are those preferring heterosexual parents and protecting the rights of biological or adoptive parents against third parties. As already discussed, the latter does not apply, because our hypothetical partner Sarah is not a third party, but rather a parent, and the biological parent freely consented to her acquisition of parental rights by marrying her. The former policy has weakened considerably in most jurisdictions. While in the past, many jurisdictions discriminated openly against gay and lesbian parents in custody determinations, today most states take sexual orientation into account only if the other parent demonstrates a nexus between the parent’s sexual conduct and harm to the child. A smaller group of states allows the courts to consider the conduct, but does not require a denial of custody. Only a handful of states retain a rule that homosexuality renders a parent per se unfit. Moreover, these states may well soften their stance in light of Lawrence, because the basis for the rule in the past has been, at least in part, that homosexual conduct was a crime in these jurisdictions.


See supra notes 297–310 and accompanying text (distinguishing Troxel).


Shapiro, supra note 341, at 639.

The states that retain a rule that homosexuality renders a parent per se unfit are Alabama, Mississippi, Missouri, and Virginia. See Ex parte J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (citing Ala. Code § 13A-6-65 (1975), which made deviate sexual conduct a misdemeanor, to support change in custody back to former husband from lesbian mother); Ex parte D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (citing Ala. Code § 13A-6-65(a)(3), which made lesbianism illegal, to restrict lesbian mother’s visitation and to uphold custody award to father); L. v. D., 630 S.W.2d 240, 243–45 (Mo. Ct. App. 1982) (citing Mo. Rev. Stat. § 566.090(3) (1979), which made “deviate sexual intercourse with another person of the same sex” a crime, in upholding custody award and visitation arrangement in favor of fa-
The next factor—certainty, predictability, and uniformity—points toward recognition of the parent-child relationship. Courts have long acknowledged the importance of providing certainty for marriages because of the rights to property, benefits, and legitimacy bound up with that status.\textsuperscript{344} The need for certainty and predictability is even more compelling for this issue. Here, as we have seen, a child’s emotional as well as financial well-being is at stake. Whatever risks the parents face should the marriage not be recognized pale in comparison to the damage a child will suffer if cut off permanently from one of her parents. Nor would a rule of non-recognition serve these goals because, as discussed in the previous Section, the states without DOMAs likely will view the marriage as valid. Indeed, refusal to recognize the partner’s parental status would encourage forum shopping; a biological parent wishing to ensure no claims for custody or visitation by the other parent could purposely move to a jurisdiction where neither the marriage nor the spouse’s parental rights would be recognized. It seems clear, however, from a choice of law perspective that neither rule would lead to absolute certainty, predictability, or uniformity because states with either “category two” or super-DOMAs will follow a statutory directive likely requiring non-recognition.\textsuperscript{345} This dilemma should not prove dispositive in “category one” DOMA jurisdictions. As comment (i) to section 6 of the \textit{Second Restatement} acknowledges, courts should aim to develop a good rule of law, rather than adhere to existing rules for the sake of uniformity.\textsuperscript{346}

The last factor—ease and determination of the law to be applied—supports Sarah’s claim. Identifying Sarah as a parent need not require complicated legal analysis. The court merely needs to ascertain that she and Andrea married in Massachusetts or Canada and that the spouse of a woman artificially inseminated is deemed a legal parent of the resulting child for all purposes. Analysis of the factors listed in section 6 of the \textit{Second Restatement} thus leads to the conclusion...
sion that even a state which has declared it will not recognize a same-sex marriage can apply Massachusetts or Canadian law and acknowledge Sarah’s right, as a parent, to seek custody or visitation with the child she planned for and parented since birth.

While no case law yet exists analyzing this question under the Second Restatement approach (or any other), a Nevada court has confronted a choice of law question concerning parental status. Hermanson v. Hermanson involved a custody dispute between a husband and wife who were divorcing. Cindy married her husband, David, in California, when she was six-months pregnant with a child by another man. The couple lived together on and off for the first three years of the child’s life, in a volatile relationship marked by domestic violence perpetrated by David against Cindy. Cindy and James, the child, subsequently moved to Iowa where she raised James alone. When James was eight, Cindy moved to Las Vegas where she and David attempted a reconciliation which lasted only a month. Cindy filed for divorce, alleging that there was no issue of the marriage, even though David was named as the father on James’s birth certificate. David sought to be declared the father and to obtain visitation rights. Blood tests subsequently proved conclusively that David was not James’s biological father. Nonetheless, the trial court held that David was conclusively presumed to be David’s father based on the California Evidence Code. After a trial, the court awarded David joint legal custody and liberal visitation rights. On appeal, the Nevada Supreme Court reversed, ruling that the trial court erred in applying California law, even though the parties married there and James was born there. The court acknowledged that some courts determine paternity according to the law of the child’s birthplace. It chose, instead, to apply the substantial relationship test: it would apply the law of the state which had a substantial relationship with the

348 Id.
349 Id. at 1242.
350 Id. at 1243.
351 Id.
352 Id., 887 P.2d at 1243.
353 Id.
354 Id.
355 Id.
356 Id.
357 Hermanson, 887 P.2d at 1243.
358 Id.
359 Id. at 1244 n.2.
transaction if the transaction did not violate a strong public policy of Nevada.\textsuperscript{360}

On its face, this precedent would seem to undercut Sarah’s claim. To the extent \textit{Hermanson} stands for the proposition that a forum court need not recognize parental rights lawfully acquired elsewhere, she would argue that it was wrongly decided. However, a closer look at the case suggests that it does not yield such a sweeping claim and can be distinguished from our hypothetical case. First, the evidence code section on which David relied had been repealed, bringing California’s public policy in line with Nevada’s policy.\textsuperscript{361} In both states, the presumption of paternity could be rebutted.\textsuperscript{362} The court specifically found that Nevada’s public policy gave the child a right to bring a paternity action up until three years after the age of majority; in its view, that right should not be abridged by a repealed California statute.\textsuperscript{363} The court thus implicitly found that there was no existing conflict between California and Nevada law.\textsuperscript{364} Indeed, if the divorce had been heard in California, the outcome may have been the same.\textsuperscript{365} Although the court did not discuss specifically the remaining \textit{Second Re-}

\begin{itemize}
\item \textsuperscript{360} \textit{Id.} at 1244.
\item \textsuperscript{361} \textit{Id.} at 1244 n.3.
\item \textsuperscript{362} \textit{Hermanson}, 887 P.2d at 1244 n.3.
\item \textsuperscript{363} \textit{Id.} at 1244.
\item \textsuperscript{364} \textit{See id.}
\item \textsuperscript{365} The repeal of section 621 of the California Evidence Code actually did not abolish the conclusive presumption of paternity; it remains codified at section 7540 of the California Family Code. \textit{Cal. Evid. Code} § 621 (West Supp. 1991) (current version at \textit{Cal. Fam. Code} § 7540 (West 2004)). However, the presumption now can be rebutted by the mother if she brings a motion within two years of the birth of the child and the biological father has acknowledged paternity. \textit{Cal. Fam. Code} § 7541(c). Although David Hermanson might have argued that neither of these conditions were met, he would not have prevailed because he could not rely on the conclusive presumption in the first instance. That presumption applies only if the child is conceived when the husband and mother are married and cohabiting. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 298 (Ct. App. 2000). Here, the parties married when the mother was already pregnant. \textit{Hermanson}, 887 P.2d at 1242. Even without the benefit of the conclusive presumption, however, David Hermanson would have been deemed a presumed father under section 7611 of the California Family Code. \textit{See Cal. Fam. Code} § 7611. The Nevada Supreme Court appears to have erred, however, when it concluded that this presumption of paternity could be rebutted “at any time.” \textit{See Hermanson}, 887 P.2d at 1244. Section 7630 of the California Family Code provides that an action to declare the “nonexistence of the father and child relationship” may be brought only if “within a reasonable time after obtaining knowledge of relevant facts.” \textit{Cal. Fam. Code} § 7630. In \textit{Hermanson}, the mother claimed that the husband knew from the start that he was not the child’s biological father. 887 P.2d at 1242. However, California courts might nonetheless have refused to apply the presumption, finding that its underlying policies were not served, which they have done on occasion. \textit{See, e.g., Steven W.}, 39 Cal. Rptr. 2d at 538–39; \textit{County of Orange v. Leslie B.}, 17 Cal. Rptr. 2d 797, 799 (Ct. App. 1993).
statement factors, in addressing a claim by the husband for parental status based on equitable estoppel, the court made other salient points which distinguish the case from our hypothetical. In Hermanson, the husband had not had contact with the child for some years, except for the attempted one-month reconciliation prior to the filing for divorce. Nor had he paid any significant support for the child. In essence, he appeared at best to have acted as a stepparent many years prior to the adjudication. By contrast, in our hypothetical, the non-biological parent undertook parental caretaking functions and provided support for the child throughout the child’s life until her spouse moved out.

The other two types of choice of law regimes include Brainerd Currie’s “governmental interest analysis” and Robert Leflar’s “choice-influencing considerations” or “better rule of law” analysis. Few states follow the governmental interest analysis. Of these, only California would fall within the category of cases we are discussing in this Section. Under the governmental interests analysis, cases either present false conflicts, true conflicts, or unprovided-for cases. One commentator suggests that any case in which both parties are now domiciliaries of the forum presents a false conflict. This approach would allow the forum to apply its law to our hypothetical situation. However, no California case explicitly declares that a true conflict requires parties with different domiciles. Our situation, where the parent-child relationship was formed in another state, might yield a “true conflict” if both states have an interest in the case and if the applicable state laws differ. If a true

366 See Hermanson, 887 P.2d at 1244–45.
367 Id. at 1245.
368 Id. Although not technically germane to either the choice of law or equitable estoppel claims, the history of violence perpetrated by David provides an additional reason to avoid finding the husband to be the child’s legal father.
369 See id. at 1243, 1245.
370 Cox, supra note 18, at 1083.
371 Barbara Cox identifies four states that follow the government interest analysis—California, Hawaii, Massachusetts, New Jersey. Id. at 1093. Hawaii, however, appears to follow the significant relationship or the Restatement (Second) of Conflict of Laws approach, and Massachusetts appears to follow Robert Leflar’s rule. See Roxas v. Marcos, 969 P.2d 1209, 1235 n.16 (Haw. 1998); Lewis v. Lewis, 748 P.2d 1362, 1365 (Haw. 1988); Peters v. Peters, 634 P.2d 586, 593–95 (Haw. 1981); Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 670 (Mass. 1985).
372 Cox, supra note 18, at 1090.
373 See id.
374 See id.
conflict does exist, the court then must evaluate the comparative impairment to each state’s interests and apply the law of the state whose interests would suffer most.\textsuperscript{376} Considering Sarah’s hypothetical case, California and Massachusetts arguably differ regarding the rights of same-sex parents, with California refusing to grant standing to lesbian co-parents and Massachusetts allowing same-sex couples to marry and thus to gain full parental rights.\textsuperscript{377} However, California’s A.B. 205 provides domestic partners parental rights equivalent to married persons, completely deflating the argument that California’s interests would be impaired substantially by recognizing the grant of parental rights under Massachusetts law.\textsuperscript{378} The interplay between A.B. 205 and California’s DOMA further complicates the analysis. On the one hand, A.B. 205 provides explicitly for recognition of domestic partner or equivalent benefits from other states.\textsuperscript{379} On the other hand, A.B. 205 also specifically excludes recognition of a same-sex marriage, presumably out of deference to its DOMA.\textsuperscript{380} However, this distinction does not alter our choice of law analysis regarding parental rights, because it is not contingent on recognition of the marriage.\textsuperscript{381}

As for Robert Leflar’s approach, it resembles the Second Restatement with an additional factor—the application of the better rule of law.\textsuperscript{382} In terms of the validity of the marriage per se, the determination of the better law definitely would depend on one’s perspective. Proponents of same-sex marriage would argue that recognition is the better rule because it fosters equality, and opponents would contend that preservation of traditional marriage is the preferable rule. However, when the issue is solely parental status, the better rule of law would seem to be the one that fosters the best interests of the child because all states espouse that policy.\textsuperscript{383} Of the two states with DOMAs that follow Leflar’s approach, only Minnesota potentially would qualify as a “category one”

\begin{footnotes}
\item[376] Scott, 202 Cal. Rptr. at 922.
\item[377] See West, 69 Cal. Rptr. 2d at 160; Nancy S., 279 Cal. Rptr. at 219; Curiale, 272 Cal. Rptr. at 522; Opinions of the Justices, 802 N.E.2d at 569–72; Goodridge, 798 N.E.2d at 961, 970.
\item[378] Cal. Fam. Code § 297.5(d) (West 2004).
\item[379] Id. § 299.2.
\item[380] Id. §§ 299.2, 308.5. Proposition 22 is codified in section 308.5 of the California Family Code. See id. § 308.5.
\item[381] Moreover, a same-sex spouse could argue for parental status based on the UPA, as discussed in supra notes 146–239 and accompanying text.
\item[382] Cox, supra note 18, at 1096–97. The other factors include “(1) predictability of result, (2) maintenance of interstate and international order, (3) simplification of the judicial task, [and] (4) advancement of the forum’s governmental interests.” Id.
\item[383] See supra note 335 and accompanying text.
\end{footnotes}
DOMA state. Its DOMA provides that a same-sex marriage is void and that “contractual rights granted by virtue of the marriage . . . are unenforceable in this state.” Thus Sarah would have to argue that the parental rights she seeks are not “contractual rights” granted by the marriage to avoid application of the DOMA. She has a reasonable chance of succeeding with this argument, because the law generally considers parenthood to be a status created by biological, marital, or social ties, rather than one created by contract.

Despite some arguments to the contrary, then, we can see that even in “category one” states with a DOMA, a parent in Sarah’s position has a colorable claim to parental status, and thus standing to pursue custody and visitation under a best interests standard, by virtue of the same-sex marriage. Unfortunately, in the “category two” states, these arguments would likely be unavailable to her. These states have DOMAs that explicitly deny recognition of the marriage for any purpose and deny recognition of any of the benefits or rights arising from the marriage. One of these states, Louisiana, directly forecloses the argument based on legitimacy by statute. Article 96 of Louisiana’s Civil Code provides that a null marriage nonetheless produces “civil effects” in favor of the child of the parties, but expressly states that a same-sex marriage “does not produce any civil effects.” In these jurisdictions, a co-parent seeking parental rights will likely need to pursue one or more of the alternative strategies discussed in Parts III and IV.

384 The other state, Arkansas, has a “category two” type DOMA, which provides that the marriage shall be void and “any contractual or other rights granted by virtue of that license . . . shall be unenforceable in the Arkansas courts.” Ark. Code Ann. § 9-11-208 (Michie 2002). Minnesota straddles the line between “category one” and “category two.” Minn. Stat. Ann. § 517.03 (West Supp. 2004).

385 Minn. Stat. Ann. § 517.03.

386 Were the DOMA to bar consideration of Sarah’s status as a parent based on the marriage, she could still petition for custody. See LaChapelle, 607 N.W.2d at 168. But see Kulla v. McNulty, 472 N.W.2d 175, 184 (Minn. Ct. App. 1991) (dismissing co-parent’s petition for visitation for failure to establish basis for third-party visitation).


388 See infra note 441–467 and accompanying text.
B. Recognition of Parental Rights if the Couple Enters into a Civil Union or Domestic Partnership

In this Section, I examine how the analysis changes if Andrea and Sarah enter into a civil union in Vermont or a domestic partnership in California rather than marry. Indeed, this may constitute the more salient question for the moment as civil unions seem to be the compromise of choice for many, including the Massachusetts legislature, and a constitutional amendment to ban same-sex marriage is pending in Congress.391 Ironically, in some states a civil union may actually provide greater protection to the parental rights of the non-biological parent than marriage would because most state DOMAs by their terms only prohibit recognition of marriage.

DOMAs we have classified as “category one” or “two category” speak only to recognition of “marriages.”392 By their express terms, neither a Vermont civil union nor a California domestic partnership is a marriage.393 The civil union statute defines marriage as the “legally recognized union of one man and one woman” while providing that persons are eligible for the civil union if they are “of the same sex and therefore excluded from the marriage laws.”394 Legislative findings accompanying the bill further declare that “a system of civil unions does not bestow the status of marriage.”395 Likewise, California’s domestic partner statute provides that “[t]his section does not amend or modify any provision of the California Constitution or any provision of any


392 For “category one” states, see supra note 87. For “category two” states, see supra note 88.

393 See CAL. FAM. CODE §§ 297.5(j), 308.5 (West 2004); VT. STAT. ANN. tit. 15, § 1201(4) (2002); see also Cox, supra note 18, at 778; Sawyer, supra note 18, at 736.

394 VT. STAT. ANN. tit. 15, §§ 1201(4), 1202(2).

statute that was adopted by initiative.\u201d\textsuperscript{396} This statement presumably refers to section 308.5 of the California Family Code, codifying Proposition 22, which limited marriage in California to a man and a woman.\textsuperscript{397} Consequently, Sarah can argue that the DOMAs simply do not apply to bar recognition of her parental rights if she and Andrea entered into a civil union in Vermont or a domestic partnership in California.

Two judicial decisions that have addressed the interstate recognition of a civil union provide mixed support for this conclusion. In \textit{Burns v. Burns}, a father sought and obtained an order of contempt against his ex-wife, alleging that she violated a trial court order which prohibited her from visiting with her children while cohabiting with an adult to whom she was not married, which in this case was her female lover.\textsuperscript{398} The mother argued that she had not violated the court order since she and her lover were parties to a civil union in Vermont.\textsuperscript{399} The appellate court affirmed, ruling that the civil union was not a "marriage."\textsuperscript{400}

In \textit{Rosengarten}, a party to a Vermont civil union sought to dissolve the union in Connecticut.\textsuperscript{401} The trial court dismissed the action for lack of subject matter jurisdiction, finding that the civil union was neither a marriage nor any other category of family relations under Connecticut’s jurisdictional statutes.\textsuperscript{402} The appellate court affirmed, reasoning, in part, that the civil union was not a marriage under the Connecticut statutes or under Vermont law.\textsuperscript{403}

\textsuperscript{396} Cal. Fam. Code § 297.5(j).
\textsuperscript{397} Id. § 308.5.
\textsuperscript{398} 560 S.E.2d 47, 48 (Ga. Ct. App. 2002).
\textsuperscript{399} Id.
\textsuperscript{400} Id. at 48–49.
\textsuperscript{401} 802 A.2d at 172.
\textsuperscript{402} Id.
\textsuperscript{403} Id. at 175. The \textit{Burns} court made clear that under its DOMA, the civil union, if it were a marriage, would not be recognized in Georgia. 560 S.E.2d at 49. In \textit{Rosengarten}, the court found that the trial court had no jurisdiction to dissolve the petitioner’s civil union as a “family relations matter” because a Connecticut statute approving same-sex adoptions expressly refused to endorse or to authorize same-sex civil unions. 802 A.2d at 177, 182. Neither of these conclusions, however, would preclude the court from recognizing the “incidents” of the union or the parental status created thereby, as discussed in supra notes 240–267 and accompanying text.

By contrast, a New York case that ruled in favor of a gay plaintiff undercuts the claim that we can distinguish the civil union or domestic partnership from a marriage under the mini-DOMAs. In *Langan*, the court ruled that a partner to a civil union was a “surviving spouse” under the New York wrongful death statute. Relying on the comprehensive nature of the rights provided by the civil union statute, the court concluded that the civil union was “indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union.” The court further noted that under the Vermont statute, the plaintiff-partner was considered a “literal spouse . . . not a functional or virtual one.” New York had not enacted a mini-DOMA, so the court concluded that the plaintiff’s spousal status would be recognized, giving the plaintiff standing to sue for the wrongful death of his partner.

Same-sex partners in civil unions or domestic partnerships face a quandary then. They continue to be denied access to marriage, and thus full equality within their home states. Yet the extensive tangible benefits provided by these laws may render these unions, in practical terms, indistinguishable from marriage, and thus subject to non-recognition under various state DOMAs.

The better argument would recognize that civil unions are not marriages, and that their recognition would not contradict the letter or the spirit of most state DOMAs. An advisory opinion by the Supreme Judicial Court of Massachusetts supports this conclusion. The justices there considered a question posed by the Massachusetts Senate: whether a system of civil unions would be constitutional in light of the court’s ruling in *Goodridge v. Department of Public Health*.

404 See *Langan*, 765 N.Y.S.2d at 422.
405 *Id.*
406 *Id.* at 417–18.
407 *Id.* at 422.
408 *Id.*
409 Indeed, the quandary has another dimension as well. From a broader perspective, advocates for gay rights face the prospect of arguing for the congruency of the civil union and marriage in certain contexts, for example, achieving “spousal” status in wrongful death actions, while highlighting the dissimilarities in family law cases being fought in DOMA jurisdictions.
410 Although this rule would leave the door open for dismissal based on jurisdictional grounds, as in *Rosengarten*, this risk poses less of a concern in our situation, as family courts generally have jurisdiction to consider disputes concerning custody of children. See supra note 136 and accompanying text.
411 See *Opinions of the Justices*, 802 N.E.2d at 569–72.
412 *Id.* at 566–67.
The court concluded that it would not. In doing so, the court reasoned as follows:

The bill’s absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. . . . It would deny to same-sex “spouses” only a status that is specially recognized in society and has significant social and other advantages.

The granting of nearly identical tangible benefits by the civil union could not save it under the Massachusetts Constitution because civil marriage carries with it “intangible protections, benefits, rights, and responsibilities.” Even Justice Martha Sosman’s dissenting opinion supports this argument. As she noted, same-sex couples cannot enjoy the same rights as opposite-sex couples, even if they were allowed to marry, because a substantial cadre of federal rights remain unavailable to same-sex couples under the federal DOMA and because, as we have seen, many other states may refuse to recognize the marriage.

This argument is consistent with the purposes behind the mini-DOMAs. Most of the mini-DOMAs were passed in response to the Baehr cases and the prospect of Hawaii permitting same-sex marriages; neither the Vermont civil union statute nor A.B. 205 even

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413 Id. at 572.
414 Id. at 570.
415 Id. at 571 (emphasis added).
416 Opinions of the Justices, 802 N.E.2d at 575–76 (Sosman, J., dissenting).
417 Id. (Sosman, J., dissenting). These differences also would include same-sex partners’ rights or eligibility for federally-funded state programs. Id. (Sosman, J., dissenting). Justice Martha R. Sosman stated the following in her dissenting opinion:

It would be rational for the Legislature to give different names to the license accorded to these two groups, when the obligations they are undertaking and the benefits they are receiving are, in practical effect, so very different, and where, for purposes of the vast panoply of federally funded State programs, State officials will have to differentiate between them.

Id. (Sosman, J., dissenting). This difference in treatment by the federal government and other states would “give[] rise to a vast assortment of highly tangible, concrete consequences.” Id. at 576 (Sosman, J., dissenting).
418 LA. CIV. CODE ANN. art. 86 (West 1999) (Legislative Intent: Traditional Marriage).
existed at the time many of the DOMAs were passed.\textsuperscript{419} Moreover, as we saw earlier, a number of the statutes contain specific expressions which support the view that the laws were designed to preserve the traditional institution of marriage, not to prevent any benefits from being provided to same-sex couples.\textsuperscript{420}

Given the existence of cogent arguments on both sides of this issue, we can expect to see courts reach different conclusions regarding the equivalence of civil unions, domestic partnerships, and marriages in addressing choice of law questions when civil union or domestic partners seek rights in other jurisdictions.\textsuperscript{421} If a state without a DOMA equates the civil union or domestic partnership with marriage, the analysis of the same-sex partner’s parental rights laid out in Part II.A.1 applies essentially as set forth.\textsuperscript{422} Even if a court were to view the union or partnership as distinct from a marriage, that conclusion should not substantially alter the analysis in the non-DOMA jurisdictions either. For all the reasons stated in Part II.A.1, those jurisdictions are likely to recognize the parental rights flowing from the solemnization of the relationship, whether by civil union, domestic partnership, or marriage.\textsuperscript{423}

In the DOMA jurisdictions, however, a court’s determination that civil unions and domestic partnerships are not essentially interchangeable with marriages could affect the analysis in ways both positive and negative. On the positive side, a same-sex partner like Sarah can argue that the union or partnership falls outside the scope of the DOMA, leaving the court free to recognize the civil union and all of the rights attendant to that status. The court then would apply whichever choice of law rules govern in its jurisdiction to determine whether to recognize the union. But even though the DOMA would not preclude recognition of the civil union per se, Sarah likely would fare best by seeking recognition of the union’s effects, focusing on her parental rights, as we did in Part II.A.2.c.\textsuperscript{424} The policies in favor

\textsuperscript{419} See Nat’l Gay & Lesbian Task Force, supra note 12 (showing dates of adoption of state DOMAs).

\textsuperscript{420} See supra notes 254–264 and accompanying text.


\textsuperscript{422} See supra notes 91–127 and accompanying text.

\textsuperscript{423} See supra notes 91–127 and accompanying text.

\textsuperscript{424} See supra notes 240–267 and accompanying text. Even the pro-gay opinion of the Langan court consciously avoided a determination of the validity of the civil union per se, preferring instead to evaluate its relevance to the precise issue under consideration. See 765 N.Y.S.2d at 415.
of her parental rights are recognized widely, while an attempt to validate the union per se could prove more difficult. Moreover, opponents could argue that the DOMA, although not technically dispositional on the question of civil union or partnership recognition, nonetheless evinces a strong policy against providing marriage-like rights to gays. Alternatively, if a court recognized the civil union or partnership in its entirety, Sarah would be able to sue to dissolve the union, just as she could in Vermont or California. The court then would treat her as any other parent entitled to custody or visitation in a divorce proceeding according to the best interests of the child standard. Pursuing this approach would avoid potential jurisdictional and standing barriers to perfecting her claim.

For this reason, it is worthwhile to recap briefly the most widely followed choice of law regimes and to posit arguments for recognition of the civil union or domestic partnership within those regimes. According to the First Restatement, the forum state would apply the law of the place where the most significant event leading to the cause of action arose. Here, that would be Vermont or California, the place where both parties celebrated their solemnization and were domiciled at the time. Under the Second Restatement, courts again would consider a variety of factors to determine which law to apply. The first factor—the needs of the interstate and international systems—favors recognition of the civil union or domestic partnership, at least in contrast to seeking marriage recognition, because only a few states have expressed a policy against civil unions. The second factor—the rele-

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425 See supra notes 132–142 and accompanying text.
426 For an analysis of this issue in one state, see generally Elaine M. DeFranco, Comment, Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union, 85 Marq. L. Rev. 251 (2001) (questioning whether a Wisconsin court would have to recognize a civil union under its choice of law theories). The DOMA state following the governmental interests analysis, California, already specifically provides for recognition of out-of-state civil unions or partnerships. Cal. Fam. Code § 299.2 (West 2004).
427 Restatement of Conflict of Laws §§ 121, 129 (1934).
428 See supra notes 313–318 and accompanying text.
429 Restatement (Second) of Conflict of Laws § 6(2) (1971). Minnesota and Arkansas follow Robert Leflar’s “better rule of law” approach, a variation of the Restatement (Second) of Conflict of Laws. See supra notes 382–387. On the one hand, both these states have broad DOMAs; on the other hand, Minnesota already has granted standing to a lesbian co-parent seeking custody based at least in part on an agreement with the mother. LaChapelle, 607 N.W.2d at 160–61. But see Kulla, 472 N.W.2d at 184 (dismissing co-parent’s petition for visitation for failure to establish basis for third-party visitation).
vant policies of the forum—is murkier when the goal is recognition of the civil union per se, rather than the parental rights flowing from it. Analysis of this factor would require an assessment of the forum state’s treatment of gays and lesbians, as well as, perhaps, cohabitants. Clearly, the enactment of a DOMA would provide ammunition for those claiming a policy in the forum against recognizing same-sex unions. The interests of the original home state—the third factor—are the same as those we saw previously and include interests in ensuring equality for its citizens, should they move out of the jurisdiction, and in protecting especially the children in those relationships from instability and uncertainty regarding those adults responsible for them.\textsuperscript{431} The fourth factor—the protection of justified expectations—arguably points more strongly toward recognition when dealing with civil unions and domestic partnerships, because most states have not enacted laws expressly declining to recognize them. Nonetheless, the novelty of these schemes weakens the contention that partners expect the status to be accepted without challenge in other jurisdictions.\textsuperscript{432} The basic policies underlying family law applicable to civil union recognition include those related to children as well as the more general goal of encouraging family stability, clarifying familial obligations, and protecting family members’ expectations, all of which support recognition. The final two factors—certainty, predictability, and uniformity of result, and ease of determination and application of the law—do not differ significantly when considering recognition of civil unions, as opposed to the earlier focus on parental rights.\textsuperscript{433} Neither would seem significant enough to sway the determination one way or the other.

Although on balance these factors should lead to recognition, the answer is not clear-cut. As we have just seen from the few cases decided, courts likely will disagree about whether and in what contexts to give effect to a foreign civil union or domestic partnership.\textsuperscript{434} If a court refused to apply Vermont or California law and to recognize the civil union or domestic partnership, the distinction between marriage and these alternate statuses could affect our same-sex partner negatively. In jurisdictions following the UPA, a co-parent like Sarah would no longer be able to argue for presumed motherhood

\begin{footnotes}
\footnote{See Opinions of the Justices, 802 N.E.2d at 576.}
\footnote{DeFranco, supra note 426, at 275–76.}
\footnote{See supra notes 344–346 and accompanying text.}
\footnote{See Rosengarten, 802 A.2d at 184; Burns, 560 S.E.2d at 49; Langan, 765 N.Y.S.2d at 422.}
\end{footnotes}
based on an invalid marriage, although she could try to achieve the same status by showing that she held out Madeleine as her own and received her into her home.\textsuperscript{435} Likewise, the decision not to treat the civil union or domestic partnership as a marriage could call into question arguments based on legitimacy. However, by granting partners to civil unions or domestic partnerships rights identical to their married counterparts, both statutes doubtless implicitly confer legitimacy on the children born to the couple.\textsuperscript{436}

Moreover, any distinction between civil unions, domestic partnership, and marriages would be unavailable to litigants in the states that have adopted so-called “super-DOMAs,” which explicitly prohibit recognition of civil unions and/or domestic partnerships.\textsuperscript{437} In these jurisdictions, co-parents would have to rely on the approaches outlined in Parts II.A.2.d and II.A.2.e.\textsuperscript{438} Unfortunately, three of these states—Florida, Ohio, and Texas—explicitly deny recognition not just to the alternate relationship, but also to any right or claim arising from the relationship.\textsuperscript{439} Hence, neither a civil union nor a domestic partnership would likely benefit a co-parent seeking parental rights in these jurisdictions. The co-parent’s only hope would be to meet the state’s


\textsuperscript{436} See Vt. Stat. Ann. tit. 14, § 554 (2002) (child considered legitimate when parents intermarry); id. at tit. 15, § 1204(f) (rights of parties to a civil union identical to those of a married couple with respect to a child of one); Langan, 765 N.Y.S.2d at 417 (civil union statute includes a “presumption of legitimacy” for children born of the union).


\textsuperscript{438} See supra notes 268–389 and accompanying text.

\textsuperscript{439} Fla. Stat. Ann. § 741.212(2); Ohio Rev. Code Ann. § 3101.01; Tex. Fam. Code Ann. § 6.204(c)(2). Nebraska’s “super-DOMA” simply provides that “[t]he uniting of two persons of the same sex in civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” Neb. Const. art. I, § 29. This provision still leaves open the possibility of seeking recognition of the parent-child relationship created by the civil union based on the arguments discussed in supra notes 128–390 and accompanying text.
III. SEEKING CUSTODY OR VISITATION AS A THIRD PARTY

If a court refused to grant Sarah standing as a parent based on the marriage, civil union, or domestic partnership, each of these statuses still might assist Sarah by helping to establish threshold requirements for standing based on other statutory or equitable grounds. Most states grant standing to petition for custody or visitation to certain individuals who do not meet the traditional definition of parent—biological or adoptive—in at least some circumstances. The statutes and cases establishing this right vary from one state to the next, but they share certain features. Most require the person seeking some form of parental rights, either custody or visitation, to have acted as a parent to the child and to have developed a corresponding parent-child bond. Depending on the wording of the statute or the judicial precedent, the petitioner may have to establish that she acted either in loco parentis, as a de facto custodian, or as a

440 See supra notes 453–467 and accompanying text.


442 See, e.g., Minn. Stat. § 257C.08 subd. 4 (visitation); Mont. Code Ann. § 40-4-228 (any parental interest); Or. Rev. Stat. § 109.119 (visitation, custody, or guardianship); Nev. Rev. Stat. Ann. 125C.050(2) (Michie 2004) (visitation); Hardy, 444 S.E.2d at 330 (granting standing to “the physical custodian to whom the mother entrusted the child” and with whom the child had a parental relationship); Tinsley v. Plummer, 519 N.E.2d 752, 754 (Ind. Ct. App. 1988) (denying great aunt both custody and visitation when no custodial and parental relationship was shown); J.W.E., 799 P.2d at 715 (noting that standing to pursue custody may be allowed based on the relationship to the child and whether that relationship signals that the petitioner likely has the child’s best interests at heart).
primary caregiver for a certain amount of time.\textsuperscript{443} Some statutes simply refer to “other person[s]” who may file suit for custody or visitation, although the statute or courts typically limit this language to those who can demonstrate an established relationship with the child.\textsuperscript{444} In addition, several states have explicitly allowed same-sex co-parents to petition for visitation on equitable grounds if they meet certain requirements:

(1) that the biological or adoptive parent consented to, and fostered, the parent-like relationship with the child; (2) that the [co-parent] and the child lived together in the same household; (3) that the [co-parent] assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.\textsuperscript{445}

The same-sex marriage, civil union, or domestic partnership arguably establishes the first prong of the test—that the legal parent consented to the creation of a parent-like relationship with the child. The relationship also supplies some evidence of the second prong, because the marriage by law confers on the co-parent obligations to support the child. Likewise, some of the third-party statutes seem apt to afford


\textsuperscript{445} E.g., V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000); H.S.H.-K., 533 N.W.2d at 421; see E.N.O. v. L.M.M., 711 N.E.2d 886, 891–94 (Mass. 1999); T.B., 786 A.2d at 916–17.
standing to a lesbian co-parent whose marriage was invalidated, at least under the circumstances in our hypothetical, when the co-parent clearly acted as the primary caregiver and developed a parent-child relationship.

Nonetheless, there are several potential pitfalls to relying on these statutory provisions and precedents. First, some of them incorporate additional threshold requirements for standing which may be difficult if not impossible to prove, such as unsuitability of the legal parent.446 Others require a showing that no substantial interference with or significant impairment of the legal parent’s rights will result, but may provide no guidance as to the meaning of those terms.447 Second, some statutes and even the cases recognizing a lesbian co-parent’s standing explicitly limit third parties to suits for visitation, leaving them unable to pursue custody.448 Third, some explicitly limit third-party claims to members of designated groups, such as grandparents, stepparents, or relatives.449 Fourth, and perhaps most significantly, the person seeking parental rights as a non-legal parent likely will be treated as a third party, not as a co-equal parent.450 As a result, the co-parent will not be

446 See, e.g., Ariz. Rev. Stat. Ann. § 25-415 (requiring that placement with legal parent would be detrimental to child); Del. Code Ann. tit. 13, § 721(c) (requiring that child be dependent or neglected); Minn. Stat. § 257C.03 subd.7 (requiring that parent has abandoned or neglected child so child will be harmed or physical or requiring emotional danger to child or other extraordinary circumstances); Wash. Rev. Code Ann. § 26.10.050(1) (requiring that child is not in parent’s physical custody or that parent is unsuitable); In re Custody of S.H.B., 74 P.3d 674, 679 (Wash. Ct. App. 2003), review granted sub nom., In re Custody of Brown, 94 P.3d 959 (Wash. 2004) (affirming that non-parent petitioner must show that the parent is unfit, that living with the parent would harm the child’s development, or that an award of custody to the non-parent is in the child’s best interest); In re Custody of Nunn, 14 P.3d 175, 181 (Wash. Ct. App. 2000) (noting that non-parent petitioner must show unfitness of parent with custody in order to gain standing).


450 See, e.g., Buness, 781 P.2d at 988–89; Seyboth, 554 S.E.2d at 381; Dwyer, supra note 305, at 982. But see Ky. Rev. Stat. Ann. § 405.020(3) (Michie 1999) (providing that de facto custodian petition determined by best interests standard and that de facto custodian must take parents’ place); J.A.C., 734 N.E.2d. at 1060 (providing that once “custodial and parental” relationship is established by a third party, visitation should be determined by best interests
entitled to prevail by showing merely that custody or visitation would be in the child’s best interests; rather, she will have to meet a considerably more difficult test, reflecting the constitutionally elevated status enjoyed by legal parents. Most states require a third party seeking custody to demonstrate that the legal parent is unfit, that custody would be detrimental to the child, or that other extraordinary circumstances justify interference with the legal parent’s right to control the care, custody, and upbringing of his or her children. Although some states have used the less stringent “best interests of the child” standard to award visitation to third parties, those statutes and rulings are subject to constitutional challenge under Troxel.

standard). This argument might run into difficulty in the “category two” DOMA states. Those DOMAs prohibit use of the marriage for any purpose. On the one hand, a very broad reading of the statute conceivably could prevent a co-parent from relying on the marriage to establish any of the requirements for third-party standing. On the other hand, the biological parent’s agreement to allow the co-parent to assume a parental role likely can be established in most of these cases by alternate means, including the conduct of the parties.

451 See, e.g., Nev. Rev. Stat. Ann. 125.500(1) (stating that non-parent must show parental custody would cause substantial harm to the child); Thomas v. Thomas, 49 P.3d 306, 309 (Ariz. Ct. App. 2002) (stating that third party seeking custody must show significant detriment to the child if a legal parent has custody); Lamp v. Lamp, 833 So. 2d 1224, 1229 (La. Ct. App. 2002); Lynda A.H. v. Diane T.O., 673 N.Y.S.2d 989, 990 (App. Div. 1998) (holding that third party must show parental abandonment, neglect, or other extraordinary circumstances); Owenby v. Young, 579 S.E.2d 264, 267 (N.C. 2003) (concerning methods of showing natural parent forfeiting protected status); Ellison, 502 S.E.2d at 896 (holding that third party must show parent has taken actions inconsistent with his or her constitutionally protected status before considering best interests); In the Interest of D.P.O., 667 N.W.2d 590, 592 (N.D. 2003) (noting that “[a]bsent exceptional circumstances triggering a best-interest analysis” the natural parent will prevail in a custody dispute with a non-parent); Simons v. Givsolv, 519 N.W.2d 585, 587 (N.D. 1994) (stating that non-parent must show custody by legal parent would result in serious harm or detriment to the child); T.B., 786 A.2d at 919 n.8 (noting that in third-party custody dispute “the burden of proof is not evenly balanced and... the evidentiary scale is tipped hard to the biological parent’s side”); Quinn v. Mouw-Quinn, 552 N.W.2d 843, 846 (S.D. 1996) (holding that stepfather must show extraordinary circumstances justifying visitation). But see Worrell, 704 N.E.2d at 1028–29 (concluding that once standing established, visitation determined by best interests standard, but that standing limited to stepparents); J.W.F., 799 P.2d at 715 (concluding that stepparent had standing to seek custody if in the best interest of the child).

452 Dwyer, supra note 305, at 972–73, 978–80 (describing “prevailing standard” under grandparent visitation statutes as best interests of the child—standard in doubt since Troxel); see In re Marriage of James and Claudine W., 7 Cal. Rptr. 3d 461, 463–65 (Ct. App. 2003) (declaring stepparent visitation statute applying best interests standard unconstitutional as applied); Commonwealth ex rel. Husack v. Husack, 417 A.2d 233, 235–36 (Pa. Super. Ct. 1979) (upholding custody award based on the best interests of the children). But see Rideout v. Rienceau, 761 A.2d 291, 303 (Me. 2000) (finding constitutional the awarding of visitation to grandparents acting as parents based on best interests standard); Rubano, 759 A.2d at 974–77 (holding that biological parent’s agreement to have lesbian partner assume de facto parent status supported standing for partner to seek visitation).
IV. STRATEGIC ALTERNATIVES

The preceding analysis demonstrates that same-sex parents can garner important substantive parental rights by marrying or entering into a civil union or domestic partnership in their home states, and they can make powerful arguments for retaining those rights in other jurisdictions, even those with DOMAs. Nonetheless, the outcome for these parents is far from certain, and they remain vulnerable to destruction of their parental rights if they or the biological parent move outside the home jurisdiction.

Same-sex parents can solidify their rights by adopting their spouse or partner’s child.\textsuperscript{453} Same-sex marriages, civil unions, and domestic partnerships each allow for adoption by the partner without termination of the biological parent’s parental rights.\textsuperscript{454} Adoption would increase the likelihood of recognition by a sister state jurisdiction for two reasons.

First, an adoption constitutes a legal judgment. In interpreting the Full Faith and Credit Clause, the U.S. Supreme Court long has drawn a distinction between interstate recognition of laws and of judgments. The Full Faith and Credit Clause generally requires a state to recognize judgments of sister states, while allowing the state more latitude to avoid recognition of sister state laws that violate its public policy.\textsuperscript{455} States are not free to refuse to enforce a judgment on public policy grounds.\textsuperscript{456}

This requirement would not apply to a Canadian adoption decree, as the Full Faith and Credit Clause governs interstate obligations, but not international ones.\textsuperscript{457} However, most states would recognize an adoption decree lawfully issued in a foreign jurisdiction


\textsuperscript{454} Couples who marry in Massachusetts or Canada could complete a stepparent adoption, as can couples who enter into a civil union in Vermont or register as domestic partners in California. See MASS. GEN. LAWS ch. 210, § 2A (2002); D(A.N.S), Re, 1998 Carswell Sask 710; see also CAL. FAM. CODE § 297.5(d) (West 2004); VT. STAT. ANN. tit. 15, § 1204(e)(4) (2002). Indeed, each of these states allows same-sex partner adoptions even in the absence of marriage, union, or partnership. See Sharon S. v. Superior Court, 73 P.3d 554, 558 (Cal. 2003), cert. denied, 540 U.S. 1220 (2004); Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993); B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

\textsuperscript{455} Barbara J. Cox, Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples, 31 CAP. U. L. REV. 751, 764, 771 (2003); Strasser, supra note 453, at 323.

\textsuperscript{456} Strasser, supra note 453, at 323.

based on principles of comity or statutes specifically providing for such recognition.\textsuperscript{458}

Second, neither the federal DOMA nor state DOMAs tracking its language can block recognition of the adoption.\textsuperscript{459} The federal DOMA provides as follows:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.\textsuperscript{460}

Although some have suggested that the federal DOMA’s reference to judicial proceedings calls into question the longstanding conclusion that the Full Faith and Credit Clause obliges states to honor other states’ judgments, an adoptive parent can argue that the DOMA would not apply.\textsuperscript{461} Because adoption is available to same-sex partners who do not marry or enter into a civil union or domestic partnership in those jurisdictions,\textsuperscript{462} the adoption would not constitute a right or claim “arising from” a marriage, civil union, or domestic partnership, and thus would fall outside even the broadest possible interpretation of the DOMA.\textsuperscript{463}

Adoption thus offers another avenue for acquiring parental rights. It undoubtedly carries with it more likelihood of out-of-state recognition, but the DOMAs inject some uncertainty into this conclusion as well. Moreover, same-sex partners who marry or enter into one of the alternative state-sanctioned relationships should not have to undertake the added time and expense of an adoption. The whole point of these laws is to equalize the position of gay couples and families under the law. Requiring an adoption would impose a burden on these couples not suffered by their married heterosexual counterparts.\textsuperscript{464}

\textsuperscript{460} Id. (emphasis added).
\textsuperscript{461} See generally, e.g., Whitten, supra note 18. Other scholars doubt the constitutionality of this interpretation. See, e.g., Cox, supra note 455, at 771–79.
\textsuperscript{462} See supra note 454 (citing cases allowing same-sex partner adoption in Vermont, Massachusetts, and California).
\textsuperscript{463} See Strasser, supra note 453, at 321.
\textsuperscript{464} See Robson, supra note 147, at 31–33 (critiquing the lesbian movement for second-parent adoptions).
Ultimately, the best hope for consistent recognition of parental rights for same-sex parents probably lies with the U.S. Constitution. True uniformity can be achieved in two ways: by recognizing that the prohibition on same-sex marriage violates due process and equal protection\(^{465}\) or by recognizing that stripping a parent of parental rights based on choice of law or statutory principles impermissibly deprives her of due process and equal protection and may run afoul of the Full Faith and Credit and Privileges and Immunities Clauses.\(^{466}\) Of course, a legislative solution also could solve the problem, but is virtually unimaginable at this point, given the intense polarization of legislatures and the public on this issue.\(^{467}\)

**Conclusion**

The opportunity for same-sex couples to marry and to enter into civil unions and domestic partnerships has brought gays and lesbians unprecedented rights, perhaps none more meaningful than legal recognition as parents. This development promises to strengthen families and to protect the best interests of children by ensuring that children will have two parents legally bound to care for them and that they will continue to enjoy meaningful contact with both parents who have loved, nurtured, and supported them, even in the face of dissolution of the parents’ relationship. Although grave questions exist regarding the portability of the parents’ marital status, particularly due to the proliferation of DOMAs throughout the nation, parental rights can survive the invalidation of the parents’ marriage. The UPA, precedents regarding legitimacy of children, and general choice of law principles all provide potent arguments for advocates seeking to preserve the parental rights of a same-sex partner. Similar arguments can be adapted for couples from Vermont and California who enter into civil unions or register as domestic partners. As the courts grapple with this question in the years to come, we only can hope that the


\(^{466}\) A full discussion of these challenges is beyond the scope of this Article, but is being addressed by me in a separate Article.

results will serve justice and promote the welfare of the children involved by affirming the parent-child relationship created by a marriage, civil union, or domestic partnership with the state’s blessing.
THE PRIVATE IS PUBLIC: THE RELEVANCE OF PRIVATE ACTORS IN DEFINING THE FOURTH AMENDMENT

SAM KAMIN*

Abstract: Because the Fourth Amendment regulates only governmental conduct, the behavior of private actors is almost wholly absent from academic Fourth Amendment literature. This Article argues that this exclusive focus on official conduct is myopic. Because the U.S. Supreme Court often looks to the conduct of private actors to determine the scope of permissible government conduct, a Fourth Amendment approach that ignores the invasions engaged in by these private actors is likely to concede questions regarding important civil liberties before the government even acts. This Article traces the development of Fourth Amendment jurisprudence, explaining the origins of the Court’s current focus on private conduct. It then describes the current state of private intrusions upon privacy, arguing that emerging technologies have facilitated an exponential growth in the capacity of private actors to obtain and process private information. This expansion in private searching will likely lead courts to uphold similar invasions of privacy when government agents engage in the same kind of conduct. Finally, this Article proposes legal, legislative, and practical solutions to the current privacy crisis, and reluctantly concludes that only individual, practical steps are likely to produce effective privacy expansions in the near term.

Introduction

In early 2004, the U.S. Justice Department made headlines and inflamed privacy groups when it subpoenaed medical records from a
number of abortion providers around the country.\(^1\) The Bush administration claimed that the records were necessary to defend legal challenges to the late-term abortion ban that was signed into law the previous year.\(^2\) A federal judge disagreed, however, and granted a Chicago hospital’s motion to quash the subpoenas.\(^3\) Undaunted, the Justice Department continues to press its subpoenas in several other states.\(^4\)

The Bush administration’s attempt to force the release of private medical records is only one in a series of high-profile actions that have drawn the ire of privacy groups. For example, in late 2002, the administration announced its plans for Total Information Awareness, a federal program that would combine information from public and private records to create a macro database of individually identifiable information.\(^5\) Although negative publicity forced the administration to curtail its plans for Total Information Awareness,\(^6\) there is evidence that the administration is still pursuing many of the program’s goals by other means.\(^7\)

Although these high-profile governmental attempts to obtain private information have rightly made headlines, I argue that a possibly greater threat to privacy has been largely ignored—the actions of private actors in gaining access to information to which they historically lacked access. In this Article, I argue that the focus on state actors—by the media, by scholars, and by interest groups—is myopic and ill-serves the interests of privacy. My thesis in this Article is that this ex-

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3 See id.
7 An editorial published in the San Francisco Chronicle in 2004, claimed the following:

   When retired Adm. John Poindexter left government service last year, it was widely believed that his misguided scheme to collect private data on U.S. citizens was gone for good, too. It was a bad assumption. The Poindexter-inspired drive to electronically surveil and compile dossiers on millions of Americans is apparently still in gear.

clusive focus on state action ignores the fact that, as it is currently interpreted by the U.S. Supreme Court, the Fourth Amendment’s coverage depends crucially on the scope of private actors’ conduct.\footnote{See infra notes 59–149 and accompanying text.}

This is true not because private action is subject to the requirements of the Fourth Amendment; it is not.\footnote{See, e.g., Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 614 (1989) (stating that “the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative”); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (finding that the Fourth Amendment’s “origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies”).} Rather, private conduct is crucial because courts will examine that conduct to determine whether an individual has a reasonable expectation of privacy in an area that a government actor has invaded.\footnote{See infra notes 74–84 and accompanying text.} If an individual has allowed private actors access to that area, she generally will not be permitted to complain that her rights have been violated when the government seeks access to that area as well.\footnote{See infra notes 74–84 and accompanying text.} Thus, the consistent

Private actors whose conduct is so intertwined with that of state law enforcement authorities that they may be considered state actors are the exception to this rule. See Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (holding that, in general, the Constitution does not purport to govern private conduct, and that the behavior of private individuals will not be attributed to the state unless there is a “sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself”); Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 508 (1985) (arguing that “[p]rivate behavior need comply with the Constitution only if the state is so intimately involved in the conduct—that is, if the nexus to the state is so great—that the state can be held responsible for the activity”). Professor Paul Brest provided the following explanation:

The state action doctrine originated in the Civil Rights Cases, in which the Supreme Court held that the fourteenth amendment did not authorize Congress to prohibit discrimination by privately owned inns, conveyances, and places of amusement; rather, its purpose was to “provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.” See Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1300 (1982) (quoting the Civil Rights Cases, 109 U.S. 3, 11 (1883) (citation omitted)).

Throughout, I use the word “area” to describe the thing being searched. I mean to include within this phrase those intangible places and things in which one might reasonably wish to maintain an expectation of privacy—e-mails, conversations, medical records—as well as tangible areas such as cars, houses, and offices. Of course, as I discuss below, the idea that tangible and intangible things or places are afforded the same protection is a relatively new idea. See, e.g., Olmstead v. United States, 277 U.S. 438, 464 (1928); infra notes 37–43 and accompanying text.
failure of scholars and privacy advocates to examine the role of private conduct in defining the Fourth Amendment has the effect of ceding the legal battle for protection from government intrusion before that intrusion has even taken place.

This Article proceeds in four parts. First, in Part I, I trace the development of the Supreme Court’s current understanding of the Fourth Amendment. I follow the Court’s jurisprudence from one based on a strict, historical reading of the text of the Fourth Amendment to an interpretation based on the concept of reasonable expectations of privacy. This latter test, developed in 1967, in *Katz v. United States*, remains the fundamental Fourth Amendment paradigm today.

Next, in Part II, I discuss how the *Katz* standard has been applied in recent years. I demonstrate that in determining whether or not a reasonable expectation of privacy exists when the government invades an area in which a defendant asserts a right to privacy, courts pay particular attention to whether a private actor could have done what the government in fact did. If the answer to that question is yes, courts generally find no reasonable expectation of privacy, and hence, no Fourth Amendment protections. I will show that the Court’s doctrine now focuses on the practical capacity of other actors to invade a defendant’s privacy rather than on the legality of that conduct; even if government actors are acting in a way that could be punished if done by a private actor, courts will find no reasonable expectation of privacy if such an illegal invasion by a private actor was foreseeable.

In Part III, I show how recent technological innovations have made courts’ focus on private conduct particularly troubling for those concerned about the reach of government surveillance. As technologies make it easier for employers, insurers, and even simple snoops to gain access to previously private areas, members of the public have, to a large extent, taken for granted the fact that many eyes are watching them. Those who accept this private snooping may not realize, however, that by permitting these prying eyes to investigate them, they have essentially consented to government surveillance as well.

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12 See infra notes 19–58 and accompanying text.
14 See infra notes 59–149 and accompanying text.
15 Fourth Amendment claims can be raised either by defendants seeking the exclusion of evidence in a criminal trial or by plaintiffs alleging a violation of their rights. For simplicity, I refer generically throughout to the Fourth Amendment claimant as a defendant.
16 See infra notes 150–242 and accompanying text.
Finally, Part IV looks to the future. I argue that the current scope of the Fourth Amendment is unlikely to change in the near term. If anything, the Supreme Court’s recent decision in *Kyllo v. United States* is the apotheosis of the focus on private conduct to define the contours of the Fourth Amendment. Similarly, I argue that laws designed to protect individuals from one another are unlikely to be useful in protecting individuals from their government. Because the courts have refused to find consistently that conduct by a government official that would contravene a civil statute violates an individual’s reasonable expectation of privacy per se, such statutes are perhaps worse than useless in regulating government conduct. Because these statutes can give individuals the false sense that their privacy is protected, they may have the effect of providing less protection, rather than more, against governmental invasions of privacy. I argue instead that the only way for individuals to gain protection against governmental intrusions into their privacy is to actively seek to protect their private information from all prying eyes, public and private.

I. THE MODERN UNDERSTANDING OF THE FOURTH AMENDMENT

A. The Text

Although a general right to privacy has been read into a number of the guarantees in the Bill of Rights, the privacy rights of the people vis-à-vis the government are protected most fundamentally by the Fourth Amendment of the U.S. Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

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17 See infra notes 253–274 and accompanying text.
20 Various provisions of the Fourth Amendment have been incorporated into the Fourteenth Amendment’s guarantee of due process of law, making it applicable to the states as well as the federal government. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (enforcing the exclusionary rule against the states).
particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{21}

The Amendment is generally interpreted as containing two clauses: one speaking to unreasonable searches and seizures, and the other discussing the requirements for the issuance of warrants. The relationship between these two clauses is murky at best and has been the topic of much controversy in the two-hundred-plus years since their drafting.\textsuperscript{22} Faced with an essentially inscrutable text, the U.S. Supreme Court has generated a number of interpretive rules that find varying degrees of support in the text of the Amendment—the Amendment expresses a strong preference for searches conducted pursuant to judicially approved warrants;\textsuperscript{23} all searches, whether sub-

\textsuperscript{21} U.S. Const. amend. IV.

\textsuperscript{22} See, e.g., Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100–03 (1937). Nelson B. Lasson writes that the confusion regarding the two clauses is essentially a result of misreporting by one of the drafters. Id. at 101–02. He notes that the House of Representatives originally approved a draft of what would become the Fourth Amendment that read,

\begin{quote}
The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, \textit{shall not be violated by warrants issued without probable cause}, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.
\end{quote}

\textit{Id.} at 100 n.77 (emphasis added). Although the relationship between the two clauses is relatively straightforward in this draft, the House’s Reporting Committee reported that the House approved the version with which we are now familiar, which contained amendments the House had in fact rejected. \textit{Id.} at 101. But see Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 718–19 (1999) (arguing that the evidence that the current version of the Fourth Amendment is not the one that was approved by the House of Representatives is “inconsistent”).

\textsuperscript{23} For example, in Coolidge v. New Hampshire, the Supreme Court stated the following:

\begin{quote}
It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect’s premises without a warrant is \textit{per se} unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of “exigent circumstances.”
\end{quote}

403 U.S. 443, 474 (1971). Exceptions to the probable cause and warrant requirements include the following:

\begin{quote}
[I]nvestigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.
\end{quote}

ject to the warrant requirement or not, must generally be supported by probable cause; and the ultimate constitutional test for every search is reasonableness. Although each of these interpretations is now taken more or less as orthodoxy, these heuristics are inherently inconsistent, and none of them is entirely free from controversy.

Thus, at its most fundamental levels—the relationship between the Amendment’s two clauses and the degree of suspicion that must be shown before a warrantless search may be conducted—it becomes clear that the Fourth Amendment is hardly self-defining. These problems of construction are compounded by the fact that at the time of the Amendment’s drafting, conceptions of privacy, crime, and policing were fundamentally different than they are today. For example, there were no organized police forces during the founding period. Rather, law enforcement was handled exclusively by part-timers and amateurs. Although crime as we know it today clearly existed in co-

24 See, e.g., Chambers v. Maroney, 399 U.S. 42, 51 (1970) (stating that “[i]n enforcing the Fourth Amendment’s prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution”). But see Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 624 (1989) (permitting alcohol and drug testing after railway accidents even in the absence of individualized suspicion); Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (permitting brief detentions for investigative purposes based upon the lesser standard of reasonable suspicion).

25 See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (Scalia, J.) (explaining that “[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness’”).

26 See, e.g., Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 10–17 (1997) (arguing that the Founders were deeply skeptical of judicially-issued warrants and that the Fourth Amendment should be read as mandating that all searches be reasonable rather than as expressing a preference for warranted searches); see also Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 757, 761 (1994) (arguing that the Supreme Court has misconstrued not only the relationship between the Fourth Amendment’s two clauses, but also two other pillars of Fourth Amendment jurisprudence—the requirement of probable cause for all searches and the application of the exclusionary rule to all Fourth Amendment violations); Davies, supra note 22, at 591 (arguing that a general reasonableness test would have been unimaginable to the Founders).

27 See, e.g., Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 830–32 (1994). Professor Carol S. Steiker stated the following:

Our twentieth-century police and even our contemporary sense of “policing” would be utterly foreign to our colonial forebears. Law enforcement in colonial times was, as legal historian Lawrence Friedman tells us, “a business of amateurs.” Public order was maintained by a loose system of sheriffs, constables, and night watchmen. Most counties had a sheriff, appointed by the governor of the colony as the chief law enforcement officer, in charge not only of jails and prisoners, but of jury selection as well. But sheriffs had no professional law enforcement staffs under their direction. Instead, ordinary citizens who were employed in other trades or professions as their means of
lonial times, the physical fear of crime as a social phenomenon and as a political issue simply did not. Today, the primary conundrum of crime in the United States is generally seen as the importance of protecting the public from predation while protecting individuals from the invasive power of the state.28 By contrast, crime in colonial times was feared not so much as a threat to individual safety, but as a threat to the moral and social order.29 Furthermore, the main privacy con-

livelhood took turns serving as constables during the day or watchmen during the night. The constabulary “carried the main burden of law enforcement,” as its members were required to patrol during the day as well as supervise the night watch. Serving as a constable was an unpopular task, however, and many towns had difficulty maintaining an adequate presence. The constables generally served without training, uniforms, weapons, or other accoutrements of modern law enforcement officers. They ordinarily did not receive stipends, but were sometimes compensated by private individuals for the return of stolen property. The night watch was equally amateurish: early attempts to have a paid watch in New York and Boston ultimately failed because it was so expensive; thus, the watch was generally staffed by requiring all citizens to take a turn “in the duty of watch and ward.”

The constabulary and the watch differed from modern law enforcement structures not only in personnel, but in function; their duties often strayed quite far from our modern notions of peacekeeping and investigation. For example, one of the earliest colonial constables had duties that included announcing marriages approved by civil authority and serving as “Sealer of Weights and Measures” and “Surveyor of Land.” Urban constables were generally charged with monitoring the condition of “streets, sidewalks, privies, [and] slaughterhouses.” The night watchmen usually were required to call out the hour and the weather; sometimes they were entrusted with the care of street lamps as well. Indeed, it was not until well into the nineteenth century that some urban authorities declared that it had “become necessary that in every large town there should be several intelligent and experienced men devoting their time and skill to the pursuit and arrest of . . . robbers, housebreakers, pickpockets, and other felons.” The duties of constables and night watchmen never developed into the job of investigative “policing” with which modern law enforcement agencies are charged.

28 See generally Herbert L. Packer, Two Models of Criminal Process, 113 U. Pa. L. Rev. 1 (1964) (arguing that two contrasting views of the criminal justice system inevitably compete—one based on crime control, efficiency and finality, the other on providing due process and individualized consideration).

29 See, e.g., Lawrence M. Friedman, Crime and Punishment in American History 34 (1993). Professor Lawrence M. Friedman stated the following:

Since crimes were sins, and sins crime, there was no sharp line between “victimless crimes” and crimes of predation or violence. The idea of a victimless crime is distinctly modern. An offense against God was an offense against society, and a positive threat to the social order. When Sodom and Gomorrah flouted God’s will, his anger laid them waste.
cern of the Founders generally was not searches by police officers in pursuit of criminal prosecutions, but rather wide-ranging and unfettered searches by customs and tax inspectors or by officials of the Crown looking for materials deemed seditious.\textsuperscript{30} In fact, during the founding period, Fourth Amendment claims were rarely even raised in the criminal context. At that time, the legality of a search usually was contested as a defense to a civil trespass action rather than in the course of a criminal prosecution.\textsuperscript{31} One primary reason for this, of course, is the fact that the exclusionary rule is entirely an invention of the twentieth century;\textsuperscript{32} it likely would have come as a surprise to the Founders that otherwise competent evidence would not be admitted in court because of the means by which it was obtained.

Thus, even if the text of the Fourth Amendment were clear in its terms (and it is not), applying in contemporary times a document

\textit{Id.} Thus, according to Professor Friedman, crime was a threat not simply to its direct victims but to both the perpetrators and to society as a whole. \textit{See id.}

\textsuperscript{30} \textit{See, e.g.,} William J. Stuntz, \textit{The Substantive Origins of Criminal Procedure}, 105 Yale L.J. 393, 394 (1995). William J. Stuntz stated the following:

Privacy protection in the past had little to do with ordinary criminal procedure. The Fourth and Fifth Amendments arose out of heresy investigations and seditious libel cases, not murders and robberies. In the late nineteenth century, when the Supreme Court first took a hand in crafting Fourth and Fifth Amendment law, the key cases involved railroad regulation and antitrust—again, a far cry from ordinary criminal litigation. In both the eighteenth and nineteenth centuries, the law’s primary effect seems to have been to make it harder to prosecute objectionable crimes—heresy, sedition, or unpopular trade offenses in the seventeenth and eighteenth centuries, regulatory offenses in the late nineteenth century. To a surprising degree, the history of criminal procedure is not really about procedure at all but about substantive issues, about what conduct the government should and should not be able to punish.

\textit{Id.} Similarly, Nelson B. Lasson cites as the main impetus for the protections of the Fourth Amendment, and its state analogues, a number of cases, both from the colonies and England, involving the enforcement of unpopular tax and sedition laws. Lasson, \textit{supra} note 22, at 42–78.

\textsuperscript{31} \textit{See, e.g.,} Entick v. Carrington, 95 Eng. Rep. 807, 817 (K.B. 1765) (rejecting the defense of agents of the Crown in a trespass action on the ground that the search they conducted left too much discretion to those charged with its execution); Wilkes v. Wood, 98 Eng. Rep. 489, 498–99 (K.B. 1763) (finding that a general warrant is insufficient to permit an entry into plaintiff’s home).

\textsuperscript{32} \textit{See, e.g.,} Mapp, 367 U.S. at 648 (stating that “in the Weeks case, this Court ‘for the first time’ held that ‘in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure’”) (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949)); Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing for the first time that the exclusionary rule is a necessary corollary of the rights guaranteed in the Fourth Amendment).
written in a very different context and addressing very different concerns is a task necessarily requiring a certain amount of inventiveness on the part of jurists.\(^\text{33}\) For example, how is one to determine, parsing the fifty-four words of the Amendment, whether or not police officers may conduct a warrantless search of a paper bag contained in the trunk of a suspicious automobile,\(^\text{34}\) whether federal officers may “massage” a duffle bag in the luggage compartment of a bus,\(^\text{35}\) or whether law enforcement officials may fly over private property in a borrowed aircraft to peer through the semi-opaque roof of a shed?\(^\text{36}\) The short answer, of course, is that neither the text of the Amendment nor founding-era understandings of its meaning are likely to provide consistent answers to these questions. Rather, judges must turn elsewhere to determine the scope of the Amendment’s protections in contemporary society. It is to these alternative means of interpreting the Fourth Amendment that I now turn.

B. \textit{Interpreting the Text}

An early example of the hermeneutic difficulties posed by the Fourth Amendment is presented by the 1928 case of \textit{Olmstead v. United States}.\(^\text{37}\) In \textit{Olmstead}, the government tapped the defendant’s office telephone in a way that constituted no trespass upon his property.\(^\text{38}\) The connections were all made either in the common basement of an

\(^{33}\) Of course, all of the Constitution’s provisions are applied in a context unimaginable to the Founders. One could argue, for example, that one of the problems in interpreting the Commerce Clause today is the way interstate and foreign commerce has changed since 1789. \textit{See generally} Randy E. Barnett, \textit{New Evidence of the Original Meaning of the Commerce Clause}, 55 \textit{Ark. L. Rev.} 847 (2003) (discussing the difficulties of interpreting the Commerce Clause in a modern age). The Founders were aware, however, of interstate and foreign commerce in a way in which they simply were not familiar with the modern conceptions of crime and law enforcement.

\(^{34}\) \textit{See, e.g.,} United States v. Ross, 456 U.S. 798, 820–22 (1982) (finding that when police officers have probable cause to believe that contraband may be found in a car’s trunk, they may search any closed containers within the trunk that might contain the contraband).

\(^{35}\) \textit{See, e.g.,} Bond v. United States, 529 U.S. 334, 338–39 (2000) (finding that the physical manipulation of carry-on baggage in an overhead compartment was a search for purposes of the Fourth Amendment).

\(^{36}\) \textit{See, e.g.,} Florida v. Riley, 488 U.S. 445, 451–52 (1989) (plurality opinion) (finding that because the officers were in Federal Aviation Administration approved air space, they were only doing what a member of the public could have done, and the defendant had thus assumed the risk that his illegal crop would be discovered).

\(^{37}\) \textit{See} 277 U.S. 438, 464 (1928).

\(^{38}\) \textit{Id. at} 457.
apartment building or on public wires.\textsuperscript{39} Based on conversations overheard via the wiretap, the officers obtained enough information to prosecute defendant Roy Olmstead and obtain a conviction.\textsuperscript{40} Olmstead appealed, arguing as he had at trial that the tapping of his phone was a search, and that because the search was conducted without a warrant, it was presumptively unconstitutional and its fruits must be suppressed.\textsuperscript{41}

Relying on a literal reading of the text of the Fourth Amendment, the government argued that the Constitution simply was not implicated when the government eavesdropped on the defendant’s phone calls. The Supreme Court agreed:

The [Fourth] Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or \textit{things} to be seized.

\ldots

\ldots The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.\textsuperscript{42}

The Court arrived at this conclusion by means of a very close reading of the text of the Amendment. An electronic interception of a conversation fails to qualify as a search both because of the area searched and the method used. The thing “searched” is—unlike persons, houses, papers, and effects—intangible. When the Constitution speaks of the things that are protected from unreasonable search and seizure, it speaks of substantial things on which hands can be laid. Similarly, the method used by law enforcement—listening remotely by wire—is neither a search nor a seizure because it does not involve the physical tak-

\textsuperscript{39} Id. As we have seen, the absence of a physical trespass on the defendant’s property historically was viewed as critically important, given the historical link that existed between the Fourth Amendment and property rights. See \textit{supra} notes 27–31 and accompanying text. As we shall see, however, in the latter half of the twentieth century, courts have moved away from a property-based Fourth Amendment jurisprudence. See \textit{infra} notes 132–143 and accompanying text.

\textsuperscript{40} See \textit{Olmstead}, 277 U.S. at 455.

\textsuperscript{41} See id. at 471 (Brandeis, J., dissenting).

\textsuperscript{42} Id. at 464.
ing, touching, and inspecting that the text of the Amendment appeared to envision.

As a reading of a text, this interpretation of the Fourth Amendment is almost entirely unassailable. In fact, the concept of either searching or seizing a conversation is one that strains any ordinary understanding of those words. As an attempt to understand the text in context, however—to recover the spirit behind the text—the *Olmstead* reading is somewhat cramped.\(^{43}\) To the extent that the Fourth Amendment was written to be a check on the capacity of law enforcement officials to conduct broad, invasive investigations based on little or no suspicion, the *Olmstead* Court’s reading does the Amendment little justice. So long as law enforcement officials snoop by means not imagined by the Founders or investigate areas not explicitly mentioned in the Amendment’s text, it would seem their actions will not offend the Constitution. Nonetheless, it would be thirty-eight years before the Court abandoned this narrow reading of the Fourth Amendment.

C. Katz v. United States—A Paradigm Shift

In 1967, the Supreme Court’s decision in *Katz v. United States*\(^{44}\) established a new approach to the question of when a government investigation becomes a search, an approach that remains critical to understanding the Fourth Amendment today. In *Katz*, the Court dealt again with government wiretapping, this time of a public phone booth by federal agents anxious to show that defendant Charles Katz was using the phone booth to make book on sporting events.\(^{45}\) The wiretap was achieved by placing a recording device on the outside of the booth and activating it only when Katz was seen entering the booth.\(^{46}\) Katz’s phone calls were recorded, thus allowing the government to obtain enough evidence to secure a conviction for violation of the federal bookmaking statutes.\(^{47}\)

On appeal from this conviction, Katz argued that the telephone booth was an area entitled to Fourth Amendment protections.\(^{48}\) The

\(^{43}\) See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 Cardozo L. Rev. 2209, 2218 n.43 (1995) (citing articles and arguing that “[m]ost theorizing about statutory interpretation since 1982 has emphasized the ways in which statutes evolve”).

\(^{44}\) See 389 U.S. 347, 351 (1967).

\(^{45}\) Id. at 348.

\(^{46}\) See id. at 348–49.

\(^{47}\) Id. at 348.

\(^{48}\) Id. at 349.
government, relying on Olmstead, argued to the contrary—because no physical search or seizure was made and because no tangible thing was searched or seized, the Fourth Amendment simply was not implicated by placing a listening device on top of the phone booth.\footnote{Katz, 389 U.S. at 349, 352.}

In a decisive shift from Olmstead, the Court agreed with the defendant that the Fourth Amendment was implicated when the telephone booth was tapped.\footnote{Id. at 351–52.} But the Court went beyond merely holding that an intangible search can implicate the Fourth Amendment in the same way that a tangible search can; rather, it fundamentally changed the way in which the Amendment’s protections are conceived:

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given “area,” viewed in the abstract, is “constitutionally protected” deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.\footnote{Id. (citation omitted) (emphasis added).}

Katz demonstrated that the Supreme Court was no longer inclined to limit the Amendment to a narrow reading of its text. Rather than focusing on the particular area or thing searched and attempting to determine whether that was an area or a thing meant to be protected by the Founders, the Court found that the proper focus of Fourth Amendment analysis is on the individual whose person or property is searched and on the society in which that person lives. If the defendant has acted to keep the area searched private, and if society is willing to acknowledge the reasonableness of that expectation of privacy,\footnote{In his concurrence, Justice John Marshall Harlan expressed the Supreme Court’s new test in terms of these two elements, stating, “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expecta-}
the Fourth Amendment is implicated when that area is investigated by law enforcement. If a defendant has not taken steps to keep her actions private or if society is not prepared to validate an expectation of privacy, however, then the Fourth Amendment is not implicated, even if the search involves one of the areas—houses, persons, papers, and effects—explicitly protected by the Amendment’s text.

D. Criticisms of Katz

Although the Katz approach is certainly less faithful to the text of the Fourth Amendment than was Olmstead, commentators have argued over the last three and a half decades about whether the new standard affords greater or lesser protection to individuals than did the older, more textual approach. In fact, during this time, Katz has been subject to serious criticisms from both the right and the left. Those on the left have seen it as an insufficient guarantee against invasions of privacy because the Amendment’s protections are apparently made contingent on being one that society is prepared to recognize as ‘reasonable.’” Id. at 361 (Harlan, J., concurring). This is the current understanding of the test. See, e.g., California v. Ciraolo, 476 U.S. 207, 211 (1986) (citing Katz, 389 U.S. at 360–62 (Harlan, J., concurring)) (discussing Justice Harlan’s concurrence in explicating Katz).

53 See Katz, 389 U.S. at 351–52.

54 See id.

55 See, e.g., Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (explaining that “the only thing the past three decades have established about the Katz test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’” bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable” (citations omitted)); Richard A. Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 186, 188 (describing the conception of privacy as treated by Katz as “too obvious to merit extended discussion” and arguing that the contradictions created by the Katz formulation are based on “threadbare arguments”); see also Griswold, 381 U.S. at 508–09 (Black, J., dissenting) (arguing that a move from concrete conceptions such as searches and seizures to more nebulous ones such as privacy was unlikely to be protective of individual rights).

56 See, e.g., Gerald G. Ashdown, The Fourth Amendment and the “Legitimate Expectation of Privacy,” 34 Vand. L. Rev. 1289, 1294–95 (1981) (arguing that the Katz test created “a new graduated approach to the fourth amendment that is based on the recognition of degrees of privacy expectations,” which, at least under the Burger Court, “resulted in a dangerous narrowing of the fourth amendment’s substantive scope”); Lillian R. BeVier, The Communications Assistance for Law Enforcement Act of 1994: A Surprising Sequel to the Break Up of AT&T, 51 Stan. L. Rev. 1049, 1066 n.64 (1999) (“Though Katz itself seemed to extend the Fourth Amendment’s reach, the Court’s protection of privacy since Katz has been less than generous. The reason this is so, according to commentators, is that Justice Harlan’s conception of reasonableness is not defined well enough to delineate clearly protected zones.”) (citing Scott E. Sundby, “Everyman”s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751, 1752 n.2 (1994); and Lawrence Lessig, Reading the Constitution in Cyberspace, 45 Emory L.J. 869, 905 n.104 (1996)).
on the very government practices the Amendment is supposed to regulate. For example, consider what would happen if the government were simply to announce that all phones would henceforth be tapped and monitored at random.\textsuperscript{57} Certainly if people were made aware of this change in government conduct, it would be unreasonable for them to presume that their conversations were private, and no search would occur when the government eavesdropped on these conversations. Therefore, if \textit{Katz} is taken literally, the government could, by fiat, expand the scope of permissible searches almost without limit.

Conversely, conservatives have argued that the test in \textit{Katz} is both results-driven and malleable. These critics, Justice Antonin Scalia principal among them, have contended that there is nothing in either the text or the history of the Fourth Amendment to justify the \textit{Katz} approach and that only a standard grounded in the text and original understanding of the Fourth Amendment can provide both judicial integrity and consistent results.\textsuperscript{58}

\section*{II. \textit{Katz v. United States} in Practice—A Focus on Private Action}

Despite the widespread criticism of \textit{Katz v. United States}, it remains the principal standard for evaluating whether government conduct constitutes a search.\textsuperscript{59} Of course, the \textit{Katz} formulation, like the Fourth Amendment it interprets, is hardly self-applying. In the more than thirty years that have passed since \textit{Katz} was decided, the Court has slowly fleshed out this doctrine, not in a systematic way, but by accretion. There have been few monumental Fourth Amendment decisions since \textit{Katz}; rather, the contours of the doctrine to which it has given rise have slowly come into relief. In this Part, I discuss this doctrinal development, pointing out the importance the Supreme Court has


\textsuperscript{58} See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034–35 (1992) (Scalia, J.) (criticizing \textit{Katz} as being circular, in that expectations of privacy are defined in terms of what a court finds to be reasonable); Kyllo v. United States, 533 U.S. 27, 34 (2001) (Scalia, J.) (critiquing \textit{Katz} as a standard for whether or not a search has occurred).

\textsuperscript{59} See, e.g., Kyllo v. United States, 533 U.S. 27, 32–33 (2001) (discussing \textit{Katz} as the appropriate standard for evaluating the extent of the Fourth Amendment).
attached to the conduct of private actors in determining the extent of constitutional rights.

A. Abandoned Property

If an individual has abandoned his property, there is obviously no longer even a subjective expectation of privacy in it, let alone one that society is willing to recognize as reasonable. Although this argument is relatively uncontroversial in the abstract, it leaves unanswered the question of what it means to abandon property. Consider, for example, the 1988 case of California v. Greenwood. Acting on information indicating that Billy Greenwood might be engaged in narcotics trafficking, police twice obtained from his regular trash collector garbage bags left by Greenwood on the curb in front of his house. On the basis of items in the bags that were indicative of narcotics use, the police obtained warrants to search the house and discovered controlled substances during the subsequent search. On appeal from Greenwood's conviction, the Supreme Court held that no search occurred when the officers went through the contents of Greenwood's trash bags and that the subsequent, warranted search need not be suppressed as fruit of the poisonous tree:

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the

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61 Id. at 37–38.
62 Id. In this case, as in many of the others discussed below, the question before the Supreme Court was whether the first investigation done by law enforcement, in this case looking through the collected trash, constitutes a search. If not, then the Fourth Amendment does not regulate the challenged conduct and the information thus obtained may later be used in obtaining a warrant. If, however, the first investigation is a search, it must comply with the Fourth Amendment or else the evidence derived from it becomes inadmissible.
express purpose of having strangers take it,” respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.63

This is perhaps the clearest statement from the Court that when an individual has made a part of his life transparent to the public, he has made it available to the government as well. The defendant simply could not have had an expectation of privacy in his discarded trash because he could reasonably foresee that members of the public would go through it. Because he knowingly allowed the possibility that others would gain access to his trash, he was not permitted to object when the government sought to do the same thing.

Furthermore, the Supreme Court has held that when a private actor actually invades a defendant’s reasonable expectation of privacy, the government may subsequently do so as well, at least to the extent that the private actor already has. For example, in 1984, in United States v. Jacobsen,64 the Supreme Court upheld a search by federal drug agents that followed the opening of a sealed package by private freight transporters.65 After employees of Federal Express had opened a sealed package in their possession and discovered that it contained a white powder, they resealed it and contacted law enforcement officials.66 The federal officers then re-opened the package and conducted a field test that indicated that the white powder was cocaine.67

63 Id. at 40–41 (citations omitted) (quoting United States v. Reichert, 647 F.2d 397, 399 (3d Cir. 1981)). In his dissent, Justice William Brennan argued that the mere fact that the bags might be rifled through was not enough to cause the defendant to lose his reasonable expectation of privacy in them:

The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an un-opened package; or the possibility that an operator will listen in on a telephone conversation negates an expectation of privacy in the words spoken on the telephone.

486 U.S. at 54 (Brennan, J., dissenting). As resonant as this argument might be, the Supreme Court has continued to focus on the possibility of a private search, not necessarily its legality.


65 Id. at 111. Employees of the shipper testified that the package had been inadvertently torn by a forklift and had subsequently been opened pursuant to a written company policy regarding insurance claims. Id.

66 Id.

67 Id. at 111–12.
In upholding the re-opening of the package and the field test, the Court re-emphasized that the private search did not implicate the Fourth Amendment, and that law enforcement officials are not obligated to avert their gaze from information supplied to them by third parties. The Court went on to hold that although the defendant had enjoyed a reasonable expectation of privacy in the package before it was opened by the shippers, that expectation was severed when the package was actually opened:

[I]n this case the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable official conduct unreasonable. The reasonableness of an official invasion of the citizen’s privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred.

Thus, although the government officials could not have been the first to open the package—because the defendant had a reasonable expectation of privacy at the time he sent it—they were permitted to re-open it because any expectation of privacy they thereby invaded had been lost by the initial, private intrusion. The fact that the private actor did something the government would not have been permitted to do simply did not convert the subsequent, otherwise reasonable,

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68 Id. at 113–14.
69 See Jacobsen, 466 U.S. at 130.
70 Id. at 114–15. The Court went on to state that the field cocaine test did not amount to a search because it revealed nothing about the contents of the container except whether it contained a particular kind of contraband, a fact in which the defendant could not have a reasonable expectation of privacy. Id. at 121; see also United States v. Place, 462 U.S. 696, 707 (1983) (finding that a sniff by a drug detecting dog, because it discloses only whether or not an individual possesses contraband, is not a search for Fourth Amendment purposes). See generally Sam Kamin, Law and Technology: The Case for a Smart Gun Detector, Law & Contemp. Probs., Winter 1996, at 221 (arguing that a scan with an advanced metal detector that could indicate in real time whether or not an individual is armed would not constitute a Fourth Amendment search).
71 The Court’s statement that the initial search “might” have violated the Fourth Amendment if conducted by state actors seems generous; assuming the package was not torn completely open by the forklift, it remained a closed container for which probable cause and a warrant would have been required before a government search would have been permissible. See Jacobsen, 466 U.S. at 114. It is not surprising, therefore, that at no point did the government argue that if that search had been conducted by government officials it would have been constitutional.
police conduct into a search that implicated the Fourth Amendment.\textsuperscript{72}

Thus, whether or not an individual enjoys a reasonable expectation of privacy is not always a question over which she necessarily has much control. Jacobsen wrapped his package tightly, making it as impervious to discovery as was possible.\textsuperscript{73} Nonetheless, that expectation of privacy was lost when the Federal Express employees broke into it; Jacobsen’s expectation of privacy was lost through no fault of his own. Although Greenwood could have taken greater efforts to protect his own privacy, Jacobsen simply could not. Jacobsen initially had a subjective expectation of privacy that society was willing to recognize as reasonable. Because of the conduct of other, private actors, however, Jacobsen could not object when the government merely mimicked this private invasion of his privacy.

B. Information Knowingly Exposed to Others

Just as one does not have a reasonable expectation of privacy in those things he has physically abandoned, the Supreme Court has held in a number of different contexts that an individual does not have a reasonable expectation of privacy in personal information that is knowingly supplied to a third party. This is so even if that information is supplied for a very limited purpose and is expected to be kept from others. For example, in United States v. Miller, agents of the federal government subpoenaed the defendant’s bank records, not from the defendant himself, but from his bank.\textsuperscript{74} In upholding the validity of the subpoena, the Supreme Court held that the defendant did not have a reasonable expectation of privacy in those records because he had voluntarily given them to a third party:\textsuperscript{75}

\textsuperscript{72} Of course, the Court’s focus on the reasonableness of official conduct is hardly unusual. \textit{See}, e.g., Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that a mentally disturbed defendant’s confession was voluntary because the pressure he felt came from the voices in his head, not from police coercion).

\textsuperscript{73} \textit{See} Jacobsen, 466 U.S. at 111.

\textsuperscript{74} 425 U.S. 435, 436 (1976).

\textsuperscript{75} \textit{Id.} at 443. Unlike many of the other cases discussed in this Article, Miller involved the issuance of a subpoena \textit{duces tecum} rather than a search warrant. \textit{Id.} at 436. Grand jury subpoenas are governed by a different set of rules than search warrants; the governing rules are generally those pertaining to the issuance of civil warrants rather than those of the Fourth Amendment. \textit{See}, e.g., United States v. Dionisio, 410 U.S. 1, 11 (1973) (finding that “[t]he Fourth Amendment provides protection against a grand jury subpoena \textit{duces tecum} too sweeping in its terms ‘to be regarded as reasonable’”) (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)). In Miller, however, the Supreme Court addressed whether a reasonable expectation of privacy exists in the material subpoenaed. 425 U.S. at 442.
The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.\(^{76}\)

Similarly, in *Smith v. Maryland*, the telephone company installed, at police request, a pen register on the defendant’s phone line.\(^{77}\) A pen register is a device that creates a list of the phone numbers called from a particular line.\(^{78}\) The Court held that the installation and use of the pen register was not a search for Fourth Amendment purposes.\(^{79}\) The Court reasoned that information regarding which numbers were called by the defendant was made available to a third party and was therefore not treated privately by the defendant:

[\(W\)]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must “convey” phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies “for the purposes of checking billing operations, detecting fraud, and preventing violations of law.” . . . Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor

\(^{76}\) *Miller*, 425 U.S. at 443.

\(^{77}\) 442 U.S. 735, 737 (1979).

\(^{78}\) Id. at 736 n.1.

\(^{79}\) Id. at 745–46.
any general expectation that the numbers they dial will remain secret.\textsuperscript{80}

Although the opinions in \textit{Smith} and \textit{Miller} are perfectly consistent with the conclusion in \textit{Greenwood}, the Court has not uniformly held that what is exposed to one is exposed to all. For example, in \textit{Minnesota v. Olson},\textsuperscript{81} the Court upheld the Fourth Amendment rights of an overnight house guest in a third party’s home, finding that although he had surrendered some of his privacy to his host, he had surrendered it only to his host:

That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. . . . The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.\textsuperscript{82}

This reasoning is directly counter to that of \textit{Smith} and \textit{Miller}. In \textit{Olson} the Court reasoned that although a houseguest surrenders some of her privacy to another, that does not mean that she loses any expectation of privacy vis-à-vis others.\textsuperscript{83} In contrast, in \textit{Smith} and \textit{Miller}, the Court reasoned that surrendering information to anyone is to risk surrendering it to all.\textsuperscript{84}

\textit{Miller} and \textit{Smith} have never been repudiated and represent the logical extension of the line of cases that begins with \textit{Katz}. In \textit{Katz}, the Court stated that what one knowingly exposes to the public even in one’s own home is not protected by the Fourth Amendment. By the time we reach \textit{Miller} and \textit{Smith}, however, the question is not whether the individual has given away her privacy by making her life an open

\textsuperscript{80} Id. at 742–43 (citations omitted). Of course, the Court’s statement that “subjective expectations of privacy cannot be scientifically gauged” is demonstrably false. See id. at 743. Researchers can test, and to a certain extent have tested the extent to which the public considers various invasions of their privacy to be reasonable. See generally Christopher Slobogin & Joseph E. Schumacher, \textit{Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”} 42 \textit{Duke L.J.} 727 (1993) (reporting the results of a survey of which law enforcement practices unreasonably infringe on individual privacy and liberty).

\textsuperscript{81} 495 U.S. 91, 99 (1990).

\textsuperscript{82} Id.

\textsuperscript{83} Id. at 99–100.

\textsuperscript{84} \textit{Smith}, 442 U.S. at 742–43; \textit{Miller}, 425 U.S. at 443.
book. Rather, in these cases, the Court asked whether any other person has been given (or has gained) access to the information the government is seeking to obtain. If the answer is yes, the Court has held that the area simply is not protected by the Fourth Amendment. Although the Court’s reasoning in these cases is hardly a model of consistency, it is clear that an individual who knowingly shares information with anyone, for any purpose, runs the risk of losing any expectation of privacy in that information.

C. The Plain View Doctrine

One of the principal implications of Katz, one in fact envisioned by the decision’s own language, was that even objects within the home are not protected by the Fourth Amendment if they have been knowingly exposed to others. This corollary to Katz has come to be known as the plain view doctrine—as it is usually stated, if the police are in a place they are legally entitled to be, and they observe contraband or evidence of a crime that has been exposed to view, the Fourth Amendment is not implicated by this viewing. Because the Fourth Amendment only governs searches and seizures, and because a search or sei-

85 See, e.g., 389 U.S. 347, 351–52 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” (citation omitted) (emphasis added)).
86 See id.
87 See, e.g., Illinois v. Andreas, 463 U.S. 765, 771 (1983) (stating that “[t]he plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner’s privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy”) (emphasis added); Texas v. Brown, 460 U.S. 730, 737 (1983) (finding that “the police officer must lawfully make an ‘initial intrusion’ or otherwise properly be in a position from which he can view a particular area”) (emphasis added) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971)).
88 Furthermore, the police may seize the object if they have probable cause to believe that it is either contraband or evidence of criminal activity. See, e.g., Horton v. California, 496 U.S. 128, 140–41 (1990). Law enforcement officials, however, may generally seize only those objects that may be reached from a place they are legally entitled to be. Id. at 138–39.
89 For a critique of this doctrine, see Kyllo, 533 U.S. at 32. For Justice Scalia, inquiring whether an individual enjoys a reasonable expectation of privacy ought to determine whether the search that occurred was reasonable, not whether it ought to be termed a search:

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a “search” despite the absence of trespass, is not an “unreasonable” one under the Fourth Amendment. But in fact we have held that visual observation is no “search” at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional.
zure does not even occur, in the constitutional sense, unless a reason-
able expectation of privacy is invaded, this conduct need not even
comport with the Fourth Amendment’s reasonableness requirement.\textsuperscript{90}

One thing that becomes clear in the Court’s plain view cases,
however, is that the Court does not literally mean its statement that in
order for a plain view examination to fall outside the dictates of the
Fourth Amendment the officers must be lawfully in a position from
which to observe evidence in plain view.\textsuperscript{91} Consider, for example, the
case of United States v. Dunn.\textsuperscript{92} In Dunn, officers of the Drug Enforce-
ment Administration observed a drug lab inside a barn on the defen-
dant’s property.\textsuperscript{93} Although it was true that the officers did not enter
the barn in order to make this observation, it could hardly be said
that the officers were “somewhere they were legally entitled to be”:

The ranch was completely encircled by a perimeter fence,
and contained several interior barbed wire fences, including
one around the house approximately 50 yards from the
barn, and a wooden fence enclosing the front of the barn,
which had an open overhang and locked, waist-high gates.
\textit{Without a warrant, officers crossed the perimeter fence, several of the
barbed wire fences, and the wooden fence in front of the barn.}\textsuperscript{94}

Had a member of the public attempted to do the same thing, the indi-
vidual likely would have been liable to a suit in trespass and to possible
criminal prosecution as well. Nonetheless, the Court held that the
officers did not conduct a search when they observed the drug lab in
the barn.\textsuperscript{95} Thus, the Court must mean something other than “lawfully

\textit{Id.} (citations omitted).

\textsuperscript{90} See Michael Campbell, \textit{Defining a Fourth Amendment Search: A Critique of the Supreme
government actions that are neither searches nor seizures are not governed by the
amendment, and therefore need not be ‘reasonable,’ the definitions of search and seizure
limit the scope of the amendment’s protection of individual rights”). Of course, govern-
ment conduct must comport with the other applicable provisions of the Constitution; a
policy of conducting plain view searches only of cars registered to blacks or women, al-
though it would not violate the Fourth Amendment, would almost certainly violate the
Equal Protection Clause. See, e.g., Whren v. United States, 517 U.S. 806, 813 (1996) (refus-
ing to invalidate pretextual stops and holding that “the constitutional basis for objecting to
intentionally discriminatory application of laws is the Equal Protection Clause, not the
Fourth Amendment”).

\textsuperscript{91} See Andreas, 463 U.S. at 771–72.

\textsuperscript{92} 480 U.S. 294, 305 (1987).

\textsuperscript{93} \textit{Id.} at 297–98.

\textsuperscript{94} \textit{Id.} at 294 (syllabus) (emphasis added).

\textsuperscript{95} \textit{Id.} at 304.
entitled” when it describes the conduct of the officers prior to making their plain view observation. In later cases, it has become clear that what the Court means is that the officers have not engaged in a Fourth Amendment violation prior to observing evidence in plain view.

The Court came very close to stating this explicitly in its 1971 opinion in *Coolidge v. New Hampshire.* After surveying a number of its plain view cases, the Court summarized them as follows:

What the “plain view” cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused . . . .

In other words, so long as her conduct does not otherwise constitute a violation of the Fourth Amendment, the mere observation of evidence in plain view does not convert an officer’s conduct into an illegal search. This position—that plain view requires that the officer’s conduct prior to the plain view observation comply with the Fourth Amendment—is now the view of most of the federal circuit courts of appeals.

One of my central theses is that this subtle, semantic shift in how the Court defines plain view—moving from a conception of plain view based on the legality of the official conduct to one based on whether the officer has committed a Fourth Amendment violation prior to

96 403 U.S. at 466.
97 Id.
98 For example, some of the federal circuit courts of appeals have cited the U.S. Supreme Court’s 1990 decision, *Horton v. California,* for its proposition that the plain view rule is satisfied if “the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” See, e.g., United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 81 (2d Cir. 2002) (citing Horton, 496 U.S. at 136–37); United States v. Jones, 187 F.3d 210, 219 (1st Cir. 1999) (quoting Horton, 496 U.S. at 136); United States v. Elwood, 993 F.2d 1146, 1152 n.28 (5th Cir. 1994) (citing Horton, 496 U.S. at 136); see also United States v. Elkins, 300 F.3d 638, 653 (6th Cir. 2002) (finding that the relevant question was whether the “Fourth Amendment prohibited [the officer] from walking” to the place where the plain view observation was made). Some of the federal circuit courts of appeals have defined lawful presence in terms of whether an independent Fourth Amendment violation had taken place. See, e.g., United States v. Collins, 321 F.3d 691, 694 (8th Cir. 2003); United States v. Tucker, 305 F.3d 1193, 1202–03 (10th Cir. 2002); Perry v. Sheahan, 222 F.3d 309, 316 (7th Cir. 2000).
making the plain view observation—is crucial. Because the foreseeability, not the legality, of official conduct has become the central inquiry in determining whether a reasonable expectation of privacy exists, laws designed to protect individual privacy from private actors are unlikely to increase the scope of privacy from the government. As Dunn eloquently demonstrates, the mere fact that a public official has failed to comply with a civil or criminal statute designed to protect individuals from one another will, at most, be relevant in determining whether that official has invaded a reasonable expectation of privacy; it will certainly not be dispositive of that issue. Furthermore, as I argue below, such laws very well may be counterproductive. To the extent that they lull individuals into a false sense of security regarding their privacy, these laws may be a greater threat to privacy than the absence of such laws would be.

1. Rejection of the Inadvertence Rule

Prior to 1990, at least a plurality of the Supreme Court had held that discoveries of evidence in plain view had to be inadvertent to be permissible;99 in other words, the rule stated that although an officer may lawfully discover contraband or evidence of crimes in plain view, the officer may not affirmatively seek it out.100 The Court finally rejected this rule in Horton v. California,101 holding that inquiry into the minds of law enforcement officers was not constructive and that the inadvertence rule encouraged dishonesty in law enforcement officials.102

After Horton, law enforcement officials were permitted to do what many had suspected them of doing all along, namely, engaging in searches for evidence in plain view. Thus, an officer may now walk

99 See, e.g., Coolidge, 403 U.S. at 466 (Stewart, J., joined by Douglas, Brennan, and Marshall, JJ.) (explaining that “the ‘plain view’ doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object”).

100 The seeming rationale for this rule was that although the Constitution cannot require officers to avert their eyes when they see evidence of wrongdoing, it does not permit them to seek out that evidence if they have some reason to believe it will be found. See id.

101 496 U.S. at 141.

102 Id. at 138. The Supreme Court has, in other contexts, avoided adopting rules that would create an incentive for police deception. See, e.g., Bond v. United States, 529 U.S. 334, 342 (2000) (Breyer, J., dissenting) (arguing that “a Fourth Amendment rule that turns on [the officer’s] purpose could prevent police alone from intruding where other strangers freely tread”); Whren, 517 U.S. at 814 (finding that the “Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, whatever the subjective intent” of the officer).
along a public street, peering into every car window the officer comes across.103 Because one cannot have a reasonable expectation of privacy in something she has left on the seat of her car—if she really wanted that object to remain private, she would have placed it in the glove box or trunk of the car—no search occurs when an officer conducts such an investigation. Because no search is conducted when an officer conducts a plain view investigation,104 no suspicion whatsoever is required; an officer need not even have a hunch that evidence of a crime will be found in order to conduct a plain view search. In doing away with the inadvertence requirement, the Supreme Court has moved its plain view jurisprudence even further from a focus on what the officer is doing toward an examination of what anyone else might do. Because a member of the public may walk down the street snooping in the windows of parked cars, an officer may do so as well.105

103 See, e.g., Brown, 460 U.S. at 740. In Texas v. Brown, the Supreme Court stated the following:

The general public could peer into the interior of Brown’s automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.

Id. (citations omitted).

104 See, e.g., Arizona v. Hicks, 480 U.S. 321, 325 (1987) (finding that although the slightest moving or opening of an object discovered in plain view is a search, no search occurs when officers merely make observations of objects left available to their view).

105 One recent case, however, has called into question the Supreme Court’s rejection of the inadvertence rule. In Bond v. United States, the Court appeared to return to an interpretation of the Fourth Amendment based in part on the intent of the officer. 529 U.S. at 338–39. In that case, a federal officer boarded a stopped bus and manipulated the defendant’s soft-sided luggage in an overhead bin to determine whether it contained contraband. Id. at 335–36. In holding that the manipulation of the bag constituted a search and was thus presumptively unconstitutional in the absence of a search warrant, the Court distinguished between the sort of invasions of privacy a passenger expects when he places his bag in an overhead compartment from the sort of invasion visited on Bond’s bag in this case:

[A] bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.

Id. at 338–39. The dissent objected to this distinction, pointing out that in the past, the Court had inquired into whether what the officer was doing was something a member of the public could have done as well, rather than whether the officer had the same intention that the member of the public did:
2. Technologies to Improve Plain View

We have seen that in cases where the officer merely sees contraband with the naked eye, the application of the plain view doctrine or one of its analogs will validate the search. Cases often arise, however, involving law enforcement officials who have augmented their senses with devices designed to facilitate the discovery of evidence of criminal wrongdoing. To take perhaps the most innocuous example, an officer peering into a car window from the sidewalk on a sunny day clearly has not conducted a search and may make this investigation without any prior suspicion that he will discover evidence of criminal activity. When the officer conducts the same investigation on a moonless evening, however, and must use a flashlight to see in the window, a more complicated case is presented.

Nonetheless, the federal courts have consistently held that the use of simple devices to improve the senses does not elevate an oth-

Of course, the agent’s purpose here—searching for drugs—differs dramatically from the intention of a driver or fellow passenger who squeezes a bag in the process of making more room for another parcel. But in determining whether an expectation of privacy is reasonable, it is the effect, not the purpose, that matters.

Id. at 341 (Breyer, J., dissenting). Even applying the dissent’s standard to the facts of the case, however, the majority’s reasoning seems sound. The majority explained that the sort of manipulation done by the officers was different in kind from the sort of touching one expects on a public bus, not merely because of the officers’ intent, but because that intent drove them to manipulate the bags differently. Id. at 338–39. Although one’s bag might be pushed, compressed, moved, or otherwise abused by one’s fellow passengers, one does not expect these passengers to do the sort of invasive manipulation that would reveal a bag’s contents. The officers did a different search than members of the public would have done, and it was this practical difference, rather than any difference in the officers’ state of mind, that made the difference in the case.

106 The courts have extended the plain view doctrine to cover senses other than vision. Thus, if an officer, in the course of a properly circumscribed frisk for weapons, feels something that is immediately apparent as contraband, the discovery of the contraband is not itself a search requiring independent constitutional justification. See, e.g., Minnesota v. Dickerson, 508 U.S. 369, 378–79 (1993) (applying the plain view doctrine to the sense of touch). Similarly, if an officer is somewhere she is lawfully entitled to be and smells something that indicates that criminal activity is afoot, or hears a sound that leads her to believe that such activity is occurring, no further search has occurred. See, e.g., United States v. Roby, 122 F.3d 1120, 1124–25 (8th Cir. 1997) (applying the plain view doctrine to the sense of smell); United States v. Jackson, 588 F.2d 1046, 1051–52 (5th Cir. 1979) (applying the plain view doctrine to the sense of hearing).

In each of these cases, the court’s rationale is that the suspect, by exposing incriminating evidence to the sense of touch, hearing, or smell of the officer, has indicated that the suspect does not have a reasonable expectation of privacy in it. Because the officer is merely doing what another member of the public might do, she conducts no search when her senses indicate the presence of contraband.
erwise permissible investigation to the level of a search. For example, more than seventy-five years ago in *United States v. Lee*, the U.S. Supreme Court held that the “use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.”

Although the issue has rarely reached the Supreme Court since, the lower federal courts have unanimously held that the use of simple devices such as flashlights, binoculars, step-ladders, and the like simply does not transform police investigations into searches.

A more difficult question is presented by law enforcement’s use of more sophisticated technologies. Take, for example, the 1986 case of *California v. Ciraolo*. Hoping to gain evidence of marijuana cultivation, police officers flew over the defendant’s property in a borrowed private plane and observed the plants growing there. The plants were eight to ten feet high and were seen and photographed growing in a fifteen- to twenty-five-foot plot in the defendant’s yard. Based on this observation, a search warrant was obtained, the plants were seized, and the defendant was convicted for their cultivation.

On appeal, the government argued that no search occurred when the officers flew over the shed, and the Court agreed:

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

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107 274 U.S. 559, 563 (1927).
108 See, e.g., United States v. Ocampo, 650 F.2d 421, 427 (2d Cir. 1981) (stating that the agent’s use of a flashlight did not keep the cash in the bag from being in ‘plain view’ and therefore seizable under the logic of *Coolidge v. New Hampshire*) (citation omitted).
109 See, e.g., United States v. Allen, 633 F.2d 1282, 1290–91 (9th Cir. 1980) (finding that use of ordinary binoculars does not constitute a Fourth Amendment “search”).
110 See, e.g., United States v. Bellina, 665 F.2d 1335, 1345 (4th Cir. 1981) (finding that an officer’s use of a stepladder “did not infringe in any way the defendants’ legitimate expectation of privacy”).
112 Id. at 209.
113 Id.
114 Id. at 209–10.
The observations by [the officers] in this case took place within public navigable airspace, in a physically nonintrusive manner; from this point they were able to observe plants readily discernible to the naked eye as marijuana. That the observation from aircraft was directed at identifying the plants and the officers were trained to recognize marijuana is irrelevant. Such observation is precisely what a judicial officer needs to provide a basis for a warrant. Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.115

A number of aspects of Ciraolo are noteworthy. First, although the Court states that it does not require the officers to turn a blind eye to criminal activity observed from a public thoroughfare, that hardly describes what the officers in this case were doing. The officers had acquired a plane for the express purpose of flying over the defendant’s property to look down at it to find criminal evidence.116 Although the inadvertence rule had been rejected by the time Ciraolo was decided,117 to justify this decision on the ground that deciding otherwise would effectively require officers to ignore criminal evidence that they stumble upon seems entirely beside the point.118

Note also that Ciraolo was decided in part on the somewhat surprising basis that the police officers were in Federal Aviation Administration navigable airspace at the time they observed the marijuana growing on the defendant’s property.119 Given that the Federal Aviation Administration is charged with protecting the public safety rather than privacy,120 this may seem an unusual ground for the decision. Yet

115 Id. at 213–14 (citations omitted).
116 Ciraolo, 476 U.S. at 209. It appears that the police, lacking a plane for overflight purposes, proceeded to charter one in order to investigate the tip regarding the defendant’s marijuana cultivation. See id.
117 See supra notes 44–54 and accompanying text.
118 Of course, the Bond decision, taken to its logical conclusion, would call into question a number of the Court’s landmark cases, including Ciraolo. See Bond, 529 U.S. at 338–39; Ciraolo, 476 U.S. at 213–14. Although the officers were indeed flying where a member of the public could have flown, their interest in the defendant’s illicit plants caused them to fly in a way calculated to find the marijuana, a manner of flight that a member of the public was unlikely to undertake. As I argue above, however, the Court has thus far not extended Bond beyond its holding. See supra note 102 and accompanying text.
119 476 U.S. at 213 (noting that “[t]he observations by Officers Shutz and Rodriguez in this case took place within public navigable airspace”).
the implication of this observation, as the dissent points out,⁹¹ is that
the police in this case were merely doing what members of the public
could do; they were only flying where a member of the public could
cy. Because the defendant failed to protect himself from this foresee-
able invasion of his privacy by protecting his property from aerial sur-
veillance, he cannot have a reasonable expectation of privacy in the
crops he was growing therein.⁹² As we have seen, however, even if the
police were somewhere members of the public could not legally go,
the result would not likely have been different; the Court’s focus is
generally on what members of the public could do as a practical mat-
ner, not what they are permitted to do as a legal matter.

Note finally that the Court’s focus is on the risks that the defen-
dant has exposed himself to from members of the public rather than
on any actual diminution of his privacy. Ciraolo is thus different from
Smith and Miller, in which the defendants had already made their in-
formation available to others and from Jacobsen, in which a third party
had deprived the defendant of his privacy.⁹³ In Ciraolo, there was no
intimation that members of the public regularly or even occasionally
overflew the defendant’s rural property. Nonetheless, the Court
found no invasion of a reasonable expectation of privacy because the
officers were doing what a member of the public might do.

The same day that it decided Ciraolo, the Court also decided Dow
Chemical Co. v. United States.⁹⁴ In Dow Chemical, the Court rejected the

⁹¹ Ciraolo, 476 U.S. at 223 (Powell, J., dissenting). In his dissent in Ciraolo, Justice Lewis
Powell stated the following:

The Court’s holding . . . must rest solely on the fact that members of the
public fly in planes and may look down at homes as they fly over them. The
Court does not explain why it finds this fact to be significant. One may as-
ume that the Court believes that citizens bear the risk that air travelers will
observe activities occurring within backyards that are open to the sun and air.

Id. (citation omitted).

⁹² Some courts and commentators have described this rationale as an outgrowth of
the assumption-of-risk doctrine—if an individual has not protected himself against a fore-
seeable, private invasion of privacy, then he has assumed the risk of a similar invasion of
privacy by law enforcement officials. See, e.g., Smith, 442 U.S. at 744 (finding that Smith had
“assumed the risk that the [phone] company would reveal to the police the numbers he
[had] dialed” from his home telephone); Tracey Maclin, Katz, Kyllo, and Technology: Virtual
Fourth Amendment Protection in the Twenty-First Century, 72 Miss. L.J. 51, 135 (2002) (claiming
that “[u]nder the assumption of risk theory, the disclosure of information to a third party
denies Fourth Amendment protection to what might otherwise be private information”).

⁹³ Compare Ciraolo, 476 U.S. at 213, with Jacobsen, 466 U.S. at 114–15, Smith, 442 U.S. at
742–43, and Miller, 425 U.S. at 443.

defendant’s argument that the government’s warrantless, sophisticated aerial photography of its chemical plant was a search. Using language that the Court would echo in its *Kyllo v. United States* decision, the Court held that although

[i]t may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant. . . . the photographs here are not so revealing of intimate details as to raise constitutional concerns.

 Defendants should not be expected to shield themselves from invasions by unknown threats, the Court seemingly reasoned; by contrast, when the risk is one that defendants face from their peers, their failure to protect themselves from it is an indication that they do not have a reasonable expectation of privacy.

 Furthermore, the Court explicitly rejected Dow’s contention that the use of aerial photography constituted a search because, had it been done by a competitor, such an invasion would violate state trade secret laws. Repeating the proposition that state tort law does not define the contours of the Fourth Amendment, the Court rejected this argument in short order. The Court stated that government investigations raise the specter of different harms than those raised by unfair competition in the private sector, and that the fact that gov-

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125 *Id.*
126 *Id.* at 238.
127 *Id.* at 232.
128 *Id.*
129 *Dow Chemical*, 476 U.S. at 232.
130 See *id.* at 232. But see *Florida v. Riley*, 488 U.S. 445, 450–51 (1989) (plurality opinion) (finding that a helicopter overflight from 400 feet did not violate the defendant’s reasonable expectation of privacy, but that “[w]e would have a different case if flying at that altitude had been contrary to law or regulation”). In *Riley*, five Justices rejected the plurality’s view that Federal Aviation Administration regulations should control the question of a reasonable expectation of privacy. See *Riley*, 488 U.S. at 452–68 (O’Connor, J., concurring; Brennan, Marshall, Stevens, JJ., dissenting; Blackmun, J., dissenting). For example, in her concurrence, Justice Sandra Day O’Connor stated the following:

In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley’s expectation of privacy from aerial observation was not “one that society is prepared to recognize as ‘reasonable.’”
ernment conduct would have been tortious or criminal if done by a private actor is but one factor to be considered in determining whether that conduct violates a reasonable expectation of privacy.\footnote{See Dow Chemical, 476 U.S. at 232.}

\section*{D. The State of the Law: Kyllo v. United States}

In its 2000 term, the U.S. Supreme Court decided a case that commentators anticipated would force the Justices to confront head-on the question of how emerging technologies would affect the scope of the Fourth Amendment. In \textit{Kyllo v. United States},\footnote{533 U.S. at 40.} the Supreme Court invalidated an investigation based in part on the use of a thermal imaging device to measure the heat coming off a suspected marijuana cultivator’s home. Instead of confronting the technology question directly, however, the Court looked to the past, principally to \textit{Katz} and \textit{Dow Chemical}, in search of answers.\footnote{See id. at 32, 34.}

Federal law enforcement officials suspected Danny Kyllo of growing marijuana inside his home using high-intensity grow lamps.\footnote{Kyllo, 533 U.S. at 29.} To confirm these suspicions, the officers used a thermal imaging device, the Agema Thermovision 210, to measure the heat patterns coming off of Kyllo’s building.\footnote{Id. at 30.} The thermal scan conducted from the street in front of Kyllo's house revealed that "the roof over the garage and a side wall of petitioner’s home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in [Kyllo’s] triplex." Based in part on this information, the officers sought and obtained a warrant to search Kyllo’s home. More than one hundred marijuana plants were found, and Kyllo was indicted on one
count of manufacturing marijuana in violation of federal law. Kyllo entered a conditional guilty plea and appealed, arguing that the thermal scan of his house was a search and should be presumed to be unconstitutional in the absence of a warrant.

On appeal, the Supreme Court held that the use of a technology to obtain information regarding the interior of a home is a search, at least when the technology in question “is not in general public use.” This language, lifted almost verbatim from Dow Chemical, makes absolutely clear the importance of private conduct to the definition of reasonable expectations of privacy. Once individuals can be fairly charged with an awareness of a technology and its implications, the Court reasoned, they are responsible for protecting themselves from its possible invasions. If they fail to do so, they cannot complain when the government later uses that technology to discover information about them; the question of whether individuals have “knowingly expose[d]” an area to the public turns, therefore, on whether or not they failed to protect themselves from a known threat.

E. Conclusion

For much of American history, there was a marriage between the contours of the Fourth Amendment and the contours of private law. For example, at common law, it was a defense to an action brought in trespass that the defendant was a public official engaged in a legal search; that which was trespass was constitutionally impermissible and that which was constitutionally permissible was no trespass. This marriage continued well into the twentieth century.

To a large extent, however, the twentieth century witnessed a growing disconnect between private ordering and public ordering. As

137 Id.
138 Id.
139 Kyllo, 533 U.S. at 40 (finding that “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant”).
140 See Dow Chemical, 476 U.S. at 238 (stating that “[i]t may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant”).
141 See Kyllo, 533 U.S. at 40.
142 Katz, 389 U.S. at 351.
143 See, e.g., Boyd v. United States, 116 U.S. 616, 627 (1886).
many of the cases cited above clearly indicate, the scope of property law simply no longer determines the contours of the Fourth Amendment.\textsuperscript{145} Time and again, the Supreme Court stated that although the existence of private law—property, tort, or contract—may be relevant in determining whether a reasonable expectation of privacy exists, that law is not dispositive of the constitutional question.

Furthermore, the above cases make clear that, to a large extent, private law has been replaced as an ordering principle with private conduct; courts now focus on what a member of the public could do rather than on what the law would permit the individual to do.\textsuperscript{146} As the law stands today, if an individual has exposed her trash to her neighbors, she has exposed it to the police as well;\textsuperscript{147} if she has shared information with her bank or phone company, she has exposed it to the police as well;\textsuperscript{148} if she has inadvertently made part of her property visible to those flying overhead, she has exposed it to the police as well.\textsuperscript{149}

Thus, as I have argued from the outset, although the Fourth Amendment does not govern private conduct, that conduct is far from irrelevant in defining the scope of the Fourth Amendment. The more that an individual exposes to private actors, the more difficult it becomes to keep that same information from governmental actors should

\textsuperscript{145} See, e.g., Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1979) (finding that “[e]xpectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest”); United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (finding that shared authority over property, rather than “mere property interest,” is the proper standard for determining the permissible scope of third-party consent to search); Warden v. Hayden, 387 U.S. 294, 304 (1967); Silverman v. United States, 365 U.S. 505, 511 (1961) (finding that “[i]nherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law”); Thomas K. Clancy, What Does the Fourth Amendment Protect: Property, Privacy or Security?, 33 Wake Forest L. Rev. 307, 309–27 (1998) (tracing the property right basis of the Fourth Amendment from its origins in Boyd and Entick through its demise in the last third of the twentieth century). The Supreme Court in Warden v. Hayden stated the following:

\textbf{The premise that property interests control the right of the Government to search and seize has been discredited.} Searches and seizures may be “unreasonable” within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

387 U.S. at 304 (emphasis added).

\textsuperscript{146} See, e.g., Greenwood, 486 U.S. at 40; Dunn, 480 U.S. at 301; Ciraolo, 476 U.S. at 213–14.

\textsuperscript{147} See supra notes 60–63 and accompanying text.

\textsuperscript{148} See supra notes 74–80 and accompanying text.

\textsuperscript{149} See supra notes 111–123 and accompanying text.
they seek to gain access to it as well. Even if the government official was doing something that a private individual could be sued or prosecuted for doing, that fact will not be dispositive of the Fourth Amendment inquiry. In determining the current scope of our rights, therefore, it becomes relevant just how much information that an individual might think of as private has actually been exposed to or shared with others.

III. THE EXTENT OF PRIVATE SNOOPING

Clearly, if the contours of the Fourth Amendment are defined in part by private, intrusive conduct, it is important to understand the extent of that conduct. In this Part, I demonstrate that, largely owing to advances in surveillance and information technology, Americans are currently subject to scrutiny—from their employers, insurers, advertisers, and even their neighbors—as they never have been before.\footnote{See generally Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000) (arguing that to live in the modern era is to be subject to surveillance).}

Although such invasions of privacy are impossible to catalogue exhaustively, I set forth some of the examples that have made news and have particularly concerned privacy advocates in recent years. I focus in this Part on the following three broad categories of private conduct: workplace surveillance,\footnote{See infra notes 159–188 and accompanying text.} consumer information misuse,\footnote{See infra notes 189–210 and accompanying text.} and medical privacy intrusions.\footnote{See infra notes 211–241 and accompanying text.} With respect to each example, I discuss how technology has facilitated the acquisition of personal information by private actors and the implications of these private actors’ conduct for the contours of the Fourth Amendment.

One thing that becomes clear as we study these areas of law is that there are no blanket privacy protections provided by federal statute;\footnote{See, e.g., Rita Heimes, Foreword, Internet Privacy Law, Policy, and Practice: State, Federal, and International Perspectives, 54 Me. L. Rev. 95, 96 (2002) (explaining that “[w]hile the EU has established broad standards for individual privacy protection, the United States government focused only on narrow categories of sensitive data”) (citation omitted).} rather, different areas—the workplace, consumer information, medical information—are each covered, in varying degrees, by an alphabet soup of federal legislation. For example, the Video Privacy Protection Act (the “VPPA”)\footnote{Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2000).} guards records of video rentals from unauthorized public disclosure; the Health Insurance Portability and Accountability
Act ("HIPAA")\textsuperscript{156} governs the disclosure of medical information to those other than health care providers; and the Children’s Online Privacy Protection Act ("COPPA")\textsuperscript{157} regulates commercial websites’ ability to collect personal information from minors. Rather than creating an omnibus privacy act, Congress has reacted to high-profile privacy concerns by attempting to remedy specific privacy threats.\textsuperscript{158} As a result, each context presents its own legal issues and must be analyzed independently.

A. Workplace Surveillance

The average American who works full time spends nearly forty-three hours per week at work;\textsuperscript{159} in other words, between Monday and Friday the average worker now spends nearly as many waking hours at work as at home. Furthermore, as the average amount of time workers spend at work has gone up, so too has the surveillance to which these workers are subjected.\textsuperscript{160} As employers attempt to maintain and increase the productivity that has fueled the American economy in recent years,\textsuperscript{161} they are increasingly turning to technologies that allow them to keep tabs on their employees’ activities while at work.

It is true, of course, that employers have always had an incentive to supervise their employees closely; an unsupervised employee can steal, shirk, or otherwise cost the employer money. As the American economy has moved from one based on manufacturing to one based on the service sector and information technologies,\textsuperscript{162} however, emp-
ployers have largely shifted the focus of their surveillance. No longer are their primary concerns workplace safety and preventing simple theft. Rather, employers are now increasingly concerned with insulating themselves from litigation, preventing the misappropriation of their intellectual property, and limiting unproductive work time. As their concerns have changed, so have the tools available to employers to ensure employee compliance with workplace rules.

1. State of the Art

As with each of the other areas of private conduct discussed in this Part, workplace surveillance has been both changed immeasurably and facilitated by the advent of technologies designed specifically for that purpose. The most obvious example of this technology-powered surveillance is management’s monitoring of the computers it provides to its employees. More than half of the American workforce now spends at least some part of the day in front of a computer, and as anyone who has spent much time in front of an Internet-connected computer can attest, it is often far too easy to find distractions online. Not surprisingly, an entire industry has sprung up to help employers monitor their employees’ use of these work computers. Employers can now pu-
chase software that allows them to record every keystroke their employees make, view anything that has appeared on their employees’ screens, and maintain a copy of every e-mail their employees send and receive from their computers.167

Furthermore, it is becoming increasingly clear that employers are taking full advantage of these surveillance technology options. For example, a recent report by the American Management Association found that nearly half of private firms monitor their employees’ e-mail, and 62.8% monitor their employees’ Internet connections.168 Of the companies surveyed, 77.7% monitored their employees’ telecommunications, and 27% had dismissed an employee based at least in part on information obtained from such monitoring.169 Of course, workplace surveillance is not limited to the monitoring of employees’ work computers.170 Currently, more employees than ever are being drug-tested,171 having their phone conversations tape recorded,172 and having their work activities videotaped.173 If the previous Part of this Article was correct, then this expansion of employee surveillance in the workplace should correspond to a diminished expectation of privacy

place, 23 Hamline L. Rev. 539, 541 (2000) (explaining that “[a]ccompanying the growing use of . . . new business tools is the development of equally advanced means of allowing employers to electronically monitor their use by employees”).

167 For example, SpectorSoft, a software company, offers a product on its website that will perform all of these functions. See SpectorSoft, Spector Pro 5.0, at http://www.spec
torsoft.com/products/SpectorPro_Windows/index.html (last visited Jan. 31, 2005) (pledging that their software “Records Every Exact Detail of Their PC and Internet Activity”); see also Karen J. Bannan, Watching You, Watching Me, PC Mag., July 2002, at 100–04 (describing and reviewing a number of products that perform essentially the same functions).


169 Id. at 1–2; see also Elise M. Bloom et al., Competing Interests in the Post 9–11 Workplace: The New Line Between Privacy and Safety, 29 WM. MITCHELL L. REV. 897, 898 (2003) (explaining that “[s]ince September 11 [2001], sales of Internet and e-mail monitoring software have risen dramatically”).

170 See generally S. Elizabeth Wilborn, Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace, 32 Ga. L. REV. 825, 826 n.5 (1998) (cataloguing lower court cases involving polygraph testing, psychological profiling, drug testing, and physical searching of employees).


172 See, e.g., Jeffrey L. Seglin, As Office Snooping Grows, Who Watches the Watchers?, N.Y. TIMES, Jun. 18, 2000, § 3, at 4 (reporting that the monitoring of employees’ work phones is widespread and that “[e]xcept for the shouting, it is becoming clear that the debate over employee privacy is over”).

173 Am. Mgmt. Ass’n, supra note 168, at 1.
in the workplace for Fourth Amendment purposes. As the next section will demonstrate, the cases reported in this area indicate exactly that.

2. Fourth Amendment Implications

Federal law does little to explicitly regulate employer surveillance of employees. For example, although the Electronic Communications Privacy Act of 1986 (the “ECPA”) prevents the interception and monitoring of electronic communications by private individuals, 174 almost all employer monitoring of employees is likely exempted from this legislation. 175 Furthermore, although many states have passed laws that reinforce the protections of the ECPA, 176 in most cases, the greatest restraint on workplace surveillance is the employer’s own statement of what it will and will not do. 177 Although an employer may not snoop upon its employees if it has promised or contracted not to do so, an

174 18 U.S.C. § 2510 (2000) (prohibiting the interception or disclosure of “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photooptical system that affects interstate or foreign commerce”).

175 See, e.g., McIntosh, supra note 166, at 549 (describing the Business Use, Consent and Provider exceptions to the ECPA and stating that “the exceptions have been applied favorably to employers and thus, have posed significant hurdles to employee claims under the ECPA that allege unlawful interception or access of workplace communications”). Similarly, the Federal Wiretap Act has been held not to prohibit employer interception of e-mails and monitoring of web traffic, at least so long as the interception is of stored data rather than data in transit. See Steve Jackson Games, Inc. v. United States Secret Serv., 36 F.3d 457, 458 (5th Cir. 1994); Philip L. Gordon, Job Insecurity? When It Comes to Workplace Surveillance of Electronic Communications, Employers Are Free to Establish the Rules of the Game, 79 Denv. U. L. Rev. 513, 513 (2002) (discussing how judicial interpretation of the Federal Wiretap Act essentially eliminates statutory protection for workplace Internet and e-mail use).

176 Given that the federal law preempts inconsistent state laws, the only way states can avoid having their statutes preempted by ECPA is to provide identical or greater protection than is provided by federal law. See, e.g., United States v. McKinnon, 721 F.2d 19, 21 n.1 (1st Cir. 1983) (finding that a state wiretap statute must provide greater protection than the federal statute in order to avoid being preempted).

177 See, e.g., Jeffrey Benner, Privacy at Work? Be Serious, WIRED News, at http://www.wired.com/news/business/0,1367,42029,00.html (Mar. 1, 2001). In an article for Wired News, Jeffrey Benner stated the following:

[If an employee is led to expect something is private, such as e-mail communications, then that privacy cannot be violated. But, if the company informs its employees that, for example, e-mail sent over the company’s network is monitored, then the employee can no longer claim an “expectation of privacy.” In short, once the company stakes its claim over its cyber-dominion, its employees have no right to privacy there.

Id. }
employer who informs workers that their activities are subject to surveillance will likely have a free hand in conducting that surveillance.\footnote{178}

Under \textit{Katz}, law enforcement officials conduct a search when they invade an individual’s reasonable expectation of privacy.\footnote{179} In the workplace context, the determination of whether the employee has a reasonable expectation of privacy has often involved an analysis of whether the individual was able to protect the area in question from others\footnote{180}—whether the employee had the capacity to lock files, to exclude others from the employee’s work space, and so on.\footnote{181} Of course, evidence that a person’s employer has engaged in exactly the sort of surveillance that the government is later attempting to conduct—whether it be the reading of e-mails, the searching of hard drives, or the tracking of web traffic—generally makes it very difficult for an employee to claim a reasonable expectation of privacy in the workplace.

For example, in \textit{Muick v. Glenayre Electronics}, the Seventh Circuit Court of Appeals found that a private employee did not have a reasonable expectation of privacy in a computer given to him by his employer for work purposes.\footnote{182} At the request of federal law enforcement officials who suspected Albert Muick of possessing child pornography,\footnote{183} Muick’s employer seized his work computer until a warrant

\footnote{178}Furthermore, even if legislation were passed regulating the extent to which employers monitor their employees, such legislation would likely only be a default rule, one that employers, with their generally superior bargaining power, would almost certainly be able to bargain around. \textit{See, e.g.}, Lee Kovarsky, \textit{Tolls on the Information Superhighway: Entitlement Defaults for Clickstream Data}, 89 \textit{Va. L. Rev.} 1037, 1043 (2003) (“That employers may monitor e-mail and web surfing to promote productivity and protect against industrial espionage has become more of a fact of life than a controversy, and employers would likely contract around any default rule to the contrary.”) (citation omitted). It is difficult to imagine a regime in which employers were completely forbidden from engaging in this type of surveillance, even with the consent of their employees.

\footnote{179}See \textit{supra} notes 44–54 and accompanying text.

\footnote{180}See, \textit{e.g.}, O’Connor v. Ortega, 480 U.S. 709, 714–15, 722 (1987) (finding that the Fourth Amendment can be implicated by a public employer’s search of an employee’s workplace, but that when the search is conducted by a public employer for a work-related reason, neither a warrant nor probable cause is required).

\footnote{181}See, \textit{e.g.}, United States v. Anderson, 154 F.3d 1225, 1229 (10th Cir. 1998) (finding that the defendant had a reasonable expectation of privacy in those private effects he brought to the office where he kept his office door closed and his window covered); United States v. Taketa, 923 F.2d 665, 673 (9th Cir. 1991) (finding “a privacy interest in an office reserved for one’s exclusive use at a place of employment to be reasonable, especially when asserted against a forcible entry after work hours”).

\footnote{182}280 F.3d 741, 743 (7th Cir. 2002) (Posner, J.).

\footnote{183}Interestingly, a very large percentage of the reported cases in this area involve computer searches for child pornography. In his book on the loss of privacy in the modern era, Jeffrey Rosen critiques the expansion of gender discrimination law as contributing to a general decrease in privacy in the workplace:
could be issued for its contents. A subsequent warranted search of the computer revealed the presence of child pornography, and Muick was convicted of violating federal laws forbidding the possession of such material.

On appeal, the Seventh Circuit held that because Muick had been told that his computer remained the employer’s property and that the employer had explicitly reserved the right to examine its contents at any time and without notice, it was unreasonable for him to have an expectation of privacy in the information stored on that computer—"[The employer] had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had and so scotches his claim." Although most reported federal cases involving workplace searches have involved job-related searches by public employers, the handful of cases involving searches of pri-

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Most Americans . . . will never be deposed in a sexual harassment suit, either as a plaintiff, a defendant, or a witness. Nevertheless, many Americans have their e-mail or Internet browsing habits monitored at work, and one of the most common justifications of employee monitoring offered by courts and management lawyers is the fear of liability for sexual harassment.

See Rosen, supra note 150, at 12. My review of cases involving criminal prosecutions that follow workplace searches, however, reveals that they nearly uniformly involve searches for child pornography. Although Rosen may be correct about the majority of employer surveillance, when law enforcement officials search a worksite, it is almost always to search for child pornography. In a later article, I hope to explore further this relationship between substantive criminal law and the issues that new criminal statutes will raise in the realm of criminal procedure.

Surprisingly, the court found that the employer was not a state actor although it seized the computer at the government’s request. Muick, 280 F.3d at 742–43. Nonetheless, the court went on to consider the Fourth Amendment implications of the seizure. Id. at 743.

See, e.g., United States v. Simons, 206 F.3d 392, 398, 400 (4th Cir. 2000) (applying the O’Connor exception to the warrant requirement to a search by CIA administrators of an employee’s computer, notwithstanding the fact that the administrators conducted the search “to acquire evidence of criminal activity”); see United States v. Slanina, 283 F.3d 670, 678 (5th Cir. 2002), vacated on other grounds sub nom. Slanina v. United States, 537 U.S. 802 (2002) (following Simons and finding that “O’Connor’s goal of ensuring an efficient workplace should not be frustrated simply because the same misconduct that violates a government employer’s policy also happens to be illegal”); United States v. Fernandes, 272 F.3d 938, 942–43 (7th Cir. 2001) (finding the O’Connor standard applicable to a post-firing search of a prosecutor’s office); see also Taketa, 923 F.2d at 673–75 (holding that an initial search of a law enforcement officer’s office was subject to the O’Connor exception to the warrant requirement, but that a subsequent, unwarranted videotaping of that office was not).
vate work spaces by law enforcement officials have largely been resolved in the same way as *Muick*.  

In brief, these cases reveal that the increased capacity of employers to surveil their employees has, in fact, led directly to a decreased expectation of privacy vis-à-vis the government. Employees who are subject to private surveillance in the workplace are generally defenseless when the government seeks to collect data from their workplace as well.

### B. Commercial Information Misuse

There are many laudable reasons to allow retailers to collect and even share information about those with whom they do business. For example, Amazon.com, the online retailer that I use most often, knows a lot about me. It knows what books, compact discs, and clothing I have purchased. It can probably conclude from my late interest in infant clothing that I have recently had a child. It knows what items I have considered buying based on what I have placed in my virtual shopping cart but not actually purchased. Allowing Amazon.com to collect and analyze this information can be a very good thing. If I have purchased two compact discs from a particular artist in the past, I might want to know that the artist has recently released a new album. I might also want to know that people who enjoy the band whose compact discs I have purchased seem to like another band’s releases as well. Similarly, I might want to be alerted to sales on merchandise I have perused in the past but not purchased. If I am bound

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188 *See, e.g.*, United States v. Angevine, 281 F.3d 1130, 1132, 1134 (10th Cir. 2002) (finding no reasonable expectation of privacy in a college professor’s work computer when the university had a written computer policy stating that it reserved the right to “view or scan any file or software stored on the computer or passing through the network, and will do so periodically”); *see also* Dir. of Thrift Supervision v. Ernst & Young, 795 F. Supp. 7, 10 (D.D.C. 1992) (holding that employees and partners of private accounting firm have no reasonable expectation of privacy in work-related diaries kept in their offices for business purposes). In *United States v. Bailey*, the United States District Court, Nebraska, stated that the defendant had no expectation of privacy in the work computer owned by someone else because every time he accessed the work computer he physically acknowledged that he was giving consent to search the computer. Such repeated warnings about consent to search, followed by such repeated acknowledgments, categorically and without more defeat Bailey’s claim of privacy.


to be targeted by online retailers, and I am, it would be nice if that advertising could be relevant to my previously expressed preferences.

Of course, there is also a downside to Amazon.com having this information about me. It could choose to share this information with others without my permission. It could reveal it to the public either accidentally or in order to embarrass me. Its employees could misuse my private information for their own purposes. All of these risks prompted Scott McNealy, the CEO of Sun Microsystems, to infamously remark when queried about his company’s privacy policy, “You already have zero privacy—get over it.”

1. State of the Art

Many of the concerns regarding the misuse of consumer information involve the enormous databases of information that retailers and advertisers are able to compile. Perhaps the most well-known case of purported commercial information misuse was the Double-Click incident of 1999. DoubleClick, a direct marketer that provided advertisements for websites, compiled browsing information on more than one hundred million web users. When DoubleClick acquired a company that gathered information on individuals’ offline purchasing trends, it announced that it would be combining its two databases in a way that might make it possible to identify, by name, the buying and surfing habits of individuals included in both databases. Although a consolidated lawsuit challenging the company’s

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193 DoubleClick Unveils an Initiative to Protect Users’ Online Privacy, WALL ST. J., Feb. 15, 2000, at B6.

194 Andrea Petersen, A Privacy Firestorm at DoubleClick: Web Highflier’s Executives Blinded by a Backlash, Are Scrambling to Recover, WALL ST. J., Feb. 23, 2000, at B1 (explaining that “[w]hat makes privacy advocates so crazy is that a combined DoubleClick-Abacus database can now connect Web sites someone visits with that person’s real name and address”).
plans was eventually dismissed for failure to state a claim, negative publicity forced DoubleClick to curtail its plans.

The desire of advertisers to obtain, store, and mine demographic information on potential customers was hardly extinguished, however, with the public firestorm that surrounded the DoubleClick case. Directed advertising remains the dream of those who advertise online. For example, the *New York Times*’s website recently announced that it would allow advertisers to reach its readers based on the type of story those readers most often accessed. So, for example, a sporting goods manufacturer might be interested in advertising to those readers who had clicked on three or more sports articles in a given period of time. There is little reason to think that negative publicity alone will be sufficient to slow this trend toward data accumulation and targeted advertising in the near future.

2. Fourth Amendment Implications

Currently, consumers are protected against the misuse of their information mainly by the negative publicity surrounding the misuse of this information. Federal law governs this area only tangentially and in some cases actually facilitates the sharing and selling of this information. Just as the greatest restraint on what employers may

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196 Andrea Petersen, *DoubleClick Reverses Course After Privacy Outcry*, WALL ST. J., Mar. 3, 2000, at B1 (explaining that “[i]n a stunning about-face, online advertising firm DoubleClick Inc. says it will not connect people’s names, addresses and other personal information with the data it collects about where they go on the Web, at least until government and industry set privacy standards”).


198 See *id.*


do in the employment context is the employer’s own promises on that point, so in the e-commerce area, one of the greatest constraints on how an electronic retailer may gather and share the information it gathers is the company’s own stated privacy policy. For example, when Northwest Airlines revealed earlier last year that it had given the National Aeronautic and Space Administration data on as many as ten million passengers, one of the Airline’s principal defenses was that it had not violated its own privacy policy. Distinguishing itself from JetBlue Airways, which had earlier admitted to violating its own privacy policy, Northwest officials defended their actions by arguing that they had given the information directly to a government agency that had an obligation to safeguard that information and that such disclosure was not inconsistent with its stated policies.

Furthermore, it is difficult to see why courts will not treat the information compiled on consumers by retailers, advertisers, and direct marketers, both online and elsewhere, like they treated the banking and phone records in Miller and Smith, respectively. Because consumer information has been conveyed willingly to a third party—because you know that your online retailer maintains these records, for example—it is very unlikely that the government will be held to invade a reasonable expectation of privacy when it attempts to access these records. If anything, there is likely to be less protection for consumer information than for the arguably more sensitive information regarding one’s phone calls and finances.

Thus far, there has been a relative dearth of reported cases involving the Fourth Amendment protections afforded to information collected by commercial entities. In fact, all of the reported cases in

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203 See, e.g., Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 S. Cal. L. Rev. 1083, 1141 (2002) (explaining that “[c]ommunications service providers frequently store their customers’ communications. These probably fall under the third-party record rule of Smith v. Maryland and United States v. Miller because third parties maintain the information.”) (citations omitted).
204 This concern is neither merely hypothetical nor limited to the online context. A relatively well-known example comes from my home state of Colorado. See Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1063 (Colo. 2002). During a raid on a drug lab, officers found two books on the making of methamphetamine along with a mailing envelope from a local bookstore. Id. at 1048. Utilizing first a subpoena and then a search warrant, law enforcement officials attempted to obtain evidence of what books were sent to the house and to whom. Id. at 1049. The bookstore fought the requests, and the Colorado Supreme Court ultimately decided that the requests for the information violated the First Amendment rights of the store’s clients. Id. at 1063.
this area have dealt with privacy interests in the context of an Internet service provider ("ISP"). Furthermore, in each case the court concluded that there is no expectation of privacy in information one shares with an ISP. For example, in United States v. Hambrick, a Virginia district court held that individuals have no reasonable expectation of privacy in information they have freely chosen to share with their ISPs:

[W]hen Mr. Hambrick entered into an agreement to obtain Internet access from MindSpring, he knowingly revealed his name, address, credit card number, and telephone number to MindSpring and its employees. Mr. Hambrick also selected [his] screen name. . . . When the defendant selected his screen name it became tied to his true identity in all MindSpring records. MindSpring employees had ready access to these records in the normal course of MindSpring’s business, for example, in the keeping of its records for billing purposes, and nothing prevented MindSpring from revealing this information to nongovernmental actors. Also, there is nothing in the record to suggest that there was a restrictive agreement between the defendant and MindSpring that would limit the right of MindSpring to reveal the defendant’s personal information to nongovernmental entities. Where such dissemination of information to nongovernmental entities is not prohibited, there can be no reasonable expectation of privacy in that information.

Just as Miller waived an expectation of privacy in his personal data by sharing it with his bank, so Hambrick waived any expectation of privacy in his personal information by sharing it with his ISP. To date,
each of the courts that has considered the question has ruled the same way.209

Furthermore, each time the issue has arisen, the courts have held that the existence and possible violation of a relevant federal statute—either the ECPA or the Cable Communications Policy Act (the “CCPA”)—neither created a reasonable expectation of privacy nor required suppression as a remedy. For example, in Hambrick, the Court found the following:

Although Congress is willing to recognize that individuals have some degree of privacy in the stored data and transactional records that their ISPs retain, the ECPA is hardly a legislative determination that this expectation of privacy is one that rises to the level of “reasonably objective” for Fourth Amendment purposes. Despite its concern for privacy, Congress did not provide for suppression where a party obtains stored data or transactional records in violation of the Act. Additionally, the ECPA’s concern for privacy extends only to government invasions of privacy. ISPs are free to turn stored data and transactional records over to nongovernmental entities. For Fourth Amendment purposes, this court does not find that the ECPA has legislatively determined that an individual has a reasonable expectation of privacy in his name, address, social security number, credit card number, and proof of Internet connection. The fact that the ECPA does not proscribe turning over such information to private entities buttresses the conclusion that the ECPA does not create a reasonable expectation of privacy in that information.210


210 55 F. Supp. 2d at 507 (citation omitted); see Kennedy, 81 F. Supp. 2d at 1111. In United States v. Kennedy, the United States District Court held the following:

This court need not decide whether the [Cable Communication Policy Act] was violated in the instant action because even if it were, defendant still would not be entitled to suppression of the evidence as a remedy for the vio-
Hambrick and the cases decided along similar lines demonstrate that the courts will afford little protection to information disseminated for commercial purposes. Even if that information is disclosed to a single entity for a narrow purpose, even if that information is protected by a privacy statute if accessed by a private actor, and even if the government conduct in question would violate that statute, the courts are unlikely to find a reasonable expectation of privacy.

C. Medical Information

The information we share with our medical professionals reveals the most intimate details of our lives. Our private habits both legal and illegal, sexual practices, family characteristics, and psychological history can all be relevant to medical treatment. We reveal things to our doctors that we might not reveal to our spouses, families, or friends, and that we certainly do not want our employers, neighbors, insurance companies, or law enforcement officials to become aware of. Because of its sensitivity, the wrongful or careless disclosure of medical information strikes a very resonant chord with those concerned about their privacy.

There is mounting evidence that information shared with health care providers and insurers is being sought and obtained by private entities that have no legitimate interest in its use. The Health Privacy Project, a research institute associated with Georgetown University, lists some egregious recent examples on its website:

Terri Seargent, a North Carolina resident, was fired from her job after being diagnosed with a genetic disorder that required expensive treatment. . . . [S]he suspected that her
employer, who is self-insured, found out about her condition, and fired her to avoid the projected expenses.

. . . .

An Atlanta truck driver lost his job in early 1998 after his employer learned from his insurance company that he had sought treatment for a drinking problem.

Joan Kelly was automatically enrolled in a “depression program” by her employer, Motorola, after her prescription drugs management company reported that she was taking antidepressants.212

1. State of the Art

Like the misuse of commercial information, one of the main threats to medical privacy is the maintenance of large databases of information.213 When a patient’s file was a physical object that remained in the doctor’s office, the possibility of prying eyes discovering its contents was relatively low, and the risks of widespread disclosure were almost non-existent.214 As the information conveyed to doctors increasingly becomes stored electronically and aggregated with others’ information, however, the possibilities of misuse multiply almost exponentially.215


In the United States approximately 140 million people, or nearly two-thirds of the population under sixty-five, receive medical benefits through their job. Because these benefits are an increasingly costly part of the overall package of compensation, employers have a great incentive to weed out workers with expensive health care needs.


213 See, e.g., DeVries, supra note 211, at 302 (explaining that “[w]hile digital technology can save money and allow life-saving medical information to be instantly sent between hospitals and doctors, the same technology also heightens the possibility of mistake or misuse”).

214 But see Healthy Privacy Project, supra note 212, at 4–5 (containing examples of disclosure of medical records based on misplaced or lost physical files).

215 See, e.g., DeVries, supra note 211, at 307–08 (arguing that “[t]he underlying problem of informational privacy in the digital age is the ability to access and aggregate vast amounts of otherwise harmless personal data into a form that can do real damage to the individual’s sense of self-determination and autonomy”). Professor Julie E. Cohen stated the following:
Despite these risks, there are also great benefits to aggregating and digitalizing medical information. These processes make possible the sharing of medical information between different healthcare providers virtually instantaneously, thereby facilitating the delivery of medical care wherever the patient seeks it.\(^{216}\) Furthermore, extensive databases of medical information may allow medical research to be conducted in ways unimaginable before widespread information sharing became possible.\(^{217}\) Like the databases of consumer information discussed in the previous section, therefore, the problem is not with the information’s aggregation and use per se, but rather with the enormous potential for misuse that coincides with it.

2. Fourth Amendment Implications

Federal law now expressly regulates medical information privacy; HIPAA became effective on April 14, 2003.\(^{218}\) HIPAA creates Privacy

Collections of information about, and identified to, individuals have existed for decades. The rise of a networked society, however, has brought with it intense concern about the personal and social implications of such databases—now, in digital form, capable of being rapidly searched, instantly distributed, and seamlessly combined with other data sources to generate even more comprehensive records of individual attributes and activities.


\(^{216}\) See, e.g., Peter D. Jacobson, Medical Records and HIPAA: Is It Too Late to Protect Privacy?, 86 MINN. L. REV. 1497, 1501 (2002). Professor Peter D. Jacobson offered the following explanation:

\[S\]haring [medical information] among medical professionals may be crucial for monitoring the quality of care and for maintaining continuity of care. For example, physicians and pharmacists must have accurate data on all pharmaceuticals a patient takes to prevent adverse drug-drug interactions. The American Hospital Association (AHA) argues that health professionals need a full picture of the patient’s health, not a small amount of information about one specific condition, to avoid complications.

\[I\]d. (citation omitted); see also Schwartz, supra note 212, at 53 (arguing that “[t]he multifunctional patient record has the potential to heighten the efficiency of the health care business. It also is capable of leading to improvements in medical science.”).

\(^{217}\) See, e.g., Jacobson, supra note 216, at 1501–02 (arguing that a positive use of medical information databases can be the facilitation of medical research).

and Security Rules applicable to “protected health information” held or transmitted by covered entities and their affiliated businesses. HIPAA’s coverage is both extensive and strict—unless an exception to the privacy provisions applies, “a covered entity may not use or disclose protected health information.”

Prior to the passage of HIPAA there was a wide split of authority in both the state and federal courts regarding whether or not individuals had a reasonable expectation of privacy in their medical information, particularly in information that was held by third-parties. For example, in the Rhode Island case of State v. Guido, the defendant was involved in a serious car accident and was taken to a hospital where his blood was drawn pursuant to normal hospital protocols. Three days later a subpoena duces tecum was requested and issued for defendant’s medical records from the hospital. The records were turned over to the authorities and indicated that the defendant’s blood alcohol level was more than twice the legal limit at the time he

The Supreme Court has long implied that the right to privacy it identified in Roe v. Wade and Griswold v. Connecticut governs medical information and decision making. See Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (citing Roe, 410 U.S. 113, 153 (1973); and Griswold, 381 U.S. 479, 484 (1965)) (concluding that the state statute at issue was not sufficiently invasive to infringe on a right the plaintiff might have to medical information privacy).

The Act provides a federal floor for the protection of medical privacy. States remain free to provide greater protections. See 45 C.F.R. § 160.103 (2004); see also Nat’l Abortion Fed’n v. Ashcroft, No. 04 C 55, 2004 WL 292079, at *2–3 (N.D. Ill. Feb. 6, 2004) (finding that subpoenas issued in a federal action may be quashed under Illinois privacy law, though they would be permitted under HIPAA).


Compare F.E.R. v. Valdez, 58 F.3d 1530, 1535 (10th Cir. 1995) (finding a reasonable expectation of privacy in medical records), and United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (finding that “[t]here can be no question that an employee’s medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection”), with Webb v. Goldstein, 117 F. Supp. 2d 289, 295–96 (E.D.N.Y. 2000) (finding no reasonable expectation of privacy on the part of a parolee in medical records released in connection with a rape investigation).

Id. at 732.

Id.
was admitted to the hospital; the defendant was subsequently indicted for driving under the influence with serious bodily injury resulting.\textsuperscript{227}

Both prior to trial and following his conviction, Salvatore Guido challenged the introduction of medical records to indicate that he was intoxicated.\textsuperscript{228} On appeal, the Rhode Island Supreme Court affirmed the conviction, analogizing the medical records to the banking records at issue in \textit{Miller}:

In this case we conclude that defendant had no legitimate expectation of privacy in the medical records. We reach this conclusion largely on the basis that these records were produced by medical personnel for \textit{their} use in providing medical treatment. These were not defendant's personal papers created or kept by him. The defendant can demonstrate neither ownership nor possession. For those reasons the records here more closely resemble the telephone records lawfully subpoenaed in \textit{State v. McGoff}, or the bank records subpoenaed in \textit{United States v. Miller}.\textsuperscript{229}

In \textit{State v. Hardy}, the Texas Court of Criminal Appeals came to the same conclusion in a lengthy opinion reciting similar facts.\textsuperscript{230} The Texas court, however, found \textit{United States v. Jacobsen} to be more analogous than \textit{Miller}:

A subpoena for blood alcohol and drug information about the driver in an automobile accident is somewhat analogous to the chemical test in \textit{Jacobsen}. A subpoena directed solely at blood alcohol and drug tests would, like the chemical test in \textit{Jacobsen}, be a very narrow investigatory method designed to elicit evidence for a very narrow purpose.\textsuperscript{232}

\textsuperscript{227} Id.
\textsuperscript{228} Id. at 732–33.
\textsuperscript{229} Guido, 698 A.2d at 734 (citations omitted). In \textit{State v. McGoff}, the Rhode Island Supreme Court analogized to \textit{United States v. Miller} in finding that no reasonable expectation of privacy exists in records maintained by one's telephone company. 517 A.2d 232, 234 (R.I. 1986).
\textsuperscript{230} 963 S.W.2d 516, 525–26 (Tex. Crim. App. 1997).
\textsuperscript{231} 466 U.S. 109, 119–21 (1984); see supra notes 60–73 and accompanying text.
\textsuperscript{232} Hardy, 963 S.W.2d at 525–26. In \textit{Commonwealth v. Riedel}, the Pennsylvania Supreme Court came to a slightly different conclusion. See 651 A.2d at 141. Finding that there is a reasonable expectation of privacy in medical records, the court concluded that a search of those records was not unreasonable when a police officer merely wrote to the hospital to request those records rather than relying on a subpoena to obtain them. \textit{Id}. 
Other courts, in different contexts, have found a reasonable expectation of privacy in medical information, particularly when medical records are searched or seized as part of a broad investigation conducted without probable cause. For example, in *Doe v. Broderick*, the Fourth Circuit was confronted with a search of the records of a methadone clinic as part of an investigation of a nearby armed robbery. One of the clinic’s patients subsequently brought suit under 42 U.S.C. § 1983, alleging that the search of the clinic violated his Fourth Amendment rights. The Fourth Circuit found that there was a reasonable expectation of privacy in the records, although they were maintained by a third party:

There is no question that Doe maintained a genuine subjective expectation of privacy in his records and files kept at the methadone clinic. The more interesting issue is whether a patient’s expectation of privacy—Doe’s expectation of privacy—in his treatment records and files maintained by a substance abuse treatment center is one that society is willing to recognize as objectively reasonable and thus comes within ambit of the Fourth Amendment’s protections. We think it is.

The court distinguished *Miller* on the ground that the Supreme Court’s decision in that case was influenced by the Bank Secrecy Act which required the bank to keep and maintain certain records. “The relevant statute here . . . does quite the opposite, making access to the records more difficult for criminal investigation purposes. Under these circumstances, we think that the statute is a fitting indication that society is willing to recognize Doe’s expectation of privacy as objectively reasonable.”

The statute at issue prohibits, in most circumstances, the disclosure of “[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research.” 42 U.S.C. § 290dd-2(a). The statute also states that unless an exception applies, “no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.” Id. § 290dd-2(c). Finally, the statute provides for criminal penalties for anyone violating its provisions. Id. § 290dd-2(f).

\(^{233}\) 225 F.3d 440, 450 (4th Cir. 2000).
\(^{234}\) Id. at 444.
\(^{235}\) Id. at 445.
\(^{236}\) Id. at 450 (citations omitted).
\(^{238}\) *Broderick*, 225 F.3d at 450 (citation omitted) (citing 42 U.S.C. § 290dd(2) (2000)).
A. The Implementation of HIPAA

The implementation of HIPAA is unlikely to change this legal landscape significantly. In the Justice Department abortion subpoena case discussed in the Introduction, the federal judge who ordered the subpoena quashed under Illinois law found that the subpoenas comported with HIPAA’s provision for the release of medical records “in the course of any judicial or administrative proceeding . . . in response to an order of the court.” Thus, once again, the mere existence of a statute regulating or even punishing the disclosure of sensitive information was held insufficient to prohibit the government from acquiring that information in a criminal proceeding. Particularly when express provision is made for the use of sensitive material in a legal proceeding, courts are very unlikely to find that such disclosure violates the Constitution.

D. Summary

As I stated at the outset of this Part, my goal was not to catalogue systematically the myriad ways in which individuals are under surveillance in the United States today—given recent events and developments, such an analysis would be virtually impossible in any single article. Rather, this Part was meant to highlight some of the most serious threats to individual privacy posed not by government actors but by private actors. It is clear that private surveillance, information sharing, and information acquisition are widespread and growing, and that technological innovation will only accelerate the capacity of private actors to gain access to our “private” information.

Technological development in each of these areas is neither an unmitigated good nor an unmitigated evil, however. As the benefits
and costs of digitization, aggregation, data-mining, and the like are evaluated, one factor that is often excluded from the calculus is the unconscious externality of increased government surveillance. As even this brief selection of topics and cases makes clear, courts are considering the pervasiveness of private intrusions when determining whether a reasonable expectation of privacy exists, and they often use those private invasions to validate invasive governmental conduct.

IV. How to Increase Privacy Protections

In this Part, my focus moves briefly from the descriptive and analytical to the prescriptive. I argue that if the discussion above is accurate, increased privacy protections will come in one of the following three ways: the Supreme Court will abandon its adherence to an assumption-of-risk reading of the Fourth Amendment, thereby delinking private and governmental conduct; civil privacy protections will be extended to cover more people and to offer greater protections, resulting in fewer and fewer non-governmental intrusions on privacy; or individuals will begin to take practical steps to protect themselves from invasions of privacy, making it more difficult for any actor—governmental or private—to acquire their private information. I cover each of these possibilities in turn, concluding that only the last is likely to provide much solace for privacy advocates in the near future.

A. Moving Beyond Assumption of Risk

As discussed above, what I describe as the current crisis in American privacy law dates from the Supreme Court’s 1967 decision in *Katz v. United States*. At the time it was decided, *Katz* was rightly seen as a privacy boon, another Warren Court decision extending individual rights. *Katz* overturned *Olmstead v. United States*, announced that privacy was an individual, portable right, and extended Fourth Amendment protections to areas and activities to which they had never previously applied. Over time, however, the shifting meaning

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244 See, e.g., Michael E. Tigar, *The Supreme Court 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1, 12–13 (1970) (praising the Court for moving from a Fourth Amendment based on property rights to one in which “[t]he emphasis is placed on the will of the actor”).
245 See supra notes 44–54 and accompanying text.
of the Fourth Amendment that was adopted in *Katz* has come to be seen as a threat as well as a benefit to civil liberties.\textsuperscript{246}

No clear alternative to *Katz*’s conception of the Fourth Amendment has yet emerged, however. Although proposed alternative conceptions of privacy rights have ranged from a return to a textually-based interpretation of the Fourth Amendment,\textsuperscript{247} to the passage of a constitutional amendment explicitly establishing a right to privacy,\textsuperscript{248} to the creation of a federal agency to monitor privacy,\textsuperscript{249} to an appeal to *Lochner*-era formalist interpretation,\textsuperscript{250} no consensus has yet developed regarding how to improve on the *Katz* formulation. Thus, *Katz* is apparently here to stay, seemingly unloved by conservatives and liberals alike, but not so intolerable to either group that a consensus for replacing it has emerged. Perhaps part of the doctrine’s current appeal is its malleability—it means whatever a majority of the Court thinks it means. Although the doctrine has been criticized precisely because of its imprecision, as long as both sides are able to utilize the doctrine equally to gain a majority of the Court’s votes, they are equally unwilling to pursue its fundamental change.

Although the Court is thus unlikely to distance itself from the *Katz* formulation any time soon, it does not follow that its Fourth Amendment doctrine is entirely irredeemable. For example, the doctrine established in *Smith v. Maryland*\textsuperscript{251} and *United States v. Miller*\textsuperscript{252}

\begin{footnotesize}
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\item \textsuperscript{246} See supra notes 55–56 and accompanying text.
\item \textsuperscript{247} See, e.g., Minnesota v. Carter, 525 U.S. 83, 92–94 (1998) (Scalia, J., concurring) (arguing for a return to a reading of the Fourth Amendment based on the text of the Amendment as it would have been understood by the Founders).
\item \textsuperscript{249} See, e.g., Robert M. Gellman, *Fragmented, Incomplete, and Discontinuous: The Failure of Federal Privacy Regulatory Proposals and Institutions*, 6 Software L.J. 199, 236 (1993). Robert M. Gellman provided the following explanation:

Of the four major privacy studies identified in the last twenty years, three recommend the establishment of a permanent new federal agency with responsibilities including privacy policy. The fourth study, the earliest of the four, rejected the notion of a privacy regulatory agency, although it did recommend institutional change within one cabinet department to implement and oversee recommended new privacy policies.

\begin{itemize}
\item \textsuperscript{Id.}
\item \textsuperscript{250} Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 Stan. L. Rev. 555, 561 (1996) (arguing that although “[e]ach of the *Lochner* era approaches has defects,” they “can be integrated into a vibrant and effective theory of the Fourth Amendment”).
\item \textsuperscript{251} 442 U.S. 735, 737 (1979).
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that the exposure of information to anyone, even for a limited purpose, releases any expectation of privacy in that information, could be overturned without requiring an unlikely overhaul of the Court’s entire Fourth Amendment jurisprudence. In place of this assumption-of-risk view of privacy, the Court should adopt the reasoning it has employed elsewhere that societal expectations of privacy ought to be validated rather than ignored. As discussed above, in Minnesota v. Olson, the Court held that an overnight guest had a reasonable expectation of privacy in the home he was visiting and thus could object to evidence illegally seized from that home. The Court reasoned that although the guest surrendered some of his privacy to his host, guests generally expect their hosts to honor their privacy. In reaching this conclusion, the Court described its holding as “merely recogniz[ing] the everyday expectations of privacy that we all share.”

Had the Court applied these “everyday expectations of privacy” to the Miller and Smith cases, the result would likely have been very different. For example, the Court might reasonably conclude from the fact that nearly all people with the means to do so keep their money in bank accounts that they reasonably expect their privacy in their banking information to be respected. Just as the overnight guest is aware of a risk that his host will betray him, yet nonetheless enjoys a reasonable expectation of privacy in another’s home, so the bank patron, aware of the (relatively minute) risk of betrayal, ought to be entitled to a reasonable expectation of privacy in his financial records.

In his dissent in California v. Greenwood, Justice William Brennan made essentially this point, arguing the following:

The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home; or the possibility of a private intrusion negates an expectation of privacy in an unopened package; or the possibility that an operator will listen in on a telephone conver-

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253 See, e.g., Skok, supra note 209, at 61 (noting that “[c]ourts employing assumption of risk analysis focus on the Supreme Court’s decisions in United States v. Miller and Smith v. Maryland”) (citations omitted).
255 Id.
256 Id. at 98.
sation negates an expectation of privacy in the words spoken on the telephone.\textsuperscript{257}

Justice Brennan rightly saw the assumption-of-risk argument as something of a \textit{reductio ad absurdum}. If we accept the premise that the possibility of a private intrusion negates a reasonable expectation of privacy, then, because private intrusion is almost always possible, nothing can ever be private.

In determining whether or not an expectation is in fact one that society is willing to validate, rather than one that is merely possible, the Court ought to be guided by more than its own intuitions regarding societal expectations of privacy.\textsuperscript{258} As discussed above, the question of whether a particular area is widely perceived as private is an empirical one, one that social scientists can answer, and to a certain extent have answered.\textsuperscript{259} Thus, calling on judges to consider societal expectations truly is more than an invitation for them to turn their personal views of privacy into law. By investigating current societal norms—as expressed through survey research, public referenda, and actual practices—judges can, as they did in \textit{Olson}, both increase the scope of rights and confirm \textit{Katz}'s promise that those expectations of privacy that society is willing to validate as reasonable will be protected in the face of expanding government surveillance.

Of course, the assumption-of-risk theory of reasonable expectation of privacy has not been limited to the \textit{Smith} and \textit{Miller} cases. Those two cases are merely an extension of the doctrine the Court announced in a number of other cases—\textit{Ciraolo}, \textit{Dunn}, \textit{Greenwood}, and even \textit{Katz} itself—that the police need not avert their eyes from what a person exposes or allows to be exposed to others.\textsuperscript{260} It is a broad jump


\textsuperscript{258} Of course, this is exactly what many conservatives have accused the Court of doing in its post-\textit{Katz} jurisprudence. \textit{See, e.g.}, \textit{Carter}, 525 U.S. at 97 (1998) (Scalia, J., concurring) (opining that “the only thing the past three decades have established about the Katz test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as ‘reasonable’’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable”) (citations omitted).

\textsuperscript{259} \textit{See generally} Slobogin & Schumacher, \textit{supra} note 80 (reporting the results of a survey regarding the perceived invasions of a number of common searches).

\textsuperscript{260} In fact, what has been described as the assumption-of-risk theory has not been limited to this context. For example, in \textit{Hoffa v. United States}, the Supreme Court held that no search or seizure occurs when a federal agent poses as a confidant of a criminal defendant, noting that “[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” 385 U.S. 293, 302 (1966). In \textit{United
from this premise, however, to the finding that society is willing to accept police officers peering down from the skies, trespassing onto private property, rummaging through trash, or peering into homes with advanced imagers. The assertion that the mere possibility of such intrusion destroys an expectation of privacy follows from neither the text nor the principle of *Katz*.

### B. Increased Privacy Protection

The second possible solution to the current conundrum of privacy law in the United States is affording greater protections to individuals from private invasions of privacy. If trespass laws are further expanded to cover invasions of privacy as well as physical invasions, if employees are able to contract for greater protection from surveillance by their employers, if websites offer enforceable protection for the information revealed by their users, then the bounds of private conduct will be circumscribed and the scope of permissible government conduct will likely contract as well.

The problem with the extension of civil privacy protections, however, is that the fit between the lawfulness of the conduct government agents are engaged in and whether or not the government is violating a reasonable expectation of privacy is hardly perfect. As the cases discussed in Parts II and III make clear, the existence of a property right or other civil protection is only one factor a court will consider in determining whether a reasonable expectation of privacy has been invaded. Thus, even if privacy protections continue to be extended—offering individuals greater protection against their employers, neighbors, insurers, and the like—this extension may prove to be of little use against government actors who violate these provisions.

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*States v. White*, the Supreme Court extended *Hoffa* to cover agents wearing hidden microphones, finding the following:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant’s constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.


261 *See supra* notes 174–188, 199–210, and 218–241 and accompanying text.

262 *I say nothing here of those instances in which a private individual has violated one of these provisions and turns incriminating evidence over to the government. Under current doctrine this evidence simply need not be excluded as there is no government conduct violative of the Fourth Amendment.*
For example, in *Greenwood*, the defendant argued that the search of his garbage that led to his conviction was illegal under California law and that this fact ought to insulate him against the evidence obtained against him.\(^{263}\) The Court dismissed this assertion quickly, even though the provision to which Greenwood referred was contained in his state’s constitution:

> We have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs. We have emphasized instead that the Fourth Amendment analysis must turn on such factors as “our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion.” We have already concluded that society as a whole possesses no such understanding with regard to garbage left for collection at the side of a public street. Respondent’s argument is no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment. We do not accept this submission.\(^{264}\)

The Court was, of course, correct that the state governments assertions of the privacy expectations of their citizens are incapable of binding the federal courts. Such local determinations, however, at the very least, ought to be relevant to a federal court’s determination of whether a particular individual enjoyed a reasonable expectation of privacy. Although the Supremacy Clause prohibits the states from dictating the bounds of federal law, nothing would prohibit a federal court from considering the fact that a state has protected the defendant against exactly the sort of privacy invasion engaged in by government agents in a given case.

In addition to the misfit between the legality of a search and the determination that the search infringes on the defendant’s reasonable expectation of privacy, there is the additional concern that the existence of privacy protection in tort or contract will cause members of the public to become more lackadaisical in protecting their privacy. It would likely have come as a surprise to Ronald Dunn, for example, that federal officers could enter his property to look for drugs notwithstanding the “no trespassing” signs and fences that he con-

\(^{263}\) 486 U.S. at 43.

\(^{264}\) *Id.* at 43–44 (citations omitted).
structed on that property. In fact, we can be fairly certain that he would not have manufactured drugs in the way he did had he been aware of this fact. The protections that Dunn was afforded against his neighbors—the opportunity to sue them in trespass or to seek a criminal conviction against them should they enter his property without his permission—were thus worse than useless when it came to protecting him against governmental incursions. It is likely that if Dunn had not been lulled into a sense of security by the trespass laws of his jurisdiction, he either would have put up more and better fences or chosen to manufacture his drugs elsewhere.

Furthermore, the case law makes quite clear that the only way in which privacy statutes can effectively protect individuals from the use of their private information against them in criminal prosecutions is if the statutes explicitly prescribe exclusion as a remedy. The courts have decided in a variety of contexts that the failure of legislatures to provide for exclusion as a remedy is an indication that they wished to make civil remedies exclusive. Unless legislatures become willing to explicitly provide for exclusion—to state that evidence seized in a manner that would violate the statute if obtained by a private party may not be admitted in court—the passage of additional privacy provisions is unlikely to prevent the use in criminal proceedings of evidence seized in violation of these statutes.

My point is not that we are better off without trespass laws, without workplace protections, or without medical privacy rules; these rules can significantly increase our privacy, at least with regard to one another. And it is quite possible that increased privacy with regard to private actors may convince some courts that privacy protections against the government ought to be validated as well. Rather, my point is that these protections, alone, are unlikely to be sufficient to protect us from invasions by our government and may, in fact, make us more vulnerable to these invasions. As I argue in the next section, I believe that the only method for reliably achieving privacy from gov-

266 See, e.g., United States v. Kennedy, 81 F. Supp. 2d 1103, 1111 (D. Kan. 2000) (finding that there was no need to decide if “the [Cable Communication Policy Act] was violated in the instant action because even if it were, defendant still would not be entitled to suppression of the evidence as a remedy for the violation. As with the ECPA, the CCPA speaks nothing of an exclusionary remedy, only a civil remedy.”); United States v. Hambrick, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999) (finding that “[d]espite its concern for privacy, Congress did not provide for suppression where a party obtains stored data or transactional records in violation of the [Electronic Communications Privacy] Act”).
267 See Kennedy, 81 F. Supp. 2d at 1111; Hambrick, 55 F. Supp. 2d at 507.
ernmental intrusions is to take practical steps to make invasions of privacy by actors, public or private, as difficult as possible.

C. Taking Practical Steps

We come, finally, to what I argue is the most effective way to increase the protections we have against government surveillance. Individuals must take actual, practical steps to protect their information from all prying eyes, public and private. For example, Danny Kyllo’s indoor marijuana cultivation was detected because he did not take sufficient steps to keep it from being discovered. The facts of the case seem to indicate that the use of additional insulation could have made the heat produced by his grow lamps undetectable from outside his home. Although the Court held that a presumptively invalid search occurred when the thermal imager was used in his case, future cases are unlikely to be resolved in a similar manner.

What is required is not for the public to become technophiles, to engage in a privacy arms race against government. Rather, many of the steps that individuals can take to protect themselves from private snooping and from government searches are relatively straightforward. For example, inexpensive shredders make the reading of private correspondence, the obtaining of financial information, or the perusing of medical records impossible, even when those records are tossed into the common trash. In this sense, a twenty-five dollar device may be much more protective of privacy than a statute imposing civil or criminal penalties for those looking through disposed trash. Similarly, basic encryption software, available from any number of for-profit and not-for-profit purveyors, can do the work that the EPCA and the Wiretap Act simply cannot. Because these techniques can make e-mail, web traffic, instant messaging, and the like almost im-

\[268\text{ See Kyllo v. United States, 533 U.S. 27, 29–30 (2001).}\]

\[269\text{ See id.}\]

\[270\text{ In fact, such an arms race might be very much against the public’s interest. The goal is not to make discovery of information by the government impossible. Such a goal would be both unwise and largely unattainable. Rather, the goal is to make discovery of information by private citizens more difficult and thus to further guarantee the protection of that information vis-à-vis the government.}\]

\[271\text{ See, e.g., ELEC. PRIVACY INFO. CTR., EPIC ONLINE GUIDE TO PRIVACY RESOURCES, at http://www.epic.org/privacy/privacy_resources_faq.html (last updated May 6, 2002) (listing some of the array of products available to make online life more private).}\]
possible for a busy-body or snoop to read, they significantly reduce the likelihood that a court will find that a defendant has abandoned a reasonable expectation of privacy in that conduct. Even under the current assumption-of-risk reading of the Fourth Amendment, an individual who has made his e-mail unreadable by anyone except its intended recipient cannot reasonably be found to have waived a privacy interest in that information.

Clearly, asking individuals to take personal, practical steps to protect their privacy is no panacea. For example, it is virtually impossible to live in the modern era without sharing information with others. Although it may once have been possible to do without banks, without credit cards, and without leaving electronic footprints that could be retraced, that era has long since passed. Thus, the goal is to make people aware of the information they send into the world, to alert them to the nefarious uses to which that information can be put—not only by private actors but by the government as well—and to encourage them to minimize their exposure where they can.

There is no doubt that advocating vigilance against one’s neighbors is a defeatist view of privacy today. Unfortunately, I believe that any other view of the current state of privacy law in the United States is simply unrealistic. Until elected officials are willing to take up the cause of expanding protections against government, however, self-defense is the only course that remains available.

Conclusion

At the outset I described the Bush administration’s now-abandoned plans for the formation of a Total Information Awareness program.

272 See, e.g., Max Guirguis, Electronic Mail Surveillance and the Reasonable Expectation of Privacy, 8 J. TECH. L. & POL’y 135, 154 (2003) (explaining that “strong encryption makes e-mail practically impossible to decrypt and virtually pointless to intercept”).


274 In fact, my view of the state of privacy in the United States today is considerably less pessimistic than the views of others. See, e.g., supra notes 172, 190 and accompanying text (describing works authored by Jeffrey L. Seglin and John Markoff, respectively).

275 See supra notes 5–7 and accompanying text.
This plan set off alarm bells as civil libertarians on both the right and the left expressed concern that the agency, which would combine information from both governmental and private sources into an über-database, would signal the death of privacy in the United States. As a result of this outcry, the agency has been abandoned and its mission has been scaled back.

The linkage between information gleaned by private sources and information gleaned by government sources, however, has already been made and will continue to exist regardless of the future of Total Information Awareness. Because courts have been instructed to look to private conduct when determining the permissible bounds of official conduct, the link between private invasions of privacy and government intrusion already exists, and it exists in a manner that is in many ways more insidious than the defunct Orwellian agency.

276 See, e.g., William Safire, Privacy Invasion Curtailed, N.Y. Times, Feb. 13, 2003, at A41. William Safire argues the following:

In the name of combating terrorism, [TIA] would scoop up your lifetime paper trail—bank records, medical files, credit card purchases, academic records, etc.—and marry them to every nosy neighbor’s gossip to the FBI about you. [I have described] the combination of intrusive commercial ‘data mining’ and new law enforcement tapping into the private lives of innocent Americans . . . as a supersnoop’s dream.

Id. Similarly, Gene Healy argues the following:

Some have suggested that [proposed TIA Director Adm. John] Poindexter’s record as a former Iran-Contra defendant convicted of five felony counts of lying to Congress disqualify him from his position. But the question isn’t whether Poindexter’s the right man for the job; it’s whether that job should exist in the first place.


277 See, e.g., Jay Stanley, Is the Threat from “Total Information Awareness” Overblown?, at http://www.aclu.org/privacy/Privacy.cfm?ID=11501&c=130 (Dec. 18, 2002) (arguing that “a close examination of existing public material on TIA makes several other points clear: the goal is to collect information about everyone, not just specific targets; privacy protections promised by Pentagon officials cannot be relied upon; and existing legal protections for privacy cannot be relied upon”).

278 See, e.g., Solove, supra note 203, at 1084 (decrying the flow of information from private to public information collectors).
A RUDE AWAKENING: WHAT TO DO WITH THE SLEEPWALKING DEFENSE?

Abstract: Some sleepwalkers commit acts of violence, or even murder, in their sleep. Courts must decide what to do with criminal defendants who raise a defense of sleepwalking. A brief review of common law reveals that courts apply the defense inconsistently under various doctrines of justification and excuse. Sleepwalking is a unique medical phenomenon, and courts are poorly equipped to evaluate claims of sleepwalking under existing common law defenses. This Note proposes a single sleepwalking defense based on a balancing test that integrates the medical understanding of sleepwalking.

Introduction

Scott Falater admits that in January 1997 he stabbed his wife forty-four times and drowned her in the swimming pool at their Arizona home. Police struggled to find a motive for the crime. Scott Falater claims to have no recollection of the murder and believes he is not culpable for the crime because he was asleep when he killed his wife. At Falater’s trial, an expert in sleep disorders testified that Falater’s defense that he was sleepwalking during the killing was possible.

Sleepwalking, also known as somnambulism, is a sleep disorder in which sleepers rise from their beds and perform various tasks while still asleep. Occasionally, sleepwalkers commit crimes. Scott Falater

2 LaMotte, supra note 1.
3 Id.
4 Id.
6 See id.; Christopher Howard & P.T. D’Orbán, Violence in Sleep: Medico-Legal Issues and Two Case Reports, 17 PSYCHOL. MED. 915, 916 (1987). A thirty-one-year-old fireman awoke to find himself battering his wife with a shovel. Howard & D’Orbán, supra, at 916. Upon realizing what he had done, he fainted in shock. Id. He later regained consciousness, found his wife dead, and attempted suicide. Id. The crime appeared entirely motiveless; he had no recollection of the assault and enjoyed an amicable relationship with his wife. Id.

More recently, in Canada, Kenneth Parks drove to the home of his parents-in-law while sleepwalking, attacked his father-in-law and killed his mother-in-law. R. Broughton et al.,
is not the first criminal defendant to raise sleepwalking in defense of his actions. The defense of sleepwalking is rarely asserted, and there exists little case law on the subject, leaving courts and criminal defendants little or no precedent as guidance for applying the defense.

There has been inconsistency among courts faced with sleepwalking defenses; there are currently three different sleepwalking defenses and no objective criteria for evaluating a defendant's claim of sleepwalking. Criminal defendants raising the defense of sleepwalking face the possibility of arbitrary and unprecedented judicial decisions due to a lack of statutory, common-law, and scholarly precedent on the sleepwalking defense.

The problems of prosecuting, defending, and convicting defendants who commit crimes while sleepwalking strike at the heart of criminal law jurisprudence. Criminal defendants facing prosecution have their freedom and liberty at stake. Criminal justice and constitutional protections strive to promote consistency in the prosecution of criminal defendants to ensure that criminal defendants are not deprived of their liberty through arbitrary or unprecedented decisions.

Courts and legal scholars have focused on the philosophical nuances of sleepwalking defenses and have neglected to answer more practical questions, such as how to raise the sleepwalking defense at trial, who should bear the burden of proving sleepwalking, and what

Homicidal Somnambulism: A Case Report, _Sleep_, Apr. 1994, at 255. From all accounts, Parks was very close with the victims, and seemed to lack motive for the attack. See _id._ at 256, 261. The defense presented substantial evidence indicating that Parks was sleepwalking during the attack, and consequently, the jury acquitted Parks of murder. See _id._ at 256–63.


10 See Corrado, _supra_ note 9, at 1554; Denno, _supra_ note 9, at 284–85.

11 See _Denno, supra note 9, at 284–85._

12 See _id._

13 See Corrado, _supra_ note 9, at 1554; Denno, _supra_ note 9, at 284–85.
criteria should be considered in determining a sleepwalker’s criminal culpability.\textsuperscript{14} This Note argues that the courts should apply a consistent balancing test in evaluating a defense of sleepwalking.\textsuperscript{15} Courts should require the defendant to raise sleepwalking as an affirmative defense, evaluated by comparing the facts of the case to a list of medical criteria indicative of sleepwalking behavior.\textsuperscript{16}

This Note analyzes sleepwalking defenses in the context of medical research on sleepwalking and advocates a defense suited to the available medical information.\textsuperscript{17} Part I begins with a summary of psychological and medical research on sleepwalking.\textsuperscript{18} It then considers four theories of a sleepwalker’s mental capacity to commit crimes, questioning the degree of control exhibited by sleepwalkers and their ability to make rational choices.\textsuperscript{19} Part II discusses the incorporation of sleepwalking defenses into the common-law legal doctrines of automatism, unconsciousness, and insanity.\textsuperscript{20} Part III first considers placing the burden of proving the sleepwalking defense on the defendant as an affirmative defense.\textsuperscript{21} It then considers placing the burden of proof on the prosecution, who must establish that the defendant was not sleepwalking at the time of the alleged crime.\textsuperscript{22} Part IV criticizes existing sleepwalking defenses for their failure to compensate for the medical differences between sleepwalking conduct and insane, automatist, or unconscious criminal behavior.\textsuperscript{23} It argues that a defendant should bear the burden of raising a sleepwalking defense.\textsuperscript{24} Part IV proposes a new sleepwalking defense, a multi-factored balancing test of objective criteria specifically tailored to the unique medical and psychological characteristics of sleepwalking.\textsuperscript{25}

\textsuperscript{14} See infra note 64 and accompanying text.
\textsuperscript{15} See infra notes 256–319 and accompanying text.
\textsuperscript{16} See infra notes 262–319 and accompanying text.
\textsuperscript{17} See infra notes 26–59, 265–319 and accompanying text.
\textsuperscript{18} See infra notes 26–59 and accompanying text.
\textsuperscript{19} See infra notes 60–101 and accompanying text.
\textsuperscript{20} See infra notes 102–169 and accompanying text.
\textsuperscript{21} See infra notes 172–188 and accompanying text.
\textsuperscript{22} See infra notes 190–205 and accompanying text.
\textsuperscript{23} See infra notes 207–255 and accompanying text.
\textsuperscript{24} See infra notes 313–319 and accompanying text.
\textsuperscript{25} See infra notes 256–319 and accompanying text.
I. Medical and Philosophical Perspectives on Sleepwalking

A. Sleepwalking: A Medical and Psychological Perspective

Before assessing the legal status of sleepwalking defendants, it is necessary to develop a basic understanding of what sleepwalking is and how it affects the sleepwalker’s mind and body.26 Advances in medical research on sleepwalking are beginning to expose the strengths and weaknesses of current legal theories on the sleepwalking defense.27 The medical description of sleepwalking helps to resolve the question of whether sleepwalking is a voluntary act for the purposes of assigning criminal liability to defendants raising the defense of sleepwalking.28

Recent medical and psychological research has changed the way doctors diagnose and treat sleepwalking episodes.29 Until the 1960s, sleepwalking was thought to be a mental disorder related to dreaming.30 Recent studies have revealed that sleepwalking does not occur in the dreaming phases of sleep, and therefore, sleepwalkers do not act out dreams in their sleep as previously believed.31 Sleepwalking episodes typically occur within two or three hours after the sleepwalker falls asleep and generally last less than fifteen minutes.32

26 See Fenwick, supra note 5, at 346–47; Ian Oswald & John Evans, On Serious Violence During Sleepwalking, 147 Brit. J. Psychiatry 688, 690 (1985). In a personal narrative, one doctor described his struggle with sleepwalking as follows:

I do think I know what these night wanderings are all about in my own life: they are attempts to do what can’t be done in the light—to say things left unsaid that still need to be said, to try somehow to touch, to recon with, the ghost in every darkness.


27 See infra notes 29–59 and accompanying text.

28 See infra notes 29–59 and accompanying text.


31 Principles and Practice of Sleep Medicine, supra note 30, at 700; see Fenwick, supra note 5, at 344–45; Masand et al., supra note 30, at 649; William H. Reid et al., Treatment of Sleepwalking: A Controlled Study, 35 Am. J. Psychotherapy 27, 28 (1981); Grant, supra note 8, at 1007.

32 Principles and Practice of Sleep Medicine, supra note 30, at 701; K. Abe & M. Shimakawa, Predisposition to Sleepwalking, 152 Psychiatric Neurology 306, 306 (1966); Peter Fenwick, Murdering While Asleep, 293 Brit. Med. J. 574, 574 (1986); Ernest Hartmann, Night Terrors—Sleep Walking: Personality Characteristics, 11 Sleep Res. 121, 121 (1982); Anthony Kales et al., Somnambulism: Clinical Characteristics and Personality Patterns, 37 Ar-
Sleepwalking in children is almost exclusively a physiological disorder (a physical defect of the body), and not a psychological disorder (a mental defect). In adults, however, there may be a correlation between sleepwalking and psychological disorders, but this correlation has not been confirmed in some studies. The balance of the available research suggests that the correlation between psychopathology and sleepwalking is tenuous, at best, and psychopathology is certainly not a prerequisite for sleepwalking. Episodes of sleepwalking are often brought on by stress and triggered by personal crises. Sleepwalking is more common among children than adults. Children who sleepwalk generally stop sleepwalking in their teens, and sleepwalking becomes extremely rare beyond sixty years of age. In old age, sleepwalking may be a manifestation of other disorders such as delirium, drug toxicity, or seizure disorder.

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33 Principles and Practice of Sleep Medicine, supra note 30, at 701; Howard & D’Orbán, supra note 6, at 921; Kales et al., supra note 32, at 1410; see J.V. Gilmore Jr., Murdering While Asleep: Clinical and Forensic Issues, 4 Forensic Rep. 455, 457 (1991); Oswald & Evans, supra note 26, at 690.

34 Principles and Practice of Sleep Medicine, supra note 30, at 701; Kavey et al., supra note 32, at 749. Adult sleepwalking appears to be a different medical phenomenon from childhood sleepwalking. See Kavey et al., supra note 32, at 749. Compare Kales et al., supra note 32, at 1408, 1410 (finding 72% of adult sleepwalkers in the study were diagnosed with psychiatric disorders, including impulsivity, antisocial behavior, and hypomania; no patient was overtly psychotic), with D. Hartman et al., Is There a Dissociative Process in Sleepwalking and Night Terrors?, 77 Postgraduate Med. J. 244, 246 (2001) (finding significant psychologically traumatic experiences in 27% of sleepwalking or night terror sufferers, most of whom were adults), and Howard & D’Orbán, supra note 6, at 922 (suggesting that sleep violence is a physiological phenomenon unrelated to psychological conditions.)

35 See Howard & D’Orbán, supra note 6, at 922, 924; Schenck, supra note 29, at 1171.

36 Reid et al., supra note 31, at 28; see Mahowald et al., supra note 32, at 420; Masand et al., supra note 30, at 650.

37 Principles and Practice of Sleep Medicine, supra note 30, at 701; Kales et al., supra note 32, at 1406; Reid et al., supra note 31, at 28; see Gilmore, supra note 33, at 455; Schenck, supra note 29, at 1170.

38 Principles and Practice of Sleep Medicine, supra note 30, at 701; Abe & Shimakawa, supra note 32, at 308; Kales et al., supra note 32, at 1408; Ismet Karacan, Parasomnias, in Sleep Disorders: Diagnosis and Treatment 131, 132 (Robert L. Williams et al. eds., 2d ed. 1988).

39 Masand et al., supra note 30, at 649.
Sleepwalkers appear dazed, with a blank, staring expression, and seldom respond to communication or actions of others. Sleepwalking behavior generally is limited to sitting up in bed, occasional rising and walking around, and rare instances of leaving the house. Sleepwalking movements are usually clumsy, but researchers disagree about the potential extent of the sleepwalker’s dexterity and motor skills. Sleepwalking violence is often instigated by a bystander who attempts to wake the sleepwalker. Complex behavior while sleepwalking is rare. Incidents of self-inflicted injuries and violence toward others during episodes of sleepwalking are not uncommon. Instances of violent sleepwalking do not generally occur in isolation; they are usually accompanied by prior violent sleepwalking acts. Researchers also disagree about the clinical classification of sleepwalking as automatism, which is a non-reflex act without conscious volition.

Sleepwalkers seldom remember what happened during an episode. They act confused and disoriented after being woken from

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41 See Fenwick, supra note 5, at 346; Masand et al., supra note 30, at 649; Sloan & Shapiro, supra note 40, at 21.
42 Principles and Practice of Sleep Medicine, supra note 30, at 701; Alexander Bonkalo, Impulsive Acts and Confusional States During Incomplete Arousal from Sleep: Criminological and Forensic Implications, 28 Psychiatr. Q. 400, 407 (1974); Fenwick, supra note 5, at 346 ("The subject can carry out purposeful acts, many of which are highly complex. . . . Sleepwalkers have walked out onto fire escapes, fired guns, driven cars, sometimes with the result of serious self-injury, or of injury to others."); Kales et al., supra note 32, at 1406; Karacan, supra note 38, at 132; Kavey et al., supra note 32, at 749; Masand et al., supra note 30, at 650, 652 (suggesting that complicated goal-oriented activities during supposed sleepwalking cast doubt on the patient’s claim of sleepwalking); L.B. Raschka, Sleep and Violence, 29 Can. J. Psychiatry 132, 133 (1984).
43 Principles and Practice of Sleep Medicine, supra note 30, at 701.
44 Kavey et al., supra note 32, at 749 (stating that “frenzied behavior or aggression to persons or objects is infrequent”); Masand et al., supra note 30, at 650, 652.
45 Principles and Practice of Sleep Medicine, supra note 30, at 701; Kavey et al., supra note 32, at 750; see Fenwick, supra note 5, at 346; Schenck et al., supra note 29, at 1167, 1171.
46 See Mahowald et al., supra note 32, at 426.
47 Masand et al., supra note 30, at 650. One possible reason for the controversy over sleepwalking’s classification as automatism is the fear that courts might confuse the legal definition of automatism with the medical definition of automatism. Howard & D’Orbán, supra note 6, at 922.
48 Principles and Practice of Sleep Medicine, supra note 30, at 701–02; Bonkalo, supra note 42, at 407; Fenwick, supra note 32, at 574; Hartmann, supra note 32, at 121; Kales et al., supra note 32, at 1406; Karacan, supra note 38, at 132; see Masand et al., supra note 30, at 650 (suggesting that sleepwalking is not commonly accompanied by a recollection of
their sleep. Researchers believe this is why sleepwalkers can be dangerous, and their actions often result in violent behavior and injuries to the sleepwalker and others. Motivated or premeditated violence suggests the patient was not sleepwalking.

The exact causes of sleepwalking are unknown, but relevant trigger factors include the following: developmental disorders, stress, medication or drug use, sleep deprivation, and environmental stimuli. Sleepwalking often runs in the family suggesting that it is partly an inheritable genetic condition. Sleepwalking may be confused with other sleep disorders such as sleep drunkenness and night terrors. Sleep drunkenness is a gradual and incomplete wakening where the sleeper’s motor skills and consciousness remain impaired. Night terrors are closely related to sleepwalking, except that night terrors are shorter and more severe, accompanied by panic, screaming, increased heart rate, and sweating. Recent research suggests

the episode); Oswald & Evans, supra note 26, at 688. But see Schenck et al., supra note 29, at 1171 (stating that some adult sleepwalkers reported substantial recall of nighttime behavior).

49 See Masand et al., supra note 30, at 650.

50 Id.

51 See Fenwick, supra note 5, at 354; Mahowald et al., supra note 32, at 426.

52 Principles and Practice of Sleep Medicine, supra note 30, at 701; Fenwick, supra note 5, at 346, 347, 350, 354; Gilmore, supra note 33, at 457–58; Howard & D’Orbán, supra note 6, at 922; Brett R. Kuhn & Amy J. Elliott, Efficacy of Behavioral Interventions for Pediatric Sleep Disturbance, in Treating Sleep Disorders: Principles and Practice of Behavioral Sleep Medicine 415, 429, 430 (Michael L. Perlis & Kenneth L. Lichstein eds., 2003); Masand et al., supra note 30, at 650–52.

53 Abe & Shimakawa, supra note 32, at 306; Gilmore, supra note 33, at 455; Kales et al., supra note 40, at 111 (finding that a first-degree relative of a sleepwalker is ten times more likely to sleepwalk than a member of the general population); Kales et al., supra note 32, at 1409; Kuhn & Elliott, supra note 52, at 429; Masand et al., supra note 30, at 650–51; Reid et al., supra note 31, at 28. About 80% of sleepwalkers have an immediate family history of sleepwalking or night terrors. Principles and Practice of Sleep Medicine, supra note 30, at 700.

54 Kales et al., supra note 40, at 111–12; Raschka, supra note 42, at 132 (stating that although most sleep-related violence is presumed to occur during sleepwalking, other sleep disorders may lead to sleep violence); see Sleep Research and Clinical Practice 38 (Gene Usdin ed., 1973); Karacan, supra note 38, at 132; J. Catesby Ware, Sleep and Anxiety, in Sleep Disorders: Diagnosis and Treatment, supra note 38, at 189, 203. Although the defense of somnambulism theoretically may cover all violence committed during sleep, this Note is concerned only with the legal consequence of sleepwalking and does not address the treatment of other sleep-related violence in the criminal law. A. McCall Smith & C.M. Shapiro, supra note 40, at 1, 39.

55 Raschka, supra note 42, at 132.

56 Hartman et al., supra note 34, at 244; Howard & D’Orbán, supra note 6, at 921; Karacan, supra note 38, at 134; Kuhn & Elliot, supra note 52, at 429; Ware, supra note 54, at 203 (noting that night terrors, unlike sleepwalking episodes, are commonly associated with
that sleepwalking and night terrors may be the same physiological disorder differing only in severity. Complex goal-oriented behavior, episodes lasting more than fifteen minutes, or episodes reportedly occurring at a time of night when sleepwalking does not generally occur may indicate that the patient is faking an episode of sleepwalking. Sleepwalking is a rare phenomenon afflicting only 2.5% of the general population.

B. Philosophical Perspective on Sleepwalking: Criminal Culpability

Theories of criminal culpability focus on criminal intent (mens rea) and criminal action (actus reus), both of which are required for conviction of a defendant. Generally, for a criminal defendant to be held culpable, the prosecution must prove that the defendant committed the act voluntarily. Therefore, criminal defendants who successfully prove that they were sleepwalking during the alleged crime cannot be convicted unless the prosecution establishes that sleepwalking is a voluntary act. Based on the available medical research, sleepwalking behavior is neither obviously voluntary, nor obviously involuntary.

Much of the recent discussion about sleepwalking defenses focuses on the behavior and state of mind of the sleepwalker at the time of criminal misconduct. The basic premise of sleepwalking defenses psychiatric disorders such as depression, anxiety, aggression, obsessive-compulsive tendencies, and phobicness).

57 Kales et al., supra note 40, at 111–12 (citing a common genetic and neurophysiologic connection between sleepwalking and night terrors); Kales et al., supra note 32, at 1409; Kuhn & Elliot, supra note 52, at 429.

58 Masand et al., supra note 30, at 652; see Principles and Practice of Sleep Medicine, supra note 30, at 704.

59 Fenwick, supra note 5, at 346; Kales et al., supra note 40, at 111; Kavey et al., supra note 32, at 749; Mahowald et al., supra note 32, at 420. Only 0.7% of adults sleepwalk according to one study. Kavey et al., supra note 32, at 749.


61 See Model Penal Code § 2.01 (1962); Overton, 815 A.2d at 522.


64 See Adam Candeub, Consciousness and Culpability, 54 Ala. L. Rev. 113, 119, 121 (2002); Michael Cortado, Addiction and Causation, 37 San Diego L. Rev. 913, 919–20 (2000); Mark E. Hindley, United States v. Denny-Shaffer and Multiple Personality Disorder: “Who Stole the Cookie from the Cookie Jar?,” 1994 Utah L. Rev. 961, 993–94; Bruce Ledewitz, Mr. Carroll’s Mental State or What Is Meant by Intent, 39 Am. Crim. L. Rev. 71, 80–81 (2001);
is that sleepwalkers are not aware of their actions, and thus, should not be held culpable for actions beyond their control. If sleepwalkers are capable of exercising discretion over their actions, the premise of involuntariness is undermined, and the sleepwalking defense fails. The philosophical debate over sleepwalking volition has identified the following four theories of sleepwalking action: (1) the Model Penal Code approach, (2) the voluntary act theory, (3) the dual-self theory, and (4) the semi-voluntary act theory.


The Model Penal Code (the “MPC”) adopts a voluntary act requirement, which does not specifically define a voluntary act, but uses sleepwalking as an example of what is not voluntary. Under the MPC, a voluntary act is an essential component of any crime, and therefore, any act that is not voluntary is not a crime.

Under this theory of sleepwalking, actions of sleepwalkers are not voluntary because sleepwalkers lack the ability to entertain and resolve conflicting interests. Sleepwalkers are not conscious of their actions. Even if sleepwalkers are capable of considering and executing volitional movements, the decision-making process is so impaired that sleepwalkers cannot effectively restrain their behavior. Thus, sleepwalkers should not be punished for their behavior because they did not have the mental or physical capacity to choose any alternate


Fenwick, supra note 32, at 574; see Moore, supra note 63, at 1812–13; Saks, supra note 62, at 434–35.

See Candeub, supra note 64, at 121; Corrado, supra note 9, at 1553–54.

See infra notes 68–101 and accompanying text.

See Model Penal Code § 2.01(2) (1962) (listing four examples of actions that are not voluntary, including “a bodily movement during unconsciousness or sleep”); see also Denno, supra note 9, at 287–89 (discussing the MPC’s failure to define “voluntary” and “unconsciousness”). Due to a lack of case law addressing various theories of sleepwalking volition, the following discussion relies primarily on the MPC and legal scholarship. See Model Penal Code § 2.01(2); Denno, supra note 9, at 287–89.

See Model Penal Code § 2.01(2).

See Moore, supra note 63, at 1817.

See People v. Sedeno, 518 P.2d 913, 922 (Cal. 1974).

See Moore, supra note 63, at 1817.
course of action. They could not have avoided the allegedly criminal behavior.

Furthermore, the theory of sleepwalking as an involuntary act proposes that sleepwalkers are unable to attend consciously to detailed behavior and have no memory of their sleepwalking episodes upon waking. The full range of desires and intentions that are available to waking persons are not available to the sleepwalker. Accordingly, the crucial component of volition, the ability to choose between alternate courses of action, the ability to choose between right and wrong, is not available to the sleepwalker. This is why sleepwalkers do not act voluntarily, and this is why they are incapable of criminal conduct.

2. Sleepwalking Is a Voluntary Act

The MPC’s classification of sleepwalking as an involuntary act has been greeted with skepticism. The skeptics propose that sleepwalking is a voluntary act and criminal acts performed while sleepwalking are within the sleepwalker’s control. Sleepwalkers appear to exhibit a substantial amount of control over their actions, making their behavior seem voluntary and uninhibited. Some sleepwalkers perform complicated tasks in their sleep and often respond to environmental stimuli. This responsive behavior appears to be goal-oriented, leading some to believe that sleepwalkers are aware of themselves and the surrounding environment, and therefore, their bodily movements are intentional actions. Sleepwalkers respond to their perceptions of the waking world, and exhibit behavior that is not just patterned after waking conduct, but interactive with the waking world.

73 Smith & Shapiro, supra note 54, at 2; see H.L.A. Hart, Punishment and Responsibility: Essays in Philosophy of Law 109, 153 (1968); Moore, supra note 63, at 1817.
74 See Moore, supra note 63, at 1817.
75 See id. at 1813.
76 See id. at 1815.
77 Smith & Shapiro, supra note 54, at 32; see Moore, supra note 63, at 1817.
78 See Moore, supra note 63, at 1817.
79 See id. at 1809, 1812; Williams, supra note 64, at 1664, 1667.
80 See Candeub, supra note 64, at 121; Corrado, supra note 9, at 1554; Moore, supra note 63, at 1812, 1813; Williams, supra note 64, at 1664, 1667.
81 See Corrado, supra note 9, at 1553–54; Moore, supra note 63, at 1813.
82 See Corrado, supra note 9, at 1553; Fenwick, supra note 5, at 346; Morse, supra note 63, at 1641. But see Principles and Practice of Sleep Medicine, supra note 30, at 701 (suggesting that sleepwalkers have a diminished response to environmental stimuli).
83 See Corrado, supra note 9, at 1554; Morse, supra note 63, at 1641, 1646.
84 See Morse, supra note 63, at 1641, 1646.
Sleepwalking conduct appears to be volitional, purposeful action, and without evidence to the contrary, a presumption of intent should apply to defendants raising the sleepwalking defense.\footnote{See id. at 1651–52.} According to this theory, not only does sleepwalking behavior appear voluntary to onlookers, the behavior is guided by the intentions of the sleepwalker, and therefore, is voluntary.\footnote{See id.} Thus, sleepwalking defenses are dubious, at best, because the criminal conduct was probably a manifestation of the sleepwalker’s intent.\footnote{See id.} Furthermore, sleepwalking is easily diagnosed, and proper treatment can mitigate sleepwalking violence or even eliminate episodes altogether, which suggests that sleepwalking violence is preventable.\footnote{See id.}

3. The Dual-Self Theory

The dual-self theory proposes that sleepwalking behavior is volitional but is not criminal because sleepwalkers are not conscious of their actions.\footnote{See Candeub, supra note 64, at 117; Saks, supra note 62, at 434–35.} Under this theory, sleepwalkers have some basic level of comprehension about their actions, but they lack the consciousness to fully understand the consequences of those actions.\footnote{See id.} The waking self cannot be held responsible for the actions of the unconscious sleeping self, and it would be wrong to punish criminal defendants for actions perpetrated while unconscious.\footnote{Id.} Under this dual-self theory of sleepwalking, the sleeping self is not governed by the intentions and volitions of the waking self.\footnote{Id.} Unlike the waking self, the sleeping self is unconscious of its behavior, and therefore, unable to perpetrate any criminal act.\footnote{Id.}

In 1974, in People v. Sedeno, the California Supreme Court implicitly supported the dual-self theory.\footnote{See 518 P.2d at 922; infra notes 133–137 and accompanying text.} The court ruled that under the California Penal Code, unconscious actors (including sleepwalkers)
do not act with volition because they are not aware that they are acting. Implicit in the decision was the belief that a sleepwalker’s actions are not controlled by the sleepwalker’s conscience, so the sleepwalker cannot be punished for actions committed while asleep.

4. The Semi-Voluntary Act Theory

The semi-voluntary act theory asserts that sleepwalking behavior is neither clearly voluntary, nor clearly involuntary, and either classification of sleepwalking conduct is premature and unfounded. Adherents to the semi-voluntary act theory believe that the MPC dichotomy between voluntary and involuntary conduct is arbitrary and that there seems to be little medical support for drawing such an absolute distinction. According to this theory, sleepwalking should be classified as a semi-voluntary act, because it is neither completely voluntary, nor completely involuntary. This would allow courts to determine, on an ad hoc basis, which sleepwalking acts are voluntary and which acts are involuntary. Sleepwalking is not easily classified as either conscious or unconscious action, leading to the possible conclusion that the sleepwalker’s consciousness should be evaluated on a sliding scale, which is entirely consistent with the notion of sleepwalking as a semi-voluntary act.

II. History of the Sleepwalking Defense

Regardless of whether sleepwalking behavior is voluntary or involuntary, sleepwalking has been raised and accepted as a defense to criminal culpability in common-law jurisdictions for over three hundred years. The sleepwalking defense is asserted rarely in American courts, leaving judges and criminal defendants wondering how the

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96 See Sedeno, 518 P.2d at 922; see also Cal. Penal Code § 26(4).
97 See Moore, supra note 63, at 1815.
98 See Denno, supra note 9, at 287, 292, 308.
99 See id. at 359, 361.
100 See id. at 357, 369, 371–74.
101 Smith & Shapiro, supra note 54, at 59.
102 See Bonkalo, supra note 42, at 401 (tracing the roots of the sleepwalking defense back as far as 1313 when the Council of Vienne declared that if a sleepwalking person killed or wounded someone, he was not held culpable); Fenwick, supra note 5, at 351 (“In England, in 1686, a Colonel Culpepper shot a guardsman and his horse on night patrol. At his trial he pleaded, successfully, that he committed the crime when asleep, and was convicted of manslaughter while insane.”).
defense should be applied.\textsuperscript{103} Sleepwalking has been raised under three criminal law defenses: automatism, unconsciousness, and insanity.\textsuperscript{104} Courts agree that sleepwalking is a defense to criminal conduct, but they do not agree about how to apply the defense.\textsuperscript{105}

A. Somnambulism: Automatism and Unconsciousness

Occasionally, sleepwalkers run afoul of the law, much to the surprise of sleepwalkers, their victims, and the courts who must decide what to do with these defendants.\textsuperscript{106} Courts have generally classified sleepwalking, also known as somnambulism, as a defense to criminal charges under the common-law doctrines of automatism and unconsciousness.\textsuperscript{107} Legal scholars use the term “automatism” to classify states of involuntary bodily movement, and “unconsciousness” to describe states of temporary mental incapacity.\textsuperscript{108}

Criminal justice has long supported the belief that criminal defendants should only be held responsible for actions that could have been avoided had the defendant simply chosen otherwise.\textsuperscript{109} Actors must have some control over their physical and mental capacities to be held responsible for criminal wrongdoing.\textsuperscript{110} Consequently, society does not punish actions performed in a state of uncontrolled motion or unconsciousness.\textsuperscript{111}

\textsuperscript{103} See Grant, \textit{supra} note 8, at 1009.

\textsuperscript{104} See Denno, \textit{supra} note 9, at 284–85. The recent decision of \textit{New Jersey v. Overton} is a departure from the traditional approach to sleepwalking defenses. \textit{See generally} 815 A.2d 517 (N.J. Super. Ct. App. Div. 2003). The court held that sleepwalking negates the voluntary act requirement and implicitly recognized a general sleepwalking defense outside the confines of the traditional doctrines of automatism, unconsciousness, and insanity. \textit{Id.} at 522.

\textsuperscript{105} See \textit{supra} note 9 and accompanying text. The \textit{Overton} decision further illustrates the inconsistency among courts faced with sleepwalking defenses. \textit{See supra} notes 9, 104 and accompanying text.

\textsuperscript{106} See Denno, \textit{supra} note 9, at 346–48; Grant, \textit{supra} note 8, at 1009–11.

\textsuperscript{107} People v. Sedeno, 518 P.2d 913, 922 (Cal. 1974) (classifying sleepwalking as an unconsciousness defense); McClain v. Indiana, 678 N.E.2d 104, 106–07 (Ind. 1997) (classifying sleepwalking as an automatism defense); \textit{see} Denno, \textit{supra} note 9, at 284–85.

\textsuperscript{108} See Denno, \textit{supra} note 9, at 283–84. Unconsciousness is not to be confused with insanity. The unconsciousness defense applies to defendants who claim to have been temporarily mentally incapacitated at the time of the crime, whereas, the insanity defense applies to defendants with permanent mental incapacities. McClain, 678 N.E.2d at 108; Denno, \textit{supra} note 9, at 283–84.

\textsuperscript{109} See Hart, \textit{supra} note 73, at 153; Corrado, \textit{supra} note 9, at 1553.

\textsuperscript{110} See Hart, \textit{supra} note 73, at 158; Denno, \textit{supra} note 9, at 271, 283.

\textsuperscript{111} See People v. Coogler, 454 P.2d 686, 696 (Cal. 1969).
1. Automatism

Sleepwalking, under specific circumstances, has been a complete defense to criminal culpability under the doctrine of automatism. Automatism is a common-law defense where defendants are released from criminal culpability upon proving that their actions were the result of involuntary bodily movement. Automatism relies on the assumption that a sleepwalker’s bodily motions are beyond the sleepwalker’s waking control, and the waking self should not be punished for the misdeeds of the sleeping self. In 1950, in the English case of King v. Cogdon, the defendant was acquitted on charges of murdering her daughter with an axe. Mrs. Cogdon had been sleepwalking when she wandered into her daughter’s room, and believing that there were soldiers attacking her daughter, she struck twice with an axe, killing her daughter. In her defense, Mrs. Cogdon claimed automatism, more specifically somnambulism, and sought to establish that her actions were beyond her control. Her story was supported by testimony of a physician, a psychiatrist, and a psychologist, who all believed that she suffered from a series of mental and physical stresses which made her prone to sleepwalking. The jury believed Mrs. Cogdon and acquitted; they believed the killing was not an act within her control.

2. Unconsciousness

Sleepwalking also has been classified as an unconsciousness defense. Unconsciousness is a common-law defense absolving criminal defendants of culpability upon proving they were temporarily mentally incapacitated at the time of the criminal act. The unconsciousness defense assumes that sleepwalkers are incapable of crimi-

112 See Howard & D’Orbán, supra note 6, at 923 (discussing the tendency of British courts to accept, in principle, the defense of automatism for sleepwalking defendants because it seems unfair to hold them morally accountable for their actions); Morse, supra note 63, at 1641; Grant, supra note 8, at 1000, 1004.
113 See McClain, 678 N.E.2d at 106.
114 Hindley, supra note 64, at 993; Saks, supra note 62, at 434–35.
116 Id.
117 Id.
118 Id.
119 Id.; see Denno, supra note 9, at 369–73.
120 See Sedeno, 518 P.2d at 922; Fain v. Commonwealth, 78 Ky. 183, 189, 193 (1879).
121 See Sedeno, 518 P.2d at 922.
nal activity because their minds are asleep, and therefore, sleepwalkers do not exhibit the requisite mental capacity to commit a crime. Accordingly, criminal defendants who prove that they performed their actions while asleep must be acquitted because they were not capable of conscious thought or criminal intent.

In 1879, the Court of Appeals of Kentucky in *Fain v. Commonwealth* reversed the defendant’s conviction for manslaughter after finding that the trial court should have admitted evidence confirming the defendant’s history of sleepwalking. In *Fain*, Welsh and the defendant fell asleep in the lobby of the Verdana Hotel where Welsh later woke and tried to wake the defendant. When the defendant did not stir, Welsh asked a stranger to wake him. The stranger picked up the defendant, who suddenly pulled a gun and shot the stranger three times, inflicting lethal wounds. The defendant claimed that he slept through the entire ordeal. The court held that evidence of the defendant’s history of sleepwalking would have confirmed that the defendant was unconscious at the time of the shooting, and therefore, was unable to understand the circumstances or consequences of his actions. Implicit in the court’s reasoning was the belief that if the defendant could prove that he was sleeping when he killed the stranger, the unconsciousness defense would apply, and the defendant would be acquitted.

California has codified the unconsciousness defense and interpreted the defense to include sleepwalking. The California Penal Code exempts from criminal liability persons who committed an allegedly criminal act while unconscious. In 1974, in *People v. Sedeno*, the Supreme Court of California found the Penal Code’s definition of

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123 See Hindley, supra note 64, at 993–94; see also Overton, 815 A.2d at 522 (holding that sleepwalking negates the voluntary act requirement, but leaving open the possibility that sleepwalking behavior may be reckless when the sleepwalker is aware of the condition and fails to take adequate preventative measures).

124 78 Ky. at 189, 193.

125 Id. at 184.

126 Id.

127 Id. at 185.

128 See id. at 186, 189.

129 *Fain*, 78 Ky. at 186, 189.

130 Id.


unconsciousness to include acts performed while sleepwalking. The court reasoned that an unconscious act is one committed by a person whose act cannot be deemed volitional due to sleepwalking, a blow to the head, or a similar cause. The defendant, charged with first degree murder, was struck in the head during a fatal fight with his prison guard. The defendant claimed that the blow to his head rendered him unconscious for the duration of the fight, so he requested an unconsciousness defense. Criminal defendants who wish to raise the sleepwalking defense in California must assert the defense of unconsciousness, which, if proven, results in acquittal.

The distinction between unconsciousness and automatism has faded, and because the defenses are functionally equivalent, sleepwalking could be raised under both doctrines. Automatism and unconsciousness remain the predominant defenses to criminal culpability, and in some jurisdictions, remain the only recognized defenses for sleepwalking defendants.

B. Sleepwalking and Insanity

The only other recognized defense for criminal acts perpetrated while sleepwalking is legal insanity. The insanity defense applies when the defendant has a mental disease or defect, which renders the defendant incapable of cognitive awareness and control at the time of the criminal conduct. Most jurisdictions have distinguished a sleepwalking defense from an insanity defense, and few courts continue to

133 518 P.2d at 922.
134 See Sedeno, 518 P.2d at 922; see also CAL. PENAL CODE § 26(4).
135 Id. at 917.
136 See id.
137 See Sedeno, 518 P.2d at 922.
138 See Michael Corrado, Automatism and the Theory of Action, 39 EMORY L.J. 1191, 1217 (1990); Denno, supra note 9, at 338.
139 See Sedeno, 518 P.2d at 922.
140 See Tibbs v. Commonwealth, 128 S.W. 871, 874 (Ky. 1910).
141 Patricia J. Faulk, Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage, 74 N.C. L. REV. 731, 784 (1996). An alternative analysis requires the following three components: (1) mental disease or defect, (2) lack of cognition, and (3) lack of volition. See Grant, supra note 8, at 1004.
recognize sleepwalking as an insanity defense.\textsuperscript{142} A minority of courts, however, have treated sleepwalking as an insanity defense.\textsuperscript{143}

Some courts have instructed juries on the insanity defense when defendants asserted a sleepwalking defense.\textsuperscript{144} In 1910, the Court of Appeals of Kentucky in \textit{Tibbs v. Commonwealth} affirmed the trial court’s decision to instruct the jury on the insanity defense, rather than a separate sleepwalking defense.\textsuperscript{145} In \textit{Tibbs}, the defendant left a “house of ill fame” and fell asleep after consuming alcohol.\textsuperscript{146} The defendant’s friend tried to wake defendant causing defendant to punch him.\textsuperscript{147} Immediately after punching his friend, the defendant apologized and shook hands with his friend, but later stabbed his friend above the eye, inflicting fatal wounds.\textsuperscript{148} The defendant claimed that he was sleepwalking throughout the entire incident and that he remembered nothing of the encounter.\textsuperscript{149} The court declared that even if the defendant was sleepwalking, the only defense appropriate for that claim was insanity.\textsuperscript{150}

Similarly, in 1925, in \textit{Bradley v. State}, the Court of Criminal Appeals of Texas reversed the defendant’s conviction for murder, holding that the trial court should have applied the insanity defense to the defendant, who claimed that he was sleepwalking during the incident.\textsuperscript{151} In \textit{Bradley}, the defendant put a pistol under his pillow before falling asleep, rose when he heard a noise, and fired several shots, killing Ada Jenkins in his bed.\textsuperscript{152} His conviction was reversed partially on the grounds that the trial court failed to consider his claim that he was sleepwalking at the time of the shooting.\textsuperscript{153} The court stated that

\textsuperscript{142} See Denno, \textit{supra} note 9, at 342–48. The reluctance of courts to accept insanity defenses for sleepwalking defendants might be attributed to the tenuous link between medical definitions of insanity and attempts to classify sleepwalking under the legal definition of insanity. See Howard & D’Orbán, \textit{supra} note 6, at 924.

\textsuperscript{143} See Michael J. Davidson & Steve Walters, United States v. Berri: \textit{The Automatism Defense Rears Its Ugly Head}, 1993 Army Law. 17, 19; Denno, \textit{supra} note 9, at 284, 343–44, 346–48; Grant, \textit{supra} note 8, at 1003.

\textsuperscript{144} See, e.g., \textit{Tibbs}, 128 S.W. at 874; Bradley v. State, 277 S.W. 147, 149 (Tex. Crim. App. 1925).

\textsuperscript{145} See 128 S.W. at 874.

\textsuperscript{146} \textit{Id.} at 872.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.} at 873, 874.

\textsuperscript{150} See \textit{Tibbs}, 128 S.W. at 874 (“We fail to see how these facts would constitute any defense other than that embraced in a plea of insanity.”).

\textsuperscript{151} 277 S.W. at 149, 150.

\textsuperscript{152} \textit{Id.} at 148.

\textsuperscript{153} \textit{Id.} at 149, 150.
the sleepwalking defense should take the form of an insanity defense, which results in acquittal if believed by the jury.\textsuperscript{154} The court in \textit{Bradley} considered sleepwalking to be the legal equivalent of insanity.\textsuperscript{155}

In contrast, some courts distinguish sleepwalking from insanity defenses.\textsuperscript{156} In 1997, in \textit{McClain v. Indiana}, the Supreme Court of Indiana, faced with no binding precedent, held that sleepwalking cannot be raised as an insanity defense.\textsuperscript{157} The court held that automatism, including sleepwalking, was a matter of voluntary action, not a matter of mental defect, and therefore, the automatism defense should be distinct from the defense of legal insanity.\textsuperscript{158} The court reasoned that the difference between insanity and automatism/unconsciousness is the potential punishment.\textsuperscript{159} Criminally insane defendants are considered mentally impaired and may be committed to a mental institution, whereas defendants raising the automatism/unconsciousness defense do not suffer from any long-term mental deficiencies and would not benefit from institutionalization.\textsuperscript{160} Requiring the institutionalization of sleepwalkers would result in the commitment of defendants who are entirely sane and who do not suffer from any mental defects.\textsuperscript{161} Consequently, the court ruled that the defense of automatism, which includes the defense of sleepwalking in Indiana, is separate from the defense of insanity.\textsuperscript{162}

Few courts continue to recognize sleepwalking as an insanity defense and there is little precedent on which a court could justify such a classification.\textsuperscript{163} Modern courts and scholars have abandoned the classification of sleepwalking as an insanity defense, primarily because criminally insane defendants are often committed to a mental institution for mental rehabilitation, an inappropriate treatment for sleepwalkers.\textsuperscript{164} Criminally insane defendants are considered to have a permanent or semi-permanent mental incapacity, making rehabilitation and institutionalization appropriate remedies.\textsuperscript{165} Conversely, sleepwalk-

\begin{itemize}
\item \textsuperscript{154} \textit{Id.} at 149.
\item \textsuperscript{155} \textit{See id.}
\item \textsuperscript{156} \textit{See}, e.g., \textit{McClain}, 678 N.E.2d at 107.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{See id.} at 106–07.
\item \textsuperscript{159} \textit{See id.} at 108–09.
\item \textsuperscript{160} \textit{See id.} at 109; \textit{Grant, supra} note 8, at 1004–05.
\item \textsuperscript{161} \textit{See McClain}, 678 N.E.2d at 109.
\item \textsuperscript{162} \textit{See id.} at 107.
\item \textsuperscript{163} \textit{See id.}
\item \textsuperscript{164} \textit{See Fulcher v. State}, 633 P.2d 142, 145 (Wy. 1981); \textit{Grant, supra} note 8, at 1004–05.
\item \textsuperscript{165} \textit{See Grant, supra} note 8, at 1004.
\end{itemize}
ing defendants do not suffer from any permanent mental disorders and receive no benefit from rehabilitative treatment.\textsuperscript{166}

Sleepwalkers resemble the criminally insane in appearance only; the psychological and physiological causes of sleepwalking differ substantially from the causes of insanity.\textsuperscript{167} The classification of sleepwalking as an insanity defense was based on the assumption that sleepwalkers suffered from a mental disease similar to insanity, as seen in Bradley.\textsuperscript{168} Recent medical research suggests that sleepwalking is not a psychological disorder, but a physiological phenomenon triggered by a combination of genetic and environmental factors.\textsuperscript{169}

III. SLEEPWALKING ON TRIAL: THE BURDEN OF PROVING SLEEPWALKING

If a court chooses to recognize a defense based on sleepwalking, either through the automatism or unconsciousness defenses or through legal insanity, it must decide which party should bear the burden of proving whether sleepwalking occurred at the time of the allegedly criminal act.\textsuperscript{170} Common-law decisions indicate that courts have reached different decisions on who should bear the burden of proof in cases where defendants were allegedly sleepwalking.\textsuperscript{171}

A. Defendant’s Burden: The Affirmative Defense

Some courts require the defendant to raise sleepwalking as an affirmative defense.\textsuperscript{172} This requires defendants to prove that they were sleepwalking at the time of the criminal acts in question.\textsuperscript{173} The affirmative defense of sleepwalking is a complete defense resulting in acquittal.\textsuperscript{174}

In 1879, in Fain v. Commonwealth, the Court of Appeals of Kentucky found reversible error in the trial court’s failure to admit evi-

\textsuperscript{166} See Fulcher, 633 P.2d at 146; Grant, supra note 8, at 1004.
\textsuperscript{167} See Fulcher, 633 P.2d at 145; Grant, supra note 8, at 1004; supra notes 33–35 and accompanying text.
\textsuperscript{168} Oswald & Evans, supra note 26, at 690; see 277 S.W. at 149.
\textsuperscript{169} See supra notes 33–35 and accompanying text.
\textsuperscript{170} See Morse, supra note 63, at 1641, 1651.
\textsuperscript{171} See Fain v. Commonwealth, 78 Ky. 183, 188 (1879) (implicitly placing burden of proof on the defendant through an affirmative defense); Fulcher v. State, 633 P.2d 142, 147 (Wy. 1981) (suggesting that the burden of proof lies with the prosecution if the facts suggest the defendant may have lost consciousness or control of his actions during the crime).
\textsuperscript{172} See Corrado, supra note 9, at 1554; Morse, supra note 63, at 1651.
\textsuperscript{173} See Morse, supra note 63, at 1651–52.
\textsuperscript{174} See Grant, supra note 8, at 1000.
evidence in support of the defendant’s claim that he was sleepwalking when he shot a stranger who tried to wake him. The court implicitly found that the defendant needed an opportunity to rebut the presumption that he was awake during the shooting, which if such evidence were admitted, would have served as an affirmative defense to the shooting.

In 1943, the Supreme Court of Georgia in *Lewis v. State* found that the sleepwalking defense did not apply because the defendant failed to offer evidence in support of his claim that he suffered from sleepwalking at the time of the shooting. In *Lewis*, the defendant laid his pistol on the mantle before falling asleep and woke the next morning to find his friend in the bed next to him, lying dead from bullet wounds. The defendant did not remember anything of the previous night’s events and asserted a defense of sleepwalking. The court’s reasoning implied that the defendant, if anyone, was responsible for raising the issue of sleepwalking, and he must offer some evidence in support of his claim.

In both *Fain* and *Lewis* the courts made an a priori assumption that shootings generally occur while the shooter is awake. Based on the evidence presented in these cases, an inference of sleepwalking does not arise from the facts, and therefore, any effort to prove that the defendant was sleepwalking should fall on the defendant. If the fact pattern suggests that sleepwalking was a possibility at the time of the alleged crime, then the defendant needs an opportunity to present that defense to the jury.

Supporters of the affirmative defense to sleepwalking suggest several advantages. Defendants have the best access to the necessary evidence of sleepwalking, such as past instances of sleepwalking and testimony from family members and loved ones of sleepwalking

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175 78 Ky. at 185, 189 (the defendant sought to offer evidence that he had been a sleepwalker since childhood); see supra notes 124–130 and accompanying text.
176 See *Fain*, 78 Ky. at 189.
177 27 S.E.2d 659, 665–66 (Ga. 1943) (finding the sleepwalking defense inapplicable in this case). Sleepwalking is a recognized defense to criminal charges. See id.; State v. Williams, 252 S.E.2d 739, 744 (N.C. 1979) (citing generally *Lewis*).
178 27 S.E.2d at 659.
179 Id.
180 See id.
181 See *Lewis*, 27 S.E.2d at 665; *Fain*, 78 Ky. at 189.
182 See *Lewis*, 27 S.E.2d at 665–66.
183 See *Lewis*, 27 S.E.2d at 665; *Fain*, 78 Ky. at 189.
184 See Morse, supra note 63, at 1651–52.
tendencies.\textsuperscript{185} Furthermore, affirmative defense advocates believe that defendants should carry the burden of proof because they are the ones aware of their state of consciousness at the time of the acts in question.\textsuperscript{186} The affirmative defense approach assumes that most actions are voluntary and that to prove otherwise, a defendant must show a lack of substantial control at the time of the act.\textsuperscript{187} According to affirmative defense advocates, claims of sleepwalking are too difficult to refute and too easy to fake, and therefore, the burden of proof should remain with the defendant.\textsuperscript{188}

B. The Voluntary Act: The Prosecution’s Burden

Some jurisdictions have left open the possibility of placing the burden of proof on the prosecution to establish that the defendant was not sleepwalking.\textsuperscript{189} Under this approach, the prosecution would have to disprove the defendant’s claim of sleepwalking.\textsuperscript{190}

The MPC implicitly supports placing the burden of proof on the prosecution through the voluntary act requirement.\textsuperscript{191} The MPC requires proof of a voluntary act for criminal culpability and defines sleepwalking as a non-voluntary act.\textsuperscript{192} A voluntary act is an essential element of any crime, and sleepwalking defendants would be acquitted if the jury believed that they were sleepwalking at the time of the act.\textsuperscript{193} According to this argument, volition is the primary concern, so sleepwalkers, who are incapable of voluntary actions as a matter of law, are incapable of committing criminal acts.\textsuperscript{194} If sleepwalkers are not responsible for their actions, they need not excuse their conduct.\textsuperscript{195}

In 1981, in \textit{Fulcher v. State}, the Supreme Court of Wyoming held that the unconsciousness/automatism defense is separate from the defense of insanity, and the burden of establishing automatism/un-
consciousness rests upon the defendant, unless it arises from the prosecution’s evidence. The court provided sleepwalking as an example of when an automatism/unconsciousness instruction should apply. The language of the Fulcher opinion is ambiguous, and it could be interpreted to suggest that the burden of proof may shift to the prosecution if, and only if, evidence presented by the prosecution would lead the fact finder to believe that the defendant perpetrated the allegedly criminal act while sleepwalking.

Subsequently, in 1997, the Court of Appeals of North Carolina in State v. Connell ordered a new trial of the defendant accused of sexual assault of a minor, in part because the trial court failed to instruct the jury with an unconsciousness defense. The facts showed that the defendant went to bed and fell asleep, soon to be joined by his girlfriend and her daughter. The defendant was accused of sexually molesting his girlfriend’s daughter during the night. He claimed that even if he did commit the acts in question, he was asleep at the time. The court set forth an ambiguous opinion, faulting the prosecution for failing to provide any evidence that the defendant was awake, while simultaneously affirming the defendant’s duty to raise sleepwalking as an affirmative defense. The court noted the lack of judicial precedent as to who should bear the burden of proving sleepwalking behavior. Like Fulcher, where the court relied on the same interpretation of the unconsciousness defense, one possible interpretation of the Connell court’s decision is that the burden of disproving the defendant’s sleepwalking shifts to the prosecution if the prosecution presents evidence suggesting that the defendant may have been asleep.

196 633 P.2d at 147.
197 See id. app. at 147.
198 See id. at 147 (“We now hold that, under the law of this state, unconsciousness, or automatism . . . is an affirmative defense; and that the burden rests upon the defendant to establish this defense, unless it arises out of the State’s own evidence, to the satisfaction of the jury.” (quoting State v. Caddell, 215 S.E.2d 348, 363 (N.C. 1975))); see also Connell, 493 S.E.2d at 296.
199 493 S.E.2d at 296, 297.
200 Id. at 294.
201 Id.
202 See id. at 296.
203 Connell, 493 S.E.2d at 296 (“Although our research discloses no case law as to whether being asleep is an appropriate circumstance that requires an unconsciousness or diminished capacity instruction, we conclude that on this record both instructions would be proper.”).
204 See id. at 294–95 (stating that “there was no evidence presented to suggest that the defendant was awake at the time of the alleged incident”); Fulcher, 633 P.2d at 147; see also
IV. A NEW AND COMPREHENSIVE SLEEPWALKING DEFENSE

Sleepwalking should be recognized as a defense to criminal charges. Current sleepwalking defenses do not account for the available medical information on sleepwalking. The insanity defense rests on the false presumption that sleepwalking is a mental defect. Criminal defendants who wish to raise a defense of sleepwalking find themselves at the mercy of the courts, which have failed to apply the sleepwalking defense consistently. These inconsistencies are further exacerbated by the scarcity of judicial opinions addressing the legal analysis of sleepwalking defenses. Courts need to apply the defense consistently using objective criteria to evaluate the defendant’s claim of sleepwalking. This Note advocates a distinct, affirmative defense of sleepwalking to accommodate the unique mental and physical characteristics of sleepwalking.

A. Problems with Current Sleepwalking Defenses

The preceding review of case law exposes inconsistencies in the application of the sleepwalking defense. Courts have classified sleepwalking defenses as unconsciousness, automatism, or insanity. Some courts allow sleepwalking as an affirmative defense whereas

New Jersey v. Overton, 815 A.2d 517, 522 (N.J. Super. Ct. App. Div. 2003) (stating that once a defendant raises a question of his or her mental state the prosecution must establish beyond a reasonable doubt that the defendant acted consciously, purposely, and knowingly).

See Overton, 815 A.2d at 522; Broughton et al., supra note 6, at 263 (laying to rest any worries that sleepwalking defenses might be abused). Sleepwalking defenses have been available for over one hundred years and the defense has been used sparingly. See Broughton et al., supra note 6, at 263. Furthermore, it would be extremely difficult for a defendant to fake the genetic history and medical evidence necessary to establish a persuasive sleepwalking defense. See id.

Smith & Shapiro, supra note 54, at 33; see Fenwick, supra note 8, at 979–80; see also Howard & D’Orbán, supra note 6, at 925 (chastising courts for their failure to consider the medical realities of sleepwalking, and recommending that courts faced with the sleepwalking defense “should not exploit medical terminology in a manner which, as things stand, does no justice to medical thinking”); supra notes 26–59 and accompanying text (reviewing medical information on sleepwalking).

See supra notes 30–35 and accompanying text.

See supra note 9 and accompanying text.

See Smith & Shapiro, supra note 54, at 33.

See Denno, supra note 9, at 357.

See infra notes 256–319 and accompanying text.

See supra notes 102–205 and accompanying text.

See supra notes 102–169 and accompanying text.
other courts place the burden of proof on the prosecution.\footnote{215} Inconsistently, application of the sleepwalking defense prejudices criminal defendants who rely on judicial precedent and leaves judges wondering how to instruct juries on the sleepwalking defense.\footnote{216} Much depends on the resolution of the essential question—who should bear the burden of proof at a criminal trial when sleepwalking is raised as a defense?\footnote{217} Criminal defendants raising the sleepwalking defense have their freedom at stake and are greatly concerned with consistent application of the defense.\footnote{218} Existing defenses purporting to protect sleepwalking defendants are not sufficiently adapted to the medical information available on the causes and effects of sleepwalking.\footnote{219}

1. Sleepwalking Is Neither Automatism Nor Unconsciousness

Sleepwalking is a peculiar and distinct medical phenomenon, and medical information on sleepwalking does not support the current practice of lumping sleepwalking in with the automatism and unconsciousness defenses.\footnote{220} Classifying sleepwalking as automatism or unconsciousness oversimplifies the issue.\footnote{221} Unconsciousness is a state of temporary mental incapacity; automatism is a state of involuntary bodily movement.\footnote{222} Both the automatism and unconsciousness defenses are based on a premise of involuntary action and thought, which is not supported by medical evidence on sleepwalking.\footnote{223}

Sleepwalking is not exactly automatism because the sleepwalker’s bodily movements are not clearly involuntary.\footnote{224} First, sleepwalkers are solely responsible for their physical movements; their movements are directed by their own actions, not some external impetus.\footnote{225} Second, based on the medical and psychological evidence of sleepwalking, the sleepwalker’s actions may be partially voluntary.\footnote{226}

\footnote{215} See \textit{supra} notes 170–205 and accompanying text.
\footnote{216} See Denno, \textit{supra} note 9, at 284–85.
\footnote{217} See Grant, \textit{supra} note 8, at 1002.
\footnote{218} See McClain v. Indiana, 678 N.E.2d 104, 109 (Ind. 1997); Denno, \textit{supra} note 9, at 284–85.
\footnote{219} See Smith & Shapiro, \textit{supra} note 54, at 33; \textit{supra} notes 26–59 and accompanying text.
\footnote{220} Smith & Shapiro, \textit{supra} note 54, at 33; see \textit{supra} notes 26–59 and accompanying text.
\footnote{221} Smith & Shapiro, \textit{supra} note 54, at 33; see \textit{Corrado}, \textit{supra} note 9, at 1553; Fenwick, \textit{supra} note 32, at 575.
\footnote{222} See \textit{supra} notes 107–108 and accompanying text.
\footnote{223} See Smith & Shapiro, \textit{supra} note 54, at 33; see \textit{supra} notes 26–59 and accompanying text.
\footnote{224} See Smith & Shapiro, \textit{supra} note 54, at 32; \textit{supra} notes 79–87 and accompanying text.
\footnote{225} See \textit{Corrado}, \textit{supra} note 9, at 1553–54; Morse, \textit{supra} note 63, at 1646.
\footnote{226} Smith & Shapiro, \textit{supra} note 54, at 32; see \textit{supra} notes 26–59 and accompanying text.
searchers disagree about whether sleepwalking is automatism and, therefore, the legal classification of sleepwalking as a form of automatism lacks a consistent medical basis.\textsuperscript{227}  

Furthermore, sleepwalking is not unconsciousness because the sleepwalker is not temporarily mentally incapacitated.\textsuperscript{228}  Sleep research suggests that sleepwalking is a physiological condition of the body, not a psychological condition of the mind.\textsuperscript{229}  Sleepwalkers do not suffer from mental incapacity or psychological disorders, and consequently, they have no temporary mental incapacitation.\textsuperscript{230}  

The medical information available on sleepwalking suggests that many factors contribute to sleepwalking behavior.\textsuperscript{231}  People prone to sleepwalking can reduce or even eliminate sleepwalking episodes though simple lifestyle changes, such as reduced alcohol and drug consumption, regular sleeping schedules, and stress reduction.\textsuperscript{232}  Research suggests that sleepwalkers have the ability to mitigate sleepwalking violence.\textsuperscript{233}  This suggests that sleepwalking is not completely beyond the sleepwalker’s control as unconsciousness or automatism would suggest, but rather it is preventable and curable.\textsuperscript{234}  

Rather than considering the factors contributing to sleepwalking, courts have been more comfortable treating sleepwalking as a defense based on involuntary mental incapacity (unconsciousness) or physical incapacity (automatism).\textsuperscript{235}  Automatism and unconsciousness do not adequately describe the defense of sleepwalking, and they reduce sleepwalking to a simple physical or mental disorder, when in fact sleepwalking is a combination of physical, genetic, and environmental

\begin{footnotesize}
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\item \textsuperscript{227} See Masand et al., supra note 30, at 650.
\item \textsuperscript{228} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457; Mahowald et al., supra note 32, at 420.
\item \textsuperscript{229} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457; Howard & D’Orbán, supra note 6, at 922; Mahowald et al., supra note 32, at 420.
\item \textsuperscript{230} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457; Howard & D’Orbán, supra note 6, at 922; Mahowald et al., supra note 32, at 420.
\item \textsuperscript{231} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Mahowald et al., supra note 32, at 420, 426; Masand et al., supra note 30, at 650–52.
\item \textsuperscript{232} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457–58.
\item \textsuperscript{233} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457–58.
\item \textsuperscript{234} Principles and Practice of Sleep Medicine, supra note 30, at 701; see Gilmore, supra note 33, at 457–58.
\item \textsuperscript{235} See supra notes 102–139 and accompanying text.
\end{enumerate}
\end{footnotesize}
conditions that lead the sleepwalker to commit acts of violence.\textsuperscript{236} If sleepwalking can be justified as a defense to criminal culpability it is not because the sleepwalker suffers from a simple mental or physical incapacity.\textsuperscript{237}

2. Sleepwalking Is Not Insanity

The defense of insanity is not a proper means of evaluating a sleepwalking defense.\textsuperscript{238} Under the insanity defense, defendants generally must prove that they suffered from a mental defect or disorder.\textsuperscript{239} Sleepwalking is not a mental disorder, and therefore, the defense of insanity is rendered useless because sleepwalking does not result from a mental disease or defect.\textsuperscript{240}

Insanity was thought to be a proper sleepwalking defense at a time when sleepwalking was viewed as a type of insanity.\textsuperscript{241} Sleepwalking has not been raised successfully as a defense of insanity since the 1925 case of \textit{Bradley v. State}, when the Texas Court of Criminal Appeals based its ruling on outdated medical information on sleepwalking.\textsuperscript{242} The court reasoned implicitly that if modern science (as of 1925) characterized sleepwalking as a form of insanity, then the law might as well do the same.\textsuperscript{243} The court reversed the defendant’s conviction because the trial court should have allowed the defendant to present his defense of sleepwalking through an insanity defense.\textsuperscript{244}

More recently, in 1997, in \textit{McClain v. Indiana}, the Indiana Supreme Court ruled that insanity was a separate defense from sleepwalking and automatism.\textsuperscript{245} The court reasoned that policies behind the insanity defense counsel against classifying automatism as a mental disease or defect.\textsuperscript{246} The court was concerned about the fairness of punishing automatist defendants and attempts to correct their behavior.\textsuperscript{247} Defendants found not guilty by reason of insanity are confined

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\textsuperscript{236} \textit{See supra} notes 220–234 and accompanying text.
\textsuperscript{237} \textit{See supra} notes 220–234 and accompanying text.
\textsuperscript{238} Fenwick, \textit{supra} note 8, at 980; \textit{see supra} notes 30–35, 156–169 and accompanying text.
\textsuperscript{239} \textit{See Grant}, \textit{supra} note 8, at 1004.
\textsuperscript{240} \textit{See McClain}, 678 N.E.2d at 108–09; Gilmore, \textit{supra} note 33, at 457.
\textsuperscript{242} \textit{See id.}
\textsuperscript{243} \textit{See id.}
\textsuperscript{244} \textit{See id.} at 149, 150.
\textsuperscript{245} 678 N.E.2d at 108.
\textsuperscript{246} \textit{See id.} at 108–09.
\textsuperscript{247} \textit{See id.}
\end{footnotes}
to mental institutions to correct their mental defects and to mitigate further harm to themselves and others.\textsuperscript{248} The policy of correcting a defendant’s mental defect clearly does not apply to defendants who commit sleepwalking violence.\textsuperscript{249} Sleepwalkers are not insane, and consequently, mental institutions cannot correct a defect that does not exist.\textsuperscript{250} By rejecting the insanity defense in cases where the defendant raises sleepwalking as a defense, the \textit{McClain} court recognized that sleepwalking is substantially different from insanity, and the two defenses should remain separate.\textsuperscript{251} Following the lead of \textit{McClain}, other jurisdictions should not recognize sleepwalking as an insanity defense.\textsuperscript{252}

Traditional and modern doctrines of sleepwalking are ill-adapted to trying defendants who raise the sleepwalking defense.\textsuperscript{253} Case law and legal scholarship provide no consistent formula for evaluating sleepwalking defenses.\textsuperscript{254} Sleepwalking is a unique medical condition, and the defenses of unconsciousness, automatism, and insanity are not equipped to handle the defense of sleepwalking.\textsuperscript{255}

\textbf{B. Proposed Resolution}

Because existing defenses are ill-equipped to handle sleepwalking defenses, sleepwalking should be a separate, affirmative defense with the burden of proof on the defendant.\textsuperscript{256} The defense should apply when either the defense or the prosecution offers evidence suggesting that the defendant may have been asleep at the time of the alleged crime.\textsuperscript{257} Defendants should be given an opportunity to prove that they were sleepwalking at the time of the crime and that the sleepwalking was sufficiently debilitating to render them incapable of committing criminal acts.\textsuperscript{258} A distinct affirmative defense for sleepwalking would provide courts with a consistent, scientific, and specific

\begin{footnotesize}
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\item \textsuperscript{248} Fenwick, supra note 8, at 980; see \textit{McClain}, 678 N.E.2d at 109.
\item \textsuperscript{249} Fenwick, supra note 8, at 980; Fenwick, supra note 32, at 575; see \textit{McClain}, 678 N.E.2d at 109.
\item \textsuperscript{250} Fenwick, supra note 8, at 980; Fenwick, supra note 32, at 575; see Grant, supra note 8, at 1004–05.
\item \textsuperscript{251} See \textit{McClain}, 678 N.E.2d at 108.
\item \textsuperscript{252} See \textit{id}.
\item \textsuperscript{253} See supra notes 213–252 and accompanying text.
\item \textsuperscript{254} See supra notes 213–252 and accompanying text.
\item \textsuperscript{255} See supra notes 213–252 and accompanying text.
\item \textsuperscript{256} See Smith & Shapiro, supra note 54, at 33; Morse, supra note 63, at 1651–52.
\item \textsuperscript{257} See \textit{Overton}, 815 A.2d at 522; Fulcher v. State, 633 P.2d 142, 147 (Wy. 1981).
\item \textsuperscript{258} See Fenwick, supra note 5, at 355.
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formula for determining criminal culpability.\textsuperscript{259} Criminal defendants would no longer have to guess whether sleepwalking could be admitted as an unconsciousness defense, an automatism defense, an insanity defense, or rejected altogether.\textsuperscript{260} Courts should evaluate, on a case-by-case basis, the credibility of the defendant’s sleepwalking claim according to a reliable, objective set of criteria based on empirical medical research.\textsuperscript{261}

1. Incorporation of Medical Evidence on Sleepwalking

Current legal doctrines of sleepwalking do not adequately address what sleepwalking is, how it works, and how it affects the sleepwalker’s body and mind.\textsuperscript{262} In \textit{Fain v. Commonwealth}, the Court of Appeals of Kentucky declared that the law must acknowledge the medical phenomenon of sleepwalking and offer the defendant an opportunity to present the defense.\textsuperscript{263} Implicit in the decision is the belief that the law should respond to medical information on sleepwalking to determine the defendant’s criminal culpability.\textsuperscript{264}

Sleepwalking defenses should be evaluated using objective criteria consistent with the medical information available on sleepwalking.\textsuperscript{265} Sleepwalking research has identified several trigger factors contributing to the onset of sleepwalking episodes.\textsuperscript{266} These factors include the following: drug and alcohol use, irregular sleep patterns or sleep deprivation, and environmental stresses.\textsuperscript{267} Courts should use this information to evaluate the credibility of defendants claiming that they were sleepwalking at the time of the alleged crimes.\textsuperscript{268}

\textsuperscript{259} See Denno, \textit{supra} note 9, at 357.
\textsuperscript{260} See id. at 284–85. Defendants may also fear that expert testimony on sleepwalking might be excluded altogether. See People v. Cegers, 9 Cal. Rptr. 2d 297, 298 (Cal. Ct. App. 1992).
\textsuperscript{261} See Denno, \textit{supra} note 9, at 357. This proposal is implicitly supported in a thorough analysis of a recent decision of the Supreme Court of Canada affirming the acquittal of Kenneth Parks, who drove to the home of his parents-in-law while sleepwalking, and assaulted his father-in-law and killed his mother-in-law. See Broughton et al., \textit{supra} note 206, at 254–60.
\textsuperscript{262} See Fenwick, \textit{supra} note 5, at 355.
\textsuperscript{263} 78 Ky. 183, 188 (1879).
\textsuperscript{264} See \textit{id}. at 188.
\textsuperscript{265} See \textit{PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, supra} note 30, at 704; Fenwick, \textit{supra} note 5, at 353–55.
\textsuperscript{266} Fenwick, \textit{supra} note 5, at 347, 350, 354; Mahowald et al., \textit{supra} note 32, at 420, 423; Masand et al., \textit{supra} note 30, at 652.
\textsuperscript{267} See Fenwick, \textit{supra} note 5, at 347, 350, 354; Mahowald et al., \textit{supra} note 32, at 420, 423; Masand et al., \textit{supra} note 30, at 652.
\textsuperscript{268} See Overton, 815 A.2d at 520; Fenwick, \textit{supra} note 5, at 353–55.
Furthermore, sleep experts have identified medical conditions that are commonly associated with sleepwalking. Sleepwalking typically occurs within the first two or three hours of sleep. A family history of sleepwalking raises the likelihood that the defendant suffers from sleepwalking. Past instances of sleepwalking suggest a predisposition to sleepwalking. Sleepwalking rarely begins after childhood, and children are more likely to sleepwalk than adults. In the absence of these conditions, a defendant’s claim of sleepwalking at the time of the act should be doubted. Proof of these conditions would bolster a claim that the defendant was sleepwalking at the time of the act.

2. The New Sleepwalking Defense

The sleepwalking defense should be a multi-factored balancing test setting forth specific criteria, which if proven, would result in acquittal. Judges should instruct juries on the sleepwalking defense, and juries should be left to determine whether, based on the medical and circumstantial evidence presented at trial and the guidelines of the defense, the defendant was sleepwalking during the alleged crime. If the jury determines that the defendant was sleepwalking, it should acquit. An effective and consistent sleepwalking defense should evaluate specific medical and circumstantial criteria in determining whether the defendant was sleepwalking. The following discussion proposes

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269 Principles and Practice of Sleep Medicine, supra note 30, at 701, 704; see Fenwick, supra note 5, at 355–55.

270 Fenwick, supra note 5, at 346, 354; Gilmore, supra note 33, at 455.

271 Principles and Practice of Sleep Medicine, supra note 30, at 700; see Fenwick, supra note 5, at 346, 354; Gilmore, supra note 33, at 455; Mahowald et al., supra note 32, at 420; Masand et al., supra note 30, at 650–51.

272 See Fenwick, supra note 5, at 354; Mahowald et al., supra note 32, at 426.

273 Principles and Practice of Sleep Medicine, supra note 30, at 701; Fenwick, supra note 5, at 354; Gilmore, supra note 33, at 455; Masand et al., supra note 30, at 649–50.

274 Principles and Practice of Sleep Medicine, supra note 30, at 701; Gilmore, supra note 33, at 455; Mahowald et al., supra note 32, at 420; Masand et al., supra note 30, at 649; Schenck et al., supra note 29, at 1170.

275 See Fenwick, supra note 5, at 353–55; Mahowald et al., supra note 32, at 426.

276 See Fenwick, supra note 5, at 353–55.

277 See id.

278 See id.

279 See id.; Howard & D’Orbán, supra note 6, at 923 (“Running through many judicial decisions [in Britain] is a recognition that there are cases of automatism in which it seems unfair to impute moral responsibility and unnecessary to impose restriction.”).

280 See Fenwick, supra note 5, at 353–55.
criteria for courts to consider in evaluating a defendant’s claim of sleepwalking.\textsuperscript{281}

a. Evidence of Sleepwalking at the Time of the Crime

In evaluating evidence of possible sleepwalking at the time of the crime courts should compare the nature of the criminal act with the degree of control exhibited by the defendant.\textsuperscript{282} The nature of the criminal act affects the credibility of the defendant’s claim of sleepwalking in proportion to the complexity of the crime.\textsuperscript{283} Some crimes require more complex actions than others.\textsuperscript{284} Violent crimes involving simple motions are more likely to occur during sleepwalking than crimes that require planning and intricate thought.\textsuperscript{285} For example, sleepwalking is a much more persuasive defense to assault and battery than it is to shoplifting.\textsuperscript{286} The degree of control exhibited by the defendant is also relevant to the credibility of the sleepwalking claim.\textsuperscript{287} For example, a defendant who tied his friend to a chair and abused him over the course of several hours was probably not sleepwalking, but if he pushed his friend down the stairs, his claim of sleepwalking would be more credible.\textsuperscript{288} The nature of the crime should be compared with the degree of control exhibited by the sleepwalker to determine if, based on the comparison, the resulting behavior took place while the defendant was asleep.\textsuperscript{289}

b. Elapsed Time

Sleepwalking usually occurs within the first two or three hours of sleep.\textsuperscript{290} The time when the defendant fell asleep should be consid-

\begin{itemize}
\item \textsuperscript{281} See infra notes 282–307 and accompanying text.
\item \textsuperscript{282} See Fenwick, supra note 5, at 353–55; Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{283} See Fenwick, supra note 5, at 353–55; Masand et al., supra note 30, at 652; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{284} See Fenwick, supra note 5, at 353–55; Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{285} See Mahowald et al., supra note 32, at 426; Masand et al., supra note 30, at 652.
\item \textsuperscript{286} See Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{287} See Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{288} See Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{289} See Mahowald et al., supra note 32, at 426; Oswald & Evans, supra note 26, at 691.
\item \textsuperscript{290} Principles and Practice of Sleep Medicine, supra note 30, at 701; Abe & Shimakawa, supra note 32, at 306; Fenwick, supra note 32, at 574; Grant, supra note 8, at 1007; Hartmann, supra note 32, at 121; Kales et al., supra note 32 at 1407; see Fenwick, supra note 5, at 346; Mahowald et al., supra note 32, at 426.
\end{itemize}
ered to determine if the crime took place within the three hour window.291 If a crime occurs more than two hours after the defendant fell asleep, the defendant’s claim of sleepwalking becomes less credible.292

c. Predisposition to Sleepwalking

A defendant’s history of sleepwalking, genetics, and age should be taken into account when evaluating sleepwalking defenses.293 Sleepwalking generally does not occur in isolated incidences;294 a history of the defendant’s sleepwalking episodes will help determine if the defendant was sleepwalking during the crime.295 Family members, spouses, and friends are often available to testify about the defendant’s sleeping habits.296 A family history of sleepwalking increases the likelihood that the defendant is genetically prone to sleepwalking and should be considered by the court.297 The age of the defendant is also relevant;298 sleepwalking is much more common in children than adults and rarely begins after childhood.299 For example, a middle-aged defendant with no prior instances of sleepwalking and no family history of sleepwalking is not likely to succeed on a sleepwalking defense.300

d. Trigger Factors

Ingestion of drugs, alcohol, and medication can trigger sleepwalking episodes.301 Allegations of sleepwalking become more credible when defendants can prove that they ingested any of these sub-

291 See Fenwick, supra note 5, at 354; Gilmore, supra note 33, at 455.
292 See Fenwick, supra note 5, at 354; Gilmore, supra note 33, at 455.
293 See Fenwick, supra note 5, at 353–55; Mahowald et al., supra note 32, at 426; Masand et al., supra note 30, at 651–52.
294 See Fenwick, supra note 5, at 354; Mahowald et al., supra note 32, at 426.
295 See Masand et al., supra note 30, at 652.
296 See Mahowald et al., supra note 32, at 425; Masand et al., supra note 30, at 652.
297 Fenwick, supra note 5, at 346, 353–55; Gilmore, supra note 33, at 455; Mahowald et al., supra note 32, at 420; Masand et al., supra note 63, at 650–51.
298 See Principles and Practice of Sleep Medicine, supra note 30, at 701; Abe & Shimakawa, supra note 32, at 308; Fenwick, supra note 5, at 354; Gilmore, supra note 33, at 455; Kales et al., supra note 32, at 1408; Karacan, supra note 38, at 132; Masand et al., supra note 63, at 649–50.
299 Principles and Practice of Sleep Medicine, supra note 30, at 701; Abe & Shimakawa, supra note 32, at 308; Fenwick, supra note 5, at 354; Gilmore, supra note 33, at 455; Kales et al., supra note 32, at 1408; Karacan, supra note 38, at 132; Masand et al., supra note 63, at 649–50; Reid et al., supra note 31, at 28; Schenck et al., supra note 29, at 1170.
300 See Fenwick, supra note 5, at 354–55; Oswald & Evans, supra note 26, at 691.
301 See supra note 52 and accompanying text.
stances prior to the alleged crime.\textsuperscript{302} Irregular sleep patterns, sleep deprivation, and stress are also probative of sleepwalking.\textsuperscript{303}

e. Circumstantial Evidence

Courts should also consider any other relevant information which tends to support or refute the defendant’s claim of sleepwalking.\textsuperscript{304} Motive and premeditation decrease the likelihood that the defendant was sleepwalking.\textsuperscript{305} Because sleepwalking behavior is usually impulsive and senseless, the act of sleepwalking violence should seem random, and there should be no signs of premeditation.\textsuperscript{306} Victims of sleepwalking violence tend to be those who aroused the sleepwalker or who just happened to be nearby at the wrong time.\textsuperscript{307}

3. The Balancing Test

All five of the following factors should be considered in determining the credibility of the defendant’s sleepwalking defense: (1) evidence of sleepwalking at the time of the crime, (2) elapsed time between falling asleep and the criminal act, (3) trigger factors, and (4) medical factors, (5) circumstantial evidence.\textsuperscript{308} Courts should adopt a balancing test of these criteria when evaluating a sleepwalking defense.\textsuperscript{309} If the court determines that evidence supporting the defendant’s claim of sleepwalking is credible, the jury should be instructed to weigh the evidence to determine if the defendant was sleepwalking at the time of the crime.\textsuperscript{310} The relative weight of the five criteria depends

\textsuperscript{302} See Fenwick, \textit{supra} note 5, at 353–55; Mahowald et al., \textit{supra} note 32, at 423, 426; Masand et al., \textit{supra} note 30, at 652.

\textsuperscript{303} See \textit{supra} note 52 and accompanying text.

\textsuperscript{304} See Fenwick, \textit{supra} note 5, at 354–55; Mahowald et al., \textit{supra} note 32, at 426.

\textsuperscript{305} See Fenwick, \textit{supra} note 5, at 354; Howard & D’Orbán, \textit{supra} note 6, at 920; Mahowald et al., \textit{supra} note 32, at 426.

\textsuperscript{306} Howard & D’Orbán, \textit{supra} note 6, at 920; see Mahowald et al., \textit{supra} note 32, at 426.

\textsuperscript{307} See Mahowald et al., \textit{supra} note 32, at 426.

\textsuperscript{308} See Fenwick, \textit{supra} note 5, at 353–55; Gilmore, \textit{supra} note 33, at 455, 457–58; Mahowald et al., \textit{supra} note 32, at 420, 426; Masand et al., \textit{supra} note 30, at 652.

\textsuperscript{309} See Fenwick, \textit{supra} note 5, at 353–55; Mahowald et al., \textit{supra} note 32, at 426.

\textsuperscript{310} See Fenwick, \textit{supra} note 5, at 353–55; Mahowald et al., \textit{supra} note 32, at 426. A group of doctors and lawyers analyzing the recent prosecution of Kenneth Parks (in Canada) believe that the jury, in acquitting Parks on the charge of murder, employed a similar balancing test. See Broughton et al., \textit{supra} note 206, at 263. Parks displayed most of the symptoms of sleepwalking outlined in this Note: the killing lacked motive, Parks had many sleepwalkers in his family, the timing of the attack was not inconsistent with the length of a sleepwalking episode and occurred within three hours of Parks falling asleep, and Parks had been suffering from severe stress and anxiety prior to the attack. \textit{Id.} at 256, 260–62.
on the nature of the charge and the specific facts of the case.\footnote{See Fenwick, supra note 5, at 353–55; Mahowald et al., supra note 32, at 426.} The judge should instruct the jury to acquit if the jurors reasonably believe the defendant was sleepwalking during the crime.\footnote{See Overton, 815 A.2d at 522.}

4. Affirmative Defense

Fairness demands that defendants bear the burden of proving sleepwalking.\footnote{See Morse, supra note 63, at 1651–52.} The defendant has the best access to evidence of sleepwalking.\footnote{See id.} A family history of sleepwalking and previous instances of sleepwalking are more readily obtained by the defendant than the prosecution.\footnote{See id.} Requiring an affirmative sleepwalking defense deters unfounded sleepwalking defenses by placing the burden of proof on the criminal defendant.\footnote{See id.}

The sleepwalking defense presumes that defendants who prove that they were sleepwalking at the time of the crime, and had no control over that behavior, should be acquitted.\footnote{See Davidson & Walters, supra note 143, at 19–20.} The sleepwalking defense would be a complete defense to criminal culpability.\footnote{See id.} Sleepwalkers act without complete discretion over their actions and they should not be held criminally culpable for actions they cannot reasonably restrain.\footnote{See Hart, supra note 73, at 153; Saks, supra note 62, at 434.}

**Conclusion**

On rare occasions, defendants facing criminal charges have claimed they were sleepwalking during the crime and should not be held culpable for their actions. Due to a lack of judicial and scholastic precedent on the topic, courts have been inconsistent in trying these defendants. The traditional response has been to treat sleepwalking as an unconsciousness, automatism, or insanity defense, whereby defendants must prove that they were mentally or physically incapacitated at the time of the criminal act. Those defenses have offered little consistency in application and have failed to respond to current medical

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\footnote{The jury acquitted Parks of murder, and the prosecution did not challenge the acquittal on appeal. \textit{Id.} at 263.}
knowledge of sleepwalking, which suggests that sleepwalking is a unique physiological disorder. In response, there should be a new, separate sleepwalking defense, which takes into account the available medical information on sleepwalking. The sleepwalking defense should be a balancing test designed to provide juries with a consistent formula for determining if the defendant was sleepwalking at the time of the crime. It should be an affirmative defense, and the judge should instruct the jury to acquit if they believe the defendant was sleepwalking.

Mike Horn
THE SELECTIVE USE OF ADMINISTRATIVE REGULATIONS IN CREATING RIGHTS ENFORCEABLE THROUGH § 1983 ACTIONS

Abstract: For over 125 years, 42 U.S.C. § 1983 has provided a means for plaintiffs to bring a cause of action against any person acting under color of state law who deprives them of their rights. Since the U.S. Supreme Court expanded § 1983 to encompass remedies for violations of rights secured by federal laws, federal circuit courts of appeals have disagreed whether federal agency regulations, in addition to federal statutes, can create rights enforceable under § 1983. This Note explores this debate, as well as the Court’s treatment of federal regulations and the evolution of the Court’s approach to recognizing individual rights under § 1983. This Note argues that those regulations that create cognizable rights, that possess the full force and effect of law, and that deserve judicial deference should be eligible to create § 1983 interests. This Note also argues that both our modern administrative state and public policy considerations support the derivation of § 1983 interests from federal regulations.

Introduction

The 2003 decision of the Ninth Circuit Court of Appeals in Save Our Valley v. Sound Transit refreshed the debate among federal circuit courts of appeals over whether federal administrative agency regulations may create rights enforceable under 42 U.S.C. § 1983.1 Section 1983 provides a mechanism for individuals to bring causes of action against any person acting under color of state law who violated their rights.2 Although the statute alone does not create substantive federal rights, it provides a private remedy to individuals for the actions of state officials that deprive them of rights that already are established.3 Until 1980, claimants could only bring § 1983 actions for violations of constitutional rights.4 The U.S. Supreme Court then expanded § 1983 to encompass remedies for violations of federal laws.5

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1 335 F.3d 932, 936 (9th Cir. 2003); see infra notes 121–194 and accompanying text.
3 See id.
4 See Maine v. Thiboutot, 448 U.S. 1, 4 (1980).
5 See id.
The current controversy among federal circuit courts of appeals focuses on whether § 1983 should include remedies for violations of rights created by federal administrative agency regulations.\textsuperscript{6} Congress has delegated the ability to create regulations to federal administrative agencies.\textsuperscript{7} Although courts recognize regulations as carrying varying degrees of validity and weight, the Supreme Court has not ruled on whether Congress intended regulations, as a class, to create interests that can be used as grounds for § 1983 actions.\textsuperscript{8} As § 1983 suits allow individuals to safeguard their federal rights against actions of the state, the resolution to this controversy will determine whether a host of new regulatory rights can be recognized and preserved through private enforcement.\textsuperscript{9} If a multitude of federal agency regulations could create rights enforceable under § 1983, plaintiffs would enjoy far greater protection than if such rights could only find origin in federal statutes.\textsuperscript{10} For example, if federal Medicaid regulations afforded recipients the right to certain grievance procedures before the termination of their benefits and a state Medicaid plan failed to provide such a process, a recipient under the state plan would be able to bring a § 1983 action against officials of that state.\textsuperscript{11} If regulations could not create rights enforceable under § 1983, however, the right to such grievance procedures would need to be directly articulated by statute for a plaintiff to sue under § 1983.\textsuperscript{12}

Beyond the potential that this debate has to restrict or to expand the application of § 1983, broader constitutional and administrative law issues are at stake.\textsuperscript{13} If regulations can create § 1983 rights, some courts are concerned that this will have the capacity to erode the power of statutes and will assign authority that Congress never intended regulations to possess.\textsuperscript{14} Alternatively, if regulations are prohibited from creating § 1983 interests, some courts are concerned

\textsuperscript{6} See infra notes 121–194 and accompanying text.
\textsuperscript{8} See infra notes 23–120 and accompanying text.
\textsuperscript{9} See 42 U.S.C. § 1983 (2000); infra note 258 and accompanying text.
\textsuperscript{10} See infra notes 258–260 and accompanying text.
\textsuperscript{11} See Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997); Samuels v. District of Columbia, 770 F.2d 184, 188 (D.C. Cir. 1985).
\textsuperscript{12} See Harris, 127 F.3d at 996; Samuels, 770 F.2d at 188.
\textsuperscript{13} See Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 438 (1987) (O’Connor, J., dissenting); Save Our Valley, 335 F.3d at 939; id. at 954–60 (Berzon, J., dissenting).
\textsuperscript{14} See Wright, 479 U.S. at 438 (O’Connor, J., dissenting); Save Our Valley, 335 F.3d at 939.
that this will minimize the role that administrative regulations play in the modern administrative state despite the increasing reliance that Congress necessarily must have on federal agencies. Ultimately, this controversy is demonstrative of problems that the judiciary encounters in attempting to preserve a delicate balance between reserving lawmaking authority for Congress while simultaneously recognizing the validity and necessity of the modern administrative state.

Part I of this Note reviews the U.S. Supreme Court’s treatment of federal administrative agency regulations during the past sixty years. This Part identifies different methods that the Court has used to measure the weight and import of regulations. Part II traces the historical application of § 1983 and the evolution of the Supreme Court’s approach to preserving individual rights under § 1983. Part III examines the current controversy among the federal circuit courts of appeals over whether federal administrative agency regulations can create rights enforceable under § 1983. Finally, Part IV argues that the requirements for statutes to create rights and for courts to accord respect to certain regulations provide stringent tests that should reveal those regulations that have the potential to create rights enforceable under § 1983. This Note argues that those regulations that create cognizable rights, that possess the full force and effect of law, and that deserve judicial deference should be eligible to create § 1983 interests.

I. THE SUPREME COURT AND FEDERAL ADMINISTRATIVE AGENCY REGULATIONS

The U.S. Supreme Court long has monitored the amount of authority possessed by regulations of federal administrative agencies. In 1944, in Skidmore v. Swift & Co., the Supreme Court declared a method of determining the amount of respect due to agency rulings

15 See Save Our Valley, 335 F.3d at 954–60 (Berzon, J., dissenting).
16 See Wright, 479 U.S. at 438 (O’Connor, J., dissenting); Save Our Valley, 335 F.3d at 939; id. at 954–60 (Berzon, J., dissenting).
17 See infra notes 23–81 and accompanying text.
18 See infra notes 23–81 and accompanying text.
19 See infra notes 82–120 and accompanying text.
20 See infra notes 121–194 and accompanying text.
21 See infra notes 195–284 and accompanying text.
22 See infra notes 195–284 and accompanying text.
and interpretations.\textsuperscript{24} Since that time, a sequence of more recent Supreme Court cases have simultaneously preserved and expanded upon this method.\textsuperscript{25} The result is a legal patchwork of approaches that guides principles of modern administrative law.\textsuperscript{26} 

In \textit{Skidmore}, the Supreme Court held that the nature and weight of an administrative agency’s rulings determine the degree to which courts should defer to the agency’s interpretations of a statute.\textsuperscript{27} In the case, workers sued their employer under the Fair Labor Standards Act of 1938 (the “FLSA”) for failing to provide overtime compensation for overnight on-call services.\textsuperscript{28} An administrator of the Department of Labor’s Wage and Hours Division, however, issued interpretive rules indicating that time spent on-call at night did not qualify as working time for the purposes of the FLSA.\textsuperscript{29} The Court determined that although the interpretations that the administrator issued could serve as an informed judgment, they were non-binding and should not control a court’s interpretation of the FLSA’s provisions.\textsuperscript{30} In arriving at this decision, the Court formulated a three-part test that determined the weight that courts should assign to such an administrative judgment.\textsuperscript{31} First, courts should consider the thoroughness of the agency’s consideration of the issue.\textsuperscript{32} Next, courts should examine the validity of the reasoning contained within the interpretive document.\textsuperscript{33} Finally, courts should evaluate the interpretative pronouncement’s “consistency with earlier and later pronouncements.”\textsuperscript{34} The degree to which agency interpretive rules satisfy these elements will determine how much respect and persuasiveness courts will afford them.\textsuperscript{35} 

Although in 1983, the Supreme Court would take up the issue of assigning deference to agency rules, in 1979, in \textit{Chrysler Corp. v. Brown}, the Court ruled on a closely related matter when it created an innovative multi-factorial measure for assigning authority to administrative

\begin{itemize}
\item \textsuperscript{24} See 323 U.S. at 140.
\item \textsuperscript{25} See \textit{Mead}, 533 U.S. at 234–35; \textit{Chevron}, 467 U.S. at 842–44; \textit{Chrysler}, 441 U.S. at 301–03, 312–15.
\item \textsuperscript{26} See \textit{Mead}, 533 U.S. at 234–35; \textit{Chevron}, 467 U.S. at 842–44; \textit{Chrysler}, 441 U.S. at 301–03, 312–15; \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{27} 323 U.S. at 140.
\item \textsuperscript{28} \textit{Id.} at 135.
\item \textsuperscript{29} \textit{Id.} at 137–38.
\item \textsuperscript{30} \textit{Id.} at 140.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\end{itemize}
regulations.\textsuperscript{36} The Court in \textit{Chrysler} considered a government contractor’s challenge, under the authority of the Freedom of Information Act, of the government’s requirement that the contractor disclose employment information.\textsuperscript{37} The Department of Labor’s Office of Federal Contract Compliance Programs promulgated regulations that required the contractor to furnish such information.\textsuperscript{38} In assessing the legitimacy of these regulations, the Court determined that regulations may have “the force and effect of law” if they satisfy a three-part test.\textsuperscript{39} First, regulations must fit the Administrative Procedure Act (the “APA”) definition of “substantive rules” rather than “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”\textsuperscript{40} Using the standard established in 1974, by the Supreme Court in \textit{Morton v. Ruiz}, the Court noted that a substantive rule “affect[s] individual rights and obligations.”\textsuperscript{41} Second, Congress must grant the requisite authority to the agency to promulgate the rule.\textsuperscript{42} There must be some “nexus” between the regulation and congressional legislative authority.\textsuperscript{43} Likewise, regulations must not exceed limitations set by Congress.\textsuperscript{44} Third, the agency must follow congressional procedural requirements when promulgating regulations.\textsuperscript{45} Those procedural requirements, prescribed by the APA, contain the minimal elements to which substantive regulations must conform.\textsuperscript{46} Agencies that issue regulations by affording notice to interested parties and permitting them an opportunity to comment prior to the creation of regulations have satisfied the APA’s procedural requirements.\textsuperscript{47}

In 1983, in \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, the Supreme Court articulated a measure of according deference to agency regulations by holding that if a statute is silent or ambiguous about its meaning and implications, courts should defer to the

\textsuperscript{36} See \textit{Chevron}, 467 U.S. at 842–44; \textit{Chrysler}, 441 U.S. at 301–03.
\textsuperscript{37} 441 U.S. at 286–87.
\textsuperscript{38} \textit{Id.} at 286.
\textsuperscript{39} \textit{Id.} at 301–03. For the origins of the phrase “force and effect of law,” see Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977), \textit{cited in Chrysler}, 441 U.S. at 295 n.18; U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 30 n.3 (1979).
\textsuperscript{40} \textit{Chrysler}, 441 U.S. at 301 (quoting 5 U.S.C. §§ 553(b)(3)(A), 553(d) (1974)).
\textsuperscript{41} \textit{Id.} at 302 (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 304.
\textsuperscript{44} \textit{Id.} at 302.
\textsuperscript{45} \textit{Chrysler}, 441 U.S. at 303.
\textsuperscript{46} 5 U.S.C. § 553 (2000); \textit{Chrysler}, 441 U.S. at 313.
\textsuperscript{47} See 5 U.S.C. § 553; \textit{Chrysler}, 441 U.S. at 313, 316.
appropriate administrative agency’s reasonable interpretation of that statute. The case involved judicial review of an Environmental Protection Agency ("EPA") interpretation of the term “stationary source” as included in the Clean Air Act Amendments of 1977. The EPA defined the term “stationary source” in a manner that led environmental advocates to bring this suit in hopes that the judiciary would review and reject the EPA definition. Justice John Paul Stevens’s majority opinion offered a two-step judicial review process of administrative agency interpretations of congressional acts. First, Justice Stevens identified the need for the reviewing court to determine whether Congress directly addressed the issue that the agency interpreted. Administrative agencies and courts must always defer to congressional speech on any question at issue because such speech is indicative of congressional intent. If Congress, however, has not spoken to the question at issue because it has written ambiguously or remained silent on a precise issue, the Court declared the second analytical step to be an examination of whether the administrative agency has offered a permissible construction of the statute. In this analysis, courts must defer to reasonable administrative agency interpretations. The Court’s rationale for this deference was that Congress intentionally leaves gaps and ambiguities within statutes so that it either explicitly or implicitly may delegate the task of policy development and rulemaking to federal administrative agencies.

Given this analytical framework, the Court in Chevron proceeded to look first to the plain meaning of the statutory language, and determined that it was not conclusive as to the meaning of the term “stationary source.” The Court then examined the legislative history to comb for congressional intent and found it “unilluminating.” Confident that Congress failed to address directly the meaning of the term, the Court declared the EPA’s interpretation of “stationary source” a “rea-

48 467 U.S. at 842–44.
49 Id. at 839–40.
50 See id.
51 See id. at 842–44.
52 Id. at 842.
53 Chevron, 467 U.S. at 842–43.
54 Id. at 843–44.
55 Id.
56 Id.
57 Id. at 859–62.
58 Chevron, 467 U.S. at 862–64.
sonable accommodation of . . . competing interests.” The Court thus granted deference to the EPA’s interpretation of the term because Congress delegated regulatory authority to EPA administrators, who are experts in the field of environmental safety, rather than to judges. The Court recognized potential criticism that the Court should not defer to interpretations of administrative agencies that are not held politically accountable for their actions. In anticipation of this criticism, the Court noted that the President, as head administrator, remains politically accountable for the entire system and is entitled to make policy choices to resolve conflicting interests of Congress. Thus, the Court held the EPA’s definition of “stationary source” to be a permissible construction of the Clean Air Act Amendments of 1977.

In 2001, in *United States v. Mead Corp.*, the Supreme Court reintroduced the *Skidmore* measures for courts to use in analyzing administrative agencies’ interpretations of statutory language apart from the test in *Chevron*. *Mead* involved regulations created by the Secretary of the Treasury that permitted the U.S. Customs Service to issue a ruling letter categorizing certain imports subject to tariff. An importer challenged a ruling letter, contending that the Customs Service improperly categorized certain imports and, therefore, that the imports should not be subject to tariff. Justice David Souter offered the opinion of an eight-justice majority, which held that, in determining the scope of the category of imports subject to tariff, the Court would not grant the Customs Service’s ruling letters the same amount of deference as the notice and comment regulations at issue in *Chevron*. The Court observed that the substantial degree of deference that the *Chevron* Court afforded an agency regulation can only be the consequence of both congressional intent that an agency possess the authority to promulgate regulations that carry the force of law and an agency’s proper use of such authority in issuing regulations. Congressional intent to give such authority is embedded in an agency’s capacity to create rules through a fair and deliberate administrative procedure.

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59 Id. at 865–66.
60 Id. at 865.
61 Id. at 865–66.
62 Id.
63 *Chevron*, 467 U.S. at 866.
64 See *Mead*, 533 U.S. at 234–35.
65 Id. at 221–22, 225.
66 Id. at 224–25.
67 Id. at 231; see *Chevron*, 467 U.S. at 843–44.
68 *Mead*, 533 U.S. at 226–27; see *Chevron*, 467 U.S. at 843–44.
appropriate for a credible pronouncement, such as the notice and comment procedures developed in the APA.\textsuperscript{69} According to the \textit{Mead} Court, only those regulations that are composed through proper notice and comment procedures or that bear a similar mark from Congress identifying a ruling as deserving respect typically earn the substantial level of deference found in \textit{Chevron}.\textsuperscript{70}

The \textit{Mead} Court also refused to assign substantial deference to the ruling letter because when the Customs Service issued such a pronouncement, it concerned only the importer and failed to clarify or to define rights or obligations beyond the specific matter at hand.\textsuperscript{71} The Customs Service was clear that the issued letters did not bind third parties.\textsuperscript{72} The Customs Service also put all third parties on notice that they could not assume reliance on such letters.\textsuperscript{73} The Court noted that in light of these features, classification rulings of the Customs Service more closely resembled “interpretations contained in policy statements, agency manuals, and enforcement guidelines” than the regulations promulgated through a notice and comment process.\textsuperscript{74} The Court determined that these attributes indicated that neither Congress nor the Customs Service intended the letters to carry the force of law.\textsuperscript{75} Therefore, the Court refrained from according the agency pronouncement \textit{Chevron} deference.\textsuperscript{76} In going beyond the precedent set forth in \textit{Chevron}, the Court in \textit{Mead} concluded that interpretive pronouncements of agencies still can be deemed persuasive to the degree that they satisfy the requirements that the Court set forth in \textit{Skidmore}.\textsuperscript{77} The Court reiterated the seminal factors, as described in \textit{Skidmore}, that determine the weight that the Court affords an agency interpretive rule and noted that they include ““the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.””\textsuperscript{78} The Court vacated the judgment of the Court of Appeals for the Federal Circuit in \textit{Mead} and remanded the case to the lower court because the Federal Circuit should have applied the \textit{Skidmore} assessment in tan-

\textsuperscript{69} \textit{Mead}, 533 U.S. at 230; see 5 U.S.C. § 553 (2000).
\textsuperscript{70} \textit{Mead}, 533 U.S. at 230–31; see 5 U.S.C. § 553; \textit{Chevron}, 467 U.S. at 843–44.
\textsuperscript{71} 533 U.S. at 232–33.
\textsuperscript{72} Id. at 233.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 234 (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)).
\textsuperscript{75} Id. at 231–33.
\textsuperscript{76} \textit{Mead}, 533 U.S. at 231; see \textit{Chevron}, 467 U.S. at 843–44.
\textsuperscript{77} See \textit{Mead}, 533 U.S. at 234–35; \textit{Skidmore}, 323 U.S. at 140.
\textsuperscript{78} \textit{Mead}, 533 U.S. at 228 (quoting \textit{Skidmore}, 323 U.S. at 140).
dem with the *Chevron* test. The *Mead* decision recognized the validity of the binary *Chevron* analysis of notice and comment regulations, while simultaneously lending credence to the multi-factorial measures of interpretive rulings in *Skidmore*. These cases represent methods of determining the deference and weight due to federal agency regulations in a manner that will prove essential to understanding the relationship between these regulations and § 1983 causes of action.

II. EVOLUTION OF THE U.S. SUPREME COURT’S § 1983 JURISPRUDENCE RELATING TO ADMINISTRATIVE AGENCIES

Since its inception in 1871, 42 U.S.C. § 1983 has provided a mechanism for plaintiffs to bring a cause of action for violations of rights. Although the statute originally conceived of providing remedies only for violations of constitutional rights, the Supreme Court has included statutory rights as eligible for enforcement under § 1983. The Supreme Court has failed to provide a definitive ruling as to whether federal regulations can create rights enforceable under § 1983. Over the past twenty-five years, however, the Court has addressed many related issues that illuminate the complexities of § 1983 actions and has created seeming ambiguities that have set the stage for disagreement among the federal circuit courts of appeals over this issue.

Section 1983 emerged from the first section of the Civil Rights Act of 1871 (the “1871 Act”), a post-Civil War attempt to safeguard the rights established by the Fourteenth Amendment. Originally, section 1 of the 1871 Act only provided causes of action for the deprivation of rights, privileges, or immunities secured by the Constitution. The statute, however, underwent a series of revisions that resulted in its encompassing rights, privileges, and immunities secured by federal

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79 *Id.* at 221, 238–39; see *Chevron*, 467 U.S. at 843–44; *Skidmore*, 323 U.S. at 140.
80 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 843–44; *Skidmore*, 323 U.S. at 140.
81 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Chrysler*, 441 U.S. at 301–03, 312–15; *Skidmore*, 323 U.S. at 140; *infra* notes 82–120 and accompanying text.
82 See *infra* notes 86–91 and accompanying text.
83 See Maine v. Thiboutot, 448 U.S. 1, 4, 7 (1980); *id.* at 15 (Powell, J., dissenting) (discussing the legislative history of the Civil Rights Act of 1874).
84 See Save Our Valley v. Sound Transit, 335 F.3d 932, 936 (9th Cir. 2003).
85 See *infra* notes 92–120 and accompanying text.
87 Thiboutot, 448 U.S. at 15 (Powell, J., dissenting).
laws as well.\textsuperscript{88} The provision, § 1983, creates a cause of action against any person who, acting under color of state law, abridges “rights, privileges, or immunities secured by the U.S. Constitution and laws” of the United States.\textsuperscript{89} The statute itself does not create substantive federal rights.\textsuperscript{90} Section 1983, rather, provides a private remedy for the actions of state officials that result in a deprivation of rights that already are established by federal law.\textsuperscript{91}

In 1980, in \textit{Maine v. Thiboutot}, the U.S. Supreme Court held that the Social Security Act established rights that individual plaintiffs may enforce under § 1983.\textsuperscript{92} For the first time, the Court applied § 1983 to the violation of federal statutory rights, whereas previously § 1983 had only been a remedy for a violation of constitutional rights.\textsuperscript{93} To justify this application of § 1983, the majority opinion dismissed the legislative history of § 1983 as inconclusive.\textsuperscript{94} The Court instead applied a plain-meaning analysis to conclude that the phrase “and laws” contained within § 1983 should encompass all federal laws.\textsuperscript{95} The Court reasoned that because Congress did not attach any modifying words to the phrase “and laws,” the statute could recognize a claim for violation of rights created by the Social Security Act.\textsuperscript{96} The dissent, however, contested that the phrase “and laws” was intended to reference only equal rights legislation that Congress created after the Civil War.\textsuperscript{97} The dissenters also feared that the majority’s holding could create an overly broad application of § 1983 to all federal statutes.\textsuperscript{98}

A single comment contained within the dissent of Justices Stevens, William Brennan, and Harry Blackmun in the 1983 case of \textit{Guardians Ass’n v. Civil Service Commission of New York} provided the first mention that § 1983 could enforce rights created through regulations, in addition to federal statutes.\textsuperscript{99} The dissenters interpreted the

\begin{thebibliography}{99}
\bibitem{88} Id. (Powell, J., dissenting).
\bibitem{89} 42 U.S.C. § 1983; Save Our Valley, 335 F.3d at 936.
\bibitem{90} Samuels v. District of Columbia, 770 F.2d 184, 193 (D.C. Cir. 1985).
\bibitem{91} Id.
\bibitem{92} 448 U.S. at 4, 9.
\bibitem{93} See id. at 4. For further discussion of previous applications of § 1983, see Todd E. Pettys, \textit{The Intended Relationship Between Administrative Regulations and Section 1983’s “Laws,”} 67 Geo. Wash. L. Rev. 51, 52 (1998).
\bibitem{94} Thiboutot, 448 U.S. at 7–8.
\bibitem{95} Id. at 4.
\bibitem{96} Id.
\bibitem{97} Id. at 12 (Powell, J., dissenting).
\bibitem{98} See id. (Powell, J., dissenting).
\bibitem{99} See 463 U.S. 582, 638 (1983) (Stevens, J., dissenting). The majority decision in Guardians did not concern § 1983 or federal regulations, but rather denied compensation
Court’s analysis in *Thiboutot* to mean that “the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law.” The dissenting opinion went on to elaborate that although the *Thiboutot* decision only spoke to federal statutes, “[i]ts analysis of § 1983 . . . applies equally to administrative regulations having the force of law.” The dissenting justices speculated that regulations that meet the *Chrysler Corp. v. Brown* test and that have the force of law may create rights enforceable under § 1983.

In 1987, in *Wright v. City of Roanoke Redevelopment & Housing Authority*, the U.S. Supreme Court handed down a decision which has provided the focal point for the debate among the federal circuit courts of appeals regarding the use of agency regulations in creating rights enforceable under § 1983. The strength with which four dissenters contested an opinion supported by a terse majority rationale has fueled the controversy regarding this case and the subsequent disagreement among the federal circuit courts of appeals.

In *Wright*, the parties asked the Court to decide whether a local housing authority violated both a federal statute by establishing rent controls and the accompanying implementing regulations to the statute because the housing authority failed to make reasonable utility allowances in tenants’ rents. The Court found that Congress had not intended to preclude plaintiffs from invoking § 1983 under the Brooke Amendment to the Housing Act of 1937 (the “Brooke Amendment”), which contained implementing regulations in which the Department of Housing and Urban Development (“HUD”) established rent controls. The Court also dismissed the defendant’s claim that neither the Brooke Amendment nor the implementing regulations produced rights that plaintiffs could enforce under § 1983. Reasoning that the implementing regulations carry the force of law under the *Chrysler* analysis, the Court held that the regu-
lations are specific and definite enough to create rights enforceable under § 1983.108

The dissenting opinion of four justices in Wright articulated a concern that, under the majority opinion, any agency regulation adopted within the purview of a statute that contains an enforceable right can possess enforceable federal rights, even if Congress or the agency never intended for the regulations to create such rights.109 Additionally, the dissenters were skeptical of the enduring authority of HUD regulations, which contain the “frequently changing views” of a federal administrative agency, and of the capacity of such regulations to create federal rights.110 Although some federal circuit courts of appeals have interpreted Wright as holding that a regulation promulgated by a federal agency can create a right enforceable under § 1983, others have interpreted the case as standing for the proposition that regulations are limited to further defining rights already created by statutes.111

The Court also has decided cases that articulate requirements that statutes, and as this Note argues, regulations, must satisfy to be eligible to create enforceable § 1983 rights.112 In 1989, in Golden State Transit Corp. v. City of Los Angeles, the U.S. Supreme Court held that to bring a § 1983 suit, a plaintiff must demonstrate a deprivation of a specific federal right that Congress intended to benefit a class that includes the plaintiff.113 Additionally, a plaintiff must demonstrate that the rights that are the subject of a § 1983 action are not too vague to be judicially enforceable.114

In 1997, in Blessing v. Freestone, the Court further fleshed out the qualifications for a § 1983 suit as originally laid out in Golden State.115 In Blessing, the Court established a three-part test for determining whether a statute creates an enforceable right that establishes a cause of action under § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so

108 Wright, 479 U.S. at 431–32; see supra notes 39–47 and accompanying text.
109 Id. at 438 (O’Connor, J., dissenting).
110 Id. (O’Connor, J., dissenting).
111 See infra notes 121–194 and accompanying text.
113 493 U.S. at 106.
114 Id.
115 See Blessing, 520 U.S. at 340–41; Golden State, 493 U.S. at 106.
“vague and amorphous” that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.\(^{116}\)

There is a rebuttable presumption that a federal statutory right that meets this three-part test is enforceable under § 1983.\(^{117}\) Although rare, such a presumption can be overcome if Congress expressly prohibits use of § 1983 in the statute or implicitly prohibits use by enacting a comprehensive remedial scheme.\(^{118}\)

There are a plethora of U.S. Supreme Court decisions that have addressed § 1983 generally and cases that have attempted to address the interplay between regulations and § 1983 with ambiguous results.\(^{119}\) The Court, however, has refrained from hearing any cases that would resolve a debate among the federal circuit courts of appeals as to whether federal regulations can create rights that individuals may enforce using § 1983.\(^{120}\)

III. THE CONTROVERSY AMONG FEDERAL CIRCUIT COURTS OF APPEALS

A. FEDERAL AGENCY REGULATIONS MAY CREATE § 1983 RIGHTS

A minority of federal circuit courts of appeals—the Sixth Circuit Court of Appeals and the Court of Appeals for the District of Columbia—have ruled, based upon a broad reading of both Maine v. Thiboutot and Wright v. City of Roanoke Redevelopment & Housing Authority, that agency regulations independently may create rights enforceable under 42 U.S.C. § 1983.\(^{121}\) These two courts of appeals have interpreted the language of § 1983 that permits remedies for violations of rights created through laws to include violations of rights derived from agency regulations.\(^{122}\)

\(^{116}\) 520 U.S. at 340–41 (citations omitted).

\(^{117}\) Id. at 341.

\(^{118}\) Id. In 1997, the Supreme Court in Blessing noted that the Court has only twice found comprehensive remedial schemes that have precluded § 1983 suits. Id. at 347 (citing Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984); Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 20 (1981)).

\(^{119}\) See supra notes 92–118 and accompanying text.

\(^{120}\) See Save Our Valley, 335 F.3d at 936.


\(^{122}\) See Loschiavo, 33 F.3d at 551; Samuels, 770 F.2d at 199–200.
In 1985, in *Samuels v. District of Columbia*, the D.C. Circuit became the first federal circuit court of appeals to find that agency regulations may create rights enforceable under § 1983. In *Samuels*, the court considered the case of tenants of a housing project that received federal funds. The tenants contended that local public housing officials violated HUD regulations that set forth grievance procedures and brought a § 1983 action for a violation of rights created by such regulations. After establishing that the public housing officials violated the HUD regulations, the court decided whether the regulations alone created rights enforceable under § 1983. The HUD regulations possessed the full force and effect of federal law under the *Chrysler Corp. v. Brown* test because they were “issued under a congressional directive to implement specific statutory norms and they affect individual rights and obligations.” The *Samuels* court cited the Supreme Court decision in *Chrysler*, which held that regulations that meet certain criteria may have the force and effect of laws, as evidence that such regulations are considered part of federal law.

The court then looked to the Supreme Court’s decision in *Maine v. Thiboutot*, which interpreted the phrase “and laws” in § 1983 to include all federal laws, to conclude that the phrase includes federal regulations “adopted pursuant to a clear congressional mandate that have the full force and effect of law.” According to the *Samuels* court, the Court in *Thiboutot*, which held that federal statutory rights may provide grounds for § 1983 actions, did not intend to limit § 1983 to any particular set of federal laws. The court viewed the HUD regulations as particularly appropriate to create rights enforceable under § 1983, as they were the result of an explicit congressional direction to HUD that the agency issue such grievance procedure regulations. This clear congressional direction to a federal administrative agency to act persuaded the *Samuels* court to recognize a valid § 1983 claim for the violation of HUD regulations.

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123 See 770 F.2d at 199–200.
124 Id. at 188.
125 Id.
126 Id. at 199–200.
127 Id. at 199.
128 See *Samuels*, 770 F.2d at 199 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03 (1979)).
129 Id.
130 Id. (citing *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)).
131 Id.
132 Id. at 199–200.
More recent among this tandem of cases, in 1994, in Loschiavo v. City of Dearborn, the Sixth Circuit determined that a Federal Communications Commission (“FCC”) regulation possessed the potential to create a private right enforceable under § 1983.133 After receiving notice that a recently installed satellite dish antenna in their backyard was in violation of a local zoning ordinance, the plaintiffs were denied a variance by a zoning board of appeals and were ordered to remove the antenna.134 The plaintiffs brought a claim under § 1983 based on the FCC regulation that bars the enforcement of zoning ordinances that unduly interfere with installing satellite dish antennas.135 The court in Loschiavo cited Wright v. City of Roanoke Redevelopment & Housing Authority for the propositions that plaintiffs may use § 1983 to enforce rights defined by federal statutes, and that federal regulations can create enforceable rights because they possess the force of law.136 In Loschiavo, the Sixth Circuit found that the FCC regulation had the capacity to create rights that are enforceable under § 1983.137

B. Federal Agencies May Never Independently Create Rights Enforceable Under § 1983

In contrast, many federal circuit courts of appeals, including the Third, Fourth, Eleventh, and, most recently, Ninth Circuit Courts of Appeals, have held that an agency regulation cannot create an individual federal right enforceable through § 1983.138 Most of these courts have followed patterns of reasoning similar to the Supreme Court’s § 1983 cases, linking the claimed right with Congress’s intent to create the right.139 As a result, these federal circuit courts of appeals have decided that administrative regulations provide interpreta-

133 33 F.3d at 551–52.
134 Id. at 550.
135 Id.
136 Id. at 551 (citing Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 431 (1987)).
137 Id. at 551–52.
138 Save Our Valley v. Sound Transit, 335 F.3d 932, 936 (9th Cir. 2003); S. Camden Citizens in Action v. N.J. Dep’t. of Envtl. Prot., 274 F.3d 771, 788, 790 (3d Cir. 2001) (holding that regulations cannot enforce federal rights under § 1983 unless Congress already has articulated such rights in a statute); Harris v. James, 127 F.3d 993, 1008, 1009 (11th Cir. 1997) (holding that regulations cannot create federal rights that are not already found in a statute because regulations do not contain sufficient evidence of congressional intent to create rights and the Supreme Court’s decision in Wright did not assign regulations such creative authority); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987).
139 See Save Our Valley, 335 F.3d at 936; S. Camden, 274 F.3d at 788; Harris, 127 F.3d at 1008.
tions that merely define the content of statutory rights and cannot create rights enforceable under § 1983 independently.\textsuperscript{140}

In 1987, in \textit{Smith v. Kirk}, the Fourth Circuit Court of Appeals became the first federal circuit court of appeals to rule that federal administrative agency regulations cannot create rights enforceable under § 1983.\textsuperscript{141} The court addressed the question of whether a state’s selective determination of disability benefits violates rights created by a Social Security Administration regulation promulgated under the Social Security Act.\textsuperscript{142} In determining whether the state action violated statutory rights, the court first looked to Supreme Court precedent regarding § 1983 to determine that the statute did not create a right.\textsuperscript{143} In addressing the issue of rights created through administrative agency regulations, however, the Fourth Circuit held that rights “not already implicit in the enforcing statute” cannot exist independently in regulations.\textsuperscript{144} The Fourth Circuit also supported its decision with the observation that the Supreme Court had refrained from holding that administrative regulations alone can create rights enforceable under § 1983.\textsuperscript{145}

In 2003, in \textit{Save Our Valley v. Sound Transit}, the Ninth Circuit Court of Appeals decided the most recent entry into this split among the federal circuit courts of appeals, holding that Title VI administrative regulations cannot independently create rights enforceable through § 1983.\textsuperscript{146} The plaintiffs, a community group in Washington State, challenged the decision of the regional transit authority to build a light-rail line through the neighborhoods of the group’s members.\textsuperscript{147} The plaintiffs alleged that the decision violated a Department of Transportation disparate impact regulation that prohibits actions by recipients of federal funds that burden racial minorities disproportionately.\textsuperscript{148} In this case, the line was proposed to run through Seattle’s Rainier Valley, a neighborhood with a large population of racial minorities.\textsuperscript{149} The court recognized that whether the

\textsuperscript{140} See \textit{Save Our Valley}, 335 F.3d at 936; \textit{S. Camden}, 274 F.3d at 788; \textit{Harris}, 127 F.3d at 1008.

\textsuperscript{141} See 821 F.2d at 984.

\textsuperscript{142} See \textit{id.} at 982.

\textsuperscript{143} See \textit{id.}

\textsuperscript{144} \textit{id.} at 984.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} See 335 F.3d at 939.

\textsuperscript{147} \textit{Id.} at 934.

\textsuperscript{148} \textit{Id.} at 934–35.

\textsuperscript{149} \textit{Id.} at 934.
Department of Transportation’s disparate impact regulation created a right that is enforceable under § 1983 was predicated upon first determining whether the regulations of a federal agency ever can create rights enforceable under § 1983.\footnote{See id. at 935.}

The Save Our Valley court first looked to Supreme Court precedent in the decisions of Alexander v. Sandoval and Gonzaga University v. Doe because these cases, although not necessarily controlling, contributed insight into how the court should decide this controversial issue.\footnote{See Save Our Valley, 335 F.3d at 937 (citing Gonzaga, 536 U.S. 273, 283 (2002); Sandoval, 532 U.S. 275, 291 (2001)).} In 2001, in Alexander v. Sandoval, the Court held that violations of disparate impact regulations under § 602 of the Civil Rights Act of 1964 do not provide individuals with a private cause of action.\footnote{See 532 U.S. at 293.} Plaintiffs in the case claimed that Title VI and its implementing regulations created a private right that was violated by the Alabama Department of Public Safety’s policy of administering driver’s license examinations only in English.\footnote{Id. at 278–79.} The Court concluded that because Congress did not intend for Title VI to create a private right of action for the enforcement of disparate impact regulations, the Court would not imply a right of action.\footnote{Id. at 293.} According to the Ninth Circuit in Save Our Valley, the Court in Sandoval held that only Congress can create implied rights of action through statutes, meaning that Congress alone must directly create all individual rights enforceable under § 1983.\footnote{Save Our Valley, 335 F.3d at 937 (citing Sandoval, 532 U.S. at 291).} The Save Our Valley court reasoned that as both implied rights of action and § 1983 rights are “creatures of federal substantive law,” Congress alone can create such rights because only Congress has the ability to make laws.\footnote{Id.}

The Save Our Valley majority then explored the 2002 decision in Gonzaga University v. Doe, in which the U.S. Supreme Court, in addressing whether spending legislation can create enforceable rights under § 1983, provided a rigorous test to determine whether rights generally are enforceable under § 1983.\footnote{Id. at 938–39; see Gonzaga, 536 U.S. at 283.} The Court in Gonzaga stated that under § 1983, courts can only enforce “unambiguously conferred right[s]” that bear the mark of clear congressional intent.\footnote{536 U.S. at 280, 283.} The Ninth
Circuit in *Save Our Valley* maintained that, like *Sandoval*, the ruling of the *Gonzaga* Court suggested that courts should only permit statutes, to the exclusion of federal agency regulations, to create federal rights. The court in *Save Our Valley* also found that the *Gonzaga* decision, like the decision in *Sandoval*, inextricably tied together implied rights of action with individual rights enforceable under § 1983 because both are federal substantive law and therefore exist only when “"Congress intended to create a federal right.” The combined reasoning of the Supreme Court’s *Sandoval* and *Gonzaga* decisions, in the eyes of the *Save Our Valley* court, compelled the conclusion that agency regulations independently cannot create individual rights enforceable through § 1983.

The *Save Our Valley* court then assessed the impact of the U.S. Supreme Court’s decision in *Wright v. City of Roanoke Redevelopment & Housing Authority*, relied upon heavily by the plaintiffs, which held that an implementing regulation that carries the force of law under the *Chrysler* analysis can create a right enforceable under § 1983. The Ninth Circuit in *Save Our Valley* summarily rejected the plaintiff’s assessment of the *Wright* decision as standing for the proposition that regulations can create enforceable rights. The emphasis that the *Wright* Court placed upon congressional intent in enacting the statute, according to the Ninth Circuit, provided evidence that the Supreme Court was suggesting that the statute, not the regulations, created the right. The Ninth Circuit also relied upon the dissenting opinion of four justices in *Wright*, who observed that the majority never addressed whether agency regulations can create rights enforceable under § 1983. The court maintained that the *Wright* precedent merely allows valid regulations to define further rights already conferred by statutes.

Finally, the Ninth Circuit criticized the decisions of the federal circuit courts of appeals that have held that regulations can create individual rights enforceable under § 1983. According to the *Save Our Valley* court, the D.C. Circuit in *Samuels* and the Sixth Circuit in *Loschiavo* built their decisions upon the faulty premise that regulations that have the full force and effect of laws independently have the po-

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159 *Save Our Valley*, 335 F.3d at 938 (citing *Gonzaga*, 536 U.S. at 283).
160 *Id.* (quoting *Gonzaga*, 536 U.S. at 283).
161 *See id.* at 939.
162 *Id.* at 939–40; *see Wright*, 479 U.S. at 431–32; *Chrysler*, 441 U.S. at 301–03.
163 *Save Our Valley*, 335 F.3d at 939.
164 *Id.*
165 *Id.* at 940 (citing *Wright*, 479 U.S. at 437–38 (O’Connor, J., dissenting)).
166 *Id.* at 939.
167 *Id.* at 942–43.
tential to create rights enforceable under § 1983. In addition, the Ninth Circuit pointed out that the *Samuels* and *Loschiavo* decisions predate the Supreme Court’s *Sandoval* and *Gonzaga* decisions, which otherwise would compel federal circuit courts of appeals to recognize the exclusive domain of Congress to create rights enforceable under § 1983. After considering Supreme Court and federal circuit courts of appeals precedents, the Ninth Circuit concluded in *Save Our Valley* that “although a regulation may be relevant in determining the scope of the right conferred by Congress,” only statutes can create an individual right enforceable under § 1983. Therefore, as Congress never intended to create an enforceable right for racial minorities to be free from racially disparate effects in the Department of Transportation regulations, § 1983 did not apply, and the Ninth Circuit affirmed the lower court’s judgment dismissing the action.

In her dissenting opinion, Judge Marsha Berzon stridently disagreed with the sweeping rule established by the majority opinion that administrative agency regulations never can create rights enforceable under § 1983, even though she agreed that the Department of Transportation regulations in the case presented to the court did not create enforceable rights. Judge Berzon began by exploring the nature of rights as an ordering of relationships and limitations on state actions that, at times, may be entirely distinct from private judicial remedies. She then criticized the majority opinion for an overly broad reading of *Sandoval* and *Gonzaga*. She disagreed with the majority conclusion that although *Sandoval* and *Gonzaga* speak to the applicability of implied rights of action under § 1983, they also discourage the derivation of rights from federal administrative agencies that are enforceable under § 1983. Judge Berzon maintained that the Supreme Court in *Gonzaga* failed to determine that Congress maintains exclusive jurisdiction over directly creating rights enforceable under § 1983.

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168 *Save Our Valley*, 335 F.3d at 942–43 (citing *Loschiavo*, 33 F.3d at 551; *Samuels*, 770 E.2d at 199).
169 Id. at 943.
170 Id.
171 Id. at 944.
172 Id. at 946 (Berzon, J., dissenting).
173 *Save Our Valley*, 335 F.3d at 946–51 (Berzon, J., dissenting).
174 Id. at 952–53 (Berzon, J., dissenting).
175 See id. at 952, 954 (Berzon, J., dissenting).
176 Id. at 953–54 (Berzon, J., dissenting) (indicating that the separation of powers concern of the Supreme Court in *Sandoval*, that only Congress should provide access to the federal courts, does not apply to § 1983 actions because Congress explicitly granted access to the federal courts by enacting § 1983).
Judge Berzon’s dissent is significant because she concluded that under the lens of modern administrative law, certain agency regulations should have the capacity to create individual rights.\(^\text{177}\) She criticized the majority decision for interpreting Congress’s delegation of rulemaking authority to federal agencies too formally and for commenting that “Congress, rather than the executive, is the lawmaker in our democracy.”\(^\text{178}\) The rules that administrative agencies promulgate either are qualified as interpretive or legislative rules: the agencies can create the former “independently of any express grant of power from Congress and without following special procedures,” while the latter “require an express delegation of rule-making authority from Congress and must be promulgated according to specific procedures.”\(^\text{179}\) As legislative regulations can bind and impose obligations on individuals beyond those imposed by statute, they maintain the character of statutes.\(^\text{180}\) Judge Berzon pointed out other features common to both laws and legislative regulations:

[They] are prescriptive, forward looking, and of general applicability . . . often reflect a careful balance between competing interests and policy considerations . . . “affect individual rights and obligations” . . . [and] are binding on the individuals to whom they apply . . . can order the relationship between one individual and another, and they are backed by the coercive power of the government.\(^\text{181}\)

Judge Berzon’s characterizations of federal regulations are consistent with her position to permit certain agency regulations to create individual rights.\(^\text{182}\)

Judge Berzon then addressed prominent criticisms of agency regulations by offering functional justifications for the use of agency regulations in enforcing rights under § 1983.\(^\text{183}\) She also pointed out that although regulations are more numerous and specific than statutes, such characteristics should only reinforce their capacity for cre-

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\(^{177}\) See id. at 954 (Berzon, J., dissenting).

\(^{178}\) See Save Our Valley, 335 F.3d at 956 (Berzon, J., dissenting) (quoting majority, id. at 939).

\(^{179}\) Id. at 954 (Berzon, J., dissenting) (citing Richard J. Pierce, Jr., Administrative Law Treatise § 6.4, at 325 (4th ed. 2002)).

\(^{180}\) Id. (Berzon, J., dissenting) (citing Pierce, supra note 179, § 6.4, at 325).

\(^{181}\) Id. at 954–55 (Berzon, J., dissenting) (quoting Chrysler, 441 U.S. at 302 (citations omitted)).

\(^{182}\) See id. at 954–55 (Berzon, J., dissenting).

\(^{183}\) Save Our Valley, 335 F.3d at 955–56 (Berzon, J., dissenting).
ating rights.\textsuperscript{184} She indicated that although regulations may be more transient than statutes, the short-lived nature of rights created through regulations are appropriate for the time and context of their creation, just as statutory rights are less permanent than constitutional rights and yet appropriate for the context of their creation.\textsuperscript{185}

According to Judge Berzon, the language of § 1983 produces ambiguities between the use of the terms “laws” and “statute.”\textsuperscript{186} She pointed out that in drafting § 1983, Congress used the phrase “laws” instead of “statutes” when referring to potential sources for rights enforceable under § 1983, even though the word “statute” appears in the same sentence.\textsuperscript{187} Congress’s deliberate and separate use of these terms, in Judge Berzon’s evaluation, indicates that Congress did not intend the term “laws” to include only statutes to the exclusion of regulations.\textsuperscript{188} This inclusive reading of § 1983, as Judge Berzon indicated, also is consistent with the Court’s broad interpretation of the term “laws” in \textit{Thiboutot}, which first provided that § 1983 should encompass all rights derived from federal laws rather than merely constitutional rights.\textsuperscript{189}

Furthermore, according to Judge Berzon, the majority decision of the Ninth Circuit in \textit{Save Our Valley} rested on formalistic thinking that ignores the Supreme Court’s evolving recognition that Congress has the power to delegate some of its authority to administrative agencies.\textsuperscript{190} She argued that the majority worked from the misguided premise that a law’s ability to create rights is determined solely by its origin in Congress.\textsuperscript{191} She concluded that this premise has given way in modern administrative law to a more functional view that recognizes a greater allocation of power to, and independence of, administrative agencies.\textsuperscript{192} She maintained that, subject to appropriate limita-

\textsuperscript{184} Id. at 955 (Berzon, J., dissenting).
\textsuperscript{185} Id. at 955–56 (Berzon, J., dissenting).
\textsuperscript{186} Id. at 960–61 (Berzon, J., dissenting) (citing 42 U.S.C. § 1983 (2000)).
\textsuperscript{187} Id. at 960 (Berzon, J., dissenting) (citing 42 U.S.C. § 1983).
\textsuperscript{188} \textit{Save Our Valley}, 335 F.3d at 960 (Berzon, J., dissenting).
\textsuperscript{189} Id. at 961 (Berzon, J., dissenting) (citing \textit{Thiboutot}, 448 U.S. at 7).
\textsuperscript{190} Id. at 956–57 (Berzon, J., dissenting) (quoting Loving v. United States, 517 U.S. 748, 758 (1996) (“This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.”); and Mistretta v. United States, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”)).
\textsuperscript{191} Id. at 956 (Berzon, J., dissenting).
\textsuperscript{192} See id. at 957 (Berzon, J., dissenting).
tions, agencies may exercise delegations of authority from Congress to issue regulations that can create rights, that are binding, and that have the force and effect of laws. Judge Berzon concluded that, using functional principles of modern administrative law, courts should permit agency regulations to create individual rights, and, therefore, the majority should not have declared administrative agencies incapable of creating rights enforceable under § 1983.

IV. Analysis: Select Regulations Should Have the Capacity to Create § 1983 Interests

As discussed in Part III of this Note, there is a vibrant controversy among the federal circuit courts of appeals over whether federal administrative agency regulations can create rights enforceable under 42 U.S.C. § 1983. The absence of controlling U.S. Supreme Court precedent on this issue and the modern role of federal agencies in our government should permit an exploration of whether federal agency regulations can create rights enforceable under § 1983. Those regulations that demonstrate that they can create cognizable rights, that have the force and effect of law, and that are afforded deference by courts should be eligible to create § 1983 interests. Additionally, public policy considerations support the derivation of § 1983 interests from federal regulations.

A. The Potential for Regulations to Create § 1983 Interests

To date, there is no evidence of clear congressional intent or controlling Supreme Court precedent that bars the use of administrative regulations in creating § 1983 interests. Additionally, the significant position that administrative agencies occupy in our democracy begs a consideration of regulations as rights-creating pronouncements.

193 Save Our Valley, 335 F.3d at 959 (Berzon, J., dissenting).
194 Id. at 946, 954 (Berzon, J., dissenting).
195 See supra notes 121–194 and accompanying text.
196 See infra notes 199–214 and accompanying text.
197 See infra notes 215–254 and accompanying text.
198 See infra notes 255–284 and accompanying text.
199 See Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994); Samuels v. District of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985); Pettys, supra note 93, at 71 (noting that the Supreme Court has not indicated whether agency regulations may create rights under § 1983 and that the Court has provided little more than vague signals as to how the controversy should be resolved).
Congressional intent regarding the role that administrative regulations should play in § 1983 actions is ambiguous, as the legislative history behind § 1983 is unclear. As Judge Berzon pointed out in her dissent to the Ninth Circuit Court of Appeals’s Save Our Valley v. Sound Transit decision, which held that federal regulations cannot create § 1983 interests, the language of § 1983 produces ambiguities between the use of the terms “laws” and “statutes” in a way that casts doubt about congressional intent. Despite the holdings in Alexander v. Sandoval, that violations of disparate impact regulations do not provide private causes of action, and in Gonzaga University v. Doe, that under § 1983 courts can only enforce an unambiguously conferred right that bears the mark of clear congressional intent, the Supreme Court has refrained from ruling on whether federal agency regulations can create § 1983 interests. Although some courts may construe the Sandoval and Gonzaga decisions broadly to prohibit the use of federal agency regulations to create § 1983 interests, the courts should read the holdings of these decisions with greater specificity to concern only implied rights of action. Such a reading properly places these precedents outside the scope of the current controversy among the federal circuit courts of appeals. The absence of clear congressional intent and controlling Supreme Court precedent creates the potential for competing perspectives in determining whether federal agency regulations create § 1983 interests. If not expressly prohibited by administrative law and federalism support the use of regulations in § 1983 suits); Melissa A. Hoffer, Closing the Door on Private Enforcement of Title VI and EPA’s Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After Sandoval and Gonzaga, 38 New Eng. L. Rev. 971, 995, 996 (2004) (maintaining that the Supreme Court’s administrative law decisions suggest that regulations should be eligible to create rights enforceable under § 1983); infra notes 208–214 and accompanying text.

See Maine v. Thiboutot, 448 U.S. 1, 7 (1980).


See Save Our Valley, 335 F.3d at 952, 954 (Berzon, J., dissenting). Compare Hoffer, supra note 200, at 994, 995 (arguing that the Supreme Court’s implied right of action analysis should not be overextended to determine whether federal regulations can create rights enforceable under § 1983), with Bradford C. Mank, Suing Under § 1983: The Future After Gonzaga University v. Doe, 39 Hous. L. Rev. 1417, 1461, 1467 (2003) (asserting that, in light of Gonzaga, the Supreme Court would be unlikely to find that regulations could evince the requisite congressional intent to establish rights under § 1983, although regulations still may be able to further develop a right already created by statute).

See Save Our Valley, 335 F.3d at 952, 954 (Berzon, J., dissenting).

See Loschiavo, 33 F.3d at 551; Samuels, 770 F.2d at 199.
Congress, regulations, in some circumstances, should be eligible to create § 1983 interests due to the ubiquitous modern use of federal regulations and a functional need for the creation of such interests.\footnote{207 See Save Our Valley, 335 F.3d at 957 (Berzon, J., dissenting); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 487 (1989) (suggesting that a flexible delegation of powers among the branches of government and functional administrative state has been necessary for an increasingly complex society).}

As Judge Berzon observed, the majority decision in \textit{Save Our Valley} illustrated a formalistic approach to Congress’s delegation of rulemaking authority to federal agencies when the majority commented that “Congress, rather than the executive, is the lawmaker in our democracy.”\footnote{208 335 F.3d at 956 (Berzon, J., dissenting) (quoting majority, \textit{id.} at 939).} This perspective not only expresses reservation about the basic function of agencies issuing rules, but also underlies the hesitancy of many federal circuit courts of appeals to recognize that administrative agency regulations, as a class, contain the capacity to create rights enforceable under § 1983.\footnote{209 See \textit{id.} at 842–44. But see Save Our Valley, 335 F.3d at 939.} The Supreme Court and constitutional scholars, however, have recognized that the existence and function of modern administrative agencies are constitutionally valid and necessary for the efficient operation of our highly regulated society.\footnote{210 See Loving v. United States, 517 U.S. 748, 758 (1996); Mistretta v. United States, 488 U.S. 361, 372 (1989); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Farina, supra note 207, at 487.} In 1983, the U.S. Supreme Court in \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.} held that administrative agencies exercise their proper function when courts permit them to formulate policies and to create rules that “fill any gap left, implicitly or explicitly, by Congress.”\footnote{211 467 U.S. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).} Therefore, the Supreme Court has expressed an observation that contradicts the image of Congress as sole author of authoritative pronouncements.\footnote{212 See \textit{id.} at 842–44.} By recognizing that courts should be highly deferential to agencies’ interpretations of statutes, the Court in \textit{Chevron} placed a great deal of authority in agencies to craft regulations that courts should recognize as possessing controlling weight and respect in interpreting a statute.\footnote{213 See 467 U.S. at 842–44.} The frequency with which Congress currently leaves either explicit or implicit gaps for
agencies to fill in with regulatory schemes indicates the significant authority that agency regulations collectively possess.\textsuperscript{214}

\textbf{B. Criteria to Permit Regulations to Create § 1983 Interests}

If courts allow federal regulations to create rights under § 1983, courts must apply a myriad of stringent tests to regulations to identify those that are eligible to create such rights.\textsuperscript{215} Therefore, a regulation that can create a § 1983 interest should create a judicially cognizable right and carry the force and effect of law by adhering to APA procedural requirements.\textsuperscript{216} Such a regulation also should possess controlling weight by satisfying the binary test established in \textit{Chevron} and the multi-factorial measure introduced in \textit{Skidmore v. Swift & Co.}.\textsuperscript{217}

To be eligible to create a federal right that plaintiffs may assert under § 1983, a regulation first should create a judicially cognizable right using the criteria articulated by the U.S. Supreme Court in \textit{Blessing v. Freestone}, which established a three-part test for determining whether a statute creates a § 1983 interest.\textsuperscript{218} Although the Court in \textit{Blessing} applied the criteria to determine whether a statute may provide grounds for a § 1983 claim, these criteria also could serve as a credible measurement of whether a regulation could provide similar grounds.\textsuperscript{219}

In applying the \textit{Blessing} criteria, a regulation first must reflect congressional intent to create a benefit for the plaintiff.\textsuperscript{220} A regulation may reflect congressional intent to benefit a plaintiff if, for example, it creates an individualized entitlement or confers a direct benefit on a plaintiff rather than merely having an impact on a larger

\textsuperscript{214} See id. at 843; Jerry L. Mashaw, Greed, Chaos and Governance: Using Public Choice to Improve Public Law 152 (1997) (arguing that because it is more costly for Congress to legislate than it is for federal agencies to promulgate regulations, the rulemaking function of the administrative state is necessary).


\textsuperscript{216} See 5 U.S.C. § 553; \textit{Mead}, 533 U.S. at 234–35; \textit{Blessing}, 520 U.S. at 340–41; \textit{Chrysler}, 441 U.S. at 301–03, 312–15; Pettys, supra note 93, at 81 (observing that no federal circuit court of appeals has employed both the \textit{Chrysler} force and effect of law test in tandem with the three-part \textit{Blessing} analysis in discerning whether regulations can create rights enforceable under § 1983).

\textsuperscript{217} See \textit{Chevron}, 467 U.S. at 842–44; \textit{Skidmore}, 323 U.S. at 140.

\textsuperscript{218} See 520 U.S. at 340–41.

\textsuperscript{219} See id.

\textsuperscript{220} See id. at 340.
system and an indirect benefit on an individual. A regulation cannot be too “vague and amorphous” for a court to enforce. A court would consider a regulation too vague or amorphous if it contained ambiguous terms without providing any guidance as to how to interpret these terms. Finally, a regulation must be mandatory and impose an obligation on the states. For example, a regulation that cannot command a non-complying state to take any remedial action would not be a mandatory provision. If a regulation possesses all three of these qualities, it should be able to create a right that a court can enforce.

If a regulation can create a judicially cognizable right, courts should consider the weight of the regulation and the deference due to its interpretations in determining whether it can create a right enforceable under § 1983. The Court in Chrysler Corp. v. Brown offered a test to determine whether regulations possess the force of law that the Court of Appeals for the District of Columbia has used to evaluate whether regulations can create § 1983 interests. The Court in Chrysler differentiated between substantive rules that possess the force and effect of law and interpretive rules that agencies have not issued through notice and comment rulemaking in a manner that could provide guidance in assessing their capacity to create § 1983 interests. Substantive rules should carry sufficient weight to be eligible to create § 1983 interests as they “affect individual rights and obligations” and are sufficiently binding to carry the force of law. The Chrysler requirements that a congressional grant of authority authorize the promulgating agency to issue substantive regulations and that the agency follow congressional procedural requirements when issuing such regulations also can provide guidance in determining the eligibility of regulations to create § 1983 interests.

221 See id. at 343–45.
222 See id. at 340–41 (quoting Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 431–32 (1987)).
223 See Blessing, 520 U.S. at 345.
224 See id. at 341.
225 See id. at 344.
226 See id. at 340–41.
228 See 441 U.S. at 301–03, 312–15; Samuels, 770 F.2d at 199.
229 See 441 U.S. at 301–03, 312–15.
230 See id. at 301–02 (quoting Morton, 415 U.S. at 252).
231 See id. at 302–03.
At least one federal circuit court of appeals has not permitted agency regulations to create rights enforceable under § 1983 because of a lack of evidence that Congress ever intended for regulations to possess this characteristic.\textsuperscript{232} Congressional intent that agencies create regulations possessing the force of law, however, is evident in those regulations created pursuant to the APA.\textsuperscript{233} Congress must authorize an agency to promulgate notice and comment regulations, according to the APA, through a grant of authority in crafting an agency’s organic statute—the law through which Congress establishes an administrative agency.\textsuperscript{234} Therefore, if an agency creates a regulation pursuant to the notice and comment procedural requirements of the APA, there is evidence of congressional intent for the promulgating agency to compose rules that have the force and effect of law.\textsuperscript{235} In contrast, interpretive rules, such as the U.S. Customs Service’s pronouncements in \textit{United States v. Mead Corp.}, which reiterated the \textit{Skidmore} measure of deference that courts should grant interpretive rules, are not subject to the APA requirements of notice and comment procedures.\textsuperscript{236} Congress need not grant permission for an agency to promulgate interpretive rules.\textsuperscript{237} Therefore, interpretive rules are unsuitable for creating rights enforceable under § 1983.\textsuperscript{238} The difference between regulations created according to notice and comment rulemaking and regulations created outside of such procedural requirements suggests that the former should exert greater force than the latter.\textsuperscript{239} Thus, if an agency regulation carries the force and effect of law under the \textit{Chrysler} analysis, particularly if it is the product of notice and comment rulemaking under the APA, courts should give that regulation further consideration as to whether it can create a right enforceable under § 1983.\textsuperscript{240}

Finally, by examining those regulations that are qualified to fill statutory gaps, the degree of deference accorded to a regulation’s interpretations under both \textit{Chevron} and \textit{Skidmore} also can provide sound guidance in determining whether that regulation can create rights enforceable under § 1983.\textsuperscript{241} The extent to which courts defer to an

\textsuperscript{232} See \textit{Save Our Valley}, 335 F.3d at 939, 940.
\textsuperscript{235} See 5 U.S.C. § 553.
\textsuperscript{236} See \textit{id.}; \textit{Mead}, 533 U.S. at 234–35.
\textsuperscript{237} See 5 U.S.C. § 553; \textit{Mead}, 533 U.S. at 230; \textit{Chrysler}, 441 U.S. at 313–16.
\textsuperscript{238} See 5 U.S.C. § 553; \textit{Mead}, 533 U.S. at 230; \textit{Chrysler}, 441 U.S. at 313–16.
\textsuperscript{239} See 5 U.S.C. § 553.
\textsuperscript{240} See \textit{id.}; \textit{Chrysler}, 441 U.S. at 313.
\textsuperscript{241} See \textit{Mead}, 533 U.S. at 234–35; \textit{Chevron}, 467 U.S. at 842–44; \textit{Skidmore}, 323 U.S. at 140.
agency’s interpretations of a regulation does not control whether courts must accept a regulation as creating rights enforceable under § 1983. The criteria that the Supreme Court in *Chevron* and *Skidmore* used in determining the extent of judicial deference due to agency interpretations of statutes, however, reveals both the manner in which the Supreme Court permits qualified agency regulations authoritatively to fill the gaps left by statutes and the characteristics that such regulations must possess. If certain regulations can fill gaps where Congress has not spoken through statute, these regulations should have the ability to create rights based on a reasonable interpretation of the statute that the regulation is designed to fill. *Chevron*’s holding—that agency regulations that offer a permissible construction of a statute carry authoritative interpretations of the statute—supports the creation of regulatory rights, in accordance with the statute, that are enforceable under § 1983.

Nevertheless, courts may criticize the “reasonable interpretation” measure by which *Chevron* determines the degree of deference due to regulations as insufficiently demanding if used alone to determine § 1983 eligibility by courts that are hesitant to invest such creative force behind regulations. A more comprehensive test, as articulated in *Skidmore* and recently reaffirmed by the Court in *Mead*, although typically applied to interpretive rules, should work in tandem with the binary *Chevron* test to determine whether notice and comment regulations can create § 1983 interests. Despite its intended use for interpretive rules rather than notice and comment regulations, the *Skidmore* test implemented in the context of creating § 1983 rights provides a second step to the *Chevron* test and a more thorough examination of agency regulations. In order to possess the authority necessary to create a § 1983 interest, a regulation first should be the product of thorough agency consideration. The most common example of such a regulation could be the product of notice and comment rulemaking under the APA. A regulation also should be the product of agency experience and expertise to be considered eligible

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242 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.
243 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.
244 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.
245 See 467 U.S. at 842–44.
246 See id.; see also, e.g., *Save Our Valley*, 335 F.3d at 939.
247 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.
248 See *Mead*, 533 U.S. at 234–35; *Chevron*, 467 U.S. at 842–44; *Skidmore*, 323 U.S. at 140.
249 See *Mead*, 533 U.S. at 235; *Skidmore*, 323 U.S. at 140.
to create a § 1983 interest.\textsuperscript{251} Finally, to merit consideration, a regulation should have a substantial degree of consistency with both prior and subsequent regulations issued by the agency.\textsuperscript{252} Regulations that give rise to rights enforceable under § 1983 should be visibly part of some logical patchwork of rules that an agency has issued over time.\textsuperscript{253} These criteria, when coupled with the \textit{Chevron} standard and procedural requirements of the APA, recognize the important function of federal regulations while still scrupulously examining the nature of the right, the weight of the regulation, and the intent of Congress in granting authority for agencies to issue regulations.\textsuperscript{254}

\textbf{C. Public Policy Arguments Supporting Regulations’ Creation of § 1983 Interests}

Courts may be reluctant to entertain federal regulations as the source of rights enforceable under § 1983 due to public policy concerns.\textsuperscript{255} Although such policy concerns are not without foundation, a broader consideration of the purpose of § 1983 and the nature of federal regulations reveals public policy considerations that bolster, rather than refute, the proposition that regulations can create rights enforceable under § 1983.\textsuperscript{256}

Some courts may contend that it would be inefficient to recognize federal regulations as creating rights enforceable under § 1983 because of the abundance of regulations that would be eligible and the excessive manner in which these numerous claims would consume judicial resources.\textsuperscript{257} Recognizing regulations as a source of rights enforceable under § 1983 undoubtedly would increase the number of claims brought under the statute.\textsuperscript{258} The expense of increased claims, however, should not be a significant consideration in this determination, as § 1983 is de-

\begin{itemize}
\item \textsuperscript{251} See \textit{Mead}, 533 U.S. at 234–35; \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{252} See \textit{Mead}, 533 U.S. at 234–35; \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{253} See \textit{Mead}, 533 U.S. at 234–35; \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{255} See \textit{Save Our Valley}, 335 F.3d at 955–56 (Berzon, J., dissenting); \textit{infra} notes 257–284 and accompanying text.
\item \textsuperscript{256} See \textit{Save Our Valley}, 335 F.3d at 955–56 (Berzon, J., dissenting).
\item \textsuperscript{257} See \textsuperscript{id. (Berzon, J., dissenting); Charles Davant IV, \textit{Sorcerer or Sorcerer’s Apprentice?: Federal Agencies and the Creation of Individual Rights}, 2003 Wis. L. Rev. 613, 640 (asserting that if regulations could create rights enforceable under § 1983, federal courts would be burdened with an excessive volume of such claims); Keith E. Eastland, \textit{Environmental Justice and the Spending Power: Limits on Using Title VI and § 1983}, 77 NOTRE DAME L. REV. 1601, 1615 (2002) (concluding that the use of federal regulations to create rights enforceable under § 1983 would increase federal litigation substantially).}
signed to safeguard the rights of the individual from abusive state actions. As a result, courts should permit plaintiffs to assert § 1983 claims liberally, and an abundance of claims is a signal of achieving our democratic goal of preserving the rights and interests of the minority.

In light of the concern of judicial efficiency that some courts may maintain, accepting regulations as creating § 1983 interests still will not cause an undue strain on the judicial system. An increase in § 1983 suits grounded in rights from federal regulations would be similar in scope to the increase of suits that resulted after the expansion of § 1983 by the holding of the Supreme Court in Maine v. Thiboutot to encompass statutory rights in addition to constitutional rights. Moreover, if statutes provided the only grounds for § 1983 interests, there is a substantial risk that the efficiency of the entire rulemaking system could be in jeopardy. Universally ignoring those § 1983 interests created by regulatory rights would threaten the legitimacy and authority of federal regulations as a class. As one of the central functions of agency regulations is to fill the gaps left open by Congress, the erosion of regulatory authority necessarily would result in an increased reliance on statutory authority and heightened strain on congressional resources. If Congress were less able to delegate authority to administrative agencies, the current system of delegating rulemaking authority would be rendered less efficient.

Although some courts maintain that regulations should not create § 1983 interests because they are more transient than statutes, the transience of federal regulations does not render them less valid or inadequate to create rights. Courts consider regulations more transitory than statutes because federal agencies create and terminate regulations with greater ease than when Congress promulgates statutes. The potentially brief lifespan of federal regulations, however,

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261 See Thiboutot, 448 U.S. at 4.
262 See id.
263 See Chevron, 467 U.S. at 843 (citing Morton, 415 U.S. at 231).
264 See id.
265 See id.
266 See id.
267 See Wright, 479 U.S. at 438 (O'Connor, J., dissenting); Save Our Valley, 335 F.3d at 940; id. at 955–56 (Berzon, J., dissenting); Eastland, supra note 258, at 1615, 1644 (arguing, in the context of Title VI disparate impact regulations, that transient agency regulations are unfit to create federal rights).
268 See Wright 479 U.S. at 438 (O'Connor, J., dissenting); Save Our Valley, 335 F.3d at 940; id. at 955 (Berzon, J., dissenting).
should not render them unable to create rights.\textsuperscript{269} As Judge Berzon pointed out in her dissenting opinion in \textit{Save Our Valley}, it is uncertain why relatively short-lived rights created by federal regulations are objectionable, as they are no less valid during their existence, even if brief.\textsuperscript{270} Just as regulations impose short-lived obligations on individuals, they should likewise be able to create equally transient rights.\textsuperscript{271} Moreover, as Judge Berzon argued, the transience of regulations can only be defined in relative terms.\textsuperscript{272} Although the nature of regulatory rights may be more short-lived than those of statutes, statutory rights are far more transient than the immutable rights found in the U.S. Constitution.\textsuperscript{273} Nonetheless, courts have deemed statutory rights enforceable under § 1983, just as regulatory rights should be.\textsuperscript{274}

Although some courts may be hesitant to permit regulations to create § 1983 interests because the public cannot hold administrative agencies, unlike Congress, politically accountable for their actions, the President remains ultimately accountable as executive of all federal agencies.\textsuperscript{275} The Supreme Court in \textit{Chevron} justified its decision to accord substantial deference to agency interpretations of a statute by refuting the argument that agencies are unaccountable.\textsuperscript{276} In \textit{Chevron}, the Court maintained that the President, as head administrator, remains politically accountable for the entire system of federal administrative agencies and is entitled to make policy choices to resolve conflicting interests of Congress.\textsuperscript{277} This same direct chain of responsibility is equally applicable to regulations in their rights-creating capacity.\textsuperscript{278}

Finally, some courts may object to the use of regulations as grounds for § 1983 suits because regulations are insufficiently authoritative or binding.\textsuperscript{279} As Judge Berzon indicated, however, regulations contain the

\textsuperscript{269} See \textit{Save Our Valley}, 335 F.3d at 955–56 (Berzon, J., dissenting).
\textsuperscript{270} \textit{Id.} at 955 (Berzon, J., dissenting).
\textsuperscript{271} \textit{Id.} (Berzon, J., dissenting).
\textsuperscript{272} \textit{Id.} at 955–56 (Berzon, J., dissenting).
\textsuperscript{273} \textit{Id.} (Berzon, J., dissenting).
\textsuperscript{274} See \textit{Thiboutot}, 448 U.S. at 4; \textit{Save Our Valley}, 335 F.3d 955–56 (Berzon J., dissenting).
\textsuperscript{275} See \textit{Chevron}, 467 U.S. at 865–66; Davant, \textit{supra} note 258, at 639, 640 (maintaining that, compared to acts of Congress, federal agencies are less accountable to the states and their policy decisions are not subject to the same rigorous examination by multiple branches of government).
\textsuperscript{276} See \textit{Chevron}, 467 U.S. at 865–66.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} See \textit{id.}
\textsuperscript{279} See \textit{Save Our Valley}, 335 F.3d at 954–55 (Berzon, J., dissenting); Pettys, \textit{supra} note 93, at 96–99 (indicating that Congress intended a sharp divide between the authority of regulations and statutes as demonstrated by the inability of regulations to create obligations that impose criminal penalties or confer vested employment rights).
same properties as statutes because they are binding on individuals, as well as on branches of government, and contain the same form and effect as statutes.\(^{280}\) Regulations, like statutes, are also “prescriptive, forward-looking, and of general applicability.”\(^ {281}\) Additionally, regulations are only inferior to statutes in that they must conform to, and cannot be an arbitrary or capricious expression of, the authority that statutes give them.\(^ {282}\) Valid regulations are no less legitimate or authoritative than statutes.\(^ {283}\) The manner in which courts examine regulations to be a proper exercise of authority, coupled with the proposed judicial tests mentioned earlier in this Note, should help courts identify those regulations that create valid rights enforceable under § 1983.\(^ {284}\)

**Conclusion**

Courts should resolve the conflict among the federal circuit courts of appeals regarding whether federal administrative agency regulations can create § 1983 interests by selectively allowing certain regulations to create such interests. When taken together, the rights-creation test of *Blessing v. Freestone*, the full-force-of-law measure of *Chrysler Corp. v. Brown*, the binary criteria of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and multi-factorial criteria of *Skidmore v. Swift & Co.* produce a battery of thorough evaluations that should guide courts in permitting certain regulations to create § 1983 interests. Such a thorough evaluation should assuage the concerns of those courts that are hesitant to permit regulations to provide rights enforceable under § 1983. The benefit of providing individuals with a cause of action to preserve their regulatory rights against abusive actions of state actors outweighs opposing public policy concerns. Additionally, permitting federal regulations to create § 1983 interests should be reflective of, and necessary in light of, the increased authority and deference that Congress and the judiciary accord to regulations.

John A. McBrine

\(^{280}\) *Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting).

\(^{281}\) *Id.* at 954 (Berzon, J., dissenting); *See 5 U.S.C. § 551(4) (2000) (defining “rule”).

\(^{282}\) *See Save Our Valley*, 335 F.3d at 955 (Berzon, J., dissenting) (citing 5 U.S.C. § 706(2)(A), (C)).

\(^{283}\) *See id.* (Berzon, J., dissenting).

\(^{284}\) *See 5 U.S.C. § 553; Mead*, 533 U.S. at 234–35; *Blessing*, 520 U.S. at 340–41; *Chevron*, 467 U.S. at 842–44; *Chrysler*, 441 U.S. at 301–03, 312–15; *Skidmore*, 323 U.S. at 140; *supra* notes 215–254 and accompanying text.
ADOPTING THE EEOC DETERRENCE APPROACH TO THE ADVERSE EMPLOYMENT ACTION PRONG IN A PRIMA FACIE CASE FOR TITLE VII RETALIATION

Abstract: Section 704(a) of Title VII of the Civil Rights Act of 1964 protects employees who oppose what they consider to be workplace discrimination from subsequent employer retaliation. The retaliation provision, however, does not delineate the types of discriminatory acts that an employer is prohibited from taking. Thus, the federal circuit courts of appeals are divided on what types of acts rise to the level of adverse action such that an employee plaintiff may establish a prima facie case of retaliation. The U.S. Supreme Court has stated that the purpose of the retaliation provision is to maintain unfettered access to Title VII’s remedial mechanisms. This Note argues that the most appropriate way to do this is to ensure that all retaliatory acts that would likely deter an employee from filing a discrimination charge or otherwise opposing discriminatory activity should be prohibited.

Introduction

Title VII of the Civil Rights Act of 1964’s prohibition on retaliation is essential in ensuring that employees do not suffer quietly through workplace discrimination without voicing their complaints. When employees oppose what they consider to be discriminatory acts or behavior, an employer may not then discriminate against those employees for doing so.

Recently, retaliation claims have received a great deal of attention from courts as well as legal commentators. In part, this is due to the

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2 See id. § 2000e-3(a).
proliferation of retaliation claims.\textsuperscript{4} Plaintiffs find that they can recover on a retaliation claim even when the court dismisses their underlying claim.\textsuperscript{5} Retaliation claims have been successful with juries, and in 2003, they accounted for 27.9\% of all claims filed with the Equal Employment Opportunity Commission (the “EEOC”).\textsuperscript{6}

Aside from the statistical increase in retaliation claims, legal commentators and courts have been interested in these claims because the federal circuit courts of appeals are divided on what types of retaliatory actions an employer can be liable for taking, that is, what constitutes an adverse employment action.\textsuperscript{7} This disagreement is rooted in the ambiguity of the language in section 704(a) of Title VII, the retaliation provision, as well as the lack of legislative history associated with it.\textsuperscript{8} At one end of the debate, the U.S. Courts of Appeals for the Fifth and Eighth Circuits hold that an employer can be liable only for retaliation when it makes an ultimate employment decision, such as hiring, discharging, failing to promote, demoting, or changing compensation.\textsuperscript{9} A second group of circuits adopts an intermediate threshold, holding that decisions materially affecting the terms and conditions of employment may be actionable.\textsuperscript{10} At the other end of the spectrum, a number of circuits, including the U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits employ a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action.\textsuperscript{11} The EEOC endorses a deterrence


\textsuperscript{5} Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000); see Passatino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 506 (9th Cir. 2000); Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981).

\textsuperscript{6} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 4.

\textsuperscript{7} See Shannon v. BellSouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Cude & Steger, supra note 3, at 373–75; Kravetz, supra note 3, at 316–18; Wiles, supra note 3, at 218–20.


\textsuperscript{9} Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern, 104 F.3d at 707.

\textsuperscript{10} See Akers v. Alvey, 338 F.3d 491, 497–98 (6th Cir. 2003); Von Gunten, 243 F.3d at 866; Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997).

\textsuperscript{11} See Ray, 217 F.3d at 1240; Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998); Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996); Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991).
approach, whereby any act reasonably likely to deter the plaintiff or others from exercising their statutory rights amounts to an adverse employment action.\textsuperscript{12} The U.S. Court of Appeals for the Ninth Circuit is the only one to adopt the EEOC’s approach explicitly.\textsuperscript{13}

The use of these different standards produces inconsistent results depending on which jurisdiction the claim is brought in.\textsuperscript{14} Employers and employees are left without a clear understanding of what facts are sufficient to establish a prima facie case of retaliation.\textsuperscript{15} The U.S. Supreme Court should grant certiorari and end the disagreement among the federal circuit courts of appeals as to which standard to employ.\textsuperscript{16} The most appropriate standard is the EEOC’s deterrence approach, primarily because it is the most consistent with the purpose of Title VII generally and the retaliation provision specifically, as well as U.S. Supreme Court precedent.\textsuperscript{17}

Part I.A of this Note provides an outline of the text of Title VII’s discrimination and retaliation provisions, along with a discussion of their purpose.\textsuperscript{18} Part I.B explains what a plaintiff must demonstrate to establish a prima facie case of retaliation.\textsuperscript{19} Part I.C explores the differences in Title VII’s general discrimination and retaliation provisions and relevant U.S. Supreme Court precedent addressing Title VII.\textsuperscript{20}

Next, Part II provides an overview of the current divide among federal circuit courts of appeals by exploring the different approaches that they employ.\textsuperscript{21} Part III.A provides an example of the varying results produced by the different approaches to defining an adverse employment action.\textsuperscript{22} Part III.B argues that the deterrence approach is most consistent with the language and purpose of Title VII, as articulated by the U.S. Supreme Court.\textsuperscript{23} Part III.C argues that courts should defer to the reasoned judgment of the EEOC in adopting the deterrence approach.\textsuperscript{24} Next, Part III.D contends that in light of an affirmative de-
fense to supervisory harassment established by the U.S. Supreme Court, the deterrence approach is most logical to ensure that employees can adequately exercise their rights.\textsuperscript{25} Finally, Part III.E contends that employers have ways within Title VII to manage their workplaces effectively; the adverse employment action requirement is not, however, the appropriate vehicle to take this concern into account.\textsuperscript{26}

I. Title VII and the Retaliation Provision

A. Title VII's Language, Purpose, and Use

The goal of Title VII of the Civil Rights Act of 1964 is to eliminate discrimination in employment, public accommodations, and public education.\textsuperscript{27} In terms of employment, this goal has been explained as “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees.”\textsuperscript{28} The U.S. Supreme Court has stated that Title VII protects employees against a workplace full of “discriminatory intimidation, ridicule, and insult.”\textsuperscript{29}

Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.\textsuperscript{30} Specifically, the general discrimination provision of Title VII, section 703(a), makes it unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.\textsuperscript{31}

\textsuperscript{25} See infra notes 289–299 and accompanying text.
\textsuperscript{26} See infra notes 300–331 and accompanying text.
\textsuperscript{30} 42 U.S.C. § 2000e-2(a) (1).
\textsuperscript{31} Id. § 2000e-2(a) (1)-(2).
To give effect to section 703(a), section 704(a) prohibits employers from retaliating against employees who have filed a discrimination charge or otherwise opposed a discriminatory employment practice.\textsuperscript{32} A section 704(a) retaliation claim arises when an employee files a complaint accusing an employer of discriminating against him or her, and the employer retaliates against the employee for filing the initial claim.\textsuperscript{33}

Section 704(a) of Title VII prohibits retaliation by employers, employment agencies, and labor organizations against employees, applicants, union members, and other individuals who either (1) opposed an unlawful employment practice or (2) made a charge or testified, assisted, or participated in an investigation, proceeding, or hearing under the statute.\textsuperscript{34} These two different types of protection are referred to as the “opposition” and “participation” clauses.\textsuperscript{35}

Retaliation charges serve as independent legal claims, which do not depend on the validity of the underlying claim.\textsuperscript{36} In some cases, courts have found that there was no discrimination based on the employee’s protected class status, but nevertheless have allowed recovery for an employer’s adverse action taken in retaliation for the employee’s filing of a claim of discrimination.\textsuperscript{37} Given retaliation claims’ proven success with juries, it is becoming common for plaintiffs to add them to their discrimination claims.\textsuperscript{38} In fact, retaliation claims

\textsuperscript{32} Id. § 2000e-3(a).
\textsuperscript{33} See id.
\textsuperscript{34} See id. The retaliation provision reads as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

\textsuperscript{35} See 42 U.S.C. § 2000e-3(a).
\textsuperscript{36} Pryor v. Seyfarth, Shaw, Fairweather & Geraldson, 212 F.3d 976, 980 (7th Cir. 2000); see Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 506 (9th Cir. 2000); Payne v. McLemore’s Wholesale & Retail Stores, 654 F.2d 1130, 1140 (5th Cir. 1981).
\textsuperscript{37} Pryor, 212 F.3d at 980; see Passantino, 212 F.3d at 506; Payne, 654 F.2d at 1140.
\textsuperscript{38} See WAYNE N. OUTTEN ET AL., PRACTICING LAW INST., WHEN YOUR EMPLOYER THINKS YOU ACTED DISLOYALY: THE GUARANTEES AND UNCERTAINTIES OF RETALIATION LAW 151, 153 (2003); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 4.
increased by over 10% in the 1990s, and in 2003, 27.9% of all claims filed with the EEOC were for retaliation.

For example, in 2000, in Fine v. Ryan International Airports, the Seventh Circuit Court of Appeals upheld the plaintiff’s jury verdict on her retaliation claim, even though the underlying sexual harassment and sex discrimination charges were dismissed because they were time-barred and the employer offered a legitimate business reason that was non-pretextual. The jury awarded the plaintiff a mere $6000 in compensatory damages, but $3.5 million in punitive damages. The court later reduced this to the statutory maximum of $300,000.

Although it has been utilized heavily by plaintiffs, Congress spent little time debating section 704(a), leaving courts with negligible legislative history to elucidate interpretation of the section. In fact, the House Judiciary Committee’s report to Congress, which accompanied the Civil Rights Act of 1964, contained commentary on section 704(a) that was almost the precise wording of the section itself. Thus, Congress provided little guidance on how courts and employers should interpret this provision. Because of this, differing standards have emerged, making it difficult for employers and employees to understand their rights and responsibilities with respect to retaliation.

B. Establishing a Prima Facie Case of Retaliation

1. Burden-Shifting Framework

In 1973, the U.S. Supreme Court in McDonnell Douglas Corp. v. Green held that a plaintiff in a discrimination case may demonstrate discrimination, in the absence of direct evidence, by establishing a prima facie case. Once the prima facie case is established, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employment action. Courts analyze Title VII retaliation

39 See Wiles, supra note 3, at 218.
41 305 F.3d 746, 751, 754, 757 (7th Cir. 2002).
42 Id. at 751.
43 Id.
44 See Zion, supra note 8, at 196–97.
45 See id.
46 See id.
47 See infra notes 135–208 and accompanying text.
49 See id.
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claims similarly to the way they analyze Title VII discrimination claims.50

In order to establish a prima facie case for retaliation, the plaintiff must show the following: (1) that he or she engaged in a statutorily protected activity, (2) that he or she suffered some adverse action by his or her employer, and (3) that there exists a causal link between the protected expression and the adverse action.51 If the plaintiff establishes a prima facie case using this three-prong test, then the burden shifts to the employer to produce a valid, non-retaliatory reason for the action.52 In order to prevail, the plaintiff must then rebut the employer’s proffered reason by proving that it is a mere pretext for discrimination.53

Taking this a step further, in 2000, in Reeves v. Sanderson Plumbing Products, Inc., the U.S. Supreme Court held that when a plaintiff can establish a prima facie case of discrimination and there is sufficient evidence for a reasonable factfinder to discredit the defendant’s proffered nondiscriminatory explanation for the action, this may be enough to sustain a finding of discrimination.54 In Reeves, the plaintiff established a prima facie case, and the employer contended that the plaintiff was fired for shoddy recordkeeping.55 Although the plaintiff could not show that he was fired because of his age, he was able to show that he had properly maintained the attendance records.56 After the plaintiff demonstrated that the employer’s proffered reason was not supported by the evidence, the jury was free to conclude that the actual reason for the plaintiff’s discharge was discriminatory.57 This same principle applies in retaliation cases—a plaintiff can prevail by demonstrating that the employer’s proffered legitimate business reason is false.58

2. First Prong: Protected Activities

In order to satisfy the first prong of a prima facie case, plaintiffs must show that they either opposed an employer practice that is prohibited by Title VII, or participated in either filing a charge, testifying,

50 See Montemayor v. City of San Antonio, 276 F.3d 687, 692 (5th Cir. 2001).
51 Id.
52 See id.
53 Id. at 693.
54 530 U.S. 133, 147 (2000).
55 Id. at 143.
56 Id. at 144–45.
57 Id. at 147–48.
58 See Montemayor, 276 F.3d at 693.
or assisting in any manner in an investigation, proceeding, or hearing under Title VII.\textsuperscript{59}

The opposition clause covers a broader range of activities than the participation clause, including public protests and letters to officials; the protection against retaliation, however, is narrow.\textsuperscript{60} The basic limitation is that the employee’s activities must be reasonable and the employee must have a good faith belief that the opposed employer conduct was discriminatory.\textsuperscript{61}

Conversely, the participation clause covers fewer activities, but offers a greater degree of protection against retaliation.\textsuperscript{62} The most typical type of participation involves the plaintiff filing a discrimination charge against his or her employer, but also includes other activities, such as providing testimony or assisting in an investigation.\textsuperscript{63} The underlying charge of discrimination does not have to be valid, and unlike the opposition clause, there is not a reasonableness standard.\textsuperscript{64}

In 1976, the First Circuit Court of Appeals in \textit{Hochstadt v. Worcester Foundation for Experimental Biology} established the extent to which an employer can discipline or terminate an employee who opposed and participated in filing a claim against allegedly discriminatory conduct.\textsuperscript{65} In that case, the court held that the plaintiff’s actions went beyond the scope of protected opposition that section 704(a) is meant to encompass because the plaintiff’s complaints were exceedingly hostile, disruptive, and excessive in the context of that particular workplace.\textsuperscript{66} The court reasoned that in cases in which plaintiffs constantly complain in a hostile and disruptive way, the court must balance the setting in which the activity arises and the interests and motivations of both the employer and employee.\textsuperscript{67} In \textit{Hochstadt}, the employment setting was a laboratory, and the employer had a strong interest in maintaining a cooperative working environment, which would allow for the exchange of research and ideas.\textsuperscript{68} Therefore, by complaining in such a manner, the plaintiff’s actions were beyond the scope of protected opposition.\textsuperscript{69}

\textsuperscript{59} See U.S. Equal Opportunity Comm’n, supra note 12, at 8-3.

\textsuperscript{60} See id. at 8-3 to -11.

\textsuperscript{61} See id. at 8-7 to -8.

\textsuperscript{62} See id. at 8-10.

\textsuperscript{63} See id. at 8-9 to -10.

\textsuperscript{64} See U.S. Equal Opportunity Comm’n, supra note 12, at 8-10.

\textsuperscript{65} See 545 F.2d 222, 227–29, 233 (1st Cir. 1976).

\textsuperscript{66} See id. at 233.

\textsuperscript{67} See id.

\textsuperscript{68} Id.

\textsuperscript{69} Id. at 230.
Courts have declined to extend the holding of Hochstadt to acts of mere disloyalty because nearly every form of opposition could be considered disloyal.\textsuperscript{70} Courts that have followed Hochstadt evaluate the level of interference with the plaintiff’s job performance in determining whether the opposition falls outside the protection of Title VII and serves as a legitimate reason for the employer’s action.\textsuperscript{71} Some courts hold that there is no protected activity involved when a plaintiff complains in a disruptive or insubordinate manner; however, other courts hold that this disruptive behavior provides the employer with a legitimate business reason for the adverse action.\textsuperscript{72} In 2000, in Matima v. Celli, the Second Circuit Court of Appeals held that the employer had offered a legitimate reason for terminating the plaintiff’s employment when the plaintiff pressed his complaints in a disruptive and insubordinate manner.\textsuperscript{73} The court noted that other circuits have held similarly, although the courts disagree where to locate this principle within the prima facie case.\textsuperscript{74} Some courts find that the plaintiff did not engage in protected oppositional activity, whereas others find that the employer’s proffered reason for the conduct was legitimate.\textsuperscript{75} In Matima, however, because the plaintiff actually filed a formal complaint, which is unquestionably a protected activity, the burden shifted to the employer, who articulated the employee’s disruptive and inappropriate behavior as a legitimate, nondiscriminatory ground for the action.\textsuperscript{76} The question then became whether the employee had

\textsuperscript{70} See Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1570 (2d Cir. 1989) (agreeing with the Ninth Circuit Court of Appeals that Hochstadt must be read narrowly to ensure that valid opposition by employees asserting civil rights is not chilled); EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983) (stating that if discipline may be imposed because of mere disloyal conduct, protected activities under section 704(a) would essentially be eliminated because all opposition is in some way disloyal to the employer).

\textsuperscript{71} See Crown Zellerbach, 720 F.2d at 1015.

\textsuperscript{72} See Matima v. Celli, 228 F.3d 68, 79, 80 (2d Cir. 2000); see also Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 1260 (10th Cir. 1999) (holding that the employee’s activities were not reasonable and did not constitute protected opposition), abrogated on other grounds by Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998) (holding as a matter of law that the plaintiff did not engage in protected activities); Rosser v. Laborers’ Int’l Union, Local 438, 616 F.2d 221, 224 (5th Cir. 1980) (stating that although the plaintiff established a prima facie case for retaliation, the employer offered a legitimate business reason for the adverse action it took because the employee’s political opposition put her loyalty and cooperation in dispute).

\textsuperscript{73} See Matima, 228 F.3d at 80–81.

\textsuperscript{74} See id. at 79–80.

\textsuperscript{75} See id.; Robbins, 186 F.3d at 1260; Laughlin, 149 F.3d at 259; Rosser, 616 F.2d at 224.

\textsuperscript{76} See Matima, 228 F.3d at 80.
demonstrated that the stated reason was a pretext for illegal retaliation.\textsuperscript{77} Because there was substantial evidence that the plaintiff’s behavior was significantly disruptive, the court upheld the jury’s finding that the employer would have fired the plaintiff even in the absence of retaliation.\textsuperscript{78}

Additionally, for an oppositional activity to be considered protected, plaintiffs must have a good faith belief that the conduct of which they complain was discriminatory.\textsuperscript{79} In 2001, the U.S. Supreme Court in \textit{Clark County School District v. Breeden} addressed the limit of this good faith standard necessary to satisfy the first prong of the prima facie case.\textsuperscript{80} The Court held that no one could reasonably and in good faith believe that the recitation of an inappropriate comment made by an applicant, stated in the context of screening that applicant, violated Title VII.\textsuperscript{81} Therefore, the plaintiff did not engage in a protected activity.\textsuperscript{82}

Once plaintiffs establish that they have engaged in a protected activity, they next must establish that the employer took some sort of adverse action against them.\textsuperscript{83} This next prong is the most contentious and is discussed at length in this Note.\textsuperscript{84}

3. Second Prong: Adverse Employment Action

Much of the debate surrounding retaliation claims involves the second prong of the plaintiff’s prima facie case, specifically, what constitutes an adverse employment action.\textsuperscript{85} The federal circuit courts of appeals are divided as to what standard courts should use in determining whether employer conduct amounts to an adverse action in a retaliation claim.\textsuperscript{86} This disagreement stems from the ambiguity of the language in section 704(a) of Title VII, the retaliation provision, as well

\textsuperscript{77} See id.
\textsuperscript{78} See id. at 80–81.
\textsuperscript{79} Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994).
\textsuperscript{80} See 532 U.S. 268, 270 (2001). In \textit{Clark County}, the plaintiff alleged that she was sexually harassed when a manager, in discussing whether to hire a prospective employee, merely repeated an inappropriate comment that the prospective employee made, in the presence of the plaintiff. See id. at 269.
\textsuperscript{81} See id. at 269–70.
\textsuperscript{82} See id. at 270.
\textsuperscript{83} See, e.g., Montemayor, 276 F.3d at 692.
\textsuperscript{84} See infra notes 135–331 and accompanying text.
\textsuperscript{85} See Shannon v. Bellsouth Telecommns., Inc., 292 F.3d 712, 716 (11th Cir. 2002); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).
\textsuperscript{86} See Shannon, 292 F.3d at 716; Von Gunten, 243 F.3d at 866; Mattern, 104 F.3d at 707.
as the lack of legislative history associated with it. The U.S. Courts of Appeals for the Fifth and Eighth Circuits take a restrictive approach and hold that an employer can only be liable for retaliation when it makes an ultimate employment decision, such as hiring, discharging, failing to promote, demoting, or changing compensation. The U.S. Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits use an intermediate threshold and hold that decisions materially affecting the terms and conditions of employment may be actionable. A third group, including the U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits, employs a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action. The EEOC endorses a broad but slightly different approach, whereby any act reasonably likely to deter the plaintiff or others from exercising their statutory rights amounts to an adverse employment action. The Ninth Circuit has embraced the EEOC’s approach. At issue in the adverse employment action debate is whether retaliatory harassment should constitute an adverse employment action.

4. Third Prong: Causal Connection

Finally, a Title VII retaliation plaintiff must prove that the adverse employment action was causally related to the protected activity. Title VII requires the plaintiff to show that the employer was aware of the plaintiff’s protected activity and that a retaliatory motive played a part in the employment action. Circumstantial evidence is typically

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88 See Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern, 104 F.3d at 707. Although the Eighth Circuit has not explicitly moved away from the restrictive approach, the court in 2004 found that an employer’s practice of limiting the plaintiff’s bathroom and other breaks, refusing to provide her with job assistance, yelling at her for making mistakes, withholding privileges allowed to other employees, and attempting to dissuade her from making further complaints constituted sufficient and material disadvantages to support a retaliation claim. Baker v. Morrell & Co., 382 F.3d 816, 830 (8th Cir. 2004).
89 See Akers v. Alvey, 338 F.3d 491, 497–98 (6th Cir. 2003); Von Gunten, 243 F.3d at 866; Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997).
90 See Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998); Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996).
92 Ray, 217 F.3d at 1243.
93 See Kravetz, supra note 3, at 368; infra notes 214–244 and accompanying text.
95 See id.
enough to show that the employer both knew about the protected activity and that a retaliatory motive played a role.  

In establishing this causal connection, most plaintiffs rely on the timing of the adverse action and a demonstration that the person taking the adverse action knew about the protected activity. In cases in which the alleged retaliatory action is not immediate, there is no precise test for how long is too long to establish temporal proximity. In 2001, in Clark County, the U.S. Supreme Court held that, without other evidence of causality, an action taken twenty months after the plaintiff complained of discrimination was not enough to establish that it was retaliatory. The Court stated that where timing has been enough for the plaintiff to establish the third prong of the prima facie case, the temporal proximity must be “very close.”  

Although temporal proximity is often the basis for establishing a causal connection, a plaintiff cannot rely on proximity alone to establish this prong of the prima facie case. In addition to the time-frame, a plaintiff may also provide evidence that similarly situated employees who did not engage in the protected activity were treated differently by the employer. When the employer can show that similarly situated employees were treated in the same manner, the plaintiff’s claim will be unsuccessful absent direct evidence of a retaliatory motive.  

Although courts may differ in how they interpret all prongs of the prima facie case, the most pronounced debate involves what constitutes an adverse employment action. A look at the text of Title VII elucidates the disagreement.  

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96 See id.
97 See id. at 8-18.
99 532 U.S. at 274.
100 Id. at 273.
101 See Cooney, supra note 98, at 14.
102 See id. at 15.
103 See id.
104 See Shannon, 292 F.3d at 716; Von Gunten, 243 F.3d at 866; Mattern, 104 F.3d at 707; Outten et al., supra note 38, at 171–83.
105 See infra notes 106–113 and accompanying text.
C. Language of Title VII and Relevant Precedent: Adverse Employment Action

1. Comparing the Language of Sections 703(a) and 704(a)

The most contentious aspect of retaliation charges is the second prong of the prima facie case—what constitutes an adverse employment action.\(^{106}\) The lack of consensus as to what types of employment actions are adverse stems from the ambiguity of the term “discrimination” as used in section 704(a).\(^{107}\) In the general discrimination provision, section 703(a), employers are prohibited from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment.”\(^{108}\) By delineating the ways an employer cannot discriminate against an employee, section 703(a) sets the limits for an actionable discrimination claim.\(^{109}\)

Section 704(a), conversely, does not limit the term discrimination by listing certain actions.\(^{110}\) Instead, it states that “it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment” because that person has engaged in protected activities.\(^{111}\) The U.S. Supreme Court has not ruled on how the term “to discriminate” should be defined for the purposes of the retaliation provision.\(^{112}\) Some general guidance on how to interpret Title VII, however, can be found in the Court’s section 703(a) precedent and its holding as to how the term “employee” in section 704(a) should be interpreted.\(^{113}\)

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\(^{106}\) See Shannon, 292 F.3d at 716; Von Gunten, 243 F.3d at 866; Mattern, 104 F.3d at 707.

\(^{107}\) See 42 U.S.C. § 2000e-3(a) (2000). See generally Linda M. Glover, Note, Title VII Section 704(a) Retaliation Claims: Turning a Blind Eye Toward Justice, 38 Hous. L. Rev. 577, 585 (2001) (arguing that courts imposing higher thresholds for adverse employment actions, attempting to mirror the general discrimination provision threshold, overlook the independent interest protected by section 704(a)); Zion, supra note 8, at 215–16 (contending that there is little support in the history, language, or purpose of section 704(a) that requires an adverse action to be an ultimate employment decision).


\(^{109}\) See id.

\(^{110}\) See id. § 2000e-3(a).

\(^{111}\) Id. (emphasis added).

\(^{112}\) See id.

2. General Guidance from the U.S. Supreme Court on Section 703(a)

a. Hostile Work Environment Liability Under Section 703(a)

The U.S. Supreme Court’s broad interpretation of section 703(a), whereby the Court recognized claims based on a hostile work environment, a cause of action not explicitly found in the text, provides some context for interpreting the retaliation provision.\(^{114}\) Reinforcing the broad construction of Title VII, in 1986, in *Meritor Savings Bank, FSB v. Vinson*, the U.S. Supreme Court concluded that the language of section 703(a) is not limited to economic or tangible discrimination.\(^{115}\) Rather, the Court reasoned that the phrase “‘terms, conditions or privileges of employment’” demonstrates that the legislature intended to encompass the entire spectrum of disparate treatment between men and women in employment.\(^{116}\) The Court held that section 703(a) of Title VII encompasses claims of a hostile work environment when discrimination is severe or pervasive enough to alter the conditions of the plaintiff’s employment and create an abusive working environment.\(^{117}\)

Although the Court adopted a broad construction of discrimination in section 703(a), the Court also stated that Title VII is not a general civility code.\(^{118}\) In order for a hostile work environment claim to be actionable, the environment must be sufficiently hostile or abusive.\(^{119}\) To determine whether such an environment exists, courts consider the totality of the circumstances, including (1) the frequency of the discriminatory conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating, and (4) whether the conduct unreasonably interfered with the employee’s work.\(^{120}\)

After defining a cause of action for hostile work environments, the Court addressed the extent to which liability would flow to the employer for supervisory harassment outside the scope of employment.\(^{121}\) In 1998, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, two decisions handed down the same day, the Court held that employers may be held liable for unlawful harassment

\(^{114}\) *See infra* notes 115–129 and accompanying text.

\(^{115}\) 477 U.S. at 64.


\(^{117}\) *See id.* at 67.

\(^{118}\) *Faragher*, 524 U.S. at 788.

\(^{119}\) *See id.* at 787–88.

\(^{120}\) *Id.*

\(^{121}\) *See Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.
committed by their employees placed in supervisory roles. 122 In *Ellerth* and *Faragher*, the Court declared that employers may not avoid liability by claiming that a supervisor acted outside the scope of employment. 123 Previous decisions of the federal circuit courts of appeals had distinguished between quid pro quo harassment, for which the employer could be held vicariously liable, and a hostile work environment, for which it would not. 124 The Court eliminated this distinction and held that employers could be held vicariously liable for either cause of action. 125

Additionally, the Court established what is now referred to as the *Ellerth/Faragher* affirmative defense to supervisory harassment. 126 In cases in which the plaintiff suffers no tangible employment action, yet is subjected to a hostile work environment, the employer may establish an affirmative defense to charges that a supervisor harassed a subordinate employee. 127 An employer can avoid liability in cases where no tangible employment action was taken by showing (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise failed to avoid harm. 128 This defense has implications for the interpretation of an adverse employment action in a claim of retaliation. 129

b. Retaliation Provision Construed Broadly

In addition to interpreting section 703(a) broadly to incorporate causes of action that are not explicit in the text, the U.S. Supreme Court has likewise interpreted section 704(a) liberally, outside the context of adverse employment actions, in order to effectuate its purpose. 130 In 1997, in *Robinson v. Shell Oil Co.*, the Court determined whether former employees were covered under section 704(a). 131 The language of the

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122 See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.
123 See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.
125 See *Ellerth*, 524 U.S. at 765–66.
126 See Marshall, *supra* note 124, at 571.
127 *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.
128 *Ellerth*, 524 U.S. at 765.
129 See *infra* notes 289–299 and accompanying text.
130 See *Robinson*, 519 U.S. at 345–46.
131 See id. at 339.
section makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment.” The Court held that the term “employees” included former employees, because read with the rest of the provision, it would be illogical to prohibit retaliatory discharge, but not allow discharged employees to bring a charge of retaliation. This broad interpretation of “employees” is consistent with the primary purpose of section 704(a), which the Court held is to “[m]aintain[] unfettered access to statutory remedial mechanisms.”

II. The Circuit Split on Adverse Employment Actions

Notwithstanding the guidance provided by Title VII’s language and U.S. Supreme Court precedent, there has been no uniform standard established for defining adverse employment action in retaliation claims. Thus, federal circuit courts of appeals differ in their interpretations. The U.S. Courts of Appeals for the Fifth and Eighth Circuits employ the narrowest view and hold that an adverse employment action occurs only when the employer makes an ultimate employment decision. A number of other circuits, including the U.S. Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits, utilize an intermediate standard, holding that a plaintiff establishes an adverse employment action when the employer’s act materially affects the terms and conditions of the plaintiff’s employment. The U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits apply a broad, case-by-case approach, focusing more on the defendant’s retaliatory motive than on the severity of the act. Finally, the Equal Employment Opportunity Commission and the U.S. Court of Appeals for the Ninth Circuit em-

133 See Robinson, 519 U.S. at 345.
134 Id. at 346.
135 See Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1264 (10th Cir. 1998); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).
136 See Von Gunten, 234 F.3d at 866; Gunnell, 152 F.3d at 1264; City of Pittsburgh, 120 F.3d at 1300; Mattern, 104 F.3d at 707.
137 See Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 (5th Cir. 2003); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern, 104 F.3d at 709.
138 See Akers v. Alvey, 338 F.3d 491, 497–98 (6th Cir. 2003); Von Gunten, 243 F.3d at 866; Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997).
139 See Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Gunnell, 152 F.3d at 1264; Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996); Wyatt v. City of Boston, 35 F.3d 13, 15–16 (1st Cir. 1994); Passer v. Am. Chem. Soc’y, 935 F.2d 322, 331 (D.C. Cir. 1991).
ploy a deterrence approach, holding that the adverse employment action requirement is satisfied when the employer’s act is reasonably likely to deter the plaintiff or others from engaging in the protected activity.\textsuperscript{140}

A. Restrictive Standard: Ultimate Employment Decisions

A minority of jurisdictions, namely the U.S. Courts of Appeals for the Fifth and Eighth Circuits, take the restrictive position that plaintiffs may only claim retaliation in ultimate employment decisions, such as hiring, granting leave, discharging, promoting, or compensating an employee.\textsuperscript{141}

In 1997, in \textit{Mattern v. Eastman Kodak Company}, the Fifth Circuit Court of Appeals held against a plaintiff who alleged that her employer retaliated against her after she filed a Title VII sexual harassment, hostile work environment claim with the EEOC.\textsuperscript{142} The plaintiff offered a number of incidents that she considered retaliatory, including a visit from a supervisor in her home, in violation of company policy, after she took a day of vacation for a work-related illness, a reprimand for not being at her work station, coworker and supervisor hostility, lack of response from the employer to a call of concern from her doctor, negative performance reviews, and a missed pay increase.\textsuperscript{143} The Fifth Circuit reaffirmed its 1995 holding in \textit{Dollis v. Rubin}, where it stated that Title VII was intended to address ultimate employment decisions, as opposed to every employment decision that potentially has a peripheral effect on those ultimate decisions.\textsuperscript{144} The court in \textit{Mattern} reasoned that because section 704(a) does not mention the “vague harms” contained in section 703(a), “discrimination” as used in section 704(a)

\textsuperscript{140} See Ray, 217 F.3d at 1243; U.S. Equal Opportunity Comm’n, supra note 12, at 8-13.
\textsuperscript{141} See \textit{Mattern}, 104 F.3d at 707 (seminal case articulating the ultimate employment standard); see also \textit{Banks}, 320 F.3d at 575 (adopting \textit{Mattern}’s rationale and holding that employer’s implementation of a new position with reading requirement and new salary structure was not an ultimate employment decision); \textit{Ledergerber}, 122 F.3d at 1144 (holding that reassigning an employee to a more stressful position where she had more difficult employees to supervise was not an ultimate employment decision actionable under section 704(a)). \textit{But see} \textit{Baker v. Morrell & Co.}, 382 F.3d 816, 830 (8th Cir. 2004) (holding that employer’s practice of limiting the plaintiff’s bathroom and other breaks, refusing to provide her with job assistance, yelling at her for making mistakes, withholding privileges allowed to other employees, and attempting to dissuade her from making further complaints constituted sufficient and material disadvantages to support a retaliation claim).
\textsuperscript{142} 104 F.3d at 706, 707, 708.
\textsuperscript{143} \textit{Id.} at 705–06.
\textsuperscript{144} \textit{Id.} at 707 (citing \textit{Dollis v. Rubin}, 77 F.3d 777, 781–82 (5th Cir. 1995)).
includes only ultimate employment decisions.145 In fact, the court assumed it was established that only such decisions would be covered under section 704(a).146 Without deciding whether the missed pay increase was an ultimate employment decision, the court held that the plaintiff’s retaliation claim was not actionable because there was no evidence that the action was retaliatory, and the other incidents did not rise to the level of an adverse employment action.147

The Eighth Circuit has also adopted a restrictive standard.148 In 1997, in Ledergerber v. Stangler, it held that a lateral transfer involving only minor changes in working conditions, including a change in staff, and no reduction in pay or benefits, is not an adverse employment action.149 The court stated that a lateral transfer does not constitute an adverse employment action, reasoning that if it did, every minute decision that an irritable employee did not like would amount to a discrimination claim.150 The court concluded that although the action at issue may have had some peripheral effect on the plaintiff’s employment, it did not rise to the level of an ultimate employment decision, and thus it was not a violation of Title VII’s prohibition on retaliation.151

A number of Eighth Circuit judges, however, have reluctantly applied the restrictive standard, making it clear that they would decide the case differently absent contrary precedent.152 A significant issue that arises with the strict interpretation in the Fifth and Eighth Circuits is whether retaliatory harassment can ever be covered under section 704(a).153

B. Intermediate Standard: Materially Adverse

A majority of federal circuit courts of appeals do not follow the Fifth and Eighth Circuits’ restrictive interpretation of what constitutes

145 See id. at 708–09.
146 See id. at 708.
147 See Mattern, 104 F.3d at 709–10. In 2004, in Davis v. Dallas Area Rapid Transit, the Fifth Circuit reaffirmed its reliance on the ultimate employment decision standard and held that the denial of a promotion because of a rigged reading test was an ultimate employment decision and hence an adverse employment action. 383 F.3d 309, 320 (5th Cir. 2004).
148 See Ledergerber, 122 F.3d at 1144.
149 Id. at 1144–45.
150 Id. at 1145.
151 Id.
152 See, e.g., LePique v. Hove, 217 F.3d 1012, 1014 (8th Cir. 2000) (stating that the court is bound by precedent invoking the restrictive requirement); id. (Heaney, J., concurring) (reluctantly concurring based on precedent).
153 See Kravetz, supra note 3, at 368.
an adverse action.\textsuperscript{154} The U.S. Courts of Appeals for the Second, Third, Fourth, and Sixth Circuits have held that a plaintiff need not show an ultimate employment decision, but instead must make the same showing of a “material adverse action” that applies to any Title VII claim.\textsuperscript{155} This approach to adverse employment action has been classified as the intermediate view.\textsuperscript{156} Nonetheless, this view requires relatively significant consequences to the employee before the employer is held liable.\textsuperscript{157}

In 1997, the Third Circuit Court of Appeals in \textit{Robinson v. City of Pittsburgh} held that the following acts of reprisal did not constitute adverse employment actions: restricted job duties, reassignment and failure to transfer the plaintiff out of an assignment in which she was under the direct command of the alleged harasser, unsubstantiated oral reprimands, and several derogatory comments.\textsuperscript{158} The court concluded that, aside from firing or refusing to rehire an employee, retaliation is actionable only when it changes the employee’s compensation, terms, conditions, or privileges of employment; deprives him or her of employment opportunities; or negatively affects his or her status as an employee.\textsuperscript{159}

Similarly, in the same year in \textit{Torres v. Pisano}, the Second Circuit held that a request by the plaintiff’s supervisor that she drop her EEOC charge did not constitute an adverse employment action.\textsuperscript{160} Although the plaintiff stated that the demands made her feel frightened and intimidated, the court concluded that the plaintiff had not shown that she suffered a materially adverse change in the terms and conditions of employment.\textsuperscript{161} The court stated that it may be possible for a demand for withdrawal of an EEOC charge to amount to retaliation when the demand alters the conditions of the plaintiff’s employment in a material way, such as impliedly threatening to discharge the plaintiff.\textsuperscript{162} The court concluded, however, that employers may

\textsuperscript{154} See \textit{Ray}, 217 F.3d at 1240.

\textsuperscript{155} See infra notes 158–170 and accompanying text.

\textsuperscript{156} See Michael Rusie, Note, \textit{The Meaning of Adverse Employment Action in the Context of Title VII Retaliation Claims}, 9 Wash. U. J.L. & Pol’y 379, 389 (2002); see also \textit{Ray}, 217 F.3d at 1240 (discussing the circuit split and stating that the Second and Third Circuits hold an intermediate position).

\textsuperscript{157} See \textit{Akers}, 338 F.3d at 497–98; \textit{Von Gunten}, 243 F.3d at 866; \textit{City of Pittsburgh}, 120 F.3d at 1300; \textit{Torres}, 116 F.3d at 640.

\textsuperscript{158} 120 F.3d at 1300.

\textsuperscript{159} \textit{Id}.

\textsuperscript{160} 116 F.3d at 639.

\textsuperscript{161} \textit{Id}. at 640.

\textsuperscript{162} \textit{Id}.
take reasonable protective measures in defending themselves without violating section 704(a) of Title VII. Two years later, however, in Richardson v. New York State Department of Correctional Services, the Second Circuit held that unchecked coworker harassment could be an adverse employment action if it is sufficiently severe.

Employing a similar middle-of-the-road standard, the Fourth Circuit Court of Appeals expressly disagreed with the Fifth Circuit’s restrictive standard and held that any employer actions that materially affect the terms and conditions of employment are actionable under Title VII’s retaliation provision. In 2001, in Von Gunten v. Maryland, the Fourth Circuit held that employer action must at least meet some threshold level of substantiality for unlawful discrimination to be cognizable under section 704(a) by adversely affecting the terms and conditions of the plaintiff’s employment.

Likewise, the Sixth Circuit Court of Appeals upheld the intermediate view that an adverse employment action must materially affect the terms of employment. In 2000, the Sixth Circuit in Morris v. Oldham County Fiscal Court, employing an intermediate standard, held that severe or pervasive supervisory harassment can amount to an adverse employment action. Conversely, in 2003, the Sixth Circuit in Akers v. Alvey held that the plaintiff failed to demonstrate that she had suffered an adverse employment action because she had not established a significant change in her employment status, such as being hired, fired, not receiving a promotion, being reassigned with significantly different responsibilities, suffering a significant change in benefits, or other factors unique to her particular situation. Although the court examined the claim on the facts specific to the case, the court’s focus on “significant” changes to the plaintiff’s employment is consistent with the materially adverse standard.

The intermediate standard interprets the term “discrimination” in section 704(a) as being constrained by the language of section

163 Id.
164 180 F.3d 426, 446 (2d Cir. 1999).
165 Von Gunten, 243 F.3d at 865.
166 See id.
167 See Akers, 338 F.3d at 497–98; Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791–92 (6th Cir. 2000).
168 201 F.3d at 792.
169 338 F.3d at 497–98.
170 See id. at 498–99. The Sixth Circuit refused to adopt the EEOC’s deterrence approach and reaffirmed its reliance on the intermediate standard in 2004 in White v. Burlington Northern & Santa Fe Railway Co. See 364 F.3d 789, 800 (6th Cir. 2004).
Reading the two provisions together, courts hold that employment actions that materially affect the terms and conditions of employment are serious enough to satisfy the second prong of the prima facie case for retaliation. This standard requires less than an ultimate employment decision, but still focuses on the severity of the employer’s action.

C. Broad Case-by-Case Approach

Other federal circuit courts of appeals have applied a more liberal standard. Most of these circuits apply a case-by-case approach, focusing on the totality of the circumstances. The U.S. Courts of Appeals for the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits generally define adverse employment action liberally. These courts tend to emphasize the employer’s motive rather than the effect of the employment action. Likewise, these circuits apply a case-by-case approach that takes into account all relevant circumstances in a given case.

The First Circuit Court of Appeals employed such a case-by-case approach, but at the same time required some level of materiality. In 1995, in Wyatt v. City of Boston, the First Circuit held that the plaintiff being denied a promotion, receiving negative performance evaluations, and being transferred without a choice concerning which class to teach,

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171 See Morris, 201 F.3d at 791–92.
172 See id.
173 See id.
174 See Ray, 217 F.3d at 1243; Gunnell, 152 F.3d at 1264; Corneveaux, 76 F.3d at 1507; Wyatt, 35 F.3d at 15–16; Passer, 935 F.2d at 331.
175 See Gunnell, 152 F.3d at 1264; Corneveaux, 76 F.3d at 1507; Wyatt, 35 F.3d at 15–16; Passer, 935 F.2d at 331.
176 See Ray, 217 F.3d at 1240.
177 See Rusie, supra note 156, at 393.
178 See Wiles, supra note 3, at 228–29.
179 See Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (stating that significantly reducing an employee’s responsibility can amount to an adverse employment action); Wyatt, 35 F.3d at 15–16 (holding that demotions, disadvantageous transfers, negative job evaluations, and toleration of harassment by coworkers can constitute adverse employment action). But see Gu v. Boston Police Dep’t, 312 F.3d 6, 14–15 (1st Cir. 2002) (holding that unsupported assertions of loss of supervisory authority, exclusion from office meetings, and diminished communication regarding office matters were insufficient to establish the requisite material change in working conditions); Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 25 (1st Cir. 2002) (holding that although adverse employment actions do not have to involve economic loss, in order to be adverse, a transfer has to be accompanied by a tangible change in duties or working conditions).
if proven, would constitute adverse employment actions.\textsuperscript{180} The court noted that adverse actions include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.\textsuperscript{181} Although adopting a broad approach, in \textit{Blackie v. Maine}, the First Circuit established a limit to this liberal construction of adverse employment actions, stating that “[w]ork places are rarely idyllic retreats” and that employment decisions do not rise to the level of an adverse employment action merely because the plaintiff disagrees with or is upset by them.\textsuperscript{182}

The Eleventh Circuit has likewise broadly construed the requirement of adverse action.\textsuperscript{183} In 1998, in \textit{Wideman v. Wal-Mart Stores, Inc.}, the Eleventh Circuit expressly rejected the restrictive standard and reasoned that the language of section 704(a) extends protection against retaliation to adverse actions that fall short of ultimate employment decisions.\textsuperscript{184} The court did not define the threshold for adverse employment actions, but noted that in that specific case, the acts the plaintiff described, taken together, were sufficient to constitute prohibited discrimination.\textsuperscript{185} The acts included improperly listing the plaintiff as a no-show on a day she was scheduled to have off, forcing the plaintiff to work on that day without a lunch break, issuing written reprimands to the plaintiff, issuing a one-day suspension, soliciting employees for negative statements about the plaintiff, delaying medical treatment when the plaintiff was having an allergic reaction, and threatening to shoot the plaintiff in the head.\textsuperscript{186} Although these actions were not ultimate employment decisions, the court found that they were adverse employment actions under section 704(a).\textsuperscript{187}

Similarly, in 2002, in \textit{Shannon v. Bellsouth Telecommunications, Inc.}, the Eleventh Circuit held that the plaintiff’s lateral reassignment alone was insufficient to amount to adverse employment action.\textsuperscript{188} The reassignment, however, together with the denial of overtime and the alloca-

\textsuperscript{180} 35 F.3d at 16.
\textsuperscript{181} Id. at 15–16.
\textsuperscript{182} 75 F.3d at 725.
\textsuperscript{183} See \textit{Shannon v. Bellsouth Telecomms., Inc.}, 292 F.3d 712, 716 (11th Cir. 2002); \textit{Wideman v. Wal-Mart Stores, Inc.}, 141 F.3d 1453, 1456 (11th Cir. 1998).
\textsuperscript{184} 141 F.3d at 1456.
\textsuperscript{185} See id.
\textsuperscript{186} See id. at 1455.
\textsuperscript{187} See id. at 1456.
\textsuperscript{188} 292 F.3d at 716.
tion of a more difficult assignment and an un-air-conditioned van, did amount to unlawful retaliation.\textsuperscript{189}

In endorsing a similarly broad approach to the adverse employment action requirement, in 1996, in \textit{Knox v. State of Indiana}, the Seventh Circuit held that retaliatory harassment by a co-worker, which the supervisor knew about and failed to remedy, constituted an adverse employment action.\textsuperscript{190} The court noted that the statute purposefully did not take a “laundry list” approach to retaliation, because it can come in as many types as employers can create.\textsuperscript{191}

Likewise, the Tenth and District of Columbia Circuit Courts of Appeals have held that non-tangible, less severe acts or conduct constitute adverse actions.\textsuperscript{192} In 1998, in \textit{Gunnell v. Utah Valley State College}, the Tenth Circuit held that sufficiently severe coworker harassment could amount to adverse employment action.\textsuperscript{193} Similarly, in 1991, in \textit{Passer v. American Chemical Society}, the District of Columbia Circuit ruled that canceling a public symposium in the plaintiff’s honor, after he filed an age discrimination complaint, was sufficiently adverse to support his retaliation claim.\textsuperscript{194}

D. EEOC Deterrence Approach

The EEOC Compliance Manual offers guidance on how courts should approach the adverse employment action requirement.\textsuperscript{195} The Ninth Circuit specifically applies the EEOC’s deterrence approach.\textsuperscript{196} The EEOC Compliance Manual reads, “The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is \textit{reasonably likely to deter} the charging party or others from engaging in protected activity.”\textsuperscript{197} The Manual goes on to point out that “petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity.”\textsuperscript{198} The EEOC opposes the strict inter-

\textsuperscript{189} Id. at 715, 716.
\textsuperscript{190} 93 F.3d 1327, 1334 (7th Cir. 1996).
\textsuperscript{191} Id. Although the Seventh Circuit has not explicitly adopted the EEOC deterrence approach, it has cited approvingly both \textit{Ray} and the EEOC Compliance Manual, demonstrating that perhaps it is in line with the deterrence approach. See Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 745 (7th Cir. 2002).
\textsuperscript{192} See \textit{Gunnell}, 152 F.3d at 1264; \textit{Corneveaux}, 76 F.3d at 1507; \textit{Passer}, 935 F.2d at 331.
\textsuperscript{193} 152 F.3d at 1264.
\textsuperscript{194} 935 F.2d at 331.
\textsuperscript{195} See U.S. EQUAL OPPORTUNITY COMM’N, \textit{supra} note 12, at 8-11 to -15.
\textsuperscript{196} See \textit{Ray}, 217 F.3d at 1243.
\textsuperscript{197} See U.S. EQUAL OPPORTUNITY COMM’N, \textit{supra} note 12, at 8-13 (emphasis added).
\textsuperscript{198} Id.
pretations of this requirement and endorses the view that the degree of harm suffered by the individual goes to the issue of damages, not liability.\textsuperscript{199} The Ninth Circuit has expressly adopted the EEOC’s deterrence approach, whereas other circuits applying the broad standard employ a general case-by-case approach, which is nonetheless consistent with the EEOC’s standard.\textsuperscript{200}

In 2000, in \textit{Ray v. Henderson}, the Ninth Circuit Court of Appeals adopted an expansive view of the type of actions sufficient to constitute adverse employment actions.\textsuperscript{201} In \textit{Henderson}, the court found that the plaintiff had alleged sufficient facts to survive summary judgment in his hostile work environment retaliation claim.\textsuperscript{202} The plaintiff in \textit{Ray} claimed he was verbally abused in a manner related to his complaints, was the subject of a number of pranks, and was falsely accused of misconduct.\textsuperscript{203} In analyzing the case, the Ninth Circuit traced the division among the circuits and aligned itself with the circuits endorsing the broad approach, specifically agreeing with the EEOC that adverse employment action means any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.\textsuperscript{204} Thus, the court found that an employee has a cause of action under section 704(a) for retaliatory harassment.\textsuperscript{205}

The case-by-case and deterrence approaches focus more on the employer’s retaliatory motive than the objective severity of the action itself.\textsuperscript{206} Although minor changes or annoyances will not constitute an adverse employment action, actions less than those materially affecting the terms and conditions of employment can be sufficient.\textsuperscript{207} The various approaches courts take to the adverse employment action requirement produce varying results in cases with similar facts.\textsuperscript{208}

\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{See Ray}, 217 F.3d at 1240, 1243.
\textsuperscript{201} \textit{See id.} at 1243.
\textsuperscript{202} \textit{Id.} at 1245–46.
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.} at 1240–43.
\textsuperscript{205} \textit{See Ray}, 217 F.3d at 1245.
\textsuperscript{206} \textit{See id.} at 1240–41; U.S. \textsc{Equal Opportunity Comm’n}, \textit{supra} note 12, at 8-13.
\textsuperscript{207} \textit{See U.S. \textsc{Equal Opportunity Comm’n}, \textit{supra} note 12, at 8-13.
\textsuperscript{208} \textit{See infra} notes 215–242 and accompanying text.
III. The Deterrence Approach Should Be Universally Adopted to Put an End to Contradictory Results

The definition of adverse employment action should be uniform in all jurisdictions to give plaintiffs and employers a clear sense of their rights and responsibilities in the retaliation context. All federal circuit courts of appeals should adopt the Equal Employment Opportunity Commission’s broad, deterrence approach because it is most consistent with the language of Title VII, as well as U.S. Supreme Court precedent. Additionally, the EEOC’s support of this standard should be accorded some deference, as it is the administrative body responsible for enforcing Title VII. The broad approach is also the most logical in light of the Ellerth/Faragher affirmative defense; otherwise, the result would be harsh and unfair to plaintiffs. Finally, critics’ fear of the broad standard—that the ability of employers to effectively manage their workplace will be threatened by the broad approach—is best addressed in other elements of a retaliation claim.

A. Different Standards for Defining Adverse Employment Actions Produce Inconsistent Results

The standard a court uses to determine whether an employer has taken an adverse employment action can directly determine the plaintiff’s success in proving his or her case. The facts of Morris v. Oldham County Fiscal Court, decided by the Sixth Circuit Court of Appeals in 2000, provide a good example. Judy Morris, the plaintiff, worked as a secretary providing clerical support for the Oldham County Road Department starting in 1984. In 1994, Brent Likins became Morris’s supervisor. Morris alleged that Likins repeatedly made jokes with sexual overtones, made several comments about Morris’s dress, and once referred to her as “Hot Lips.” During this time, Likins was responsible for evaluating Morris’s job performance. In November 1994, he gave...
Morris a rating of “excellent.”\textsuperscript{220} In March of 1995, he gave her a rating of “very good.”\textsuperscript{221} When Morris asked why her rating dropped, Likins stated, in front of another employee, that if she went into his office, after they were finished he would mark her as excellent.\textsuperscript{222} Morris and the other employee interpreted this as meaning that if she performed sexual acts on Likins, he would change her performance review.\textsuperscript{223} Morris complained about these acts to County Judge John Black, who wrote a letter to Likins stating that he hoped the two of them would work it out.\textsuperscript{224} After receiving that letter, Likins began ignoring Morris.\textsuperscript{225} He also became overly critical of her work.\textsuperscript{226} Morris complained again, and Judge Black relocated Likins’s office and ordered Likins not to communicate with Morris without a third person present.\textsuperscript{227}

Likins ignored Judge Black’s instructions.\textsuperscript{228} Instead, he visited Morris’s office unaccompanied fifteen times, called her on the telephone over thirty times, and drove to her office and sat outside in his truck, making faces at her through her window.\textsuperscript{229} On one occasion, Likins followed Morris home and gave her “the finger” from his truck.\textsuperscript{230} Likins also destroyed the television Morris occasionally watched in the office and threw roofing nails onto her home driveway several times.\textsuperscript{231} Because of this conduct, Morris began having anxiety attacks and took sick leave from work.\textsuperscript{232} Ultimately, Morris filed sexual harassment and retaliation claims against her employer, Judge Black, and Likins.\textsuperscript{233}

Did the plaintiff in \textit{Morris} establish a prima facie case of retaliation?\textsuperscript{234} The outcome would likely depend on which circuit the case was heard in and which standard the court applied to define adverse

\textsuperscript{220} \textit{Morris}, 201 F.3d at 787.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} \textit{Morris}, 201 F.3d at 787.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} \textit{Morris}, 201 F.3d at 787.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} See id.
employment action.\textsuperscript{235} In the Fifth and Eighth Circuits, the plaintiff would fail because she cannot show that she was subject to an ultimate employment decision.\textsuperscript{236} In circuits that employ the intermediate threshold, the results might differ because of the undeveloped state of the law on liability for retaliatory harassment.\textsuperscript{237} In circuits that adopt the liberal case-by-case or EEOC deterrence approach, the plaintiff would almost certainly establish a prima facie case for retaliation.\textsuperscript{238} This is because the plaintiff would likely have been deterred from opposing the perceived sexual harassment had she known that she would face Likins’s increased inappropriate, harassing behavior.\textsuperscript{239}

The Sixth Circuit Court of Appeals, employing the intermediate standard, held that although her sexual harassment claim failed, the plaintiff in \textit{Morris} established a prima facie case for retaliation.\textsuperscript{240} The court reasoned that because the U.S. Supreme Court in \textit{Burlington Industries, Inc. v. Ellerth} and \textit{Faragher v. City of Boca Raton}, held that severe or pervasive supervisory harassment constitutes discrimination under section 703(a), such harassment likewise can replace adverse employment action and fulfill that prong of the prima facie case for retaliation.\textsuperscript{241} The court then stated that the defendant would have the opportunity to prove the affirmative defense outlined in \textit{Ellerth}.\textsuperscript{242}

Because of the potential for different results, employers and employees are left without a clear understanding of what facts are sufficient to establish a prima facie case of retaliation.\textsuperscript{243} The U.S. Supreme Court should grant certiorari to address the disagreement among the circuit courts of appeals and should adopt the broad, EEOC deterrence approach.\textsuperscript{244}

\begin{footnotes}
\footnotetext[235]{Compare Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 716 (11th Cir. 2002), with Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001), and Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997).}
\footnotetext[236]{See Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern, 104 F.3d at 707.}
\footnotetext[237]{See Richardson v. N.Y. State Dep’t of Corr. Srvs., 180 F.3d 426, 446 (2d Cir. 1999); Margery Corbin Eddy, \textit{Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms}, 63 \textit{Alb. L. Rev.} 361, 363 (2000).}
\footnotetext[238]{See Ray v. Henderson, 217 F.3d 1234, 1243–44 (9th Cir. 2000); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456–57 (11th Cir. 1998); U.S. \textit{Equal Opportunity Comm’n, supra} note 12, at 8-13.}
\footnotetext[239]{See \textit{U.S. \textit{Equal Opportunity Comm’n, supra} note 12, at 8-13.}
\footnotetext[240]{201 F.3d at 791, 792.}
\footnotetext[241]{See id. at 792.}
\footnotetext[242]{\textit{Id.}
\footnotetext[243]{See \textit{supra} notes 234–242 and accompanying text.
\footnotetext[244]{See \textit{infra} notes 245–331 and accompanying text.}
\end{footnotes}
B. Language, Purpose, and U.S. Supreme Court Precedent Support the Broad, Deterrence Approach

1. The Plain Meaning of “Discrimination” Is Most Consistent with the Broad, Deterrence Approach

Although there is ambiguity in the term “discrimination” in section 704(a), the broad, deterrence approach is most consistent with the language and purpose of Title VII generally and section 704(a) specifically. The language of section 704(a) is best read to support the broad standard. Because section 704(a) lacks the limiting language of section 703(a), it is more likely that Congress intended for “discriminate” to be more broadly construed, rather than restricted only to ultimate employment decisions. The dictionary definition of “discriminate” is “to make a difference in treatment or favor on a basis other than individual merit,” and thus the plain meaning of the term supports a broad rather than restrictive interpretation. Therefore, the language of the retaliation provision supports a liberal construction of the provision.

2. Reading Section 703(a) Qualifiers into Section 704(a) Is Incompatible with U.S. Supreme Court Precedent

Rather than accord “to discriminate” its plain, broad meaning, some courts and advocates of the intermediate threshold read the qualifying language of section 703(a) into section 704(a). Some scholars invoke the principle of ejusdem generis. This stands for the proposition that when a general term follows a specific one, it should be understood as a reference to similar subjects of the specific enumeration. Therefore, the qualifying language of section 703(a) would be read into section 704(a), and would limit the term “discrimi-

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248 See id.; see also 42 U.S.C. § 2000e-3(a).
249 See Morris, 201 F.3d at 791–92; Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).
250 See Cade & Steger, supra note 3, at 397–98; Glover, supra note 107, at 610.
251 See Cade & Steger, supra note 3, at 397–98.
nate” in that provision to compensation, terms, conditions, or privileges of employment.\textsuperscript{253} Although this approach is not inconsistent with the U.S. Supreme Court’s approach in Robinson \textit{v. Shell Oil Co.}, where the Court looked to other provisions to define “employees” under section 704, the Court in Robinson also made clear that it was interpreting the term liberally to effectuate the broader goals of Title VII.\textsuperscript{254} Therefore, one should interpret the language in light of the purpose of Title VII generally and the retaliation provision specifically.\textsuperscript{255}

The purpose of section 703(a) is to prevent discrimination on the basis of protected categories with respect to the terms, conditions, or privileges of employment.\textsuperscript{256} The goal of section 704(a), however, is somewhat distinct—to ensure access to Title VII statutory rights, so that people are not deterred from voicing their complaints of discrimination.\textsuperscript{257} A reading of section 704(a) in conjunction with the qualifying language of section 703(a) overlooks the specific goals of the provisions.\textsuperscript{258}

Taking the language of section 704(a) together with U.S. Supreme Court precedent further supports a liberal approach.\textsuperscript{259} The Court has interpreted Title VII broadly to effectuate its remedial goals, and for example, has construed the retaliation provision liberally.\textsuperscript{260} In Robinson, the Court made it clear that the purpose of section 704(a) is to “[m]aintain[.] unfettered access to statutory remedial mechanisms.”\textsuperscript{261} The Court in Robinson concluded that the term “employee” encompasses former as well as current employees.\textsuperscript{262} To interpret “employee” otherwise would mean that employers could discharge employees in retaliation for their filing a discrimination charge and suffer no legal consequences.\textsuperscript{263} In adverse employment actions, courts should similarly employ a liberal standard in order to allow employees effective

\textsuperscript{254} See 519 U.S. at 345–46.
\textsuperscript{255} See id.
\textsuperscript{257} See Robinson, 519 U.S. at 346.
\textsuperscript{258} See 42 U.S.C. §§ 2000e-2(a)(1)–(2), -3(a); Robinson, 519 U.S. at 346.
\textsuperscript{260} See Faragher, 524 U.S. at 802; Ellerth, 524 U.S. at 765; Robinson, 519 U.S. at 346; Meritor, 477 U.S. at 73.
\textsuperscript{261} 519 U.S. at 346.
\textsuperscript{262} Id. at 345–46.
\textsuperscript{263} See id. at 345.
access to Title VII’s remedies.\textsuperscript{264} By considering adverse employment actions to include any activity that would likely deter an employee from reporting discrimination, the purpose of section 704(a) will be most closely followed, as it was in \textit{Robinson}.\textsuperscript{265}

Likewise, the U.S. Supreme Court’s 1986 decision, \textit{Meritor Savings Bank, FSB v. Vinson}, demonstrates the Court’s broad construction of section 703(a) of Title VII, the general discrimination provision.\textsuperscript{266} In \textit{Meritor}, the Court held that discrimination in section 703(a) is not limited to economic or tangible discrimination; it can also be found where a plaintiff was subject to a hostile work environment that was sufficiently severe or pervasive to alter the conditions of the plaintiff’s employment and create an abusive working environment.\textsuperscript{267} Although section 703(a) does not provide an explicit cause of action for a hostile work environment, the Court held that in light of Title VII’s purpose, something less than an ultimate employment decision may be actionable.\textsuperscript{268} Therefore, discrimination under section 704(a) should be interpreted at least as broadly as section 703(a), because the former does not contain the qualifying language of the latter.\textsuperscript{269} The statutory construction in \textit{Meritor} and \textit{Robinson}, along with the Court’s articulation of the purpose of section 704(a), demonstrates that the deterrence or broad approach is most consistent with U.S. Supreme Court precedent.\textsuperscript{270}

3. The Contention That the Lack of Qualifying Language Leads to a Narrower Interpretation Is Flawed

In addition to the split between the federal circuit courts of appeals resulting in varying outcomes, legal commentators likewise are divided as to what standard should be adopted in evaluating whether conduct amounts to an adverse employment action.\textsuperscript{271} As with the split among the circuits, the disagreement can be traced to how the term “to discriminate” should be interpreted in section 704(a).\textsuperscript{272} The scant legislative history of Title VII provides little guidance.\textsuperscript{273} Whereas section

\textsuperscript{264} See id. at 345–46.
\textsuperscript{265} See id.
\textsuperscript{266} See 477 U.S. at 73.
\textsuperscript{267} Id. at 64.
\textsuperscript{268} See id.
\textsuperscript{270} See Robinson, 519 U.S. at 345–46; \textit{Meritor}, 477 U.S. at 64.
\textsuperscript{271} See Cude & Steger, supra note 3, at 396; Kravetz, supra note 3, at 368; Wiles, supra note 3, at 238.
\textsuperscript{272} See 42 U.S.C. § 2000e-3(a).
\textsuperscript{273} See Zion, supra note 8, at 196.
703(a) lists the ways in which an employer cannot discriminate against employees, such as through “compensation, terms, conditions, or privileges of employment,” section 704(a) does not. Proponents of the restrictive, ultimate employment decision standard construe the term “to discriminate” in section 704(a) to proscribe only ultimate employment decisions, rather than the other types of actions described in section 703(a). Instead of viewing the absence of qualifying language in section 704(a) as broadening the scope of discrimination, supporters of this view contend that it actually limits it to only ultimate employment decisions. If the drafters wanted retaliatory discrimination to include the actions enumerated in section 703(a), some commentators argue, they would have included them in section 704(a). As they did not, only ultimate employment decisions are actionable. This reasoning, however, is flawed in light of the plain language of the statute, as well as the way the U.S. Supreme Court has interpreted the statute in the past.

C. The EEOC’s Adoption of the Deterrence Standard Bolsters the Argument in Support of This Approach

Not only do the language of the statute and U.S. Supreme Court precedent support the broad approach to defining adverse employment action, the EEOC also adopts a broad, deterrence approach. In Meritor, the U.S. Supreme Court noted that, although not binding, EEOC guidelines constitute a body of experience and informed judgment to which courts and litigants properly may resort for guidance. The EEOC is the administrative agency with the task of enforcing Title VII; therefore, its interpretation should be accorded some weight. In Meritor, the Court adopted the EEOC’s view that harassment leading to non-economic injury could amount to a cause of action under Title VII.

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275 See Mattern, 104 F.3d at 708–09 (stressing that the vague proscription present in section 703(a) is lacking from section 704(a), and therefore the provision was meant to address only ultimate employment decisions).
276 See id.
277 See Wiles, supra note 3, at 233.
278 See Mattern, 104 F.3d at 708–09.
279 See 42 U.S.C. § 2000e-3(a); Robinson, 519 U.S. at 345–46.
281 477 U.S. at 65.
282 See id.
283 Id. at 66.
In interpreting the retaliation provision, the EEOC makes its disapproval of restrictive standards clear in its Compliance Manual.\(^{284}\) The Compliance Manual states that the retaliation provision proscribes \emph{any} adverse treatment that is based on a retaliatory motive and that is reasonably likely to deter the charging party or others from engaging in protected activity.\(^{285}\) Although the EEOC’s standard is broad, it does not include trivial annoyances because these would not be sufficient to deter a person from opposing a discriminatory practice.\(^{286}\) In 2000, in \textit{Ray v. Henderson}, the Ninth Circuit specifically adopted the EEOC’s deterrence approach, stating that it is consistent with its prior case law and most closely upholds the language and purpose of Title VII.\(^{287}\) The EEOC’s endorsement of this approach bolsters the argument in support of its adoption by all circuits.\(^{288}\)

\section{D. The Deterrence Approach Is Necessary in Light of the Ellerth/Faragher Affirmative Defense}

In addition to being harmonious with Title VII’s language, purpose, and precedent, the broad, deterrence approach is also the most logical given the affirmative defense announced by the U.S. Supreme Court in 1998 in \textit{Ellerth} and \textit{Faragher}.\(^{289}\) In \textit{Ellerth}, the Court held that employers may be liable for supervisory harassment amounting to a hostile work environment.\(^{290}\) When there is no tangible employment action taken, an employer can avoid liability in a supervisory hostile work environment harassment claim by establishing an affirmative defense.\(^{291}\) The employer must show (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or otherwise failed to avoid harm.\(^{292}\)

The second prong becomes significant in a court’s choice of standard in evaluating adverse employment action in retaliation

\begin{footnotes}
\item[285] Id.
\item[286] Id.
\item[287] 217 F.3d at 1243.
\item[289] See \textit{Faragher}, 524 U.S. at 807–08; \textit{Ellerth}, 524 U.S. at 765.
\item[290] 524 U.S. at 765.
\item[291] Id.
\item[292] Id.
\end{footnotes}
cases. If an employee who is being sexually harassed by a supervisor did not utilize internal grievance procedures, due to fear of being retaliated against, an employer in a formal charge could invoke the affirmative defense to avoid liability. The employer could argue that the plaintiff’s fear was unreasonable, and therefore he or she unreasonably failed to use the opportunities provided by the employer.

To encourage employees who are being discriminatorily harassed to use opportunities provided by the employer to remedy the situation, the law must protect against any retaliation that is likely to deter the employee from coming forward. If employees are not insulated against such retaliatory acts, employees might endure the harassment rather than report it and face reprisal not amounting to a material change in employment. This leaves employees in a lose-lose situation—if they fail to use the procedures provided by the employer, they could potentially lose out on recovery in a harassment case, or if they utilize internal procedures, they could risk facing employer retaliation amounting to less than an ultimate employment decision or a material change to the terms and conditions of employment. Therefore, in order to effectuate the purpose of the retaliation provision, it is necessary to apply the broad, deterrence standard.

E. Employers’ Workplace Autonomy Is Protected in Other Parts of a Retaliation Claim

The previous arguments focused on ensuring employees’ access to Title VII remedies; employers, however, likewise have interests that should not be overlooked. Those in favor of the restrictive standard argue that without the strict limitation, employees will use section 704(a) to combat every employment decision with which they are unhappy. This would prevent employers from being able to effectively

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293 See id.; Marshall, supra note 124, at 577–78.
294 See Ellerth, 524 U.S. at 765; Marshall, supra note 124, at 578.
295 See Marshall, supra note 124, at 578.
297 See Marshall, supra note 124, at 578.
298 See id. at 577–78.
299 See id.
300 See Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000); Rosser v. Laborers’ Int’l Union, Local 438, 616 F.2d 221, 224 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 233 (1st Cir. 1976).
301 Mattern, 104 F.3d at 708; Cude & Steger, supra note 3, at 398.
manage the workplace. An off-shoot of this argument is that courts will be inundated with retaliation claims and employers will have to expend massive resources to defend against frivolous lawsuits. Without a bright-line standard, proponents argue, employers will not be able to adequately identify and prevent illegal retaliation.

Those in support of the intermediate standard—that adverse employment actions are those that materially affect the terms and conditions of employment—argue that this standard will effectuate the purpose of Title VII by allowing courts to respond to the facts of particular cases, without spurring trivial claims. Proponents of this standard, like those in support of the strict standard, contend that the broad approach will open the floodgates of litigation and bombard the courts with frivolous claims. Additionally, they maintain that employers are in the best position to manage the workplace effectively, and they should be able to do so without unwarranted judicial interference. Further, proponents argue that employers will not be able to prevent discriminatory retaliation if they do not know how to recognize it.

Concerns that employers will not be able to discipline or terminate the employment of inappropriate or incapable employees without facing a lawsuit are valid. The requirement of adverse employment action, however, is not the appropriate portion of a retaliation claim to take these concerns into account. Additionally, the deterrence standard will not provide a cause of action against merely trivial annoyances in which the plaintiff or others would not be deterred from engaging in the protected activity.

Any action that an employer takes in retaliation of a protected activity, which would likely deter that activity, should be actionable. This is because it best serves the purpose of section 704, which is to maintain access to the remedies for discrimination provided in Title

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302 See Cude & Steger, supra note 3, at 398.
303 See Wiles, supra note 3, at 237.
304 See id.
305 See Rusie, supra note 156, at 403; Wiles, supra note 3, at 238, 239–40.
307 See Currie, supra note 306, at 1344; Wiles, supra note 3, at 237.
308 See Currie, supra note 306, at 1344; Wiles, supra note 3, at 237.
309 See Cude & Steger, supra note 3, at 408.
310 See Matima, 228 F.3d at 79–80; Hochstadt, 545 F.2d at 233.
312 Id.
This does not mean, however, that employers should be liable for disciplining or even discharging a troublesome employee. A plaintiff should not be able to establish a prima facie case for retaliation when he or she constantly complains in a hostile or disruptive manner.

The protected activity prong of the prima facie case is the more appropriate aspect to take into account the disruptive nature of a plaintiff’s complaints. A plaintiff should not be able to meet this requirement when he or she engages in opposition that is hostile and excessively disruptive. In 1976, the First Circuit Court of Appeals in *Hochstadt v. Worcester Foundation for Experimental Biology* held that because the employer was unable to effectively manage its workplace due to the disruptive and inappropriate complaints of the plaintiff, the employer was not liable for taking actions to eliminate the disruption. Because the plaintiff’s opposition to the employer’s practices was exceedingly hostile and disruptive, the court balanced the workplace setting and the interests and motivations of the employer and the employee. *Hochstadt* shows that the protected activity requirement can be used to ensure that courts do not constrain the employer’s ability to manage its workplace effectively.

Another way that the courts take into account the employer’s ability to manage the workplace is through the “legitimate business reason” portion of the burden-shifting framework. When an employee has clearly engaged in a protected activity, such as filing a charge with the EEOC, but also has been insubordinate or disruptive with complaints at work, an employer similarly should not be liable for disciplining or discharging that employee. The employee could satisfy the protected activities requirement, but the employer could show that it had a legitimate business reason for its action, such as disciplining a hostile or disruptive employee. This is precisely what the

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313 See Robinson, 519 U.S. at 346.
314 See Matima, 228 F.3d at 79; Rosser, 616 F.2d at 224; Hochstadt, 545 F.2d at 233.
315 See Matima, 228 F.3d at 79; Rosser, 616 F.2d at 224; Hochstadt, 545 F.2d at 233.
316 See Hochstadt, 545 F.2d at 233.
317 See id.
318 Id. at 233, 234.
319 Id. at 232.
320 See id. at 234.
321 See Matima, 228 F.3d at 79–80.
322 See id. at 80.
323 See id. at 80–81.
Second Circuit Court of Appeals held in 2000 in *Matima v. Celli*.\(^{324}\) In that case, the plaintiff engaged in a number of oppositional activities and filed a formal charge of discrimination.\(^{325}\) The employer, however, provided ample evidence that the plaintiff’s actions disrupted his work and the work of his coworkers and supervisors.\(^{326}\) The plaintiff constantly confronted his supervisors in inappropriate ways, leaving the company with no choice but to discharge him in order to effectively manage the company.\(^{327}\)

It is clear that employers retain the authority to discharge or discipline employees as they see fit, so long as their motivation in doing so is legitimate rather than retaliatory.\(^{328}\) Adopting the deterrence standard will not give plaintiffs a cause of action against trivial annoyances in the workplace.\(^{329}\) These would not be sufficient to deter the plaintiff or others from engaging in the protected activity.\(^{330}\) Therefore, the concern that employers would be liable for every small workplace decision they make is unfounded.\(^{331}\)

**Conclusion**

Because of the potential for inconsistent results, the U.S. Supreme Court should grant certiorari and establish a uniform standard for evaluating the adverse employment action requirement in a Title VII retaliation claim. The Equal Employment Opportunity Commission’s broad, deterrence approach is the most appropriate standard in light of the language of section 704(a) and U.S. Supreme Court precedent. The Court has stated that the purpose of section 704(a) is to maintain unfettered access to Title VII’s statutory remedial mechanisms. By focusing on whether an employer’s act would deter the plaintiff or others from engaging in the protected activity, this purpose is followed most closely. The possible harsh results of the *Ellerth/Faragher* defense, absent applying the liberal standard, further bolsters this argument. Concerns that every workplace action would satisfy the deterrent standard are unsubstantiated because this standard would not consider trivial an-

\(^{324}\) See id. at 81.
\(^{325}\) See id. at 74.
\(^{326}\) See id.; Hochstadt, 545 F.2d at 233.
\(^{327}\) Id.
\(^{328}\) See id.; Hochstadt, 545 F.2d at 233.
\(^{330}\) See id.
\(^{331}\) See id.
noyances actionable. For these reasons, the Court should adopt the EEOC’s broad, deterrence approach.

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