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NEW LIFE IN THE FIRST AMENDMENT:
FUNERAL PROTEST STATUTES AFTER
MCCULLEN V. COAKLEY

DEREK GOFF**

Forty-six states and the U.S. Congress have passed funeral protest statutes to counter the notorious practices of the Westboro Baptist Church, but are the statutes constitutional? The recent Supreme Court case of McCullen v. Coakley on the parallel issue of abortion clinic buffer zones suggests that they are not. First, the Court restored speech rights by reaffirming that the governmental interest of protecting people from unwanted communication while in traditional public fora is content based. Second, the Court struck down a statute as failing to be narrowly tailored, despite the Court’s application of intermediate scrutiny. While lower courts have upheld broad funeral protest statutes, the Supreme Court now shows that even facially content-neutral statutes do not give legislatures carte blanche to substantially burden speech. The Sixth and Eighth Circuit courts have upheld broad funeral protest statutes, but McCullen shows a far more speech-protective Supreme Court. In light of this precedent, lower courts should rule that existing funeral protest statutes are unconstitutional. However, this article proposes a more moderate “line of sight” legislative solution that would preserve the protestors’ First Amendment rights while protecting funeral attendees’ interest in avoiding disruptive protests during funerals. This workable solution is narrowly tailored to serve the valid state interest of preventing funeral disruptions.

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** Derek Goff, Staff Editor, Mississippi Law Journal; J.D. Candidate 2016, University of Mississippi School of Law wishes to thank his constitutional mentor Dean Jack Wade Nowlin for his inspiration, encouragement, and extensive help in writing this article. Derek would also like to thank Professor Lisa Shaw Roy for lending her First Amendment expertise and providing valuable feedback. Finally, Derek would like to thank his wife Kristina Goff, mother Elizabeth Alexander, and father Rodney Goff for their love and support during the writing process.
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INTRODUCTION

“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” – Justice Douglas

The First Amendment protects the freedom to speak, but it serves its most vital role when it protects unpopular speech. Provocative speech on issues of public concern may cause the listener to reevaluate his or her position, or the offended listener may simply ignore the speech. Either way, our Constitution ensures that it is the individual, and not the government, who decides the value of the speech in the marketplace of ideas.

The Westboro Baptist Church tests our nation’s commitment to First Amendment principles. Sidewalks and public ways are “traditional public fora” that have long received heightened First Amendment protection due to their “historic role as sites for discussion and debate.” However, in the past decade, the U.S. Congress and state legislatures have attacked freedom of speech in this protected zone. Because of public outrage against the church, the U.S. Congress and forty-six states have passed statutes to address the Westboro Baptist Church’s practice of picketing funerals. Many statutory buffer zones carve out hundreds to thousands of feet around funerals to prevent the church’s offensive expression.

While this church group deserves the widespread public condemnation it receives, courts should protect the constitutional rights of the most marginal minorities. However, the lower courts have universally interpreted Supreme Court precedent too broadly when upholding statutes restricting such speech. First Amendment protections for all are sacrificed as a result. The Supreme Court shows the unconstitutional breadth of these statutes in its recent unanimous decision of McCullen v. Coakley, a case about anti-abortion protests. In McCullen, Massachusetts passed a law making it a crime to stand on the public way or sidewalk within thirty-five feet of an abortion clinic entrance in order to prevent sidewalk crowding, crime, and unwanted communication to women approaching the clinic.

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1 Terminello v. Chicago, 337 U.S. 1 (1949).
2 See Abrams v. United States, 250 U.S. 616 (1919). Justice Oliver Wendell Holmes in dissent argued, “The best test of truth is the power of the thought to get itself accepted in the competition of the market...” Id. at 630.
In part II of this article, I explain the reasoning behind both the First Circuit’s upholding of the buffer zone statute and the Supreme Court’s subsequent unanimous reversal. The First Circuit, citing *Hill v. Colorado*, upheld the state statute as constitutional. The Supreme Court held that the buffer zone outside of the abortion clinic was content neutral and was therefore only subject to intermediate scrutiny. However, the Court unanimously held that the statute violated the First Amendment, because it burdened more speech than was necessary to serve the governmental interest of safety and preventing sidewalk obstruction. The Court reasoned that Massachusetts had not “seriously undert[aken]” to accomplish its goal with the “less intrusive tools readily available…” With this scrutinizing analysis, *McCullen* constitutionally eroded *Hill* and undercut the lower courts’ bases for upholding the funeral protest statutes.

The recent *McCullen* decision signals a far more speech-protective Supreme Court than was likely anticipated by the lower courts, which have upheld broad funeral protest statutes. By analogy, *McCullen* shows that the buffer zones around funeral services are unconstitutionally broad, as they burden far more speech than is necessary to achieve the government interests of protecting funerals from disruptions by protestors. Although the Supreme Court has not reviewed any funeral protest statutes to date, the *McCullen* decision shows that the state legislatures are not satisfying the burden of narrowly tailoring the statutes to their valid interests. *McCullen* also suggests that lower courts have interpreted *Hill v. Colorado* and other decisions too broadly, permitting the government to unconstitutionally burden speech in traditional public fora.

In part III of this article, I argue that the government lacks sufficient valid interests to support these broad buffer zones. The prevention of funeral disruption is a valid state interest, during the funeral and when the audience is truly captive. However, lower courts have interpreted precedent as creating privacy interests on the traditional public fora that could justify a buffer zone displacing protestors hundreds of feet, before and after a funeral. *McCullen* undercuts this by stating that avoidance of unwanted communication cannot be a valid content-neutral state interest on streets and sidewalks. Further, there has been no history of crime or obstruction of funeral entrances by the protestors, so the government lacks a reasonable basis for the broad statutes.

In part IV, I argue that the funeral protest statutes are not narrowly tailored to their one valid interest: preventing the disruption of funerals. The *McCullen* decision shines new light on the constitutional problems of the funeral picketing statutes. The unconstitutional buffer zones around abortion clinics in Massachusetts were only thirty-five feet each, whereas many funeral buffer zones extend several hundred feet. Further, unlike *McCullen*, there have been no successful prosecutions of funeral protestors for violating existing statutes, and there is no history of entrance obstruction, so there are
limited justifications for the buffer zone without regard for the content of the speech.

The state interest is further undercut by the effectiveness of less restrictive means. I propose a solution that would preserve funeral attendees’ privacy as well as freedom of speech on traditional public fora. Legislatures should remove the buffer zones that are likely unconstitutional after McCullen. Instead, they could pass a “line of sight” statute that would forbid audible and visual disruptions to the funeral or burial service. This would ensure protestors their constitutionally protected opportunity to reach their intended audience on streets and sidewalks while respecting the funeral attendees’ interest in having an undisrupted funeral service. Additionally, repealing these statutes would likely cut into the Westboro Baptist Church’s funds, as the church ironically gains much of its funding for protests by recovering settlements for civil rights violations by states.

Though the Westboro Baptist Church is nearly universally hated, Circuits upholding these laws accomplish little good in exchange for restricting significant First Amendment protections. All evidence suggests that counter-speech has proven to be an effective force against the church. Throughout the country, counter-protests have arisen where the church plans to protest. A group called the “Patriot Guard Riders” attends funerals to peacefully insulate funeral attendees from the protestors.

Supreme Court decisions read broadly have been used to justify these buffer zones that eliminate speech. However, the unanimous McCullen decision has held that such a buffer zone must have a strong and demonstrable state interest to which the restriction is narrowly tailored. For these reasons, this article argues that the Sixth and Eighth Circuit courts, as well as many lower courts, have over-applied precedent and upheld funeral picketing statutes that the more speech-protective Supreme Court would not likely uphold. This article argues that many of the forty-six funeral protest statutes are thus facially unconstitutional and should be more narrowly tailored by their legislatures.

I. BACKGROUND

The Westboro Baptist Church has gained notoriety as a result of their picketing high-profile funeral services. As a result, statutes targeting the protestors gained in popularity. After the Supreme Court in Snyder v. Phelps stated in dicta that the group could be subject to appropriate time, place, and

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6 See Suesz, supra note 4, at 22.
manner restrictions, new states adopted statutes and already written statues were extended.\textsuperscript{7}

Though the general rule is that listeners must “avert[] their eyes” to unwanted communication,\textsuperscript{8} the Sixth and Eighth Circuits have relied heavily on \textit{Frisby v. Schultz} and \textit{Hill v. Colorado} to expand the captive audience exception to the streets and sidewalks outside of funerals.\textsuperscript{9} However, in June 2014 the Supreme Court in \textit{McCullen v. Coakley} unanimously struck down a smaller thirty-five foot buffer zone for not being as narrowly tailored.\textsuperscript{10}

A. \textit{HISTORY OF FUNERAL PROTESTS}

1. Fred Phelps and the Westboro Baptist Church Funeral Protests

In 1955, Pastor Fred Phelps began the Westboro Baptist Church, a Calvinist, fundamentalist church that claims to teach the truth of the Bible, despite its own admission that this “truth” is “almost universally hated.”\textsuperscript{11} This small church survives as a fringe group based in Topeka, Kansas, and it consists primarily of members of the Phelps family.\textsuperscript{12} It is unaffiliated with the Baptist World Alliance.\textsuperscript{13} It stands in defiance to the popular belief that “God loves everyone,” and it instead warns of the nation’s impending destruction for its acceptance of sin.\textsuperscript{14}

By its own proud admission, the church has engaged in 53,808 demonstrations since 1991 in which its members hold signs that say “GOD HATES F**S” and other offensive messages, often thanking God for the deaths of soldiers and homosexuals.\textsuperscript{15} This includes over 400 demonstrations at military funerals.\textsuperscript{16} The church protested the funeral of Matthew Shepard, who was beaten to death in Wyoming, possibly for being homosexual.\textsuperscript{17} The

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{7}] Id. at 23, 26.
\item[\textsuperscript{8}] Cohen v. California, 403 U.S. 15, 21 (1971).
\item[\textsuperscript{10}] \textit{McCullen}, 134 U.S. at 2518.
\item[\textsuperscript{11}] \textit{About Us, GODHATESF**S}, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (last visited Jan. 25, 2015).
\item[\textsuperscript{12}] \textit{Louis Theroux: The Most Hated Family in America} (BBC 2011).
\item[\textsuperscript{14}] \textit{See GODHATESF**S, supra note 11.}
\item[\textsuperscript{15}] Id.
\item[\textsuperscript{16}] Id.
\item[\textsuperscript{17}] Id. Whether his murderers were motivated by his homosexuality remains in dispute. \textit{See John Kruzel, Matthew Shepard’s Enduring Legacy}, \textit{SLATE},
\end{itemize}
\end{footnotesize}
Phelps are drawn to high-profile funerals, where their protests draw the greatest amount of controversy and publicity. The protestors are always careful to avoid breaking any laws, including noise ordinances. Ironically, the Westboro Baptist Church receives funding for its protests from settlements flowing from violations of its members’ civil rights and the government’s failure to protect them from violence during protests.

The church’s messages are despicable on any occasion and are likely even more painful during a funeral service. But however offensive these messages may be, it is difficult to argue that the beliefs behind them are insincere. The church perceives America’s acceptance of homosexuality as a danger that will “expos[e] our nation to the wrath of God as in 1898 B.C. at Sodom and Gomorrah.” For the church, these “gospel message[s]” are “this world’s last hope” to be saved from this threat.

Believing itself to be one of the last churches preaching that uncomfortable truth of the Bible, opposition to the Westboro Baptist Church merely emboldens its members. Much of the free publicity enjoyed by the church comes from documentaries attacking the church. The church proudly links to these documentaries on their website.

Still, the church is almost universally hated and appears by any standard to be losing decisively in the marketplace of ideas. Some editorials have even contended that the church “has done a lot of good for [the gay] community” by causing Christian churches and groups to distance themselves from the Westboro Baptist Church. In this way, the church has created a unified front against such hate across the nation.

http://www.slate.com/blogs/outward/2013/10/03/even_if_matthew_shepard_s_murder_wasn_t_a_hate_crime_the_legislation_that.html (last visited Jan. 25, 2015).


19 There have been no successful prosecutions of Westboro Baptist Church Members in relation to funeral protests.

20 According to the Southern Poverty Law Center, the church does not accept outside donations, but relies on donations within the congregation and settlements from lawsuits to fund the travels. For example, the church sued the city of Topeka for failing to provide adequate protection. Westboro Baptist Church, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-files/groups/westboro-baptist-church (last visited Nov. 27, 2014).

21 The Supreme Court in Snyder v. Phelps stated that “there can be no serious claim that the picketing did not represent Westboro’s honestly held beliefs on public issues.” 131 U.S. 1207, 1211 (2011).

22 See GODHATESF**S, supra note 11.

23 Id.

24 Id.

25 Gauging support is difficult due to a lack of scientific opinion polling on the Westboro Baptist Church. Furthermore, the church does not accept donations from outside the congregation, but rather relies upon tithes and legal settlements for state civil rights violations.

26 Noah Michelson, I Love Westboro Baptist Church and Here’s Why You Should Too, HUFFPOST GAY VOICES, http://www.huffingtonpost.com/noah-michelson/i-love-westboro-baptist-
Often, the church’s protests have drawn much larger counter-protests.\textsuperscript{27} Military funeral protests have led to the creation of groups like the Patriot Guard Riders, a counter-protest group that insulates funeral attendees by forming a peaceful wall blocking out protestors.\textsuperscript{28} At Matthew Shepard’s funeral, counter-protestors dressed as angels formed a wall blocking attendees from the messages of the signs during the service.\textsuperscript{29} Even Romaine Patterson, a lesbian and close friend of Matthew Shepard who was disgusted by the demonstration at his funeral, supported the Supreme Court’s ruling in \textit{Snyder v. Phelps}.\textsuperscript{30} Calling the funeral protests “terrible,” Patterson nonetheless stated that the “United States Constitution is blind in its devotion to free speech.”\textsuperscript{31} This exchange of ideas is the purpose of the First Amendment’s protection of traditional public fora.\textsuperscript{32}

In this way, even offensive and controversial messages serve to promote better messages in the marketplace of ideas. As Noah Michelson has stated, “[d]espite their best intentions, the church is actually pushing people to get on the right side of history.”\textsuperscript{33} In this way, these counter-protests have served a broader communicative purpose for a sharply divided country.

2. Funeral Protest Statutes and Their Expansion after \textit{Snyder v. Phelps}

In response to the Westboro Baptist Church’s demonstrations at military funerals, forty-six states and the U.S. government passed funeral protest statutes that create buffer zones around funerals or burial services.\textsuperscript{34}

\begin{footnotesize}
\begin{itemize}
  \item [29] Romaine Patterson, \textit{Let the Westboro Baptist have their hate speech. We’ll smother it with peace}, THE WASHINGTON POST, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030406330.html (last visited Jan. 25, 2015).
  \item [30] Id. The Supreme Court in \textit{Snyder v. Phelps} reversed a verdict against the Westboro Baptist Church for the tort of Intentional Infliction of Emotional Distress, holding that the First Amendment protects the church’s speech. 131 U.S. 1207. \textit{See infra} note 47.
  \item [31] Id.
  \item [32] McCullen, 134 U.S. at 2518, 2529.
  \item [33] See Michelson, \textit{supra} note 26.
  \item [34] See Suesz, \textit{supra} note 4.
\end{itemize}
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These statutes create buffer zones that vary in size from 100 to 1,500 feet that prevent either disruption or protesting, and some exclude all protests within a fixed time, usually from one hour before until one hour after a funeral or burial service. These statutes have led to extensive debate and litigation over how to balance protestors’ constitutional right to speak and funeral attendees’ right to mourn in peace.

Following the Tucson shooting of 2011, Congress passed and President Obama signed into law the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012. Title VI creates a 300-foot buffer zone around the funeral of any member of the Armed Forces that extends from two hours before until two hours after the funeral service. Section 601(a) states that the purpose of the statute is to “protect[] the dignity of the service of the members” and the “privacy of the families.” This law applies to any individual willfully making or assisting in the making of any noise or diversion—(i) that is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral; and (ii) with the intent of disturbing the peace or good order of such funeral.

Violators of the Act face up to a year in prison as well as civil liability. The language varies among the several state statutes, but nearly all of them create a large buffer zone, and all of them include a window of time before and after the funeral. California’s statute makes it illegal “to engage in picketing targeted at a funeral,” while New York’s statute makes it illegal to “make[] unreasonable noise or disturbance... within three hundred feet” of a funeral service. It is difficult to predict whether the Westboro Baptist Church, in their normal protest activity, could be convicted under all of the statutes. Does holding a sign within the buffer zone constitute a “diversion” in New York? If the signs are not visible by funeral attendees, is the protest “target[ing]” the funeral in California? In City of Manchester, the Eighth Circuit agreed with the lower court, concluding that the Phelps were reasonable in their fear of prosecution under the Missouri statute.

After the Supreme Court’s dicta in Snyder v. Phelps, state legislatures were emboldened to pursue broader funeral protest statutes. In 2009, Marine Lance Corporal Matthew Snyder’s father sued the Phelps-Ropers and the Westboro Baptist Church for intentional infliction of emotional distress after

55 See Suesz, supra note 4, at 29.
57 Id.
58 Id.
59 See Suesz, supra note 4, at 50-68.
61 NY CLS Penal § 240.21
62 City of Manchester, 697 F.3d 678, 687 (8th Cir. 2012).
they protested his son’s funeral in Maryland. In the district court, a jury awarded Snyder over ten million dollars in compensatory and punitive damages based on a finding that the speech was “outrageous.” The jury also found the Phelps-Ropers liable for the state tort of “intrusion upon seclusion,” because Snyder was a “captive audience” to the protests during the funeral. The Fourth Circuit Court of Appeals reversed the ruling, holding that the Westboro Baptist Church’s protest messages spoke on a matter of public concern and was therefore entitled to First Amendment protection.

Acknowledging the pain caused by the protest, the Supreme Court nevertheless affirmed the Fourth Circuit, holding that the speech was constitutionally protected. The Supreme Court pointed out that the church members had the right to protest on the sidewalk, and they did not make loud noises, commit violent acts, or break any applicable laws.

On appeal to the Supreme Court, Snyder argued that even if First Amendment protection applied to the Westboro Baptist Church’s speech, they are still liable for the “intrusion upon seclusion” tort because Snyder was a “captive audience.” However, the Court pointed out that the protestors remained over 1,000 feet from the funeral, and Snyder was unable to read the signs until he saw them on the news after the service. Without stating how close the protestors may have to be in order to render the audience “captive,” the court simply refused to extend the doctrine to Snyder.

Emphasizing the First Amendment’s protection of streets and sidewalks as traditional public fora, moreover, the Supreme Court held that the Westboro Baptist Church was constitutionally immune to the tort claims. The Court therefore dismissed the judgment against the church.

However, the Supreme Court stated in dicta that “Westboro’s choice of where and when to conduct its picketing is not beyond the Government's

44 Snyder, 131 U.S. at 1214, 1219. The district court remitted these damages to six million dollars in damages overall. Id.
45 Snyder, 131 U.S. at 1212.
46 Id. at 1216. Speech is a matter of public concern when it is “a subject of general interest and of value and concern to the public.” City of San Diego v. Roe, 543 U.S. 77 (2004).
47 Snyder, 131 U.S. at 1210. The Court effectively ruled that the church’s protests could not be limited by the obscenity or fighting words doctrine. They stated that “[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import” Id. at 1217.
48 Id. at 1218. This occurred prior to Maryland’s funeral protest statute.
49 Id. at 1212.
50 Id.
51 Id.
52 Id.
53 Id. at 1241.
regulatory reach – it is ‘subject to reasonable time, place, or manner restrictions’ that are consistent with the standards announced in this Court’s precedents.” This statement has sparked several new funeral protest statutes as well as further restrictions on existing statutes. While the Court mentioned the content-neutral restrictions in *Frisby* and *Madsen v. Women’s Health Center, Inc.*, it pointed out that “[t]he facts here are quite different, both with respect to the activity being regulated and the means of restricting those activities.” The Court also stated that the speech cannot be prohibited “simply because it is upsetting or arouses contempt.”

3. **The *Ward v. Rock Against Racism* Test for Speech Restrictions in Traditional Public Fora**

For speech restrictions on traditional public fora, courts apply a three-prong test from *Ward v. Rock Against Racism*. First, the courts must decide if the statute is content neutral. If it is not, then the statute is held to a heightened standard of scrutiny, meaning that it must be narrowly tailored to serve a compelling state interest. On the other hand, if it is content neutral, then the statute must be narrowly tailored to serve a significant government interest. Second, courts must determine whether the statute is narrowly tailored to serve the state interest. If a statute proscribes more speech than necessary to achieve its goal, courts will strike it down as overbroad. Finally, even if a content-neutral statute is narrowly tailored to

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54 Id. at 1218.
57 Id. at 1219.
59 Ward, 491 U.S. at 781, 791. This is determined by “whether the statute distinguishes between prohibited and permitted speech based on the content.” *Frisby*, 487 U.S. at 481.
60 See *FCC v. League of Women Voters*, 468 U.S. 364 (1984), in which the Court held that § 399 of the Public Broadcasting Act was a content-based restriction, because it the statute required inquiry into the content of the message. *Id.* This section prohibited noncommercial educational radio and television stations that received government grants under this act from editorializing. *Id.* at 366. Under this heightened scrutiny, the statute was struck down.
61 *McCullen*, 134 U.S. at 2524.
62 *Ward*, 491 U.S. at 789. See *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), which struck down 15-foot floating buffer zones around individuals and vehicles approaching abortion clinics, because it proscribed more speech than necessary to achieve the government interest of public safety.
63 The overbreadth doctrine allows statutes to be challenged based on the likelihood that it would prevent speakers from engaging in constitutionally protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).
serve a significant governmental interest, it must also leave adequate alternative means of communication available to the speaker.\textsuperscript{64}

\section*{B. THE SUPREME COURT HAS RECOGNIZED PRIVACY AS A VALID STATE INTEREST IN CAPTIVE AUDIENCE CASES}

1. The Normal “Avert the Eyes” Rule of Cohen v. California

In 1968, Paul Cohen wore a jacket in a Los Angeles County courthouse which read “F*** the Draft.”\textsuperscript{65} He was tried and convicted for engaging in “offensive conduct” in violation of a California statute.\textsuperscript{66} The Court of Appeal of California affirmed his conviction.

The Supreme Court, however, reversed it. The Court held that any restriction on the speech must pertain to the manner in which it is communicated, not on the content of the message.\textsuperscript{67} Cohen’s speech was entitled to constitutional protection, and this did not change simply because “some unwilling ‘listeners’ in a public building [were] briefly exposed to it…”\textsuperscript{68} Instead of limiting the ability to speak, those listeners “could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”\textsuperscript{69} This general rule that values the speaker’s right to communicate above the listener’s interest in avoiding unwanted communication has been applied in several subsequent cases.\textsuperscript{70}

2. The Captive Audience Exception of Frisby v. Schultz

In 1988, the Supreme Court in Frisby v. Schultz upheld a local ordinance that prohibited protests targeted at private residences.\textsuperscript{71} The ordinance was enacted due to the acts of the appellees, pro-life activists who would protest outside the home of an abortion doctor.\textsuperscript{72} The primary purpose

\begin{itemize}
  \item \textsuperscript{64} Ward, 491 U.S. at 791.
  \item \textsuperscript{65} Cohen, 403 U.S. at 15, 16.
  \item \textsuperscript{66} Cohen, 403 U.S. at 22.
  \item \textsuperscript{67} \textit{Id.} at 18-19. The Court concluded that the speech did not constitute “fighting words,” obscenity, or incitement to unlawful activity. \textit{Id.} at 18-20.
  \item \textsuperscript{68} \textit{Id.} at 21.
  \item \textsuperscript{69} \textit{Id.}
  \item \textsuperscript{70} These include Erznoznik v. Jacksonville, 422 U.S. 205 (1975), Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (the rule was followed, but not cited), and Rabe v. Washington, 405 U.S. 313 (1972).
  \item \textsuperscript{71} Frisby, 487 U.S. at 474.
  \item \textsuperscript{72} \textit{Id.} at 476. The court found that the protests were “peaceful and orderly,” and there were no noise or obstruction of traffic complaints. \textit{Id.}
of the statute was to “protect[] and preserv[e]...the home” and prevent the “emotional disturbance and distress to the occupants” that results from the protests.\textsuperscript{73} The language of the ordinance did not create a fixed-area buffer zone, but instead prohibited “picketing before or about the residence or dwelling of any individual...”\textsuperscript{74} From this language,\textsuperscript{75} the Court interpreted the statute as only prohibiting protests which “focus[] on, and take place in front of, a particular residence...”\textsuperscript{76} This ordinance proscribed speech on public streets and sidewalks, the “archetype of traditional public fora,” but it was held to be a narrowly tailored statute that served a legitimate governmental interest.\textsuperscript{77} The Court concluded that the home is a unique setting that creates an exception to the normal rule which requires one to “avert[] their eyes.”\textsuperscript{78} The Court recognized that for the “unwilling listener,” the home is different from other locations, because the occupant is a captive audience.\textsuperscript{79} Further, both the majority and the concurrence rejected the statutory interpretation urged by the protestors: that the statute prohibited all speech within residential neighborhoods.\textsuperscript{80} As interpreted by the Court, the statute does not create a large zone barring protests, but instead it limits a particular expressive act that is so intrusive on the peace of the unwilling listener that he or she cannot escape it.

The narrow tailoring of this statute is further shown by the alternate means of communication that it leaves unburdened. The Court pointed out that protestors are still able to march through the neighborhood, solicit door-to-door, call, or send mail to their intended audience.\textsuperscript{81} For these reasons, the

\textsuperscript{73} Id. at 477.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 477. The singular forms of the words “residence” and “dwelling” led to this interpretation. Based on this, the Sixth Circuit Court of Appeals interpreted the Ohio funeral statute in Phelps-Roper v. Strickland differently from the natural reading of the statute. See infra note 228.
\textsuperscript{76} In adopting this interpretation, the Court considered oral argument in which the State presented this interpretation. Also, the Court recognized the “well-established principle that statutes will be interpreted to avoid constitutional difficulties.” Frisby, 487 U.S. at 482.
\textsuperscript{77} Frisby, 487 U.S. at 480.
\textsuperscript{78} Id. at 484, citing Cohen, 403 U.S. at 21-22. The Court also cited Gregory v. Chicago, which recognized homes as “the last citadel of the tired, the weary, and the sick.” Id.
\textsuperscript{79} Frisby, 487 U.S. at 486. The Court stated that other “generally directed” protests cannot be completely banned. Id. at 487.
\textsuperscript{80} Justice White’s concurrence held that the statute is constitutional as interpreted by the majority, but the broader, more natural reading of the statute would forbid any protest “before or about” a residence, regardless of whether the protest group picketed a single residence. Id. at 488-490.
\textsuperscript{81} Id. at 483-84.
Court held that the content-neutral statute was narrowly tailored to serve a significant governmental interest.82

3. The Apparent Expansion of the Captive Audience Doctrine in Hill v. Colorado

In 2000, the Supreme Court upheld a buffer zone around all health care facilities, which made it unlawful to “knowingly approach” within eight feet of another person to hand a leaflet to, show a sign to, protest, educate, or counsel the individual.83 The statute prohibited such an approach within 100 feet of the clinic.84 The statute did not exclude protestors from the buffer zone or require protestors to retreat when approached, and did not prohibit leafleting, protesting, or sign display to those approached.85 The Court applied the test from Ward.86

The proffered governmental interest at issue was the “protect[ion] of the health and safety of… citizens,” which included the “avoidance of potential trauma to patients associated with confrontational protests.”87 Citing Frisby, the majority extended the captive audience doctrine to women entering abortion clinics.88 The Court controversially recognized the interest in avoiding unwanted communication in confrontational settings, even in traditional public fora, and held that these interests outweighed the First Amendment rights of those approaching the women.89

The Court held that the statute was narrowly tailored to this legitimate interest, because it did not prohibit sign holding, chanting, or leafleting those who approached the protestors.90 Though the statute would likely prevent even harmless or even welcome approaches, the Court called this statute a “bright-line prophylactic rule” to protect women from the possibility of

82 Id. at 488. The Court acknowledged a possible exception where a residence may be used as a place of business or public meeting. However, because this was only a facial challenge, such a possibility did not render the statute overbroad. Id.
83 Hill v. Colorado, 530 U.S. 703, 707 (2000). Though the statute did not specify, it was undisputedly enacted to address protests outside of abortion clinics.
84 Id.
85 Id. at 714. This statute differs from the statute in Schenck v. Pro-Choice Network of Western N.Y. in this respect. There are no floating buffer zones that prohibit all speech, and leafleting is still possible if approached. 519 U.S. 357 (1997).
86 Id. at 719.
87 Id. at 715.
88 Id. at 716.
89 Id. at 717. Justice Scalia in dissent stated that the majority recognized a right to avoid unwanted communication. The majority responded that this was not a “right” but rather a legitimate individual interest. Based on this, Jamin Raskin argued that “the state’s interest in protecting the unwilling listener becomes an effective tool for government to reduce the speech rights of disfavored groups or individuals.” Jamin B. Raskin & Clark L. LeBlanc, Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test 51 AM. U. L. REV. 179 (2001).
90 Hill, 530 U.S. at 725.
unwanted approaches. Therefore, the Court upheld that the statute was content-neutral and narrowly tailored to a significant governmental interest.

To many, Hill was poorly decided in light of First Amendment precedents, because the governmental interest in preventing unwanted communication in a traditional public forum had never before justified speech restrictions outside of a residential setting. Justice Scalia’s dissent argued that, by applying Frisby’s privacy rights in Hill, “[t]he Court… elevate[d] the abortion clinic to the status of the home.” Further, there was no history of violence, obstruction of clinic entrances, harassment, or any other criminal activity. Instead of addressing crime, this statute of general applicability specifically targeted speech based on presupposed listener reaction. Of course, courts normally require those who encounter unwanted communication in traditional public fora to “avert[] their eyes.” The Sixth and Eighth Circuits cited this expansion of privacy rights to uphold funeral protest statutes that prohibited protests on streets and sidewalks. However, the Supreme Court would strongly erode those decisions fourteen years later in McCullen v. Coakley.

C. BASED ON THE CAPTIVE AUDIENCE DOCTRINE, LOWER COURTS HAVE Upheld BroA Funeral Protest Buffer Zones

1. Phelps-Roper v. Strickland

Several district and state courts had ruled on funeral protest buffer zones prior to the Sixth Circuit’s decision in Phelps-Roper v. Strickland in 2008. In Strickland, the Court of Appeals considered a facial challenge to Ohio Rev. Code Ann. § 3767.30. This statute stated that “no person shall picket or engage in other protest activities… within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service…” The statute further requires that “[n]o person…picket or engage in other protest activities… within three hundred feet of any funeral procession.” As used in this

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91 Hill, 530 U.S. at 730.
92 Scalia points out in his McCullen dissent that there is an “abundance of scathing academic commentary describing how Hill stands in contradiction to our First Amendment jurisprudence.” McCullen, 134 U.S. at 2545-46. See Michael W. McConnell, RESPONSE: Professor Michael W. McConnell’s Response, 28 PEPP. L. REV. 747 (2001); See also Raskin, supra note 89.
93 Hill, 530 U.S. at 753.
94 McConnell, supra note 92, at 748.
95 Professor McConnell points out that Hill v. Colorado is the first case he can think of which rejects the listener’s burden to avoid unwanted speech. Id.
96 Cohen, 403 U.S. at 21.
98 Id.
section, "other protest activities" means any action that is disruptive or undertaken to disrupt or disturb a funeral or burial service or a funeral procession.99

The district court struck down the funeral procession provision, holding it to be unconstitutionally overbroad.100 However, the court held that the 300-foot buffer zone provision statute was a content-neutral time, place, and manner restriction, as Ohio had a “significant interest in protecting its citizens from disruption” during the funeral service.101 The court held that the buffer zone was narrowly tailored to the legitimate state interest in question and upheld this provision of the statute as constitutional.102

Shirley Phelps-Roper appealed to the Sixth Circuit Court of Appeals, challenging the statute’s fixed buffer zone.103 She argued that this provision was unconstitutionally overbroad and violated her First Amendment right to protest.104

Phelps-Roper stipulated that the statute as written was a content-neutral time, place, and manner restriction, because the statute was justified without reference to the content of the message.105 Applying intermediate scrutiny, the court then considered whether the statute was narrowly tailored to serve a significant state interest, and whether it left alternate channels of communication.106

The court expressed strong disfavor for the facial challenge in the interests of judicial restraint,107 but it held that Ohio had a significant interest in protecting citizens from disruption during a funeral or burial service.108 To justify this interest, the court cited *Frisby* and held that funeral attendees are a “captive audience” to the protests which are “so intrusive that [the] unwilling audience cannot avoid it.”109 As a captive audience, the court stated that the funeral attendees cannot “avert[] their eyes,” because they are bound to attend the funeral services.110 To justify this expansion of *Frisby*, the court

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99 Id. The statute was amended in 2006 to extend the time to include one hour before until one hour after the funeral service, establish a 300-foot buffer zone, and add a residual clause that barred “other protest activities.” This statute was originally written in 1957 to prohibit picketing funerals and funeral processions, but the statute was amended in 1961 to add a time frame. Id.
100 Strickland, 539 F.3d at 360.
101 Id.
102 Id. at 373.
103 Id. at 358.
104 Id.
105 Id. at 361.
106 Id. at 366-67, 372.
107 Id. at 373.
108 Id. at 362. The court balanced the attendees’ interests in avoiding unwanted communication against the protestors’ rights to speak. Id.
109 Id.
110 Id. at 366.
pointed to the Supreme Court’s decisions in *Hill* and *Madsen v. Women’s Health Ctr.* to expand privacy rights to abortion clinics.\(^{111}\)

The court then examined the fixed buffer zone and determined that it was narrowly tailored. Phelps-Roper argued that it was not narrowly tailored, because it barred all protests within 300 feet of a funeral service. The court rejected this interpretation of the statute. Instead, the court held that because the statute used the singular forms in naming the areas where speech is limited, the buffer zone only applied to protests directed at funerals.

Next, Phelps-Roper argued that the 300-foot buffer zone was too large for the state interest.\(^{112}\) The court disagreed, stating that “*Frisby, Hill*, and *Madsen*, read together, establish that the size of the buffer zone is context sensitive...”\(^{113}\) Though the *Madsen* Court struck down a 300-foot buffer zone, the Sixth Circuit reasoned that the limited time of the funeral protest ban caused it to be narrower.\(^{114}\) The court determined that the same time difference also made the statute narrower than the one in *Hill*, although the funeral protest buffer zone was 200 feet larger.\(^{115}\)

Finally, Phelps-Roper argued that the statute was not narrowly tailored because there were already laws in place that protected funeral attendees from physical violence by protestors.\(^{116}\) Here, the court succinctly states the purpose of the statute: to protect funeral attendees from the “harmful psychological effects of unwanted communication when they are most captive and vulnerable.”\(^{117}\)

The court additionally pointed out that the 300-foot buffer zone helped solve the “logistical problems associated with moving large numbers of people from the site of a funeral to the burial site.”\(^{118}\)

The court then decided that alternate channels of communication remained open to Phelps-Roper. The court stated that Phelps-Roper had more alternate means of communication than the plaintiff in *Frisby*, because “targeted” protests at the funeral site were permitted outside of the statute’s proscribed time.\(^{119}\) The court concluded that the plaintiff was not “entitled to her best means of communication,” pointing out the church’s website and its radio and television appearances.\(^{120}\)

\(^{111}\) *Id.* at 363.

\(^{112}\) *Id.* at 367.

\(^{113}\) *Id.* at 368.

\(^{114}\) *Id.* at 370.

\(^{115}\) The court did not address the fact that protestors in *Hill* could still target the clinic or its clients within the 100-foot buffer zone as long as they did not approach within eight feet. *Hill*, 530 U.S. at 707.

\(^{116}\) *Strickland*, 539 F.3d at 371.

\(^{117}\) *Id.* at 372.

\(^{118}\) *Id.* at 371.

\(^{119}\) *Id.* at 372.

\(^{120}\) *Id.*
2. Phelps-Roper v. City of Manchester

Four years after the Sixth Circuit’s decision in Strickland, the Eighth Circuit followed suit and upheld a similar 300-foot buffer zone ordinance around funerals that extended from one hour before to one hour after the service.\textsuperscript{121} In Missouri, the Phelps-Ropers sued eight municipalities with funeral protest ordinances, and every one repealed the ordinance except the City of Manchester.\textsuperscript{122} The district court held that the statute was content-based and therefore “presumptively invalid,” but even if the statute were content-neutral, it was not narrowly tailored.\textsuperscript{123}

The Eighth Circuit affirmed the ruling in 2011, but it granted the City of Manchester a rehearing in light of the Supreme Court’s indication in Snyder that the Westboro Baptist Church is subject to reasonable time, place, or manner restrictions.\textsuperscript{124} The court reexamined the ordinance in light of Snyder and found it to be a content-neutral and narrowly tailored statute in light of the Sixth Circuit’s interpretation of Frisby and Hill.\textsuperscript{125} With similar reasoning as in Strickland, the Eighth Circuit concluded that the ordinance left open adequate alternate channels of communication, and the court upheld its constitutionality.\textsuperscript{126}

II. THE SUPREME COURT IN MCCULLEN V. COAKLEY BRINGS NEW LIFE TO THE FIRST AMENDMENT BY PROTECTING SPEECH

A. THE LOWER COURT UPHOLDS THE STATUTE AND CITES SIMILAR CAPTIVE AUDIENCE GROUNDS AS THE FUNERAL PROTEST CASES

In 2007, the Massachusetts legislature amended Mass. Gen. Laws Ch. 266, § 120E 1/2(b),(c) to create a thirty-five foot buffer zone around any abortion clinic’s entrance or driveway where “no person shall knowingly enter or remain.”\textsuperscript{127} However, the statute created an exception for persons entering or leaving, employees or agents of the clinic, emergency services, and people passing down the sidewalk.\textsuperscript{128} The buffer zone applied at any time the clinic was open.\textsuperscript{129} This legislation began a long line of

\textsuperscript{121} City of Manchester, 697 F.3d at 678.
\textsuperscript{122} Id. at 684.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 684.
\textsuperscript{125} Id. at 688.
\textsuperscript{126} Id. at 695.
\textsuperscript{127} McCullen v. Coakley, 708 F.3d 1 (1st Cir. 2013). The statute was amended because the alleged difficulty of enforcing the “no approach” statute modeled after the one in Hill v. Colorado.
\textsuperscript{128} Mass. Gen. Laws Ch. 266, § 120E 1/2(b).
\textsuperscript{129} McCullen, 134 U.S. at 2526.
constitutioinal “serial challenges” which were struck down by the district court and First Circuit Court of Appeals. The Court of Appeals upheld the statute as a valid content-neutral time, place, and manner restriction on speech.

McCullen and three other plaintiffs regularly engaged in “sidewalk counseling,” in which women entering the abortion clinic would hear prayer, see pro-life signs, and receive literature if they approached. The plaintiffs claimed to have had success in convincing women to forego abortions at the clinics, but that this was severely burdened by the Massachusetts statutory amendment.

In 2013, the Court of Appeals once again upheld the statute and cited Snyder’s statement in dicta that “even traditional public fora are subject to reasonable time-place-manner regulations.” The plaintiffs argued that the employee exception unconstitutionally permitted speech by only one viewpoint. The plaintiffs also argued that the statute was overbroad as applied to them. Finally, the plaintiffs argued that the statute did not leave adequate alternate means of communication.

To this final argument, the court showed that the plaintiffs were able to hold large signs, use their voices and sound amplification equipment, and wear “evocative garments.” Of course, standing outside of a buffer zone and shouting was not the plaintiffs’ chosen means of conveying their message, but the appellate court held that “as long as a speaker has an opportunity to reach her intended audience, the Constitution does not ensure that she always will be able to employ her preferred method of communication.” The court concluded that the plaintiffs are not guaranteed the attention of their audience or ability to speak closely.

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131 McCullen, 134 U.S. at 2525.
132 McCullen, 708 F.3d. Massachusetts had a statute similar to the one in Hill v. Colorado, which prohibited approaching within 6 feet of women within 100 feet of an abortion clinic. McCullen, 134 U.S. at 2525.
133 Plaintiff Zarrella claimed that she had not been able to convince a woman to opt out of an abortion since the 2007 amendment. McCullen, 708 F.3d at 5.
134 McCullen, 708 F.3d at 1, 8.
135 Plaintiffs alleged that "pro-choice advocates [] surround, cluster, yell, make noise, mumble, and/or talk loudly to clinic clients for the purpose of disrupting or drowning out pro-life speech and thwart Plaintiffs' efforts to distribute literature." McCullen, 708 F.3d at 9.
136 The court concluded that the comprehensive nature of the statute (that it establishes several buffer zones at several abortion clinics) does not show overbreadth, but instead shows that the government does not have a discriminatory motive. McCullen, 708 F.3d at 13. The Supreme Court majority agreed. McCullen, 134, U.S. at 2532.
137 McCullen, 134 U.S. at 2518, 2535-36.
138 McCullen, 708 F.3d at 8.
139 McCullen, 708 F.3d at 13.
140 Id.
Finally, the court pointed out the Supreme Court’s ruling in *Hill v. Colorado*, which “specifically recognized” abortion patients’ interest in “avoiding unwanted communication.”\(^{141}\) Therefore, the Constitution does not ensure “the same quantum of communication that would exist in the total absence of regulation.”\(^{142}\) The lower court rejected all of the plaintiffs’ arguments and upheld the amended statute as constitutional.\(^{143}\)

### B. The Supreme Court Reverses

The Supreme Court unanimously held that the amended statute violated the First Amendment.\(^{144}\) Just as the Court had done in *Snyder*, it once again reaffirmed that the “government’s ability to regulate speech [on traditional public fora] is ‘very limited.’”\(^{145}\) Despite the statute’s sole application at abortion clinics and its disproportionate effect on pro-life protestors, the Court held that the statute was content-neutral, because it is “justified without reference to the content of the regulated speech.”\(^{146}\) To determine whether the buffer zone was justified, Massachusetts had to show a pattern of violations of existing laws which current laws were unable to address.\(^{147}\)

The Commonwealth already had a statute similar to that in *Hill*, that prevented any unconsented approach of a woman within eighteen feet of an entrance to an abortion clinic, but Attorney General Coakley claimed that this statute was “unenforceable” and that violations occurred “on a routine basis.”\(^{148}\) However, police testified that there were only a few arrests and no successful prosecutions.\(^{149}\) On the other hand, the buffer zone was clearly marked in yellow paint and was easily enforced.\(^{150}\)

Unlike the district court below, the Supreme Court gave significant weight to the plaintiffs’ particular method of persuading patients.\(^{151}\) Citing to the record, the Court showed that the success of the plaintiffs’ efforts depended upon “maintaining a caring demeanor, a calm tone of voice, and direct eye contact” with the women.\(^{152}\) According to the plaintiffs, these efforts have resulted in “hundreds of women” choosing not to terminate their

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141 Id. at 14.
142 Id.
143 Id. at 15.
144 *McCullen*, 134 U.S. at 2518.
145 Id. (quoting United States v. Grace, 461 U.S. 171 (1983)).
146 Id. at 2523.
147 Id. at 2539.
148 Id. at 2525-26.
149 Id. at 2539.
150 *McCullen*, 708 F.3d at 5; Id. at 2526.
151 Id. at 2527.
152 Id.
pregnancies.\textsuperscript{153} However, with the imposition of these thirty-five foot buffer zones, the plaintiffs claimed that their success was greatly diminished.\textsuperscript{154} On the other hand, clinic employees have an unlimited ability to speak within the zone, sometimes telling women to ignore the protestors and calling them “crazy.”\textsuperscript{155}

The plaintiffs argued that the statute was not content-neutral, because it specifically applied to abortion clinics and exempts employees, both of which discriminate against the pro-life viewpoint.\textsuperscript{156} However, the Court stated that, despite the statute’s sole application to abortion clinics, it would not infer an unconstitutional purpose to the statute.\textsuperscript{157} Therefore, the Court held the law is “justified without reference to the content of the regulated speech.”\textsuperscript{158} Because the regulation was facially neutral, the Court held that it was not content-based and therefore not subject to strict scrutiny.\textsuperscript{159}

1. Avoidance of Unwanted Communication Is Not a Valid State Interest in Traditional Public Fora

Faced with a governmental interest of ensuring public safety and preventing sidewalk congestion, the Court nonetheless explicitly denied the possibility of a privacy interest justification. The Court did not directly address the district court’s citation of Hill’s sidewalk privacy rights, but the Court stated:

To be clear, the Act would not be content-neutral if it were concerned with undesirable effects that arise from “the direct impact of speech on its audience” or “[l]isteners’ reactions to speech.” If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech.\textsuperscript{160}

Therefore, if Massachusetts’s proffered interest were to protect women from unwanted communication as they entered the clinic, the statute would be classified as content-based and would be presumptively unconstitutional. However, Massachusetts showed a record of “crowding, obstruction, and

\textsuperscript{153} Id.
\textsuperscript{154} Id. at 2528.
\textsuperscript{155} Id. at 2528.
\textsuperscript{156} Id. at 2523.
\textsuperscript{157} Id. at 2523.
\textsuperscript{158} Id. at 2532-33 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)).
even violence” near at least one abortion clinic.\footnote{Id. at 2523.} It is undisputed that these concerns qualify as a content-neutral basis for a statute, but it was disputed that this proffered justification was sincere.\footnote{Id. at 2545-46.}

In Justice Scalia’s concurrence, he argued that the limited record of criminal activity at abortion clinics and sweeping nature of the buffer zones evinced that the statute’s true purpose is to limit speech. However, the majority refused to infer discrimination from the scope of the statute, and instead considered this imbalance under a narrow tailoring analysis.

Justice Scalia also argued that the statute was content-based because it created a broad statute that applied to all abortion clinics despite a complete lack of evidence of public safety problems arising, except at one office and on one day.\footnote{Id. at 2544.} He further argued that the issue truly before the Court, as evinced by the statute’s breadth, structure, and origins in Hill, is whether the government may protect people on streets and sidewalks from unwanted speech.\footnote{McCullen, 134 U.S. at 2545-46.}

It is unclear why the majority failed to directly address the Hill decision.\footnote{Justice Scalia argues that the Court sub silentio overruled Hill. Id. at 2546.} Kevin Russell has opined that it is possible that the Court no longer held the five-vote majority necessary to uphold such buffer zones, and the Justices who joined the majority in Hill voted with the majority in McCullen to ensure that such statutes would still be held to be content neutral.\footnote{And thereby held to intermediate scrutiny. Kevin Russell, What is left of Hill v. Colorado?, SCOTUSBLOG (Jun. 26, 2014, 4:34 PM), http://www.scotusblog.com/2014/06/what-is-left-of-hill-v-colorado.} This theory explains why the Court would proceed through the content-neutrality analysis, despite ultimately holding that the statute did not satisfy even lowered scrutiny.\footnote{Justice Scalia found the content-based statute to be “unconstitutional root and branch,” and therefore did not address whether it was narrowly tailored to the state’s interest.\footnote{McCullen, 134 S. Ct. at 2549.} The Court first looked to the burden on the plaintiffs’ speech.\footnote{Id. at 2532-33.}}

2. A Thirty-Five Foot Buffer Zone Is Not Narrowly Tailored

Even though the Supreme Court held that the Massachusetts statute was content-neutral, it concluded that it was not narrowly tailored to the state interest.\footnote{Id. at 2541-42.} The Court first looked to the burden on the plaintiffs’ speech.\footnote{Id. at 2536.}
Because the plaintiffs were excluded from the buffer zone, their ability to leaflet was severely burdened. The Court stated that the Court of Appeals was “wrong to downplay these burdens on petitioners’ speech.” Simply referring to the remaining ability to hold a sign and chant “misses the point.” The Court concluded that “[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled the petitioners’ message.”

While the burdens on the plaintiffs’ speech were substantial, the Court held that the state had failed to utilize less speech restrictive means to achieve its legitimate interest. First, within the same statute, Massachusetts prohibited violence to or harassment of clinic employees and patients, but there had been no successful prosecutions in seventeen years. Second, the state failed to utilize ordinances already in place to ensure access to the entrance of abortion clinics. While the state is not required to adopt the least speech-restrictive means to accomplish its goals, it may not create a statute in which “a substantial portion of the burden on speech does not serve to advance its goals.” The Supreme Court unanimously held that the statute was not narrowly tailored to the state interest, and was therefore unconstitutional.

III. MCCULLEN SHOWS THAT BROAD FUNERAL PROTEST STATUTES LACK SUFFICIENT GOVERNMENTAL INTERESTS

Considering the justifications for the captive audience doctrine in Frisby v. Schultz, the Supreme Court would likely hold that there is a valid governmental interest in preventing the disruption of funerals. The dicta in Snyder v. Phelps supports this. However, this interest is only valid to protecting attendees during the service, and only from disruptions that the state has reason to believe will occur.

171 Id.
172 Id.
173 Id.
174 Id. at 2536-37.
175 Id. at 2537-38.
176 Id. at 2537-39.
177 Id. at 2539. Also, the federal government had enacted the Freedom of Access to Clinic Entrances (FACE Act), which had also been adopted by several states. Massachusetts has not adopted the statute. Id. at 2537.
178 Id. at 2535.
179 Id.
180 Frisby, 487 U.S. at 474.
181 “Westboro’s choice of where and when to conduct its picketing… is ‘subject to reasonable time, place, or manner restrictions.’” Snyder, 131 U.S. at 1211.
A. PRIVACY INTEREST IN PREVENTING FUNERAL DISRUPTION IS A VALID STATE INTEREST BUT WILL ONLY SUPPORT NARROWER STATUTES

In one way, funerals require protection of privacy interests during their service more than an abortion clinic does, because funerals often take place outdoors. People inside abortion clinics do not experience the same captive audience concerns that funeral attendees do, because the building walls block the unwanted speech and signs. Women only face unwanted communication outside of an abortion clinic as they enter or exit. In this way, the location of funerals present a unique constitutional challenge, as attendees are potentially captive to disruptive speech throughout the entire funeral service. To this point, the Supreme Court recognized in Snyder that “Westboro’s choice of where and when to conduct its picketing is ‘subject to reasonable time, place, or manner restrictions.’”

On the other hand, McCullen and its progeny show that the Constitution disfavors buffer zones that encompass a traditional public forum, even when the restriction is content neutral. Faced with a legitimate interest in preventing captive funeral attendees from having unwanted communication forced upon them during the service, state legislatures have passed broad statutes that completely prevent the communication by moving protestors to outside the buffer zone. However, a statute based on this state interest could withstand intermediate scrutiny, if that law were narrowly tailored.

B. THERE IS NO VALID GOVERNMENTAL INTEREST IN PREVENTING COMMUNICATION TO THOSE ENTERING OR LEAVING FUNERALS

The Hill Court classified an interest in avoiding confrontational communication as a legitimate governmental interest that overcame the protestors’ First Amendment rights to approach and leaflet on streets and sidewalks. This holding was subsequently used by lower courts to justify buffer zones to prevent presumptively unwanted communication for funeral attendees approaching a service, even where there was no confrontational approach.

The First Circuit Court of Appeals also cited this holding in McCullen in upholding the thirty-five foot buffer zone around abortion clinics. Though the Massachusetts legislature’s stated interest in McCullen was to preserve public safety, the court added that the Hill Court had previously

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182 See Suzek, supra note 4.
183 Hill, 530 U.S. at 703, 715.
184 See supra note 111.
185 McCullen, 708 F.3d at 14.
recognized clinic patients’ interest “in avoiding unwanted communication.”\(^{186}\) Therefore, the circuit court concluded that protestors are not entitled to the same ability to communicate that they would have without the statute, so long as “adequate alternative means of communication exist.”\(^{187}\)

McCullen now shows that privacy and avoidance of unwanted communication are not legitimate state interests in traditional public fora. Without reference to the First Circuit’s mention of Hill, the Supreme Court in McCullen discarded the possibility of considering audience reaction as a valid content-neutral state interest.\(^{188}\) The Court stated that “the Act would not be content-neutral if it were concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech.’”\(^{189}\) However, because Massachusetts claimed that their interest was sidewalk safety and prevention of crowding, the Supreme Court held the interest to be legitimate and content-neutral.\(^{190}\) By refusing to address the women’s interest in avoiding unwanted communication, the Court has at least interpreted Hill narrowly. In Scalia’s concurrence, he even argued that by making this statement and striking down the statute as insufficiently tailored, the Court has “sub silentio (and perhaps inadvertently) overruled Hill.”\(^{191}\)

Therefore, McCullen now shows that the Sixth and Eighth Circuits erroneously relied on the privacy interests of Frisby and Hill in upholding the funeral buffer zones. In Frisby, the Court recognized that the interest of peace and privacy within the home could justify an ordinance barring protests directed at a residence.\(^{192}\) By a narrower vote, the Court held in Hill that privacy rights could justify a buffer zone that barred approaching an unwilling audience.\(^{193}\) The Sixth and Eighth Circuit Courts interpreted Hill’s ruling broadly, holding that the government has a legitimate interest in limiting speech “in confrontational settings” and where the speech “is so intrusive, the unwilling audience cannot avoid it,” even where the audience is not approached.\(^{194}\) McCullen shows that these privacy interests do not justify a thirty-five foot buffer zone outside of an abortion clinic, despite the

\(^{186}\) See supra note 141.

\(^{187}\) McCullen, 708 F.3d at 14.

\(^{188}\) See supra note 160.


\(^{190}\) See supra note 161.

\(^{191}\) See supra note 165. Justice Scalia in his concurrence states that the reason the Court granted certiorari was to address whether Hill should be overruled, but the majority “avoid[ed] that question by declaring the Act content-neutral on other (entirely unpersuasive) grounds. McCullen, 134 U.S. at 2545.

\(^{192}\) See supra note 79.

\(^{193}\) See supra note 88.

\(^{194}\) Strickland, 539 F.3d at 362.
possible confrontational nature of the message or the willingness of the audience.195

The Sixth and Eighth Circuits also found it “critical” to the governmental interest that the funeral protesting statutes only apply to funerals, because it shifts the burden off the captive viewer to avert his eyes.196 Both courts stated that it would be unreasonable to require an attendee to avoid the funeral of a loved one in order to avoid offensive speech.

However, McCullen struck down a buffer zone surrounding an abortion clinic, which offers a constitutionally protected service. In that case, the Supreme Court never addressed the fact that women who choose to enter an abortion clinic have to forgo obtaining an abortion in order to avoid offensive speech. Instead of citing or distinguishing Frisby or Hill, the McCullen majority nearly avoided them entirely.197 Furthermore, the Court never addressed the First Circuit’s application of privacy rights within the public forum. Instead, the Court cited Boos v. Barry, stating that if the speech “caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech.”198

As Justice Scalia’s concurring opinion pointed out, the majority in McCullen rejected Hill’s balancing of interests.199 Therefore privacy, treated by the Sixth and Eighth Circuit Courts as synonymous with “avoidance of unwanted communication,” should not be classified as a legitimate state interest for those entering a funeral after McCullen. This holding undercuts the primary foundation upon which the Sixth and Eighth Circuits have upheld broad funeral protest statutes.200

C. A CRIME PREVENTION GOVERNMENTAL INTEREST CANNOT JUSTIFY FUNERAL PROTEST STATUTES WITHOUT A FACTUAL BASIS FOR BELIEVING CRIME IS LIKELY TO OCCUR

Without the avoidance of unwanted communication as a valid state interest, there is little left to support these broad buffer zones on traditional public fora. In McCullen, the Court recognized a record of protestors who crowded streets and sidewalks, obstructed entrances, and sometimes

195 Though, as discussed infra note 231, if Hill is not overruled, states may pass “no approach” floating buffer zones around individuals.
196 See supra note 69.
197 The Court merely mentioned them in the structure of statute. McCullen, 134 U.S. at 2525.
198 McCullen, 134 U.S. at 2532.
199 In Hill, the interest in avoiding unwanted communication outweighed the speakers’ rights, at least with regard to their ability to approach. See supra note 89.
200 See supra note 108.
committed acts of violence at one clinic.\textsuperscript{201} Still, even that record did not justify a smaller buffer zone than any of those created by funeral protest statutes.

First, there have been no successful prosecutions of Westboro Baptist Church members related to funeral protests, despite more than 600 protests in twenty years.\textsuperscript{202} In \textit{Snyder}, the Supreme Court pointed out that the protesters alerted police to the protests in advance, complied with all police instructions, and violated no laws.\textsuperscript{203} Even if the prevention of crime or violence by protestors were the stated governmental interests, the lack of prosecutions would necessarily make any statute fail the narrow tailoring analysis. There have been instances of violence, however, directed \textit{against} the Westboro Baptist Church. To limit speech on this basis would constitute an unconstitutional “heckler’s veto.”\textsuperscript{204} The government has a responsibility not only to avoid infringing upon First Amendment rights, but also to protect speakers from hostile audience reaction.

Second, unlike \textit{Madsen} and other abortion cases, there has been no claim that protestors block the flow of traffic or obstruct access to funeral grounds.\textsuperscript{205} If the Westboro Baptist Church did not conform to the law so strictly, a broader buffer zone could be upheld.

Therefore, without a record of crime or a valid interest in protecting approaching funeral attendees from unwanted speech, the broad statute is obviously directed against unpopular speech without any plausible content-neutral justification.

\textbf{IV. MCCULLEN SHOWS THAT FUNERAL PROTEST STATUTES ARE NOT NARROWLY TAILORED}

Only three governmental interests could establish a valid content-neutral state interest for the funeral protest statutes. First, the state may place buffer zones to prevent violence, illegal noise disturbances, vandalism, and trespass. Second, the state may implement the buffer zone to ensure unobstructed entrance to the funeral. Finally, the state may act to prevent funeral disruption for a captive audience, an interest already accepted by the Sixth and Eighth Circuits. Of course, each of these interests would require the state to show a substantial enough problem to justify intruding upon recognized free speech in traditional public fora. As the circuit courts in

\textsuperscript{201} \textit{McCullen}, 134 U.S. at 2523.
\textsuperscript{203} See supra note 108. \textit{Snyder}, 131 U.S. at 1213.
\textsuperscript{205} The governments in \textit{Strickland} and \textit{City of Manchester} did not make this argument.
Strickland and City of Manchester pointed out, under an intermediate scrutiny standard the government need not utilize the “least restrictive or least intrusive means of serving the statutory goal.” However, the restrictions on speech must be balanced against the amount of speech burdened. In McCullen, the Supreme Court declared that even under intermediate scrutiny, this standard does not give carte blanche to legislatures to excessively burden speech.

Perhaps in an attempt to save the constitutionality of the statute, the Sixth Circuit in Strickland construed the statute as similar to the residential protest statute in Frisby in that it does not displace protestors. However, this is contrary to the language of the statute. The court held that the statute, “properly read… restricts only the time and place of speech directed at the funeral…” Under this interpretation, the court concluded that merely holding a sign within 300 feet of a funeral will not support a conviction. The protestor must somehow “direct” that protest toward the funeral. Nonetheless, the statute states “no person shall picket or engage in other protest activities…within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an actual funeral or burial service at that place.” The only place in which the “directed at” language appears is in reference to the residual clause. The court reasoned that the Supreme Court in Frisby interpreted the ordinance’s use of the singular form “residence” to show that the statute intended to cover only those protests directed at a residence. However, the language of this statute is easily distinguished. The ordinance in Frisby did not prescribe a buffer zone inside which all protests were explicitly barred. This left the scope of the statute open to interpretation by the courts. The plain language of ORC Ann. 3767.30 leaves no such room. The Eighth Circuit in City of Manchester followed a similar interpretation, citing Strickland.

However, even under this interpretation, the statutes burden far more speech than is necessary to prevent funeral disruptions. Those “directing” their protests at the funeral are still moved hundreds of feet away, regardless of whether the funeral is ongoing or whether they are visible or audible to attendees.

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206 Strickland, 539 F.3d at 367; City of Manchester, 697 F.3d at 695.
207 Strickland, 539 F.3d at 368.
208 ORC Ann. 3767.30. See supra note 97.
209 This covers “other protest activities” and is defined as “any action that is disruptive or undertaken to disrupt a funeral or burial service.” Even if the court applies this residual clause to the rest of the statute, it would give funeral attendees, the police, and jurors the ability to punish unpopular speech based on the content of a message. Mourners and police would likely not find counter protestors’ messages disruptive to the funeral. Hill petitioners lost on this argument regarding the word “protest,” but “disrupt” necessarily depends on which message an audience finds “disruptive.” Hill, 530 U.S. at 709.
A. STATUTES THAT LIMIT SPEECH ON THE SIDEWALKS AND ROADS
BURDEN TOO MUCH SPEECH IN RELATION TO THE STATE INTEREST

In order to satisfy the narrow tailoring requirement, the statutes must only address the captive audience concerns, and must not attempt to prevent the offensive communication from occurring in traditional public fora. The funeral protest statutes fail in this regard because they do not exclusively apply to the time and place where the funeral attendee becomes a captive audience, and his or her privacy interests outweigh the protestors’ speech rights. The circuit courts in Strickland and City of Manchester failed to make this distinction as they upheld a buffer zone that extended 350 feet even one hour before the funeral service began.\(^2\) If state legislatures intend to prevent the disruption of peace and privacy during a funeral service, then the restriction should only apply to those places and times where the service is actually disrupted.

In justifying the 300-foot buffer zone, the Sixth Circuit pointed to the 100-foot buffer zone in Hill v. Colorado. The court acknowledged that the buffer zone is 200 feet greater, but reasoned that “it serves a similar purpose… [to] protect[] a group of individuals who may arrive and depart from the funeral or burial service in a coordinated fashion.” This reasoning fails in several ways. First, the buffer zone in Hill did not prevent protestors from standing or holding signs within the buffer zone. The majority in Hill even pointed to the fact that signs could still be seen within eight feet.\(^2\) It only prevented the direct approach to and confrontation of unwilling listeners. Second, the Massachusetts statute in McCullen had a similar goal: to protect public safety and prevent sidewalk crowding. However, those privacy interests could not even justify a thirty-five foot buffer zone that displaced protestors.

Unfortunately, none of the funeral protest statutes are narrowly tailored, and all burden more speech than the buffer zone statute held unconstitutional in McCullen. The Court in McCullen held that “the government’s ability to restrict speech [on sidewalks] is ‘very limited.’” However, most funeral buffer zones extend 300 or more feet from the cemetery, and some statutes extend to 1,500 feet. Even the smallest of these buffer zones exceed the thirty-five foot buffer zone struck down in McCullen. These overbroad statutes push protestors far away, without providing an exception for those who are behind a wall or building and not visible from the funeral itself. Although the government has a legitimate interest in preventing funeral service disruptions by these offensive messages, these statutes go one step further by attempting to prevent the

\(^2\) See supra note 113, 125.

\(^2\) Hill, 530 U.S. at 726.
protestors’ messages from ever being conveyed to their intended recipient, even when there is no funeral in progress to disrupt. To do so, the statute creates a buffer zone in which the funeral protest is so far removed that it ceases to be a funeral protest at all.

The funeral protest statutes go farther than Hill, Frisby, and McCullen by displacing protestors in a way that eliminates their ability to gain the attention of their audience. A statute that displaces protestors so far that their intended audience can never see nor hear them violates the First Amendment.212

The Strickland court opined that the funeral protest statute was narrower than the statute in Hill, because the time restriction in Hill was greater. This distinction is meaningless. The restriction in Hill applied to whenever the clinic was open, and the restriction in Strickland applied from one hour before, to one hour after, the funeral service.213 Protestors at the clinics in Hill actually enjoyed a better opportunity to counsel, because they could approach women waiting for the clinic to open. Even if the period of time restricted by the statute in Strickland is shorter, by preventing speech anytime the intended audience is present, the statute effectively stifles the message just as effectively as the longer buffer zones in Hill and McCullen.214

The statutes are also far too broad with regard to the number of locations, as they forbid all protests within hundreds of feet of any funeral throughout the entire state, without showing a pattern of funeral disruptions. The McCullen Court held that, because only one abortion clinic had experienced the problems,215 and only one day per week, “creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.” The funeral protest statutes suffer from even less justification.216 Therefore, removing the speakers hundreds of feet from funerals throughout the state is not a narrowly tailored solution.

While perhaps the strongest argument in favor of funeral buffer zone statutes is the ease of enforcement, this does not support the statutes’ constitutionality. The existing buffer zones proscribe a large fixed area that can be clearly delineated where targeted protests may not occur. Admittedly, the “line of sight” restrictions would require police officer enforcement on

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212 See Heffron v. Int’l Soc. for Krishna Consciousness, 452 U.S. 640, 655 (1981), quoting Kovacs v. Cooper 336 U.S. 77, 87 (1949) (“The First Amendment protects the right of every citizen to ‘reach the minds of willing listeners and to do so there must be an opportunity to win their attention.’”).
213 It is possible that a funeral service could even extend beyond the length of the clinic’s open hours.
214 This reasoning would support a statute that prohibited any protest occurring within an hour before and after any politician’s speech. It is doubtful that any court would find that the limited time frame helped the constitutionality of the statute in any way.
215 The problem was crowding, obstruction of entrances, and violence. 134 U.S. at 2523.
216 There have been no successful prosecutions with regard to the funeral protests.
an individual basis, as opposed to drawing a clear line 300 feet away from the funeral. Phelps-Roper v. Strickland used this convenience as one justification for the statute. Nevertheless, the McCullen Court held that narrow tailoring does not only serve to “guard against an impermissible desire to censor,” but it also burdens speech for the purpose of convenience.\(^{217}\) Police are fully capable of detecting and prosecuting illegal noise and trespass disruptions of funerals. Moreover, if the Westboro Baptist Church or any other protestors regularly violates the line of sight provision of the statute, an impartial court could issue a narrowly tailored injunction to address that violation.

**B. THE FUNERAL BUFFER ZONES DO NOT LEAVE ADEQUATE ALTERNATIVE MEANS OF COMMUNICATION**

Analogous to McCullen, the funeral protesting statutes do not leave the protestors adequate means to convey their message. In McCullen, the right to hold signs and chant outside the smaller buffer zone where they can still be seen was never in question. Of course, the petitioners wanted more: the ability to counsel through “personal, caring, and consensual conversations” and hand leaflets to those who approached them. They had a strong interest in avoiding shouting and sign waving. Still, the First Circuit held that the petitioners’ First Amendment speech rights were not infringed by moving them outside of the buffer zone. That court recognized that the statute prevented the petitioners’ preferred methods of speech,\(^{218}\) but held that “the Constitution does not ensure that [a speaker] will [always] be able to employ her preferred method of communication.”

Both the Sixth and Eighth Circuits upheld funeral protest statutes on similar grounds. Both courts held that the petitioners’ First Amendment rights were not violated, because several other means of communication remained open to the protestors, including the church’s own website.\(^{219}\) The Sixth Circuit reasoned, as had the First Circuit in the abortion clinic context of McCullen, that protestors were “not entitled to [their] best means of communication.”\(^{220}\)

However, when McCullen reached the Supreme Court, this argument did not persuade. The Court unanimously held that the means of the message is a vital part of the message itself. Because the buffer zone moved the

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\(^{217}\) *McCullen*, 134 U.S. at 2534.

\(^{218}\) “Gentle discussions with prospective patients at a conversational distance…” *McCullen*, 708 F.3d at 13.

\(^{219}\) The Sixth Circuit also pointed to all of the alternative means available to the protestors in *Frisby v. Schultz*, and claimed that they are available here. Of course, this stifles the message by ignoring its nature and intent. *Strickland*, 539 F.3d at 372.

\(^{220}\) *Strickland*, 539 F.3d at 372.
protestors away from the drive entrance, those who approached would only “see and hear… vociferous opponents of abortion.” Consequently, if the buffer zones were upheld, they would have “effectively stifled the petitioners’ message.”

On the other hand, the means vital to the Westboro Baptist Church’s message is to protest with signs outside a funeral. The funeral setting is key to the message and media publicity, just as others have protested outside of the White House or Capitol Hill. Therefore, the Eighth Circuit’s proposal that the speech “may be freely expressed anywhere in the city except during a short period immediately surrounding a funeral service” does not provide alternate channels for communication of that same message or to the same effect. Just as the Supreme Court ruled that the Court of Appeals was “wrong to downplay” the burdens on the abortion protestors’ speech in McCullen, so have the Sixth and Eighth Circuits downplayed the burden on the funeral protestors’ message by removing them from their chosen protest site in a traditional public forum. Permitting protestors to protest hundreds of feet away, or an hour after the funeral, just as “effectively stifle[s] the [protestors’] message.” Although the funeral protestors’ speech may be purposely antagonistic and greatly offensive, the government may not effectively silence a message by leaving only ineffective means of conveying it.

C. A Moderate Solution: Far Less Restrictive Means Are Available to Prevent Funeral Disruption

The Supreme Court held in McCullen that there was no right to avoid unwanted communication in traditional public fora, but other precedent shows that right to exist when the audience is captive to the message. Though it may be tempting to pass a law that completely prevents offensive communication from ever reaching mourners, such laws cause greater harm to the marketplace of ideas than they prevent to mourners. However, the

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221 See supra note 174.
222 Id.
223 Some have argued that the Supreme Court building has its own buffer zone, but this zone does not limit speech on the sidewalks, but only within the building and grounds. SUPREME COURT OF THE UNITED STATES: BUILDING REGULATIONS, http://www.supremecourt.gov/publicinfo/buildingregulations.aspx#Reg7 (last visited Jan. 31, 2015).
224 McCullen, 134 U.S. at 2536.
225 Of course, there is no right to exploit funerals for media publicity, but this restriction cuts into a traditional public forum, where the “government’s ability to restrict speech … is ‘very limited.’” Id. at 2522.
226 See supra note 79.
227 This is not to say that there should be a balancing of interests on traditional public fora. See supra notes 188, 189.
Constitution does not require a mourner attending a funeral to avert his or her eyes to a “God Hates F**s” sign over the shoulder of the pastor delivering the service. Neither should funeral attendees saying a prayer have to shout over the chants of protestors.

There is a more narrowly tailored solution that the Supreme Court after the McCullen decision would likely hold constitutional, and which would also protect captive funeral attendees. While the McCullen Court refused to cut into the First Amendment protections of traditional public fora by upholding a buffer zone displacing protestors, abortion protestors enjoy no right to communicate the message within the abortion clinic itself. So, instead of the fixed, speech-restricted buffer zones around funerals that are now shown to be unconstitutional, legislatures could pass statutes that require protestors not be visible or audible from the funeral service itself. This lack of visibility was sufficient for the Snyder court to conclude that no funeral disruption had occurred. Those entering can still see the protestors and their message, but the speech will not bombard them audibly or visibly while captive during the service. Further, regular enforcement of noise ordinances and trespass laws would prevent disruptions of funerals.

This moderate approach removes the captive audience concerns that justified the statutes in Strickland and City of Manchester, while still preserving the Westboro Baptist Church’s means and message. Protestors can still “target” a funeral service and draw media coverage, but they cannot disrupt the funeral service itself.

Another solution could be to pass statutes similar to those in Frisby. In that case, there was no speech-chilling buffer zone around the home that prevented protests, but protests that focused on that particular home were banned. The Supreme Court pointed out that the ordinance did not prevent marching through the residential neighborhood, but merely prevented protests upon that particular home. Funeral protest statutes could be written similar to Ohio’s statute from 1961 until its amendment in 2006. The earlier statute did not proscribe a buffer zone or residual clause, and would lead to a far more narrowly tailored law than the current version.
If there is a valid interest in preventing crime or confrontational approaches, the state may also create eight foot “no approach zones” for funeral attendees. If there is a valid interest in preventing crime or confrontational approaches, the state may also create eight foot “no approach zones” for funeral attendees.233 A smaller buffer zone around entrances to funeral services could prevent the obstruction of access by attendees.234

Finally, many concerns regarding disruptions “can be readily addressed through existing local ordinances.” The McCullen Court held that Massachusetts had failed to utilize less intrusive means, by pointing to existing laws against assault, trespass, vandalism, and other crimes as a means of addressing the problem without further burdening the First Amendment. These means are also available to governments to respond to protests that create illegal disturbances at funeral services. Funeral privacy can be protected by enforcing trespass laws, as well as by content-neutral noise ordinances already in place.235

V. AVOIDANCE OF UNWANTED COMMUNICATION IS THE TRUE STATE INTEREST, SO FUNERAL PROTEST STATUTES AS WRITTEN ARE ACTUALLY CONTENT-BASED AND ARE PRESUMPTIVELY INVALID UNDER STRICT SCRUTINY

The Supreme Court in McCullen held the thirty-five foot buffer zone statute to be content-neutral, before striking it down for failing the narrow tailoring prong. Because this restriction had an obvious disproportionate impact on one particular viewpoint and was clearly aimed at particular speakers, it should not have been classified as content-neutral. However, the Court has traditionally looked at a statute only facially, to see if it considers content before application.

A. WHEN THE LOCATION OF A STATUTE EVINCES SPEAKER DISCRIMINATION, IT SHOULD TRIGGER STRICT SCRUTINY

In McCullen, the Supreme Court addressed content-based concerns under the narrow tailoring analysis. Justice Scalia in his concurrence pointed out that the problems Massachusetts sought to address occurred only in one clinic and only once a week. Therefore, he wrote, the fact that Massachusetts passed a statute that created a buffer zone around every abortion clinic must indicate that the statute is based on the content of the speech being prevented.

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233 This possibility assumes that Hill was not overruled by McCullen and that there is still a valid interest in avoiding confrontational approaches.
234 Madsen, 512 U.S. at 753.
235 There have been no successful prosecutions, however, because Westboro Baptist Church members are usually careful to antagonize without violating any laws.
However, the majority in *McCullen* held that this “poor fit... goes to the question of narrow tailoring.”

For this reason, the Court would likely consider much of the evidence pointing to a content-based statute under the narrow tailoring prong, ignoring the obvious bias it indicates. Moving protestors hundreds of feet from a funeral service an hour before the service begins shows that the law is intended to prevent communication of a particular message, not disruption of a funeral. An even better indicator of this intent was the original “floating” buffer zones that prohibited funeral procession protests struck down by the district court in *Strickland*.236

However, state courts are not required by Supreme Court precedent to ignore this evidence in interpreting their own state constitutions.237 Courts should apply a common sense analysis of the statute to determine whether it intends to discriminate against particular speech. For example, statutes that create buffer zones outside of abortion clinics should carry a presumption of content discrimination, as they clearly target the pro-life viewpoint.238 A statute that is amended to bar protests outside of a funeral should carry a presumption that it targets the one major group which protests certain funerals. This is not to say, however, that such areas should be beyond the government’s ability to regulate. Instead, these statutes should be held to strict scrutiny and only be upheld if they are narrowly tailored to serve a compelling state interest.239

**B. THE BREADTH OF FUNERAL PROTEST STATUTES SHOW THEIR TRUE PURPOSE: TO SUPPRESS WESTBORO BAPTIST CHURCH SPEECH**

The breadth of the funeral protest statutes show that their underlying concern is the prevention of speech. The statutes prohibit speech within 300 feet, regardless of whether the funeral attendees can see or hear the protestors. The time restrictions barred protestors even though the funeral was not to start for another hour or more. The state interest in preventing a funeral disruption could not justify a buffer zone when no funeral was underway. The only basis left for the statute is to prevent attendees arriving to the funeral – still on streets and sidewalks – from seeing offensive messages. As Justice Scalia wrote in his concurrence in *McCullen*:

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236 Ohio did not appeal this ruling.
237 State Constitutions are not prohibited by the Supremacy Clause from providing more rights to citizens.
238 Similarly, a statute barring protests outside of a prison that performs executions would presumptively target anti-death penalty activists.
239 *McCullen* seems to tighten the narrow tailoring analysis under intermediate scrutiny in light of this plainly discriminatory statute.
Whether the statute ‘restrict[s] more speech than necessary’ in light of the problems that it allegedly addresses… is powerfully relevant… to whether the law is really directed [at the purported content-neutral concern] or rather to the suppression of a particular type of speech. Showing that a law suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based.”

An audience’s reaction to a message cannot justify a content-neutral restriction. Therefore, the presence of restrictions on protesting in traditional public fora when there is no funeral in progress to disrupt shows that the statute’s true purpose is to restrict certain speech. As Justice Scalia explains, this is evidence that goes to both the content-neutral classification as well as the narrow tailoring analysis. McCullen shows that this desire to suppress specific communication should not justify a buffer zone in traditional public fora.

The breadth of the statute also calls its content-neutrality into question. In Justice Souter’s concurrence in Hill, he stated that “[t]he fact that speech by a stationary speaker is untouched by this statute shows that the reason for its restriction on approaches goes to the approaches, not to the content of the speech of those approaching.” In this way, Colorado showed that the target of the provision was not the content of the speech, because it left the right to speak largely unburdened. Conversely, removing funeral protestors from view during any time in which the attendees may view them, points to the opposite. Justice Scalia argues in his concurrence in McCullen that the structure of the statute shows that the true purpose of the buffer zone was to “protect[?] citizens’ supposed right to avoid speech that they would rather not hear.” In the context of funeral buffer zones, the broad zones combined with the suspicious governmental interest makes the purpose clearly related to the offensive speech itself.240

CONCLUSION

Justice O’Connor has stated that “[a]s a general matter, courts indicate that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the

240 This is not the case with my proposed solution. Noise and waving signs by protestors within eyesight is disruptive, despite what the signs say. Of course, it could be argued that attendees who see protest signs prior to entry to the funeral may consider the funeral disrupted. However, as McCullen now shows, avoidance of unwanted communication is not a valid state interest in a traditional public forum.
freedoms protected by the First Amendment.\textsuperscript{241} The hateful message of the Westboro Baptist Church is losing in the marketplace of ideas. Unfortunately, the nation has sacrificed vital First Amendment rights fighting an enemy that never really posed a threat.

Funeral mourners should not have to tolerate hateful speech when it disrupts the service. On the other hand, that privacy interest does not support statutory buffer zones that are so extensive in square footage and time. The role of the courts is to protect the speech of unpopular minorities from the democratic power of the majority. The lower courts have failed to do so, and largely due to the Supreme Court's prior failure to protect the First Amendment. However, the recent decision of \textit{McCullen v. Coakley} shows that the speech-protective Roberts Court will not likely permit this incursion into a traditional public forum.

\textsuperscript{241} \textit{Boos}, 485 U.S. at 312 (quoting \textit{Hustler Magazine v. Falwell}, 485 U.S. 46 (1988)).
LEGAL RECURSIVITY AND INTERNATIONAL LAW: RETHINKING THE CUSTOMARY ELEMENT

ROOZBEH (RUDY) BAKER**

The use of the terms “traditional” and “modern” to describe alternative interpretations of customary international law is recent. Nevertheless, the viewpoints attached to them and the debates they have engendered have existed for at least the past forty years. The emergence of these two alternative interpretations of customary international law has generated much debate within the field. Both “traditional” and “modern” custom have very different interpretations of the role state practice and opinio juris play in the formation of customary international law. This has resulted in confusion over what the precise meanings of these two components of customary international law actually are. Could part of the explanation for the emergence of these two radically different takes lie in the idea that both state practice and opinio juris are increasingly proving inadequate in explaining the process of international norm formation? The growth of international criminal tribunals has resulted in a degree of institutionalized and hierarchical norms that have had no historical precedent in the international system. Although these international criminal tribunals were designed as self-contained legal regimes, their jurisprudence has, nevertheless, begun to be elevated into norms of customary international law. Couple this phenomenon with the increasing rise and influence of transnational actors within the international system, and a complex picture of actors and institutions emerges where the old formula of state practice and opinio juris no longer describes the reality of the situation. This article proposes that, to understand the new realities of the international system, one must turn to socio-legal studies and to the new groundbreaking work within that field on norm formation, implementation, and interaction.

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INTRODUCTION

The use of the terms “traditional” and “modern” to describe alternative interpretations of customary international law is recent, having been introduced in 2001 by scholar Anthea Elizabeth Roberts.¹ Despite this, the viewpoints attached to these terms and the debates they have engendered have existed for at least the past forty years.² The “traditional” approach to customary international law holds that the creation of a customary rule comes from two co-equal elements: (1) the widespread consistent practice of states; (2) coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation or opinio juris.³ If enough states act in a consistent manner, through a sense of legal obligation, for a long enough period of time, a new customary international rule is said to have been created. The “modern” approach to customary international law challenges “traditional custom’s” reliance on the state practice prong in the test for customary international rules.⁴ Instead, “modern custom” seeks to de-emphasize state practice in exchange for a heightened reliance on opinio juris. The key point stressed by “modern custom” is that opinio juris alone, rather than coupled with consistent state practice, formulates the foundational source of customary international law.⁵ The emergence of these two alternative interpretations of customary international law has generated much debate within the field. A great strength of “modern custom” is a dynamism that “traditional custom,” with its emphasis on process, can simply never possess.⁶ The great strength of “traditional custom,” however,

³ PETER MALANCUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (7th ed. 1997); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 6-7 (2005); Restatement (Third) of The Foreign Relations Law of the United States § 102(2) (1987).
⁴ Roberts, supra note 1, at 758-759.
is an inherent restraint that ensures that customary international norms, if adopted, have a wide degree of acceptance within the international community.\textsuperscript{7}

Both “traditional” and “modern” custom have very different interpretations of the role state practice and \textit{opinio juris} play in the formation of customary international law. This has led to confusion over what the precise meanings of these two components of customary international law actually are. Ultimately the result of these contradictory interpretations has been a gradual amalgamation of these two formerly distinct ideas. The role of state practice and its relationship to \textit{opinio juris} in the formation of customary international law formation has been the subject of much uncertainty in current scholarship. One key point of confusion is whether state practice is a separate element in customary international norm formation or rather folded into \textit{opinio juris}. This uncertainty finds its source in the observation, by certain scholars, that for the state practice requirement to truly reflect that which it purports to reflect (state practice), a distinction must be made between the potential affirmative claims of a state (which would then count as state practice) versus simple government statements (which would not count as state practice). The key concept stressed here is that affirmative claims followed by action are very different things from statements that are not followed up by an act.\textsuperscript{8} While this observation is clear enough, the problem that then arises is what to do with the government statements — if they do not count as state practice, then how are they to be classified? One problematic answer seems to be that they can be thought of as possible evidence of \textit{opinio juris},\textsuperscript{9} which then has the potential of rendering the entire state practice / \textit{opinio juris} divide meaningless.\textsuperscript{10}

Though the lack of clarity in what state practice must truly reflect has contributed to the gradual amalgamation of the former state practice / \textit{opinio juris} divide, confusion over the exact meaning and parameters of


\textsuperscript{8} Anthony D’Amato, \textit{The Concept of Custom in International Law} 87-98 (1971); H.W.A. Thirlway, \textit{International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law} 58 (1972); Karol Wolfke, \textit{Custom in Present International Law} 42, 84 (2nd ed. 1993).


\textsuperscript{10} See, e.g., Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.), 1984 I.C.J. 246, 299 (Oct. 12) (Where the International Court of Justice held \textit{opinio juris} could be confirmed by “the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.”).
opinio juris has also contributed to this problem. The confusion here stems from what some scholars have labeled as the “opinio juris paradox.”\textsuperscript{11} The “opinio juris paradox” refers to the fact that if the idea (i.e. of opinio juris) refers to the belief that a practice has already become a binding obligation, then the initial belief in an emerging norm is always a mistaken one.\textsuperscript{12} How one views the implications of this paradox depends on whether opinio juris is seen as a law creating fact or as a law distinguishing it.\textsuperscript{13} If opinio juris is a tool to distinguish between a mere usage / practice and a binding obligation, then the issue becomes moot.\textsuperscript{14} If, however, opinio juris is something more, then the “opinio juris paradox” becomes highly problematic. As scholars have researched and demonstrated, international jurisprudence has issued conflicting and contradictory opinions that have at times supported both viewpoints — opinio juris as law creating and law distinguishing.\textsuperscript{15} The paradox matters because if opinio juris is a law creating fact, then it no longer can have a role independent of state practice.\textsuperscript{16}

The end result of all of these developments has been that the current state of international law involves deep confusion over the role of state practice and opinio juris within the customary element.\textsuperscript{17} Could part of the explanation for the emergence of these two radically different viewpoints, “traditional” and “modern,” lie in the idea that both state practice and opinio juris are increasingly proving inadequate in explaining the process of international norm formation? Could it be that the current understanding of the primitive or “customary” element of international law has, within the past thirty years, become increasingly obsolete as the international legal system has begun to approach the complexity of its national counterparts?

The growth of international criminal tribunals has resulted in a degree of institutionalized and hierarchical norms that have had no historical precedent in the international system. Although these international criminal tribunals were designed as self-contained legal regimes, their jurisprudence has, nevertheless, begun to be elevated into norms of customary international law.\textsuperscript{18} Couple this phenomenon with the increasing rise and influence of

\textsuperscript{12} See Olufemi Elias, The Nature of the Subjective Element in Customary International Law, 44 INT’L & COMP. LAW Q. 501, 502-503 (1995); Kammerhofer, supra note 11, at 534-535; Bederman, supra note 6, at 149.
\textsuperscript{13} See generally Elias, supra note 12.
\textsuperscript{14} See, e.g., Malanczuk, supra note 3, at 45 (“Opinio juris is sometimes interpreted to mean that states must believe that something is already law before it can become law. However, that is probably not true; what matters is not what states believe, but what they say. If some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realize that it is a departure from pre-existing rules.”).
\textsuperscript{15} See, e.g., Elias, supra note 12, at 506.
\textsuperscript{16} Id. at 508-510.
\textsuperscript{17} See, e.g., Kammerhofer, supra note 11.
\textsuperscript{18} For a detailed description of this phenomenon, see Baker, supra note 2.
transnational actors\textsuperscript{19} within the international system, and a complex picture of actors and institutions emerges where the old formula of state practice and \textit{opinio juris} no longer accurately describes the situation. There has been recent scholarship describing the degeneration of state practice and \textit{opinio juris} as the sole sources of customary international law.\textsuperscript{20} Though interesting, this scholarship has left unexplored the question of how, in the wake of these new developments, one is to view the processes through which international norms develop. This article proposes that, to understand the new realities of the international system, one must turn to socio-legal studies and to the new groundbreaking work within that field on norm formation, implementation and interaction.

Socio-legal studies explore the effect of social forces on the law.\textsuperscript{21} Socio-legal scholars are not interested in the internal rules and doctrines that form a specific doctrinal body of law, but instead consider how law can be, in part, a social construction which interacts with wider historical and cultural forces within society.\textsuperscript{22} Socio-legal scholarship has identified, with great precision, the emergence of global norms and the causal mechanisms that accompany their implementation. Most important amongst this scholarship is the work done by Terence Halliday and Bruce Carruthers. Halliday and Carruthers have examined how global norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole and domestic states.\textsuperscript{23} Halliday and Carruthers claim that law making and implementation, on both the system (international) and national level, can act as an iterative and recursive process (“legal recursivity” for short).\textsuperscript{24} This article posits that such a framework of law making and implementation as an iterative and recursive process is a more apt description of how, in a new international system dominated by norm generating international tribunals and transnational actors, international rules develop and operate. In the new realities of the international system, state practice and \textit{opinio juris} no longer adequately describe the process through

\textsuperscript{19} The most widely accepted definition of what constitutes a transnational actor is the one first offered by Robert O. Keohane and Joseph S. Nye in 1971. Keohane and Nye define transnational actors as forces engaged in “contacts, coalitions, and interactions across state boundaries...not controlled by the central foreign policy organs of governments.” See Joseph S. Nye & Robert O. Keohane, \textit{Introduction, in Transnational Relations and World Politics} xi (1972).

\textsuperscript{20} See Baker, \textit{supra} note 2.


\textsuperscript{22} Id. at 3-5.


\textsuperscript{24} Halliday & Carruthers, \textit{supra} note 23, at 1135-1138.
which international norms develop. Given this reality, a new understanding of how international rules form is needed.

Part I of this article will provide a summary of the recent debates that have taken place within the field of international law between so-called adherents of “traditional custom” who claim that state practice and *opinio juris* still form equally the foundation of customary international law, and the so-called adherents of “modern custom” who claim that *opinio juris* can and should take a more central place over state practice. Part II will demonstrate the weakness of the current understanding of customary international law, one which holds state practice and *opinio juris* as the main foundational elements of international custom. This current understanding is flawed because an approach focused on state practice and *opinio juris* fails to take into account the very real effects that norm generating international tribunals and transnational actors have on the formation of international norms. Part III shall present a detailed introduction to the idea of “legal recursivity” and demonstrate how, in an era of norm generating international tribunals and transnational actors, it presents a more logical and empirically rooted explanation of how norms develop in the international system. This article will conclude with a discussion of how “legal recursivity” can provide the correct set of blueprints for moving international legal scholarship forward in this new era.

I. CUSTOMARY INTERNATIONAL LAW AT THE CROSSROADS

The use of the terms “traditional” and “modern” to describe alternative interpretations of customary international law are recent, having been introduced in 2001 by scholar Anthea Elizabeth Roberts. See Roberts, supra note 1. This being said, though the use of these terms is fairly new, the viewpoints attached to them and the debates they have engendered have existed for at least the past forty years. The emergence of these two alternative interpretations of customary international law has generated much debate within the field. A great strength of “modern custom” is a dynamism that “traditional custom,” with its emphasis on process, can simply never possess. The great strength of “traditional custom,” however, is inherent restraint that ensures that customary international norms, if adopted, have a wide degree of acceptance within the international community. Interesting though the debates between these two approaches has been, the current state of international

25 See Roberts, supra note 1.
26 See Baker, supra note 2, at 178-184.
27 Bederman, supra note 6, at 144-145.
28 Wolfke, supra note 7, at 160-168; Weisburd, supra note 7, at 46 (1988); Roberts, supra note 1, at 762-763.
legal scholarship is one of deep confusion due to their longstanding argument. Part of the problem can be attributed to the fact that customary international law generally suffers from a heavily state-centric bias that fails to take into account the very real effects non-state forces, such as norm generating international tribunals and transnational actors, have on the international system. State practice and *opinio juris* are, after all, heavily keyed to state actions and motivations. The attempt of “modern custom” to de-emphasize state practice in favor of *opinio juris* can perhaps be seen then as a way to broaden the array of actors that contribute to the development of international norms. Yet shackled to the state-centric biases of customary international law, confusion has been the only result.

A. **EVOLUTION: “TRADITIONAL CUSTOM” AND THE CLASSIC APPROACH**

The fundamental components of the traditional approach to customary international law can be found in the widespread consistent practice of states coupled with the belief (on the part of the acting state) that they are acting out of a sense of legal obligation or *opinio juris*. If enough states act in a consistent manner, through a sense of legal obligation, for a long enough period of time, a new customary international rule is said to be created. In this traditional approach, customary international law is heavily state-centric. If a nation state objects to a newly emerging rule of customary international law then it can, in theory, vocally object and announce that it does not view itself as bound to that rule. This objection must be consistently reiterated lest it be lost and, if a rule of customary international law is emerging and a nation state remains silent, then this can be seen as giving implicit consent that the nation state will be bound by the new customary rule.

In the same vein, multilateral treaties can transform into sources of customary international law binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adhere to their provisions out of a sense of legal obligation. States then are, in effect, creating a rule through a two-step process: (1) acting in conformance to said rule over a period of time (the physical element); and (2) because they feel

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29 MALANZUK, *supra* note 3, at 44; AUST, *supra* note 3, at 6-7; Restatement, *supra* note 3, at § 102(2).
30 See Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 116 (Dec. 18). But see also *supra* note 34.
32 See Restatement, *supra* note 3, at § 102 comment d.
they are legally obligated to do so (the mental element). Traditionally accepted evidence of state practice and opinio juris has been taken to include domestic diplomatic correspondence and statements, domestic governmental reports and statements, domestic legislation, and domestic judicial decisions.

There are certain rules of customary international law considered so vital that they cannot be contracted out by individual states. Such peremptory rules are labeled *jus cogens* norms. *Opinio juris* plays an important role in elevating a regular customary international rule into a *jus cogens* norm, for only when the majority of states in the international system believe that a regular customary international rule cannot be persistently objected to, or contracted out of, does this regular norm achieve elevation to *jus cogens*.

Running parallel to *jus cogens* norms are what are called obligations *erga omnes*. Obligations *erga omnes* are obligations considered so vital and important within the international system (usually in the form of *jus cogens* norms), that any state - whether directly affected or not - may sue another state in order to compel that the obligation be met. In this way obligations *erga omnes* can be seen as a determinant in questions concerning jurisdiction and standing in international law.

### B. Revolution: The Emergence of “Modern Custom”

By redrawing the role of state practice and *opinio juris* in the formation of customary international law, adherents of “modern custom”...
have posited that, far from being a slow moving cautious process, the formation of customary international law can be dynamic with the possibility of occurring nearly overnight. “Modern custom” challenges “traditional custom’s” reliance on the state practice prong in the test for customary international rules. Instead, “modern custom” seeks to de-emphasize state practice in exchange for a heightened reliance on opinio juris and, in this sense, is more deductive in its logical reasoning where “traditional custom” is more inductive. The key stressed by “modern custom” is that opinio juris alone, rather than combined with consistent state practice, formulates the foundational source of customary international law. Proponents of “modern custom” cast state practice as an imprecise idea, with no exact model for the extent and regularity needed for the formation of a customary international rule. State practice is instead viewed as more of a secondary factor in the formation of customary international law, in that it can be thought of as composed of a general acceptance on the part of the community of states in the international system as a whole, rather than the expressed will of individual states. Taking this view further, the premise has been forwarded that it is impossible to determine whether states in the international system are aware of their obligations, whatever said obligations may be. For how can the attitudes and beliefs of a state which is, after all, a collective political institution, be determined? Under this reasoning, international treaties, long held to be a separate source of international law have been held to actually generate customary international rules. The key claim here by adherents of “modern custom” is that, as long as international treaties are to a certain extent widely ratified, then the opinio juris that this

41 Roberts, supra note 1, at 758-759.
42 Id.
43 Cheng (1965), supra note 5; Cheng (1983), supra note 5, at 532; Remarks of Judge Jimenez de Arechaga, supra note 5, at 48-50; Charney, supra note 5, at 546.
45 Indeed, the International Court of Justice seemed to, in part, endorse this point of view when, in the Nicaragua case, it relied more heavily on United Nations (UN) resolutions and international treaties (in order to ascertain customary international rules on the use of force and principle of non-intervention) than on actual state practice. See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98-107 (June 27).
47 D’AMATO, supra note 8, at 82-85.
wide ratification represents on the part of the larger international community is enough to seamlessly transform the treaty provisions (binding on the signatories) into customary international law (binding on all).\(^{49}\) Not only international treaties, but resolutions of the United Nations (UN) General Assembly\(^ {50}\) and the statements of non-governmental organizations,\(^ {51}\) can play a role in the formation of customary international rules.

On a related track, some adherents of “modern custom” have questioned the traditional formula for determining whether a rule of customary international law has become elevated to a _jus cogens_ norm.\(^ {52}\) Moving away from the traditional method which involves a determination of whether the majority of states in the international system believe that a regular customary international norm cannot be persistently objected to or contracted out of, certain “modern custom” scholarship has proposed that an internationally recognized offense\(^ {53}\) which: (a) threatens the peace and security of mankind; and (b) shocks the conscience of humanity, attains elevation as a _jus cogens_ norm.\(^ {54}\) This scholarship holds that while both elements are not necessarily required for a crime to elevate to a _jus cogens_ norms, if they are in fact found (i.e. within the context of an international crime), then that crime has absolutely attained status as _jus cogens_.\(^ {55}\)

### C. SYNTHESIS OR CONFUSION?

“Modern custom,” with its de-emphasis of state practice in favor of _opinio juris_, has provoked a serious response from adherents of “traditional custom,” who have viewed the de-emphasis of the co-equal natures of state practice and _opinio juris_ in the formation of customary international law as

\(^{49}\) Sohn (1986), _supra_ note 48, at 1077-1078.

\(^{50}\) D’Amato, _supra_ note 48, at 1128 n.72; Sohn (1986), _supra_ note 48, at 1074. Note that while it had never been disputed that the UN Security Council, under Articles 24(1) and 25 of the UN Charter (granting it the “primary responsibility for the maintenance of international peace and security” and binding the other UN member states to carry out its directives), had a very real and concrete influence upon international law, it had never been posited that the General Assembly possessed this influence as well.


\(^{53}\) There are three categories of generally accepted international offenses (derived from various international treaties and custom): (1) war crimes and grave breaches of the _Geneva Conventions_; (2) crimes against humanity; and (3) genocide. _See_ ELIAS BANTERAS, _INTERNATIONAL CRIMINAL LAW_ (1st ed. 2010).

\(^{54}\) Bassiouni, _supra_ note 52, at 69.

\(^{55}\) _Id_.
problematic.\textsuperscript{56} These critics argue that the reinterpretation of customary international law advocated by adherents of “modern custom” poses a danger to the entire idea of customary international law.\textsuperscript{57} As discussed, this reinterpretation minimizes the role of state practice as a key component in customary international law formation, and envisions the transformation of conventional international law into customary international law as a seamless process. The critique contends that “modern custom,” in its emulation of \textit{opinio juris} over state practice, often reflects aspirational goals rather than set standards,\textsuperscript{58} and as such reveals itself to be highly normative in nature.\textsuperscript{59}

The interpretation of customary international law advocated by the adherents of “modern custom” is, according to those who oppose it, one that seeks to move the sources of customary international law such as state practice and \textit{opinio juris} away from their “practice-based” methodological orientation, and instead employs methods that are more normative in nature.\textsuperscript{60} Followers of “traditional custom” hold that international treaties or resolutions of international bodies such as the UN should be seen as possible starting points in the development of international custom, not norm-generating acts in and of themselves.\textsuperscript{61} Adherents of “traditional custom” claim that many of the resolutions that the UN General Assembly votes upon are aspirational in nature and are not intended to be embraced fully and unconditionally by those states voting for them.\textsuperscript{62} Given this point of fact, according to followers of “traditional custom,” the act of using state practice and \textit{opinio juris} together as the yardsticks of custom formation gains all the more importance. For only then can aspirational or symbolic acts be separated from those intended to be law-making.\textsuperscript{63} Followers of “traditional

\begin{itemize}
\item \textsuperscript{56} Although note that some scholars have characterized “traditional custom” as not viewing state practice and \textit{opinio juris} as co-equal but rather as state practice as having precedence over \textit{opinio juris} which is described as a “secondary consideration.” See Roberts, supra note 1, at 758.
\item \textsuperscript{59} See generally Roberts, supra note 1, at 761-770.
\item \textsuperscript{61} Simma & Alston, supra note 57, at 89-90.
\item \textsuperscript{63} See, e.g., A. Mark Weisburd, \textit{American Judges and International Law}, 36 VAND. J. TRANSNAT’L L. 1475, 1505-1506 (2003) (Where the author criticizes international law scholars who, when purporting to make claims about what constitutes customary international law, do not refer to state practice.).
\end{itemize}
custom” claim that anything labeled as a customary rule of international law, in the absence of any ascertainable state practice, lacks legitimacy.\(^64\)

II. \textbf{INTERNATIONAL TRIBUNALS, TRANSNATIONAL ACTORS, AND THE CHALLENGE TO STATE-CENTRISM}

As has been seen, current interpretations of customary international law are, in many respects, flawed. The debate between adherents of “traditional custom” versus those of “modern custom” has resulted in deep uncertainty and confusion over the role of state practice and \textit{opinio juris} within the customary element. Uncertainty over the meanings and relationships between state practice and \textit{opinio juris} aside, current approaches whether “traditional” or “modern” are also flawed due to a heavily state-centric bias that fails to take into account the very real effects that norm-generating international tribunals and transnational actors have on the international system.\(^65\)

A. \textbf{INTERNATIONAL TRIBUNALS}

The exponential growth of self-contained international criminal tribunals within the international system has had deep repercussions on how international norms form and develop. Though institutionally designed as self-contained legal regimes, many of the judgments of these tribunals have slowly begun to be elevated into international norms. While scholarship studying this phenomenon is new, the results do show the very real effects international tribunals are beginning to have on the development of international law. Given this, the effects that norm-generating international tribunals have had on the formation of international norms must be taken into account in any attempt to understand how these norms function.

Rudy Baker has studied how some of the recent jurisprudence of international tribunals, mainly the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), have become elevated into

\(^{64}\) \textit{Id.} For a response to this line of reasoning, see Anthony D’Amato, \textit{Custom and Treaty: A Response to Professor Arthur A. Weisbord}, 21 VAND. J. TRANSNAT’L L. 459 (1988).

\(^{65}\) For example, in 2006, there were roughly 300 international organizations and around 40 international legal dispute settlement bodies in the world, and these numbers, high as they are, mostly exclude non-governmental advocacy groups. See José E Álvarez, \textit{International Organizations: Then and Now}, 100 AM. J. INT’L L. 324 (2006).
international norms. He analyzed the jurisprudence of these tribunals in such diverse issue areas as: (a) the standards required for determining the nature of an armed conflict (i.e. whether it is of an “internal” or “international” nature for the purposes of international law); (b) whether the traditional immunities for heads of state still remain absolute; and (c) the correct mens rea standard (a subjective standard based on what the accused knew versus an objective standard based on what the accused should have known) to be applied for international crimes prosecuted under the doctrine of command responsibility. Baker has found that the jurisprudence of these tribunals in these issue areas have not only contradicted traditionally accepted international norms, but have themselves emerged to become accepted norms by states, international legal scholars and tribunals.

B. TRANSGATIONAL ACTORS

The past several decades has seen a resurgence, mainly within the fields of international relations and sociology, of empirical scholarship studying the effects that transnational actors have had on state behavior and vice versa. Though the approaches, methodologies and conclusions of this scholarship have varied, one finding has been universal: transnational actors have a very real role to play in both state behavior and the formation of international norms.

1. Transnational Actors within the International System

Studies on the interactions of transnational actors within the international system focus on how large-scale international governmental and nongovernmental organizations interact with states on the international level. The hallmark of this scholarship has been a focus on how the presence and influence of transnational actors within the international system affects the choices states make and the behaviors they exhibit.

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66 See Baker, supra note 2.
67 Id. at 186-188.
68 Id. at 188-189.
69 Under both the Roman inspired civil law and English inspired common law, all crimes are composed of two basic elements: the physical element or guilty act (actus reus), and the mental element or guilty mind (mens rea). See e.g., JEAN PRADEL, MANUEL DE DROIT PÉNAL GÉNÉRAL 436-438, 9th ed. 1994); ZORAN STOJANOVIĆ, KRIVIČNO PRAVO, OPŠTI DEO 111-117, 162-164 (1st ed. 2000); RICHARD CARD, CRIMINAL LAW § 3.1 (15th ed. 2001); WAYNE R. LAFAYE, CRIMINAL LAW §§ 5.1, 6.1 (3rd ed. 2010).
70 Baker, supra note 2, at 190-198.
71 Id. at 186-198.
Robert O. Keohane and Joseph S. Nye began in earnest the process of investigating how “transnational interactions or organizations affect interstate politics.” Moving beyond a state-centered paradigm that saw the state as the “basic unit of action” within the international system, Keohane and Nye instead look to study how transnational actors can directly affect the international system. Through detailed studies of international governmental and nongovernmental organizations, multinational corporations, and cross-border social protest movements, Keohane and Nye have surmised that transnational actors can affect the international system in five major ways. First, transnational actors can promote “attitudinal changes” to people who have participated or been affected by them. This can have a direct effect on a domestic state’s policies and actions if enough of its elite and non-elite citizens are affected. Second, transnational actors can help link together different national interest groups (within a related issue area) and thus assist them in coordinating their actions, a process Keohane and Nye dub “international pluralism.” Third, transnational actors can create an environment where national governments are unable to directly pursue their interests (in a given issue area) alone and must instead seek the assistance of transnational organizations and networks, a phenomenon Keohane and Nye label “dependence and interdependence.” Fourth, by creating a system of “dependence and interdependence” where domestic states are dependent on forces they cannot directly control, transnational actors can inadvertently push those states to seek to manipulate transnational organizations and networks, a process Keohane and Nye dub “creating new instruments for influence.” The fifth and final way that transnational actors affect the international system is through transnational organizations becoming, in Keohane and Nye’s words, “autonomous or quasi autonomous actors in world politics,” and thus seeking to pursue their own independent policy interests.

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72 See Robert O. Keohane & Joseph S. Nye (Eds.), Transnational Relations and World Politics (1972).
73 Nye & Keohane, supra note 19, at ix.
74 Id. at xvii-xviii.
75 See Donald P. Warwick, Transnational Participation and World Peace, in Transnational Relations and World Politics (1972).
77 Nye & Keohane, supra note 19, at xviii-xix.
79 Nye & Keohane, supra note 19, at xix-xx.
80 See Robert W. Cox, Labor and Transnational Relations, in Transnational Relations and World Politics (1972).
81 Nye & Keohane, supra note 19, at xx-xxi.
82 Id. at xxii.
Building on the fresh set of insights regarding the influence of transnational actors within the international system offered by Keohane and Nye,\footnote{See supra note 71.} the work of Richard W. Mansbach, Yale H. Ferguson and Donald E. Lampert seeks to offer a unifying framework for the study of transnational actors.\footnote{See RICHARD MANSBACH, YALE FERGUSON, & DONALD LAMPERT, THE WEB OF WORLD POLITICS: NONSTATE ACTORS IN THE GLOBAL SYSTEM (1976).} Attacking a state-centered paradigm viewed as inadequate because it does not sufficiently recognize the presence and influence of transnational actors, Mansbach, Ferguson and Lampert instead look to offer up a model of a “complex conglomerate system” which refers to how various types of autonomous actors, both state and transnational, will align and work together around specific issue areas.\footnote{Id. at 41-45.} To test their new model, Mansbach, Ferguson and Lampert isolated three geographic regions (the Middle East, Latin America and Western Europe) and studied the interactions between state and non-state actors within these regions for the period 1948-1972. Mansbach, Ferguson and Lampert’s analysis reveals that non-state actors interacted considerably with the nation-states in each of the three regions tested.\footnote{Id. at 273-299.}

Looking to strike a balance between state-centric approaches and those taking into account the influence of transnational actors, the work of Harold K. Jacobson studies the interactions between international organizations and nation states within the international system.\footnote{See HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM (1979).} Through his study of the early development, as well as contemporary practices, of international organizations and their interactions with domestic states, Jacobson argues that international organizations have created a “complex web” within the international system that has “enmeshed” domestic states.\footnote{Id. at 14-19.} This phenomenon, Jacobsen argues, is at least in part a response to the international system evolving from the multistate system initially ushered in by the Peace of Westphalia and into a more interconnected model where global social and political norms interact and converge across borders.\footnote{Id. at 398-414.} The result of this new reality is that while domestic states still remain the main actors within the international system, their power within the system is no longer absolute, thus leading to an increased necessity to cooperate and develop consensus with one another through the “web” of international organizations.\footnote{Id. at 416-422. It should be noted that Jacobson’s ultimate conclusions here, although framed differently, in the end does not differ markedly from Keohane and Nye’s findings regarding “international pluralism” (i.e. the ability of transnational actors to link together different national interest groups within a related issue and assist them in coordinating their actions), and “dependence and interdependence” (i.e. the ability of transnational actors to create an environment...}
The work of Peter Willetts has sought to further explore and refine some of the findings regarding the influence of transnational actors within the international system first offered by Keohane and Nye. Willetts argues that the notion of power within the international system needs to be redefined. Power in the international system can no longer be defined solely as the authority / ability to do things — power can also be defined in terms of legitimacy as well. Achieving compliance, argues Willets, is not based just upon authority, but also perceived legitimacy. Through this refined definition of power, Willetts proposes that transnational actors have a great deal of power within the international system because although they lack the authority / ability for direct action, they can at times attack the legitimacy of domestic state actions, and in this way exert “pressure.” Legitimacy is attacked through “changing people’s perception of the issues,” which could be done through violent military action (e.g. the Palestine Liberation Organization) on one end of the spectrum through “presenting arguments and information” (e.g. the Anti-Apartheid Movement and Amnesty International) on the other.

Martha Finnemore has explored how states can be “socialized” by the network of actors (both state and transnational) that make up the international system. Rejecting the classic realist presumption that domestic states have fixed goals of “power, security, and wealth,” Finnemore...
has developed a social constructivist\textsuperscript{100} approach which argues that socialization within the international system can affect the preferences of domestic states.\textsuperscript{101} Finnemore empirically tests her theory through three case studies on how international institutions (the United Nations’ Educational, Scientific and Cultural Organization or UNESCO; International Red Cross; and World Bank) are able to reconstitute the interests of their various domestic state members. This reconstitution is achieved through “teaching,” where the various international organizations reflect to their domestic state members new international norms through “setting agendas, defining tasks, and sharpening interests.”\textsuperscript{102}

Though varied in its methods and approach to the study of transnational actors, the key similarity of all of the scholarship surveyed in this section has been its focus on how large-scale international governmental and nongovernmental organizations interact with states on the international level. As has been seen, this scholarship is consistent in the finding that the presence and influence of transnational actors within the international system affects the choices states make and the behaviors they exhibit. These findings speak to the need to include transnational actors in any discussion of how international norms are formed.

2. Studies of Transnational Actors on the State Level

Studies of transnational actors on the state level focus on how transnational social movements and advocacy groups try to push their policy preferences and affect state behavior. The hallmark of this scholarship has been an emphasis on the tools and processes these transnational actors utilize in order to attempt to influence state behavior, and how international norms begin to emerge as a result.

Thomas Risse has looked to analyze the conditions under which transnational actors can penetrate domestic state governing structures and influence national policy.\textsuperscript{103} Risse conceptualizes a theoretical framework that looks to both the national and international-level norms and institutions states operate within, in order to identify the policy impact of transnational actors.\textsuperscript{104} A key variable that he utilizes is the variation in the amount of

\textsuperscript{100} Social constructivism is a society-centric viewpoint within international relations theory which holds that the international system is governed by principles that are not permanent, but rather contingent on ongoing social processes and interactions (i.e. “constructed”). See, e.g., John G. Ruggie, \textit{What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge}, 52 INT’L ORG. 855 (1998).

\textsuperscript{101} FINNEMORE, supra note 97, at 1-3, 5, 13.

\textsuperscript{102} Id. at 12-13.

\textsuperscript{103} See THOMAS RISSE-KAPPEN (ED.), \textit{BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS} (1995).

“international institutionalization” with regard to the specific policy being advocated by the transnational actors in question. The higher the levels of “international institutionalization,” the higher the expectation that transnational actors will be able to influence domestic state policies. International institutions can thus act as a force facilitating the access of transnational actors into national political structures, by making it easier for them to form policy coalitions with like-minded domestic actors and then directly lobby for their policy preferences.

Jackie Smith, Charles Chatfield, and Ron Pagnucco have looked specifically at transnational actors which are advocacy groups and the policy preferences they advocate. Labeling the transnational actors they study as “transnational social movement organizations” or TSMOs, Smith, Chatfield and Pagnucco explore how various TSMOs have been able to push their policy preferences onto domestic states through organizing constituencies, targeting international organizations, and mobilizing resources.

Margaret E. Keck and Kathryn Sikkink have sought to study not only specific transnational actors and their ability to affect domestic state behavior, but to move beyond and study “networks” of transnational advocacy groups. “Transnational advocacy networks” are composed of “relevant actors working internationally on an issue” who are “bound together by shared values, a common discourse, and a dense exchange of information and services.” Adopting the concept of “analytic frames” from sociology, Keck and Sikkink argue that transnational advocacy networks work in part to fashion and present issues in a way that can “legitimate and motivate collective action.” Keck and Sikkink then fashion a model that explains how transnational advocacy networks frame issues and motivate collective action in order to affect specific policy changes in targeted domestic states. Labeling their model the “boomerang pattern,” Keck and Sikkink envision a world where national advocacy groups can activate their transnational advocacy network that can then put pressure

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105 Id. at 30.
106 Measured by the existence, on the international level, of “cooperative” international institutions (e.g. UN or international treaty regimes, overarching supranational institutions such as the European Union, etc.) in specific policy areas. See Risse-Kappen, supra note 103, at 30-31.
107 Id. at 30-31.
110 Id. at 2.
111 Analytic frames “frame, or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support, and to demobilize antagonists.” See David A. Snow & Robert D. Benford, Ideology, Frame Resonance, and Participant Mobilization, 1 Int’l SOC. MOV’T RES. 197, 198 (1988).
112 KECK & SIKKINK, supra note 108, at 2-4, 16-17.
Building on Keck and Sikkink’s earlier work, Thomas Risse, Stephen C. Ropp and Kathryn Sikkink have attempted to bring together the “boomerang pattern” elaborated by Keck and Sikkink and synthesize it within a broader theoretical framework. Laying out these conditions in a complex model which they label the “spiral model,” Risse, Ropp and Sikkink argue that Keck and Sikkink’s original “boomerang pattern” model can be elaborated. The “spiral model” envisions a world where, much like the “boomerang pattern” model, national advocacy groups can activate their transnational advocacy network (made up of advocacy groups around the world with transnational reach) that would then put pressure (through framing the issues at hand and thereby motivating collective action) on other domestic states and relevant international organizations. The two models differ in that the “spiral model” sees the process as fluid, with the targeted state first making blanket denials and resulting in a new round of targeted pressure, later followed by tactical concessions resulting in a new round of targeted pressure and, finally, rule consistent behavior. The key in the back and forth is that each stage can result in the targeted state becoming “socialized” or conforming to preferred behaviors and norms.

Sanjeev Khagram, James V. Riker and Kathryn Sikkink, much in the same vein as Smith, Chatfield and Pagnucco, have sought to study the effects of transnational social movement organizations on the international system. Looking in part to the social movements literature within sociology, including the concept of analytic frames, Khagram, Riker and Sikkink argue that the main ability of transnational actors to affect change in the international system is either through taking well established “international norms” and using them to “persuade” outlying actors to conform their behavior, or attempting to establish new “international norms”

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113 Id. at 12-16.
114 See Keck & Sikkink supra note 108.
117 Id. at 20.
118 Id. at 10.
119 See Smith et al., supra note 107.
120 See Sanjeev Khagram, James V. Riker, & Kathryn Sikkink (Eds.), Restructuring World Politics: Transnational Social Movements, Networks, and Norms (2002).
121 Sanjeev Khagram, James V. Riker, & Kathryn Sikkink, From Santiago to Chile: Transnational Advocacy Groups Restructuring World Politics, in Restructuring World Politics: Transnational Social Movements, Networks, and Norms 12, 15-16 (2002).
122 Khagram, Riker, and Sikkink define “international norms” here as shared standards of behavior accepted by a majority of actors within the international system.
where none had previously existed. Such “persuasion” is accomplished by transnational actors through “the use of information, persuasion, and moral pressure to contribute to change in international institutions and government.”

Though utilizing diverse methods and approaches to the study of transnational actors, the key similarity of all of the scholarship surveyed in this section has been its focus on how transnational social movements and advocacy groups try to push their policy preferences and affect state behavior, and how international norms can then begin to emerge as a result. As has been seen, this scholarship is consistent in its exploration of the tools these transnational actors utilize in order to attempt to affect state behavior, and seemingly suggests that at least some of these processes are iterative in nature. These findings speak to the need to include transnational actors in any discussion of how international norms are formed.

III. LEGAL RECURITY: A WAY FORWARD?

Given the problematic nature of the current conceptualization of customary international law, which relies on the ill-defined and problematic components of state practice and opinio juris as its cornerstones, a new framework of thinking about customary international norm formation is needed. By moving away from “customary international law” and its dual components of state practice and opinio juris, and looking instead to understand how norms develop, new and empirically tested frameworks of norm formation from the social sciences can be introduced to the discussion. As shall be seen, “legal recursivity,” a framework from socio-legal studies which views law-making and implementation, on both the international and national level as an iterative and recursive process, points the way forward.

A. LEGAL RECURITY IN CONTEXT: TRANSNATIONAL ACTORS TAKE CENTER STAGE

Legal sociologists Terence Halliday and Bruce Carruthers have examined how norms can be exchanged and transferred between, on the one hand, the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole, and, on the other hand, domestic states. According to Halliday and

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123 Khagram, Riker, & Sikkink, supra note 120, at 14-15.
124 Id. at 11.
Carruthers, law-making and implementation on both the international and national levels can act as an iterative and recursive process. International and national level actors can develop legal norms that can then be refracted onto one another through exogenous processes such as economic coercion, persuasion through international institutions, and universal norms (which can then act as models on what constitutes acceptable behavior within the international and/or national system). These norms can then undergo recursive cycles on both the international and national levels, as formal law (“the law on the books”) goes through cycles of change as it is interpreted and implemented (“law in practice”), refracting back and forth between the two levels. That episodes of these recursive cycles will occur is not a given, nor will these cycles necessarily occur in perpetuity. Rather, they are driven by four distinct identifiable mechanisms: (1) the indeterminacy of law (the ambiguities inherent in statutes, regulations, and court opinions that leads to the possible unintended consequences of their application, setting off repeated rounds of redrafting and reapplication); (2) contradictions (the phenomenon that emerges ideologically when clashing visions amongst actors leads to imperfect legal settlements, or institutionally when legal implementation is divided out between different institutions); (3) diagnostic struggles (the struggle between various actors of diagnosing perceived shortcomings in legal norms and identifying corrective prescriptions); and (4) actor mismatch (mismatches that occur when there is a disparity between actors who actually participate in the norm-making process in a particular issue area, and those who the norms actually affect—in other words, actors who are directly affected by a new norms implementation are not participants in its creation). “Legal recursivity” conceptualizes norm-making as, above all else, an “exercise of power” and a “struggle among competing actors in global arenas.” Norm-making episodes have a beginning (time 1) when there are competing claims and

125 Halliday & Carruthers, supra note 23, at 1135-1138.
126 Id. at 1146-1148.
127 “Legal recursivity,” following classic socio-legal theory, holds that the “conditions of lawmaking affect implementation, and the circumstances of practice influence what law gets placed on the books.” See Halliday, supra note 23, at 269. See also infra note 127.
129 Halliday, supra note 23, at 274.
130 Halliday & Carruthers, supra note 23, at 1149; Halliday, supra note 23, at 281-282.
133 Halliday & Carruthers, supra note 23, at 1150-1151; Halliday, supra note 23, at 277-278.
134 Halliday, supra note 23, at 268-269.
conflicts and an end (time 2) when behavior and expectations have become “routinized, orderly, and predictable” by accepted, and therefore authoritative, norms. Recursive cycles are what occur between time 1 and time 2.

Figure 1: Legal Recursivity Explained

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135 Id. at 274.
136 Figure replicates chart provided in Halliday, supra note 23, at 270.
B. LEGAL RECURSIVITY AS A BLUEPRINT FOR NORM INTERACTION

Through its detailed description of the causal mechanisms and processes of norm formation and implementation, Halliday and Carruthers’s work on “legal recursivity” is exceptional in offering a true blueprint for examining the methods through which international and national norms interact. Additionally, “legal recursivity” fits well into the literature surveyed earlier detailing the empirical work done on the effects of international tribunals and transnational actors in the formation of international norms, for it provides an overarching framework that describes the constant formation, reformation and refinement of international and national level norms, and the causal mechanisms that drive this process, both within and between the two levels (international and national). The identification of the causal mechanisms driving recursivity is key, as the identification of such mechanisms is essential if one is to truly empirically study any natural phenomenon. As Gregory Shaffer and Tom Ginsburg have so rightly noted, international law scholarship must move beyond debates regarding its utility and instead move towards more empirical work studying “the conditions under which international law is formed and has effects.”

“Legal recursivity” meets this challenge by being open to a whole range of qualitative (observational) empirical methods, including: comparative analysis, ethnographic analysis, case study analysis, and process

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137 See supra Part II.
138 Much of the literature surveyed earlier in § II, though rich in theoretical insight, was somewhat inadequate in detailing the causal mechanisms that drove the relationships investigated.
139 Causal mechanisms have been defined in numerous ways by social scientists. They have been classified as anything from “the process by which a cause brings about an effect … a theory or an explanation, and what it explains is how one event causes another,” to “entit[ies] that — when activated — generate … an outcome of interest,” or as “a delimited class of events that change relations among specified sets of elements in identical or closely similar ways over a variety of situations”. Despite this plethora of definitions, a simplified understanding of a causal mechanism, one that can partially incorporate all of the various conceptualizations just listed, could perhaps be that of a causal mechanism as a type of “trigger” that activates relationships between various social forces or variables. See Barbara Koslowski, THEORY AND EVIDENCE: THE DEVELOPMENT OF SCIENTIFIC REASONING 6 (1996); James Mahoney, Beyond Correlational Analysis: Recent Innovations in Theory and Method, 16 SOC. F. 575, 580-581 (2001); Charles Tilly, Mechanisms in Political Processes, 4 ANN. REV. POLIT. SCI. 21, 25-26 (2001).
141 The comparative method involves the comparison and subsequent analysis of a set of cases. Through a systematic set of comparisons made between sets of cases, the effect of various differences across the cases under study can then be gauged. See Adam Przeworski & Henry Teune, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY (1970); David Collier, The Comparative Method, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II (1993).
142 Ethnographic analysis involves continuous direct observation and possible interaction of the group(s) under study. See Karen O’Reilly, ETHNOGRAPHIC METHODS (2005).
143 The case study method involves the intense study of single case and serves as a useful methodological vehicle for studies looking to test and refine theories. The detailed descriptive
tracing. It should be said, however, that all of these empirical methods just listed are quasi-experimental in nature (as are all methods, either qualitative or quantitative, utilized by the social sciences). Any quasi-experimental method, by its very definition, implies that the researcher utilizing it cannot specifically manage the assignment of “causes to units.” Without randomized assignment of “causes to units,” quasi-experiments run the risk of endogeneity — the effect seemingly caused by the independent variable on the dependent variable is actually a consequence of the dependent variable itself — in other words, the direction of influence from independent to dependent variable occurs in reverse. Another related problem is the fact that unobserved and uncategorized variables (i.e. omitted variable bias) may be driving the seemingly observed relationship.

The numerous problems of measurement associated with quasi-experimental research designs can and do present valid potential methodological stumbling blocks. This critique of quasi-experimental designs can be addressed, however, by the understanding that observational studies utilizing a quasi-experimental design will always suffer from imprecise models and partial data, and indeed, by their very nature, suffer from several key threats to their internal validity (i.e. threats to the correlation in values between the independent variable and dependent variable). The numerous problems of measurement associated with quasi-

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144 Adam Przeworski, Is the Science of Comparative Politics Possible?, in OXFORD HANDBOOK OF COMPARATIVE POLITICS 8 (2007)
145 The variable that potentially influences another variable.
146 The variable that is potentially influenced by another variable.
148 Przeworski, supra note 144, at 9-10. To work against omitted variable bias, strong theory coupled with a superior understanding of the cases under study can help.
150 These threats include: (1) history (specific events occurring between the pre-test and post-test in regards to the variables under study); (2) maturation (changes in the variables commiserate with the passage of time); (3) testing (changes in the variables stemming from the preparation to test them, rather than from the application of any treatment); (4) instrumentation (a change in the measurement used to rate the phenomena under study); (5) instability (unstable measurements); and (6) regression to the mean. For a more detailed description of these threats to internal validity and methodological tools that can be used to combat them, see Donald T. Campbell & Julian
experimental designs can always be mitigated (though never completely eliminated) through a well-executed operationalization of the variables under study, good research design, strong theory, and a superior understanding of the cases under study. Indeed, a point that bears making is that, their clear weaknesses aside, observational studies can be particularly well placed to give the researcher leverage in making “causal process observations.” These types of observations, which consist of “data that provide information about context or mechanism,” can provide exceptional insight into the causal chains driving the relationships between the independent and dependent variables under study. “Legal recursivity” is not only especially well-suited to overcome the measurement problems inherent in any quasi-experimental design, but to also provide the “thick” descriptive insight that only observational methods can provide. This is so because it: (a) is systematic in its approach through its focus on a constantly reoccurring set of dynamics; (b) introduces hypotheses related to the actors and mechanisms that can drive norm-making; (c) identifies beginnings (time 1) and endings (time 2) in recursive cycles of norm-making; (d) is historical in outlook and takes contingent changes in institutions, based on shifts in time, seriously; and (e) is comparative and indeed encourages comparisons across issue areas and levels of analysis.

CONCLUSION

The debate between adherents of “traditional” and “modern” custom stems from a fundamental flaw in international legal scholarship — its heavy state-centric bias. While such an approach was necessary in the era when the nation state ruled supreme, that era is long over. If international legal scholarship is to move forward, then the rise of norm-generating international tribunals and transnational actors and their effect on the international system must not be ignored and, indeed, they have to be given center stage. This article has presented a novel approach to the exploration of the ways norms form in the international system, one which looks to new


152 Collier, Brady, & Seawright, supra note 149, at 238.
153 Id. at 252.
154 Id. at 252-255.
155 In this way “legal recursivity” corrects a key flaw in international law “theory,” the lack of any clear or accepted over-arching theoretical framework. See Kammerhofer, supra note 11, at 536-551.
156 Halliday, supra note 23, at 269.
and empirically tested models of norm formation from the social sciences. In pursuing this line of inquiry, the idea of “legal recursivity” proposed by legal sociologists Terence Halliday and Bruce Carruthers has been suggested as a more apt description of how international norms develop and operate in a new international system dominated by norm-generating international tribunals and transnational actors. “Legal recursivity” examines how norms can be exchanged and transferred between the transnational governmental, quasi-governmental, and non-governmental institutions within the international community as a whole, and domestic states. “Legal recursivity,” as a description of how international norms develop and operate (and indeed interact with national norms) points a way forward for international scholarship towards a more rigorous, scientific, and thus empirical approach. The international system is on pace to become ever more complex, as international tribunals continue to expand their areas of jurisdiction and transnational actors continue in their efforts to influence state behavior. Under such circumstances, research into the development and operation of individual international norms becomes all the more vital.
SEC OVERSIGHT OF BUSINESS DEVELOPMENT COMPANIES

JOHN H. WALSH**

Business Development Companies, or BDCs, are the public face of the venture capital business. The BDC is a specialized type of Investment Company that combines the economic functions of venture capital with public disclosure, market trading, and regulation by the Securities and Exchange Commission. This article examines the regulatory issues of concern to the SEC, in its oversight of BDCs, as revealed by the SEC’s enforcement activity. The article suggests that while the number of enforcement cases against BDCs has been relatively small, given the success of the business model, the cases reveal several continuing issues that warrant attention by every BDC.

I. DEVELOPMENT OF THE SEC’S OVERSIGHT PROGRAM FOR BDCS
   A. Early Oversight: BDC Enforcement in the 1990s
   B. The Classic BDC Case: The Rockies Fund
   C. The 2008 BDC Sweep
II. RECENT CASES INVOLVING BDCS
   A. BDC Valuation and Disclosure
      1. Brantley Capital
      2. iWorld Projects & Systems, Inc.
      3. Equus Total Return, Inc.
      4. Allied Capital Corporation
      5. KCAP Financial, Inc.
   B. The 2012 BDC Sweep
   C. BDCs as Victims
      1. Insider Trading
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III. PREVENTATIVE COMPLIANCE
   A. Enforcement Actions
      1. Avoid Falsehoods
      2. Have a Robust Valuation Process
      3. Establish an Effective Corporate Governance Structure
      4. Establish Robust Internal Controls
      5. Make Timely and Accurate Public Disclosures
      6. Distinguish Personal and Corporate Interests

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INTRODUCTION

When a credit crisis in the 1970s limited the flow of capital to small, growing businesses in the United States, policy makers became concerned that venture capital firms—an important source of capital for these businesses—were reluctant to extend financing over fears that such investments might subject them to the requirements of the Investment Company Act of 1940 (the “1940 Act”). Consequently, new and developing businesses found it difficult to obtain sufficient working capital, leading to slower economic growth.

Faced with crisis, Congress was urged to ameliorate the situation and responded, in part, with the Small Business Investment Incentive Act of 1980 (the “1980 Amendments”), amending the 1940 Act and the Investment Advisers Act of 1940 (the “Advisers Act”) to create a new category of closed-end investment company—the business development company (“BDC”). The purpose of the 1980 Amendments was to construct public vehicles that could invest in private equity by lessening certain restrictions under the 1940 Act, most notably those pertaining to compensation and borrowing. BDCs were designed to play that role.

BDCs are publicly traded closed-end funds that make investments in private or thinly-traded public companies in the form of long-term debt or equity capital, with the goal of generating capital appreciation or current income. They serve an economic function similar to venture capital funds,

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1 Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. See also Reginald L. Thomas and Paul F. Roye, Regulation of Business Development Companies under the Investment Company Act, 52 S. Cal. L. Rev. 895, 903 (1982) (“Many [private equity and venture capital firms] felt that the [1940] Act’s requirements were too burdensome and, to avoid them, either went out of business or limited their growth.”).
2 See Small Business Investment Incentive Act of 1980, H.R. 96-1341, 1980 U.S.C.C.A.N. 4800, 4801 (noting that while the contemporary economic slowdown was “the product of many economic forces,” the law sought to “reduce some of the costs of government regulation imposed on the capital-raising process”).
5 See Small Business Investment Incentive Act of 1980, H.R. 96-1341, supra note 3, at 4803-04 (noting valuable function in the capital formation process that could be played by public companies engaged in venture capital activities).
investing in small companies early in their life cycles, playing active roles in their management, and profiting as they develop and grow.6

The BDC form, however, differs from venture capital funds in several important respects. Most importantly, while venture capital funds remain largely unregulated, BDCs are highly regulated by the U.S. Securities and Exchange Commission (“SEC” when referring to the agency or “Commission” when referring to the Commissioners). BDCs also provide extensive public disclosure about their investments and operations, and most are listed on exchanges, allowing the public to trade in their securities. Because of this unique combination of attributes—high levels of regulation, public disclosure, and an opportunity for public trading in a private equity strategy—BDCs have been very successful in gathering assets.7

This article reviews the SEC’s oversight of BDCs, with a particular focus on how the agency’s regulatory interests are revealed in its public enforcement actions. As a form of business organization, the BDC is now 35 years old. It is not surprising, over such a span of time, that BDCs have been subject to a certain number of enforcement actions. Indeed, considered in light of the success of the business model and the passage of time, the number of violations involving BDCs seems relatively small. However, more interesting than the number of cases are the continuing patterns that can be observed in the actions that have been brought. This article explores those patterns, the regulatory interests they reveal, and the compliance lessons that can be drawn from them.

Following this Introduction, Part II reviews the development of the SEC’s oversight program for BDCs through a discussion of its formative cases. Part III reviews recent cases involving BDCs. Part IV suggests several steps BDCs can take to enhance their regulatory compliance and reduce the compliance risks highlighted in the SEC’s public oversight; and finally, Part V concludes that the SEC’s active oversight program helps validate BDCs’ role as the public face of the private equity sector.

6 See Small Business Investment Incentive Act of 1980, H.R. 96-1341, supra note 2, at 4804-05 (BDCs intended to provide capital to small developing or financially troubled businesses that are seeking to expand, not serve as passive investors in large well-established businesses).

I. DEVELOPMENT OF THE SEC’S OVERSIGHT PROGRAM FOR BDCs

The SEC’s oversight program for BDCs developed in three steps. Approximately ten years after enactment of the BDC provisions, the SEC began to conduct an active program. An early case, filed in 1992, demonstrated many of the continuing regulatory concerns in this area: valuation, governance for the valuation process, and the legal sufficiency of portfolio investments. Then, in 1998, the SEC brought forth a proceeding that would become the archetype BDC enforcement case. Through ten years of litigation, including a hearing before an administrative law judge, multiple opinions by the Commission, and two separate appeals to the U.S. Court of Appeals for the DC Circuit, the case would come to test the SEC’s regulatory concerns. Finally, in the fall of 2008, the SEC filed multiple cases resulting from a BDC oversight sweep. The sweep cases attracted much less attention than they deserved—perhaps because they were filed during the most critical weeks of the financial crisis. Nonetheless, they serve an important role in highlighting BDCs’ responsibilities under the 1940 Act.

A. EARLY OVERSIGHT: BDC ENFORCEMENT IN THE 1990s

The first major enforcement case involving a BDC was against a company called Corporate Capital Resources, Inc. ("CCRS"). In a series of actions in the early to mid-1990s, the SEC prosecuted CCRS and several of its officers and directors. The SEC alleged that CCRS’s financial statements for the period September 30, 1988 through March 31, 1990 were false and misleading because they materially overstated the value of its holdings in its portfolio companies. The SEC alleged two specific flaws.

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8 See infra Section II.A.
9 See infra Section II.B.
10 See infra Section II.C.
13 Id.
First, the SEC alleged that CCRS improperly claimed ownership of several portfolio companies. In four separate instances, the SEC alleged that CCRS did not own the portfolio companies for three reasons: there was no acquisition agreement, no consideration had been passed, and no shares had been transferred. In two instances, CCRS had entered into acquisition contracts, and had breached their obligations, leaving the contracts with no legally enforceable claim of ownership. Finally, in another four instances, CCRS had entered into acquisition contracts, but the contracts were executory as of the close of the accounting period.

Second, the SEC alleged that CCRS improperly valued its portfolio holdings. These allegations had several elements. Instead of following the appropriate accounting literature, and valuing its holdings at what it could realistically expect to receive upon a current sale, CCRS used retail indications of interest appearing in the “pink sheets.” This approach, the SEC noted, “wholly ignored the underlying financial condition and business prospects of the investee companies.” Moreover, on several occasions CCRS acquired a holding and claimed, within days of the acquisition, that it had a value several times its cost. For example, in one transaction, CCRS acquired a holding for $600,000 and on the same day claimed it was worth $3,500,000. Finally, CCRS failed to follow the valuation procedures set forth in its filings with the SEC. The filings contained CCRS’s “Valuation Policy,” which both called for the Board of Directors to periodically value the fund’s portfolio, and stated with regard to restricted securities that the valuation would be “in such a manner as reflects their fair value in the opinion of the Board of Directors acting in good faith.” In practice, the SEC alleged, this policy was “all but ignored.” Instead, the process consisted of the BDC’s President setting the valuations, followed by routine approval by the Valuation Committee and the Board of Directors.

\(^{14}\) Daniel D. Weston, supra note 12, at 295.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{17}\) Id.
\(^{18}\) CCRS took the indications of interest and multiplied the price by the number of shares in the portfolio and applied a haircut. Id. at 296. The Pink Sheets were a publication of the National Quotation Bureau that contained indications of interest for securities. Id.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{21}\) Id.
\(^{22}\) Id. at 297.
\(^{23}\) Id.
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Lloyd Blonder, supra note 12, at 299.
\(^{27}\) William P. Hartl et al, supra note 12, at 993.
On the basis of these allegations, the SEC brought an enforcement action alleging fraud,\(^28\) disclosure violations,\(^29\) and false filings with the SEC.\(^30\) The SEC obtained injunctions against the BDC, its President and Chairman of the Board, and several other officers and directors, and barred the named individuals from the securities business.\(^31\)

It is interesting to note the different bases for individual culpability in the CCRS case. Three separate categories can be identified. First, the President and CEO played an active role in the valuation process. He prepared the quarterly valuation sheets for each portfolio holding, and knew about the problems with the valuations, including CCRS’s lack of ownership of certain shares, that CCRS could not realistically expect to realize the values upon a current sale, and that CCRS did not follow the Valuation Policy set out in its periodic filings.\(^32\) Second, certain officers and directors were members of a Valuation Committee, and as such, the SEC stated that they were “responsible for substantially participating in the valuation process.”\(^33\) However, the SEC found that “they completely failed to do so.”\(^34\) Third, certain Directors who were not members of the Valuation Committee were found culpable because they did not consider the criteria set out in the disclosure documents and instead “blindly relied” on the valuations submitted by the Valuation Committee.\(^35\) In summary, the SEC brought actions against the senior management of the firm: the President who prepared the offending valuations, the members of the Valuation Committee who failed to consider and review them, and the members of the Board who blindly relied on the Valuation Committee.

The SEC’s action against CCRS established an active oversight program for BDCs.\(^36\) The SEC demonstrated that it was ready to review the details of the agreements between the BDC and its portfolio investments to assess their contractual status. The SEC was ready to challenge the BDC’s valuations: how they were disclosed, how they were conducted, and who

\(^{28}\) Corporate Capital Resources, Inc., supra note 11, at 4704 (alleging violation of Securities Act § 17(a), Securities Exchange Act § 10(b), and Rule 10b-5).

\(^{29}\) Id. (alleging violation of Securities Exchange Act § 13(a), and Rules 12b-20, 13a-1, and 13a-13).

\(^{30}\) Id. (alleging violation of Investment Company Act § 34(b)).

\(^{31}\) See supra notes 11 to 12.

\(^{32}\) Daniel D. Weston, supra note 12.

\(^{33}\) Morris L. Lerner, supra note 12, at 296; R. Marvin Mears, supra note 12; Lloyd Blonder, supra note 12.

\(^{34}\) Id.

\(^{35}\) William P. Hartl et al., infra note 12. It should be noted that the members of the Board who were not on the Valuation Committee were charged in administrative proceedings, not in federal court.

\(^{36}\) CCRS was not the only case against a BDC in the 1990s. The SEC also took action against similar problems at a BDC called the Vintage Group. See In re James A. Merriam, Release No. IC-21062, 59 SEC Docket 0895, 1995 WL 296994 (May 11, 1995) (sanctioning Vintage Group’s CEO, President, and Chairman of the Board); In re Beatrice Brown, Release No. IC-20004, 55 SEC Docket 2652, 1994 WL 5055 (Jan. 6, 1994) (sanctioning a Vintage Group director).
was responsible. The SEC was fully prepared to go up the managerial chain, including Directors, when assessing culpability. This new program would be quickly put to the test.

**B. THE CLASSIC BDC CASE: THE ROCKIES FUND**

On June 1, 1998, the SEC instituted a contested administrative proceeding that would eventually become the archetype of BDC enforcement action. Proceedings were brought against a BDC, the Rockies Fund, Inc. (“Rockies Fund”), its President and two Directors. 37 Unlike the case against CCRS, which was resolved relatively quickly, the case against the Rockies Fund would continue for ten years. Moreover, where the case against CCRS sketched out the concerns that would characterize the SEC’s BDC oversight program, the case against the Rockies Fund litigated the concerns in depth, both at trial and in multiple levels of appellate review. Given the importance of this case, some detail of its chronology is appropriate.

The Rockies Fund began to receive SEC oversight in March 1994, when examiners visited the fund. The timing of this examination is noteworthy – only about four months after the SEC had filed its case against CCRS. The Rockies Fund would later argue that the examiners had never raised the concerns that would figure prominently in the enforcement action, most importantly how it valued its portfolio holdings. 38 The fund would also argue that the staff had contributed to its belief that its valuation process “had passed inspection.” 39 These arguments would ultimately be rejected by the Commission twice. 40 Certainly, however, the examiners’ silence would weigh heavily on the fund’s defense team, as shown by its repeated efforts to introduce it as a defense to, or at least in mitigation of, the SEC’s charges.

37 *In re the Rockies Fund Inc.*, Release No. 34-40049, 67 SEC Docket 566, 1998 WL 275914 (June 1, 1998) (hereinafter cited as: “Rockies Fund, Order Instituting Proceedings”). The SEC also named an outside party who was engaged in certain transactions with the fund’s President, id., (proceedings against John C. Power), and brought a separate proceeding pursuant to SEC Rule 102(e) against the fund’s auditor, which resulted in yet another Commission opinion. *In re Carol A Wallace, CPA*, Release No. 34-48372, 80 SEC Docket 2641, 2003 WL 21982215 (Aug. 20, 2003) (imposing a one-year suspension from practice before the SEC based on various failures in the Rockies Fund audits).


40 Id.; *Rockies Fund, First Opinion of the Commission*, 56 SEC at 1239.
The enforcement action itself began on June 1, 1998 with an order instituting administrative proceedings. The order alleged that the fund defrauded investors by overstating its assets between June 1994 and December 1995. Among other things, the order instituting alleged that the fund improperly claimed ownership of certain securities, overstated assets by classifying and valuing restricted securities as if they were unrestricted, and by manipulating the market for a portfolio company’s stock. The order instituting also alleged that the BDC’s President improperly obtained undisclosed compensation, in the form of a waiver of liability, through a transaction in which the fund purchased a portfolio security in return for the seller agreeing to forgo a potential legal claim that ran personally against the BDC President.

The administrative law judge presiding over the Rockies Fund case held a five-day public hearing and, on March 9, 2001, issued her Initial Decision.41 She found that the fund had engaged in several types of violative conduct. It claimed to own shares that it did not.42 It misclassified material holdings of restricted stock as unrestricted.43 It valued the restricted stock as if it were unrestricted, and not as the fund’s prospectus had disclosed restricted stock would be valued.44 It filed various periodic reports with the SEC that contained these misstatements.45 She found this conduct constituted fraud,46 and violated the fund’s disclosure obligations.47 She also found the fund’s President and two Directors liable for this conduct.48

In addition, the administrative law judge found that the fund’s President had engaged in fraudulent manipulation of the market for one of the fund’s portfolio securities through matched orders and wash sales with an outside party.49 She also found that the President had committed fraud in the transaction where he obtained a waiver of personal liability because he did not disclose this personal compensation to the Board of Directors.50

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42 Id. In reaching this decision the administrative law judge (“ALJ”) found that certain other holdings challenged by the staff were owned by the fund, and appropriately reported in its periodic reports.
43 Id.
44 Id.
45 Id.
46 Id. The ALJ found the conduct to have violated Securities Exchange Act § 10(b) and Rule 10b-5.
47 Id. The ALJ found the conduct to have violated Securities Exchange Act § 13(a), and Rules 12b-20, 13a-1, and 13a-13.
48 Rockies Fund, Initial Decision, supra note 42. On some of the claims she held them directly liable; on others she held them liable for aiding and abetting.
49 Id. She found that this conduct violated Securities Exchange Act § 10(b) and Rule 10b-5.
50 Id. She found that this conduct violated Securities Exchange Act § 10(b) and Rule 10b-5, as well as Investment Company Act § 57(k)(1).
Finally, she rejected the fund’s and individuals’ defense that even if violations had occurred, they were only technical.\textsuperscript{51} She ordered them to cease and desist from future violations, barred the individuals from affiliation with a registered investment company,\textsuperscript{52} and imposed penalties.\textsuperscript{53} The respondents appealed to the Commission.\textsuperscript{54}

On appeal, the Commission received briefs, held oral argument, and on October 2, 2003, issued its decision and opinion.\textsuperscript{55} The Commission upheld the findings and conclusions of the administrative law judge both as to violations and as to the sanctions she had imposed. After the Commission denied the respondents’ motion for reconsideration,\textsuperscript{56} they appealed to the U.S. Court of Appeals for the DC Circuit.\textsuperscript{57}

On appeal, the DC Circuit received briefs, held oral argument, and on November 15, 2005, issued its decision and opinion.\textsuperscript{58} At this point, the case had been in litigation for more than seven years. The court rejected several of the SEC’s findings, and upheld others.

The court rejected the SEC’s findings regarding manipulation and fraudulent personal compensation. The court held that the SEC had failed to show that the trades between the BDC’s President and the outside party were manipulative.\textsuperscript{59} Specifically, the court said the SEC had failed to show manipulative intent. The court stated: “the simple fact that a party has conducted a matched order or wash sale (or a series of them) does not establish manipulative intent of any kind.”\textsuperscript{60} Similarly, the court held that the SEC had failed to show that the President had received improper compensation through the waiver of personal liability.\textsuperscript{61} Specifically, the court said, the SEC had failed to show that the waiver had any value.\textsuperscript{62} Accordingly the court vacated the SEC’s order as to these two findings.

On the other hand, the court upheld the SEC’s findings on several crucial grounds. It upheld the SEC’s finding based on the fund’s misclassifying restricted stock as unrestricted.\textsuperscript{63} The court noted the SEC’s

\textsuperscript{51} Id.
\textsuperscript{52} The President was given a permanent bar. The two Directors were barred for three years. Id.
\textsuperscript{53} The President was assessed a penalty of $500,000 and the two Directors penalties of $160,000 each.
\textsuperscript{54} In any proceeding in which an initial decision is made by a hearing officer, any party (and certain others) may file a petition for review with the Commission. SEC Rules of Practice, 17 C.F.R. § 201.410(a).
\textsuperscript{55} See supra note 38.
\textsuperscript{56} In re the Rockies Fund, Inc., Release No. IC 49788, 82 SEC Docket 3342, 2004 WL 1209117 (June 1, 2004) (Order Denying Motion for Reconsideration).
\textsuperscript{57} A person aggrieved by a final order of the Commission may obtain review in the U.S. Court of Appeals. 15 U.S.C. § 78a-25(a).
\textsuperscript{58} Rockies Fund, Inc. v. SEC, 428 F.3d. 1088 (D.C. Cir. 2005).
\textsuperscript{59} Id. at 1093-95.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 1098.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 1096.
contention that such a misclassification was material both because it affected the value of the holding, and its liquidity.\textsuperscript{64} The court also upheld the SEC’s finding based on the fund claiming to own shares it did not.\textsuperscript{65} The court found that until the Directors approved the purchase amount and price, several months after the relevant filing, the fund had not established ownership.\textsuperscript{66} The court also concluded that because these shares constituted 46% of the fund’s holdings in that particular issuer, and 11% of its total securities holdings, the ownership error was material.\textsuperscript{67} Finally, the court upheld the SEC’s findings with regard to the fund’s valuation of the securities and its valuation process.\textsuperscript{68} This last point warrants elaboration.

The court noted that the SEC centered its analysis of the valuation process on the fund’s 1983 prospectus, the fund’s only public statement on valuation procedures.\textsuperscript{69} The prospectus endorsed four methods of valuation, none of which had been used in regards to the values at issue.\textsuperscript{70} Instead, the court said: “The SEC found that, unmoored from its prospectus, the Fund used an ad hoc process that mainly consisted of rubber-stamping [the President’s] recommendations. The SEC concluded that the prospectus – and good accounting practice – would have directed a different approach.”\textsuperscript{71} The court also noted the fund’s argument that even if the stock was technically overvalued, the overvaluation caused no harm, only to disagree. The court stated that because the fund rejected its publically stated valuation procedures, and did not discount its largest holding, substantial evidence supported the SEC’s finding.\textsuperscript{72} Finally, the court concluded its discussion of valuation by saying: “Such a haphazard process for valuing the largest holding of the Fund constitutes an ‘extreme departure from the standards of ordinary care’ that should have been obvious to all of the Fund’s directors.”\textsuperscript{73}

The decision of the Court of Appeals did not end the litigation. The matter was remanded to the SEC, which issued a second opinion upholding its prior findings and reducing its sanctions.\textsuperscript{74} For the first time, the Commission considered various mitigating factors. It said:

\begin{itemize}
  \item \textsuperscript{64} Id.
  \item \textsuperscript{65} Id. at 1097-98.
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} Id. at 1098.
  \item \textsuperscript{68} Id. at 1096-97.
  \item \textsuperscript{69} Id. at 1097. It is worth noting that the prospectus was eleven years old at the time of the challenged valuations.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} In re the Rockies Fund, Inc., Release No. 34-54892, 89 SEC Docket 1384, 2006 WL 3542989 (Dec. 7, 2006) (Opinion on Remand).
\end{itemize}
The record fails to identify any actual losses to investors resulting from respondent’s misconduct; it similarly shows no unjust enrichment to respondents. Moreover, although we made no explicit findings as to these facts in our previous opinion, the record contains Forms 10-K showing that the Fund was relatively small, with net assets of approximately $1.7 million as of December 31, 1994 and $41.3 million as of December 31, 1995, and counsel for respondents stated in respondent’s brief and at oral argument, and the Division conceded in its brief, that the Fund was thinly traded. Additionally, the Forms 10-K show that [the President] received a salary of only $48,000 annually in 1994 and 1995 for his service to the Fund, and [the Directors] testified that they received only $500 for each quarterly meeting of the Fund’s board of directors that they attended.75

In light of these mitigating factors, the Commission determined to reduce the penalties from $500,000 for the president, to $50,000; and from $160,000 each for the directors, to $20,000.76 After the Commission rejected their motion for reconsideration,77 several of the respondents appealed this decision to the Court of Appeals, which, on October 21 2008, rejected their petition.78 More than ten years after the litigation began, and more than fourteen years after the examination, the case was over.

The SEC’s action against The Rockies Fund thoroughly tested its oversight program involving BDCs. Although two important elements of the case were rejected by the Court of Appeals, after ten years of litigation, the core regulatory concerns identified in the CCRS case, and continued in the Rockies Fund case, had been upheld. The concerns based on ownership and classification of portfolio securities, valuation, and governance for the valuation process, had survived.

C. THE 2008 BDC SWEEP

In the fall of 2008 the SEC brought nine settled enforcement cases against BDCs. Seven were brought over a two day period: four on
September 29\textsuperscript{79} and three on September 30.\textsuperscript{80} All of the cases resembled each other in their organization and findings, and plainly had emerged from an enforcement sweep.\textsuperscript{82} However, they drew little contemporary attention. This is understandable. On September 15, about two weeks before, Lehman Brothers had declared bankruptcy, triggering a massive financial crisis. The BDC Sweep cases were probably lost in the general atmosphere of financial crisis.

The BDC Sweep cases were very different from CCRS and the Rockies Fund. Where the earlier cases had alleged over-valued portfolios, and sounded in fraud and disclosure, the sweep cases all focused on compliance with the 1940 Act.\textsuperscript{83} None of them alleged fraud.\textsuperscript{84} Instead,
they provide a fairly comprehensive illustration of how a BDC can violate the 1940 Act.

**Fidelity Bonds**

All nine of the sweep cases included a finding that the BDC had violated the 1940 Act’s fidelity bond requirement. Section 17(g) of the 1940 Act,85 and Rule 17g-1 thereunder,86 which are made applicable to BDCs by Section 59,87 require each BDC to provide and maintain a bond issued by a reputable fidelity insurance company against larceny and embezzlement by officers and employees of the BDC. All of the BDCs in the sweep cases had failed to provide and maintain such a bond.88

**120 Day Limit on Warrants or Rights to Subscribe**

All nine of the sweep cases included a finding that the BDC had violated the 1940 Act’s limitation on the time a warrant or right to subscribe or purchase the BDC’s shares could be in effect. Investment Company Act Section 18(d),89 which is made applicable to BDCs by Section 61(a),90 states: it shall be unlawful “to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance…” All of the BDCs in the sweep had issued warrants or convertible securities without the mandated expiration date.91 Moreover, while the 1940 Act provides BDCs with an opportunity to extend the deadline, so long as the BDC’s shareholders authorize and a majority of the disinterested directors approve issuing such securities,92 none of the BDCs in the sweep cases had availed themselves of this opportunity.93

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85 15 U.S.C. § 80a-17(g).
86 17 C.F.R. § 270.17g-1.
88 See CLX Medical, Green Globe International, S3 Investment Company, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, Global Beverage Solutions, supra note 81; Renew Energy Resources, 5G Wireless Communications, supra note 82.
91 See CLX Medical, Green Globe International, S3 Investment Company, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, Global Beverage Solutions, supra note 81; Renew Energy Resources, 5G Wireless Communications, supra note 82.
92 15 U.S.C. § 80a-60(a)(3). If a BDC obtains shareholder authorization, and the independent directors’ approval, and complies with other restrictions set out in the provision, it may extend the deadline to ten years. Id.
93 Id.
Equal Voting Rights for Issued Stock

Seven of the sweep cases included a finding that the BDC had violated the 1940 Act’s requirement that every share issued by a BDC must be a voting stock with equal voting rights. Section 18(i) of the 1940 Act,94 which is made applicable to BDCs by Section 61(a),95 states: “every share of stock hereafter issued…” by a BDC, “shall be a voting stock and have equal voting rights with every other outstanding voting stock.”96 The seven BDCs named for this violation had issued preferred stock that either had no voting rights, less voting rights than the common, or in a few cases, more voting rights than the common.97

Issuing Securities for Services

Six of the sweep cases included a finding that the BDC had violated the 1940 Act’s prohibition on issuing securities for services. Section 23(a) of the 1940 Act,98 which is made applicable to BDCs by Section 63,99 states: no BDC “shall issue any of its securities (1) for services; or (2) for property other than cash or securities.”100 The six BDCs named for this violation had issued securities for services, including to officers, directors, employees, consultants, and lawyers.101

Compliance

Six of the sweep cases included a finding that the BDC had violated the Compliance Rule—Rule 38a-1.102 This rule was issued pursuant to 1940 Act Section 38(a),103 which is made applicable to BDCs by Section 59,104 and requires BDCs to appoint a Chief Compliance Officer, establish compliance policies and procedures, and engage in

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96 This provision also contains a ‘grandmother clause’ applicable to shares and contracts that predate 1940.
97 See CLX Medical, Green Globe International, S3 Investment Company, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, Global Beverage Solutions, supra note 81; Renew Energy Resources, 5G Wireless Communications, supra note 82.
100 Certain exceptions are set out in the provision. Id.
101 See Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, Global Beverage Solutions, supra note 81; Renew Energy Resources, 5G Wireless Communications, supra note 82.
102 17 C.F.R. § 270.38a-1.
certain other compliance practices, such as conducting an annual compliance review. Six of the BDCs named for this violation failed to appoint a Chief Compliance Officer, and five also failed to adopt compliance policies and procedures.

Disinterested Directors

Four of the sweep cases included a finding that the BDC failed to have a majority of disinterested directors. Section 56(a) of the 1940 Act states that a majority of a BDC’s directors or general partners shall be persons “who are not interested persons of such company.” The four BDCs named for this violation failed to have a majority of disinterested directors for varying lengths of time, ranging from eleven and a half months, to sixteen months.

Asset Coverage for Senior Securities

Two of the sweep cases included a finding that the BDC had insufficient asset coverage for its senior securities. Section 18(a) of the 1940 Act, which is made applicable to BDCs by Section 61(a), states that it shall be unlawful for any BDC to issue or sell any senior security, unless it has an asset coverage of at least 200%. The two BDCs named for this violation had issued debentures without meeting the asset coverage test.

Issuing Shares Below Net Asset Value

One of the sweep cases included a finding that the BDC had issued shares below net asset value. Section 23(b) of the 1940 Act, which is

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105 See CLX Medical, S3 Investment Company, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, supra note 81; 5G Wireless Communications, supra note 82.
106 See CLX Medical, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, supra note 81; 5G Wireless Communications, supra note 81.
108 See CLX Medical, Starinvest Group, supra note 80; American Energy Production, Atlantis Technology Group, supra note 81.
113 The Act defines senior security to include debentures having priority over any other class. 15 U.S.C. § 80a-18(g).
114 See CLX Medical, supra note 102; American Energy Production, supra note 103.
made applicable to BDCs by Section 63,116 states: no BDC “shall sell any common stock of which it is the issuer at a price below the current net asset value of such stock.”117 The BDC named for this violation had issued shares of stock at prices as low as one third of net asset value.118

**Repurchasing the BDC’s Own Shares**

One of the sweep cases included a finding that the BDC had repurchased its own shares. Section 23(c) of the 1940 Act,119 which is made applicable to BDCs by Section 63,120 states: no BDC “shall purchase any security of any class of which it is the issuer” except pursuant to certain defined transactions. The BDC named for this violation had issued preferred stock to an officer in return for common stock, which the SEC alleged, constituted a repurchase.121

**Books and Records**

One of the sweep cases included a finding that the BDC had failed to create and maintain appropriate books and records. Section 31 of the 1940 Act,122 which is made applicable to BDCs by Section 64,123 requires BDCs to make and keep certain books and records as the SEC requires by rule or regulation. Rule 31a-1 sets out the required records.124 The BDC named for this violation had failed to keep certain required records, specifically, daily journals of all debits and credits, ledgers of all assets, liabilities, reserve capital, income and expense accounts reflecting account balances on each day, and journals reflecting an itemized daily record reflecting sales and redemptions or repurchases of its securities.125

It is unfortunate that the BDC enforcement sweep became public at a moment when the financial crisis absorbed all attention. The sweep cases deserved greater notice. They illustrate the myriad compliance risks a BDC faces, in addition to the valuation and disclosure issues that dominated the CCRS and Rockies Fund cases.

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117 Certain additional terms and exceptions are also set forth in the provision, including that a BDC may issue below net asset value shares with the consent of a majority of shareholders. Id.
118 See S3 Investment Company, supra note 80.
121 See Green Globe International, supra note 80.
124 17 C.F.R. § 270.31a-1.
125 American Energy Production, supra note 81.
II. RECENT CASES INVOLVING BDCS

The SEC’s oversight program involving BDCs continues to reflect the primary concerns identified in its formative cases. Recent cases continue to focus on valuation and disclosure. They also continue to enforce full compliance with the applicable requirements of the 1940 Act. Finally, BDCs are not immune to fraudsters seeking victims. Recent enforcement cases have highlighted two areas where fraudsters have attempted to exploit BDCs: insider trading and traditional frauds.

A. BDC Valuation and Disclosure

In the last few years the SEC has brought several enforcement actions involving BDCs that raise valuation and disclosure issues similar to those raised in the CCRS and Rockies Fund cases. The recent cases show the SEC’s continuing concern over the issues identified in the formative cases, and further illustrate its prosecutorial decision-making.

1. Brantley Capital

In 2009 the SEC filed a civil injunctive action involving Brantley Capital, a BDC. The action named the BDC’s investment adviser, CEO, and CFO. The SEC alleged that the adviser, CEO and CFO had overvalued two of the BDC’s portfolio investments. In one instance, the portfolio company had consistently suffered losses, primarily due to operational losses in a private airline in which the portfolio company held an ownership interest. The SEC alleged that the airline was able to remain in business only because a major corporation with an ownership interest repeatedly lent it money. In the other instance, the portfolio company was suffering losses, and remained in business only because the BDC continued to lend it money.

The crux of the SEC’s action focused on the valuation process for these securities. In particular, the SEC detailed warning signs that the CEO...
and CFO received about the portfolio companies’ declining fortunes. For example, the private airline continued to miss the financial targets that had been factored into its valuation. Indeed, it reached a point where its auditors’ questioned whether it could continue as a going concern, and the corporation that was lending it money proposed a financial resolution that would have had the effect of eliminating the portfolio company’s ownership interest without compensation. Nonetheless, the SEC alleged, the CEO and CFO continued to value the portfolio company at the same, increasingly stale price, based on disproven assumptions. They also failed to inform the BDC’s board of the negative developments, and provided the board with incorrect information. The stale prices were also reported in the BDC’s periodic reports filed with the SEC.

The board learned of these problems when the BDC’s auditor brought them to its attention. The CEO had told the auditor that no independent valuations of the private airline’s securities existed or were planned. In fact, such a valuation had been conducted, and had indicated that the fair market value of the stock was de minimis. When the auditor received the valuation, the audit partner contacted the BDC’s board to express reservations about the veracity of management’s representations. In the event, despite maintaining a valuation in the tens of millions of dollars, the BDC realized only approximately eight-four thousand dollars upon resolution of its interest.

The SEC charged the adviser, CEO and CFO with fraud, disclosure violations, and other claims. The CFO settled immediately, and the CEO eventually did so as well.

Perhaps the most noteworthy allegations in the Brantley Capital case—which was charged and ultimately settled as a fraud—were the false statements made by the defendants to the BDC’s board of directors and auditor. It is important to note that the SEC did not simply allege that the valuations were wrong: it alleged that the CEO and CFO actively misled

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133 Id. at ¶ 20-192.
134 Id. at ¶ 94.
135 Id. at ¶ 101.
136 See e.g., id. at ¶ 102-106.
137 Id.
138 Id. at ¶ 112.
139 Id.
140 Id.
141 Id. at ¶ 115-119.
142 Id. at ¶ 197-221
others about them. This distinction—between making less than accurate valuations and making false and misleading statements—would be further developed in the next case.

2. iWorld Projects & Systems, Inc.

In 2009 the SEC instituted administrative proceedings involving iWorld Projects and Systems, Inc. (“iWorld”), a BDC. The proceedings included iWorld,145 which defaulted,146 its CEO,147 who settled,148 and its President,149 who also settled.150 Comparing the culpability of the CEO and the President is revealing.

The BDC’s assets consisted of two operating companies with limited histories. One had no operations when acquired, and the other had limited revenues from the sale of its sole product, a piece of project management software.151 Both were acquired for approximately $285,000 in cash and $200,000 in assumed liabilities.152 Nonetheless, the BDC valued the acquisitions at $10 million, and this value was reported in various filings with the SEC.153 Moreover, over a period of months, as the condition of the operating companies deteriorated until all meaningful operations had ceased with no prospect of revival, the BDC held to this initial valuation.154

In its proceeding against the President, the SEC noted the BDC’s obligation to determine in good faith the fair value of the portfolio securities for which market quotations were not readily available.155 Under generally accepted accounting principles, the SEC continued, the fair value of such securities is “the amount at which they could be exchanged in a current transaction between willing parties, other than a forced or liquidation sale.”156 Because there were no market quotations for its two portfolio companies, the BDC was required to determine their fair value in good faith. However, it did not do so. Instead, even though they had been

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146 Id.
148 Id.
150 Id.
151 Hipple, supra note 147148.
152 Id.
153 The BDC acquired another company, also controlled by Hipple, that held the positions in two operating companies. Id. For ease of reference, we will refer to them as the BDC’s holdings.
154 Id.
155 Pells (citing to Investment Company Act § 2(a)(41)), supra note 149150.
156 Id.
purchased for much less, they continued to lose money, and they repeatedly fell short of projected revenues or earnings, the BDC held to its valuation of $10 million. The SEC concluded this was materially misleading.\textsuperscript{157}

On the basis of these findings, the SEC charged the President with causing the BDC to violate its disclosure obligations under the Exchange Act,\textsuperscript{158} and its books and records obligations under both the Exchange Act,\textsuperscript{159} and the Investment Company Act.\textsuperscript{160} The President was not charged with fraud. The only action taken against him was an order to cease and desist from causing any future violations of these provisions.\textsuperscript{161}

In the proceeding against the CEO, the SEC noted the same violative conduct—that the BDC had never made a good faith determination of the fair value of the portfolio securities—and charged him with the same disclosure violations.\textsuperscript{162} However, the SEC also charged the CEO with fraud,\textsuperscript{163} making false statements to the SEC,\textsuperscript{164} falsifying books and records,\textsuperscript{165} and more.\textsuperscript{166} This could appear inconsistent, with much more serious charges brought against the CEO. But the proceeding against the CEO cites to an additional fact that may explain the difference. The CEO had also told the BDC’s auditor, in connection with the auditor’s review of one of the BDC’s periodic reports, that an independent investment board had approved the $10 million valuation.\textsuperscript{167} The SEC stated that the CEO “knew—or was reckless in not knowing, that this statement was false.”\textsuperscript{168} The CEO was ordered to cease and desist from future violations, subjected to a five year bar as an officer and director of a public company, prohibited from affiliation with an investment company, and denied the privilege of appearing or practicing before the SEC as an accountant.\textsuperscript{169}

The contrast between the culpability of iWorld’s President and CEO illustrates an important point that had been suggested in the Brantley Capital case. A defective valuation is not fraud, in and of itself. As the SEC noted in the action against iWorld’s President, the BDC never made a good

\textsuperscript{157}Id.
\textsuperscript{158}Id. (charging violations of Securities Exchange Act § 13(a) and Rules 13a-1, 13a-13 and 12b-20).
\textsuperscript{159}Id. (charging violations of Securities Exchange Act § 13(b)(2)(A) and 13(b)(2)(B)).
\textsuperscript{160}Id. (charging violations of Investment Company Act § 31(a), made applicable to BDCs by § 64, and Rule 31a-1).
\textsuperscript{161}Id.
\textsuperscript{162}Hipple, supra note 147148.
\textsuperscript{163}Id. (charging violations of Securities Exchange Act § 10(b) and Rules 10b-5).
\textsuperscript{164}Id. (charging violations of Investment Company Act § 34(b)).
\textsuperscript{165}Id. (charging violations of Securities Exchange Act Sections 13(b)(5) and Rules 13a-14, 13b-2-1 and Rule 13b2-2(a)).
\textsuperscript{166}Other violations are set out in the SEC’s order. See id.
\textsuperscript{167}Id.
\textsuperscript{168}Id.
\textsuperscript{169}Id.
faith determination of the portfolio securities’ fair value, and the President had caused that violation. He was charged with disclosure violations. On the other hand, above and beyond the disclosure problems, iWorld’s CEO materially misled the BDC’s auditor. He was charged with fraud and false statements, and administered much stronger remedies. This careful parsing of culpability is a credit to the SEC and its oversight program. Valuations can be imperfect, even to the point of warranting enforcement, without rising to the level of fraud. On the other hand, knowingly false statements can give rise to a higher level of culpability.

3. Equus Total Return, Inc.

In 2010 the SEC brought administrative proceedings involving Equus Total Return, Inc. (“Equus”), a BDC. The proceedings were based on the sale of the BDC’s investment adviser, and named Equus’s CFO, who settled the proceeding, its selling CEO and Chairman, who eventually settled, and its buying CEO and Chairman, who also eventually settled.

In the transaction that gave rise to this proceeding, the BDC’s CEO offered to sell his shares in the BDC’s adviser. After preparation of the sale agreement, and filing of a definitive proxy statement to obtain shareholders’ approval, the financial press ran an article noting that certain fund shares would be purchased in privately arranged transactions with individual shareholders. This raised concerns among shareholders that not all would be given an opportunity to sell at a favorable price. In response, the BDC issued a press release stating that the price paid for shares held by officers and directors would not exceed the market price. Then, to ensure a senior Vice President’s retention, he was paid a premium for his shares, and the cost was absorbed by the fund in a one-time special administrative expense attributed to the change in control. Importantly, during a review by the BDC’s board, the buying CEO “admitted that some

170 Indeed, even in regard to the disclosure violations, the CEO was charged with both causing and aiding and abetting the violations, Hipple, supra note 147145, while the President was charged only with causing the violations. Pells, supra note 149150.
175 Douglas Settlement, supra note 173174, at *1-2.
176 Id.
177 Id.
178 Id.
of the expenses included retention bonuses for the senior vice president and others, but did not enumerate the specific amounts.”179

The SEC alleged that the press release was misleading, in light of the retention bonus paid the senior Vice President. It charged both the selling and the buying CEOs with disclosure and proxy violations.180 Interestingly enough, however, while the SEC charged the two CEOs with falsifying books and record, and with a false proxy solicitation, the SEC was careful to note that the violations did not require a showing of scienter, that is, an intent to deceive, manipulate or defraud.182 The order does not draw an explicit connection between the two, but one must wonder if the lesser, non-scienter charges were selected because of the disclosure made to the BDC’s board members who were reviewing the administrative charge.183

The SEC’s handling of the retention bonus in Equus illustrates a continuing concern in its BDC oversight program: undisclosed use of fund assets to resolve personal issues. As noted above, this had been one of the claims in the Rockies Fund case, until it was vacated by the Court of Appeals on the ground the SEC had not established that the alleged benefit received by the BDC insider had any value.184 It was a claim in the Brantley Capital case, where the SEC alleged that the BDC’s CEO had required a portfolio company to place certain shares in escrow to cover any shortfall in his personal investments, which ultimately reduced the BDC’s share of the portfolio company’s liquidation value by $1.7 million.185 Finally, it arose in the Equus case, where the seller and buyer used fund assets to resolve a stumbling block in their transaction.

4. Allied Capital Corporation

In 2007 the SEC brought a settled administrative proceeding against Allied Capital Corporation (“Allied”), a BDC.186 This case illustrates an important concern of the SEC’s oversight program: the effectiveness of a BDC’s internal controls.

The SEC’s enforcement order against Allied indicated that it had a private finance portfolio of over $1.7 billion invested in approximately 152 portfolio companies.187 As a result of its inquiry, the SEC indicated that it

179 Id.
180 Id.; Moore Settlement, supra note 174175, at *1-2.
181 Id.
182 Id. (citing to Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980)).
183 See supra text accompanying note 180.
184 See supra text accompanying notes 41, 51 and 62-63.
185 Brantley Capital Management, LLC, supra note 129130, at ¶ 72.
187 Id. at *3.
had identified 15 investments where Allied could not produce sufficient contemporaneous documentation to support, or accurately and fairly reflect, the board’s determination of fair value. The order cited several problems: Allied did not retain the valuation documentation presented to the board for two quarters regarding one investment; in other instances the documentation was incomplete or inadequate such as by listing enterprise values without any explanation, by missing necessary inputs and/or calculations, or by failing to provide an adequate explanation of the various inputs; finally there were insufficient checks and balances in the valuation process to provide a sufficient assessment of its objectivity. The SEC noted that while Allied maintained that its board members and employees engaged in discussions before and during board meetings, to satisfy themselves with the recorded valuations, the written documentation did not reflect reasonable detail to support the valuations.

Beyond these flaws in Allied’s valuation process, the SEC offered three specific examples of insufficient recordkeeping: the valuation for one investment included revenue from discontinued lines of business, another was based in large part on a potential future buy-out event that remained preliminary in nature, and a third valuation failed to take account of the portfolio company’s loss of one of its major customers due to the terrorist attack on the World Trade Center.

As a result of these problems, the SEC charged Allied with violation of the books and records requirements applicable to companies whose securities are registered with the SEC, pursuant to the Exchange Act. Specifically, Allied had violated the provisions that require public reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets, to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, or other criteria applicable to its financial statements, and to provide reasonable assurances that the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. The SEC ordered Allied

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188 Id.
189 Id. at *3-4.
190 Id.
191 Id. at *4.
192 Id. at *4-5 (charging Section 13(b)(2)(A), 13(b)(2)(B)(ii) and 13(b)(2)(B)(iv) which are applicable to issuers with securities registered with the SEC pursuant to Section 12).
to cease and desist from these violations in the future. It also ordered Allied to comply with its undertakings to continue to employ a Chief Valuation Officer to oversee its quarterly valuation process, and to continue to employ third-party valuation consultants to assist in its quarterly valuation process for private finance investments.

The SEC’s action against Allied was consistent with its handling of other cases where it did not charge fraud. For example, in a case discussed above, the SEC found that iWorld’s President, who was not charged with fraud, had violated the same provisions that were charged against Allied. In other words, at least in reviewing the SEC’s public cases, it appears to distinguish carefully between fraud and other types of problems, such as non-fraudulent disclosure and internal control failures.

5. KCAP Financial, Inc.

In 2012 the SEC brought a settled administrative proceeding against KCAP Financial, Inc. (“KCAP”), a BDC. This case illustrates yet again the importance of valuation in the SEC’s oversight program.

The SEC’s enforcement order against KCAP indicated that it had a portfolio of over $500 million invested in debt securities issued by middle market companies, as well as the equity tranches of collateralized loan obligations (“CLO”). The SEC alleged that during the financial crisis of

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196 Id.
197 Id.
198 David Lloyd Pells (citing to Securities Exchange Act § 13(b)(2)(A) & (B)), supra note 149150.
199 Around the time of the case discussed in the text, Allied was involved in a bitter public dispute with a well-known short seller. One magazine described it as a “blood feud.” Elizabeth MacDonald, “Allied Capital’s Blood Feud,” Forbes Magazine (Feb. 8, 2007) (stating: “sometimes a fight gets so down and dirty you can’t tell the good guys from the bad”), available at http://www.forbes.com/2007/02/08/allied-capital-loans-biz_cz_em_0208allied.html. The author of this article states no view on the substance of the dispute. However, in 2010 the SEC’s then Inspector General conducted an investigation based on the short seller’s published allegations. See SEC Office of Inspector General, “Allegations of Conflict of Interest, Improper Use of Non-Public Information and Failure to take Sufficient Action Against Fraudulent Company,” Case OIG-496 (Jan. 8, 2010). The report shows that the SEC staff investigated both parties to the dispute—the short seller and Allied—and ultimately decided to bring the non-fraud action against Allied described in the text. The Inspector General’s report goes into great detail on a number of issues, including the short seller’s opinion of Allied and how some members of the SEC staff were apparently disappointed their investigation did not lead to charges of fraud. Unfortunately though, the report does not address the key issue for this article: what the Commission’s enforcement activity reveals about its BDC oversight program. As discussed in the text, based on its disposition of cases, the Commission appears to distinguish carefully between fraud and other types of problems, such as non-fraudulent failures in disclosures and internal controls. The Inspector General’s report, or at least the redacted version that has been made available to the public, does not add to our understanding of that analysis.

201 Id.
2008 and 2009 KCAP management made the decision that, due to market conditions, the quotes of third party pricing services did not represent fair value, and market trades reflected distressed transactions. Therefore, they decided not to use trade data when valuing the portfolio, and instead used an enterprise value methodology. This was, the SEC alleged, inconsistent with controlling statements of the Financial Accounting Standards Board. Specifically, the SEC alleged, KCAP management was aware of and disregarded market quotations and actual trades in its portfolio securities at lower values. In 2010, KCAP restated its financial statements for 2008 and two quarters of 2009, reporting that the values of both its debt and CLO investments had been overstated. In the restatement, KCAP also acknowledged weaknesses with respect to its internal controls for valuing its asset portfolio.

As a result of these problems, the SEC charged KCAP with violation of the disclosure and internal control provisions of the Exchange Act. The SEC did not charge fraud. Instead, it charged that KCAP violated its disclosure obligations under the Exchange Act, and its books and records obligations under the same Act. The SEC also charged certain of the managers with causing the BDC’s violations, and with directly violating certain related rules.

The SEC’s action against KCAP was consistent with its handling of other cases where it did not charge fraud. It shows that, in late 2012, the Commission continued to distinguish carefully between fraudulent and non-fraudulent disclosure problems.

Recent cases involving BDCs include a wide range of problems: from fraud, to disclosure problems, to books and records and internal control problems. Similarly, the SEC’s charges have reflected this range. Not every problem is a fraud. Having this range of charging options gives the SEC depth and flexibility in its oversight program. Using its prosecutorial discretion, the Commission can carefully choose the charges and remedies that best fit the conduct. This flexibility was further demonstrated in March 2012, when the SEC returned to the enforcement sweep approach, to prosecute compliance problems at BDCs.

B. THE 2012 BDC SWEEP

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202 Id. (citing to FASB 157 and FASB 157-3).
203 Id. (charging violations of Securities Exchange Act § 13(a) and Rules 13a-1, 13a-11, 13a-13 and 12b-20).
204 Id. (charging violations of Securities Exchange Act § 13(b)(2)(A) and 13(b)(2)(B)).
205 Id. (charging violations of Rules 13b2-1 and 13a-14).
On March 29, 2012, the SEC filed eight cases involving BDCs. All eight were administrative proceedings - none of which were settled. Moreover, as with the enforcement sweep of 2008, none of the 2012 cases were alleged fraud. Instead, all were concerned with the BDCs’ compliance obligations.

**Status as a BDC**

All eight of the 2012 Enforcement Sweep cases included an allegation that the BDC had ceased to engage in business. Investment Company Act Section 54(a) provides that whenever the SEC finds that a BDC has ceased to engage in business, the SEC may revoke the BDC’s election to that status. In all of the cases in the 2012 Enforcement Sweep, the SEC alleged that the BDC was no longer in business, in most cases

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208 In addition, as with the 2008 sweep, the BDCs caught in this sweep were generally small firms that claimed the exemption from 1933 Act disclosure requirements provided by Regulation E. See 17 C.F.R. §§ 230.601-610. Moreover, as in 2008, in some of the cases the SEC was concerned by the BDCs’ failure to comply with the terms of the exemption. See Olm Ventures, Entertainment Capital, supra note 207.

because its state registration was delinquent, inactive, in default, or had been revoked.\textsuperscript{210}

\textbf{Fidelity Bond}

As in 2008, the failure to provide and maintain a fidelity bond against larceny and embezzlement by officers and employees, as required by Investment Company Act Section 17(g),\textsuperscript{211} and Rule 17g-1 thereunder,\textsuperscript{212} figured prominently in this sweep. Seven of the eight BDCs in the 2012 Enforcement Sweep had allegedly violated this requirement.\textsuperscript{213}

\textbf{Delinquent Filings}

Several of the BDCs in the 2012 Enforcement Sweep were allegedly delinquent in their filings with the SEC. Most of the delinquencies arose from the BDCs’ registration of their securities with the SEC pursuant to Exchange Act Section 12(g).\textsuperscript{214} As a result, the BDCs were subject to Section 13(a) of the Act, and required to make annual filings on Form 10-K pursuant to Rule 13a-1\textsuperscript{215} and quarterly filings on Form 10-Q pursuant to Rule 13a-13.\textsuperscript{216} Four of the BDCs named in the sweep allegedly failed to keep current with their filings.\textsuperscript{217}

\textbf{Equal Voting Rights for Issued Stock}

\textsuperscript{210}See Superior Community Capital Corporation, Olm Ventures, International Asset Group, American Capital Partners Limited, Interim Capital, Central Capital Venture, Principal Mortgage Fund, Entertainment Capital, \textit{supra} note 207.

\textsuperscript{211}15 U.S.C. § 80a-17(g).

\textsuperscript{212}17 C.F.R. § 270.17g-1. As noted above, Section 17(g) and Rule 17g-1 are made applicable to BDCs by Section 59 of the Act. 15 U.S.C. 80a-58.

\textsuperscript{213}See Olm Ventures, International Asset Group, American Capital Partners Limited, Interim Capital, Central Capital Venture, Principal Mortgage Fund, Entertainment Capital, \textit{supra} note 219.

\textsuperscript{214}15 U.S.C. § 78l(g).

\textsuperscript{215}17 C.F.R. § 240.13a-1.

\textsuperscript{216}17 C.F.R. § 240.13a-13.

\textsuperscript{217}See Olm Ventures, Interim Capital, Central Capital Venture, Entertainment Capital, \textit{supra} note 207. In addition, pursuant to Investment Company Act § 30(b), 15 U.S.C. § 80a-30(b), and Rule 30b-1 thereunder, 17 C.F.R. § 270.30b-1, registered investment companies must periodically file Form N-SAR with the SEC. One of the BDCs in the 2012 sweep had registered with the SEC and allegedly failed to keep current with its periodic filings on Form N-SAR. International Asset Group, \textit{supra} note 207. In this context it is worth noting a 2009 case where a company indicated its intent to operate as a BDC, but did not qualify because it had not registered any of its securities pursuant to Securities Exchange Act § 12. See Investment Company Act § 54(a). The SEC found that since it had failed in its election as a BDC, and failed to register as an investment company, it was operating an unregistered investment company, and held the President of the entity personally responsible. \textit{In re Ryan Douglas Smith}, Release No. IC-2884196, SEC Docket 1695, 2009 WL 2366042 (Aug. 3, 2009).
Another issue in the 2008 sweep was issuing shares of stock with unequal voting rights in violation of Investment Company Act Section 18(i),218 which also reappeared in the 2012 Enforcement Sweep. In this instance, however, only one BDC was charged in this regard. The BDC named for this violation in 2012 had allegedly issued preferred stock with no voting rights.219

**Compliance**

Finally, as in 2008, the failure to implement Rule 38a-1220 reappeared in 2012. One of the BDCs named in the sweep had allegedly failed to appoint a Chief Compliance Officer and to adopt compliance policies and procedures.221

The 2012 Enforcement Sweep brought home several fundamental compliance issues: 1) keeping the BDC’s state corporate registration current, 2) providing and maintaining a fidelity bond, 3) keeping current in filings due to the SEC, and 4) remaining mindful of issues such as equality of voting for issued shares and compliance. Since all of these cases were resolved by default, the SEC’s allegations were never tested in litigation. Nonetheless, as an indication of the SEC’s continuing oversight interest in this area, the 2012 Enforcement Sweep is an important statement.

**C. BDCs AS VICTIMS**

While this article has focused on the SEC’s oversight program involving BDCs, it is worthwhile noting that BDCs are not immune from the attacks fraudsters constantly launch against the financial community. These threatening issues should not be ignored. One of the BDCs named in the 2008 BDC Enforcement Sweep illustrates this concern. At about the same time the BDC was named in the sweep for various compliance problems, it was itself victimized in a serious fraud because manipulators attacked its securities as a “Target Stock.”222 Two areas in particular

218 15 U.S.C. § 80a-18(i). As noted above, this provision is made applicable to BDCs by Section 61(a) of the Act. 15 U.S.C. § 80a-60(a).

219 Central Capital Venture, supra note 207.

220 17 C.F.R. § 270.38a-1.

221 Central Capital Venture, supra note 207.

warrant careful attention in this regard: insider trading and traditional frauds.

1. Insider Trading

One of the critical concerns of the modern SEC enforcement program is insider trading. In 2011, the then-Director of the Division of Enforcement testified that the Division continues to focus on this issue, and that the number of insider trading cases has grown.\(^{223}\) In 2008, the SEC announced a settled insider trading case against a BDC director.\(^{224}\)

Edward O. Boshell was an outside disinterested director of a BDC.\(^{225}\) The BDC of which he was a director owned a 25% stake in a portfolio company.\(^{226}\) The portfolio company was listed for trading on Nasdaq.\(^{227}\) The board of the portfolio company had held a special board meeting to discuss the sale of the company,\(^{228}\) began soliciting interested buyers,\(^{229}\) and identified a potential acquiring firm.\(^{230}\) Then, during a board meeting of the BDC, a member of the portfolio company’s board informed the BDC board that the acquiring firm was currently bidding for the portfolio company.\(^{231}\) Another director of the BDC warned fellow board members, including Boshell, that the information was non-public.\(^{232}\) Nonetheless, Boshell acquired several thousand shares of the portfolio company,\(^{233}\) and when the sale transaction was announced, sold them for a quick profit.\(^{234}\)

In its complaint, the SEC said that Boshell, “as a member of the BDC board of directors, owed a fiduciary duty to the BDC to hold in

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\(^{223}\) Robert Khuzami, Director, Division of Enforcement, Meredith Cross, Director, Division of Corporation Finance, Robert Cook, Director, Division of Trading and Markets, Carlo di Florio, Director, Office of Compliance Inspections and Examinations, Eileen Rominger, Director, Division of Investment Management, Craig Lewis, Chief Economist and Director, Division of Risk, Strategy, and Financial Innovation, U.S. Securities and Exchange Commission, Testimony on “Management and Structural Reforms at the SEC: A Progress Report,” Before the United States Senate Committee on Banking, Housing and Urban Affairs Subcommittee on Securities, Insurance, and Investment (Nov. 16, 2011), available at http://www.sec.gov/news/testimony/2011/ts111611rk.htm. Director Khuzami testified that the number of insider trading cases had grown 8% in one year. Id.


\(^{226}\) Id. at ¶ 18.

\(^{227}\) Id. at ¶ 13.

\(^{228}\) Id. at ¶ 15.

\(^{229}\) Id.

\(^{230}\) Id. at ¶ 16.

\(^{231}\) Id. at ¶ 18.

\(^{232}\) Id.

\(^{233}\) Id. at ¶ 19.

\(^{234}\) Id. at ¶ 20-21.
confidence the information discussed at the board meeting regarding the potential acquisition of [the portfolio company]. As a result, he had a duty of trust and confidence to not trade [the portfolio company’s] securities on the basis of material non-public information. The SEC charged him with fraud, and he agreed to disgorge his trading profits and to pay prejudgment interest in addition to a penalty equal to his profits.

Insider trading is a widespread problem, not just a BDC-issue. Nonetheless, BDCs in possession of material inside information must keep this danger in mind. It is interesting to note that one of Boshell’s fellow directors warned the board that the information about the portfolio company was non-public. It is unfortunate that Boshell did not heed his warning.

2. Traditional Frauds

Traditional frauds include a multitude of violations, but are not limited to the following: offering frauds, pump and dump schemes, outright theft or misappropriation. BDCs are not immune to these schemes. Indeed, as the BDC sector grows and prospers, it is not surprising that it has been targeted. Thus, careful compliance requires attention to these schemes.

Some elements of these cases should be highlighted. First, in some cases, the BDC is used to attract investors with the possibility of investing in other promising companies. This is the most dangerous fraud, because it seeks to exploit the BDC’s business model. When the fraudsters use this approach to raise significant sums of money, they do untold harm to the legitimate BDC sector. Second, in some cases the BDC is used to conduct improper offerings. In these cases, the fraudsters generally exploit the BDC to conduct an offering pursuant to Exemption E, to facilitate a pump and dump scheme, or to line their own pockets through the resale of shares issued to insiders in undisclosed discounted transactions. Finally, in some

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235 Id. at ¶ 24.
236 Id. at ¶ 27 (charging violation of Securities Exchange Act Section 10(b) and Rule 10b-5).
237 Edward O Boshell, supra note 225, at *1.
cases, the fraudsters simply loot the BDC through illegal distributions, performance fees, and expense reimbursements. It is an unfortunate characteristic of our modern economy that traditional frauds can be found almost everywhere, and BDCs are not immune. The SEC’s enforcement program plays an important role in weeding out these imposters from the legitimate community.

III. PREVENTIVE COMPLIANCE

The SEC’s enforcement program involving BDCs has highlighted several areas of compliance interest. As highly regulated entities subject to a complex regulatory structure, BDCs are exposed to a myriad of possible issues and enforcement actions, making preventive compliance a challenge. Nonetheless, review and analysis of the SEC’s enforcement actions prove instructive as to how BDCs can meet this compliance challenge.

A. ENFORCEMENT ACTIONS

1. Avoid Falsehoods

Time and again in the SEC’s enforcement program involving BDCs, one can see the difference between a mistake and a falsehood. BDCs – like any other human institution – make mistakes. Not every mistake is a fraud, and the cases brought by the SEC reflect this reality. On the other hand, when the SEC finds a falsehood, involving investors, directors or auditors, it has brought fraud cases on those grounds. Perhaps the most interesting cases in this regard are those where the same underlying problem – such as faulty disclosure – led to different levels of charges, depending on whether the problem was accompanied by false statements.

The compliance lesson should be clear: avoid making false statements. As difficult as it may be to resolve a mistake, adding a falsehood will only make it worse.

2. Have a Robust Valuation Process

The SEC’s enforcement program demonstrates the importance of valuation, valuation disclosure, and governance of the valuation process. These issues were featured in the cases against CCRS, the Rockies Fund, as well as more recent cases such as iWorld. A number of compliance lessons can be taken from these cases. Management should not allow one person or a few people to dominate the valuation process. Instead, valuations should be subject to checks and balances, such as by an active Valuation Committee, to ensure that they are based on the criteria set out in the BDC’s disclosure documents. In addition, these checks and balances should include active engagement by Directors, such as by actively reviewing board materials and asking substantive questions. The process should be evidenced in the BDC’s books and records. Most importantly, all parties to the process – staff, managers, and board -- should avoid any temptation to blindly rely on someone else’s valuations.

To support compliance, valuation meetings could begin with a brief reminder of a BDC’s disclosed valuation process. This could come in the form of an oral discussion at the beginning of a meeting or the distribution of valuation criteria, materials and procedures prior to or at a meeting. Committee chairs could be tasked with ensuring that the disclosed methods are followed. To support this process, a BDC’s Chief Compliance Officer could review board minutes and meeting materials during annual reviews to assess whether the process was sufficiently followed and documented. Further, in the absence of market quotes for securities, board members could be reminded of their duty to determine valuations in good faith. Finally, employing a third-party valuation firm and appointing a Chief Valuation Officer could be valuable in supporting the objectivity of valuation decisions and the rigor of board deliberations.

An allegation related to valuation that appeared in both the CCRS and Rockies Fund cases was the claim that the BDC overstated the value of its portfolio because it did not own all of its purported portfolio securities. In terms of preventive compliance, BDCs should take care to ensure that portfolio acquisitions and ownership interests are properly evidenced and supported by legally enforceable agreements.

3. Establish an Effective Corporate Governance Structure

The SEC’s oversight program has highlighted the importance of effective corporate governance and full disclosure to BDC boards. This issue appeared in several cases, including Brantley Capital and Equus. In the first, failure to disclose information to the board led to harsh charges by the SEC. In the second, some level of disclosure appears to have led to lesser charges. Accordingly, it would serve BDCs well to establish effective disclosure mechanisms within the firm to ensure that all
appropriate information is reaching the board. This could involve a formal
process for compiling information regarding portfolio companies and
ensuring its distribution to all Valuation Committee members and the
board. A formal process of compilation and distribution will avoid having
one or a few people in exclusive control of valuation information, and will
enable the Chief Compliance Officer to test and validate the process in the
annual compliance review.

4. Establish Robust Internal Controls

As discussed above, the SEC has brought several enforcement
cases against BDCs charging that they failed to establish appropriate
internal controls, including against iWorld and Allied. One of the
overarching lessons from these cases is the importance of creating and
retaining valuation documents that provide reasonable detail in support of
valuation determinations. For BDCs, this can be enhanced through
disciplined identification of the core documents that should be retained
regarding each valuation, careful adherence to the established policy, and
then compliance testing during the annual review.

5. Make Timely and Accurate Public Disclosures

In many of the enforcement actions discussed in this article, the
ultimate basis for the SEC’s action was a failure in disclosure. Violations
ranged from inaccurate disclosures regarding valuations, valuation
processes, securities held by BDCs, the financial performance of BDCs and
portfolio companies, to simple tardiness in making the required filings. To
avoid similar charges, BDCs should have proper procedures and structures
in place to ensure SEC filings reflect their current status or facts.
Establishing an effective and fully documented valuation process, as
discussed above, will help establish this goal. Moreover, BDCs should
remain cognizant of filing deadlines and requirements. As seen in the 2012
Enforcement Sweep, the SEC will review whether BDCs are delinquent,
inactive, or in default with annual or quarterly filing requirements. Many
Chief Compliance Officers address this concern by establishing a
compliance calendar for tracking all filing and other compliance deadlines.

6. Distinguish Personal and Corporate Interests

Several of the cases discussed in this article alleged that BDC
officials had confused personal and corporate business. These included
Equus, where fund assets were allegedly used to resolve a stumbling block
in the sale of the BDC’s adviser; the Rockies Fund, where fund assets were
allegedly used to waive an insider’s personal liability; and Brantley Capital,
where the CEO allegedly required a portfolio company to place certain shares in escrow to cover any shortfall in his personal investments, which reduced the BDC’s share of the portfolio company’s liquidation value. This is a critical area for BDC General Counsels and Chief Compliance Officers: training insiders on the appropriate separation of corporate and personal business. An apparent conflict of interest between an individual and the BDC can cast a shadow over the BDC’s work, and draw suspicious scrutiny by the SEC.

7. Be Mindful of the Specific Requirements of the Investment Company Act

The SEC’s two BDC enforcement sweeps, both in 2008 and 2012, demonstrate a commitment to enforcing full compliance with the applicable provisions of the 1940 Act. Among other things, this includes: (1) obtaining and maintaining a fidelity bond, (2) equal voting rights for issued stock, (3) implementing and complying with Rule 38a-1, (4) not issuing securities for services, (5) ensuring 120 day limits on warrants or rights to subscribe to a BDC’s securities, (6) having a sufficient number of disinterested directors, (7) maintaining sufficient asset coverage for senior securities, and (8) not repurchasing a BDC’s own securities. In the midst of the BDC’s day-to-day operations, these compliance requirements must be remembered and carefully implemented. Perhaps it is not surprising that several of the BDCs caught in the enforcement sweeps suffered from defective compliance functions, several had neither a Chief Compliance Officer nor had they implemented any compliance policies or procedures. It would serve BDCs well to have adequately staffed legal and compliance departments that are well versed in the requirements of the 1940 Act.

8. Stay Current with State Corporate Obligations

The 2012 Enforcement Sweep introduced a new area of concern for the SEC: compliance with state corporate requirements. As discussed above, the SEC has shown a readiness to move against BDCs when their state filings are delinquent, inactive, or in default of registration and filing obligations.

9. Control Inside Information

Historically, the SEC’s enforcement program has treated insider trading and the dissemination of material non-public information as priority concerns. As shown in the Boshell case, BDCs are not immune to this problem. While BDCs can help protect against the release of insider
information by developing and enforcing effective internal controls and procedures, insider trading often is a personal choice. Thus, training for insiders should be considered, particularly by BDCs investing in publicly traded securities. Moreover, every BDC should stress directors’ and employees’ fiduciary duties, and the culture of compliance expected of every member of the firm.

10. Conduct Due Diligence over Other Parties

Finally, BDCs should carefully assess the other parties with whom they do business. Like other successful business models, BDCs will draw fraudsters eager to exploit their reputation. Consequently, BDCs must conduct appropriate due diligence efforts to protect themselves from such fraudulent activity.

IV. CONCLUSION

As a form of business organization the BDC is now 35 years old. It is not surprising, over such a span of time, that BDCs have been subject to a certain number of enforcement actions. Indeed, considered in light of the passage of time, the number of actions seems relatively small. More interesting than the number, however, are the continuing patterns that can be observed in the actions that have been brought. This article has sought to identify those patterns, and suggest the compliance lessons that can be drawn from them. A final point is in order.

One of the features of the BDC is the high level of regulation it receives. For example, venture capital funds remain exempt from SEC regulation and oversight. As a result, BDCs continue to offer a unique combination of regulation, transparency and an opportunity to invest public funds in private equity. In short, regulation by the SEC, including through its oversight program, continues to support BDCs role as the public face of private equity investing.

\[243\] See Exemptions for Advisers to Venture Capital Funds, supra note 7.
MIRANDA AND THE REQUIREMENT OF REWARNING: ANALOGIZING MOSELY AND EDWARDS TO PROTECT POST-WAIVER DEFENDANTS

JUSTIN SUMRALL**

The current safeguards afforded to post-waiver defendants under Miranda leave the vast majority of defendants unprotected. Studies indicate 80% of defendants waive their Miranda rights, but the only safeguards implemented by the Supreme Court are directed at the minority of those that invoke their Miranda rights. Further, this problem, although widely litigated, receives little attention in legal scholarship. The issue of protecting post-waiver defendants from subsequent coercion is lost in the larger context of Miranda. In fact, no article directly addressing this issue has been written for several decades. In addition to being the first article in decades to shed light on this highly litigated issue, this article also contains a full fifty state and federal circuit survey of cases that categorizes each jurisdiction’s approach. Though this issue is regularly litigated, each jurisdiction is left to determine its own solution. This has lead to contrasting, and often contradictory, results. However, the Supreme Court’s lack of attention to this problem does not include an attendant lack of solutions; solutions exist in current post-invocation safeguards. Further, analogizing these protections is necessary for the equitable treatment of all defendants. Implementing a totality-of-the-circumstances test alongside a bright-line rule provides optimal protection. By ensuring all defendants are protected, the gulf between post-waiver and post-invocation defendants would be bridged, and the tenets of Miranda would be more appropriately realized.

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INTRODUCTION

“You have the right to remain silent. Anything you say can and will be
used against you in a court of law. You have the right to an attorney. If you
cannot afford an attorney, one will be provided for you. Do you understand
the rights I have just read to you? With these rights in mind, do you wish to
speak to me?”

1 What are your Miranda Rights?, (Jan. 10, 2015, 3:05 PM),
These familiar words are some of the most ubiquitous and recognizable aspects of the criminal justice system, but the profound implications of a defendant’s response to these warnings is less obvious. The few who invoke their rights enjoy clear post-invocation safeguards. However, the vast majority of defendants waive these rights, and the procedures following waiver are anything but clear.

Oddly, the issue of post-waiver safeguards is forgotten in legal scholarship. In fact, this issue has not been addressed in any significant fashion in several decades. There are few topics so widely litigated that receive so little attention, and this article attempts to bring this issue, and a proposed solution, to the forefront.

This lack of scholarly attention does not mean this issue is unimportant. This issue is regularly litigated in jurisdictions across the country due to the vast number of criminal defendants who waive their rights. Because the Supreme Court has never directly addressed the issue, though, it has fallen to each state to consider the issue and attempt to formulate a solution. However, shortly after the Miranda decision, some federal circuits addressed the issue of post-waive protections. Those decisions lacked both careful thought and thorough analysis, but for decades they have served as the status-quo approach by states.

Further, because this issue is widely litigated at the state level, this article contains the only full case collection from all fifty states where this issue is regularly litigated. This survey shows a clear divide among state judiciaries and proves that this problem needs a clear, implementable solution.

Waiving one’s Miranda rights raises an essential question: are post-waiver defendants ever entitled to additional Miranda warnings? Does waiver of one’s Miranda rights foreclose any possibility of re-warning?

Consider also the myriad circumstances that may weigh on defendants after receipt of their Miranda warnings. What if the charges against the defendant increase, the interrogators change, or the location of subsequent interrogations is entirely different? What if the defendant has an unusually low I.Q.? What if he has been under anesthesia and undergone surgery?

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2 See Appendix for a survey of this issue across all fifty states and twelve federal circuits.
3 This issue is tangentially explored and addressed in topics such as the efficacy of waivers, but such a focus misses the point. The question in this topic is not how long waivers maintain efficacy, but rather, at what point does a defendant become entitled to further Miranda warnings, and is a singular, initial, Mirandize sufficient to dispel all future coerciveness? This article says no.
4 See Appendix.
5 No clear answer exists in current jurisprudence or legal scholarship, and this lack of clarity unwittingly punishes defendants by leaving them unprotected.
What if the defendant is a minor or does not understand English? What if the defendant sleeps for several hours prior to questioning, or what if several months have passed since the initial Miranda warnings are given? Unfortunately in many state jurisdictions, once a defendant waives his rights, those subsequent circumstances are irrelevant.

As a solution to this problem, I will argue that post-waiver defendants should be given full Miranda warnings again when certain criteria are met. These criteria are drawn directly from current post-invocation safeguards; those safeguards are set forth by the Supreme Court and include a totality-of-the-circumstances test and a bright-line test. Employing a combination of such tests for post-waiver defendants would ensure that defendants experiencing identical circumstances would receive identical safeguards throughout the country.

Part I of this article discusses post-invocation and post-waiver procedural safeguards, and shows that the protections extended to those who waive their rights lack the clarity of protections given to those who invoke their rights. Part II contains a survey of cases across federal and state judiciaries which catalogs the different ways this issue is approached in different jurisdictions. Part III describes my solution to this problem: analogizing post-invocation safeguards to post-waiver defendants. Finally, Part IV argues that improving post-waiver safeguards would benefit both defendants and prosecutors.

I. THE LANDSCAPE OF POST-INVOCATION PROCEDURAL SAFEGUARDS

Before addressing post-waiver protections, we must first consider the protections already in place for those who invoke their Miranda rights. The landscape of procedural guidelines for criminal interrogations begins and ends with Miranda v. Arizona. Miranda applies only to custodial interrogations. As such, post-invocation protections are in play only in those situations where Miranda warnings first applied. The Supreme Court has clarified and refined Miranda time and again, but post-invocation protections represent a specific subset of cases that address the means and methods of dealing with defendants who invoke their Miranda rights. These

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10 United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010).
11 Crosby, 91 A.D.2d 20, 29.
16 Since 1966, many cases have reached the Supreme Court which have clarified Miranda v. Arizona.
methods ensure that post-invocation defendants are protected and given the full benefit of that invocation. The Supreme Court has decided with relative clarity\textsuperscript{17} the measures necessary to effectuate proper post-invocation protections.

\textit{Miranda v. Arizona} represented the Supreme Court’s effort to promulgate clear procedural guidelines for custodial interrogations.\textsuperscript{18} In \textit{Miranda}, the Court took issue with the coercive tactics employed by interrogators against criminal defendants.\textsuperscript{19} A lasting tenet of \textit{Miranda} is that custodial interrogations are inherently coercive.\textsuperscript{20} Accordingly, the Court established the now ubiquitous warnings aimed at dispelling this inherent coerciveness and informing defendants of their constitutional rights.\textsuperscript{21} These warnings inform defendants of their right to remain silent and to counsel. Defendants may either invoke these rights or they may waive them and cooperate with the interrogation in the absence of counsel.\textsuperscript{22}

The Court stressed the importance of \textit{Miranda} warnings regardless of a defendant’s past experience (or lack thereof) in the criminal justice system, requiring all defendants to be reminded of their rights at the outset of any custodial interrogation. In so doing, the Court made it clear that an appraisal of one’s constitutional rights at the outset is necessary to dispel coerciveness. Accordingly, those who waive their \textit{Miranda} rights and those who invoke them are both in an inherently coercive atmosphere. From the standpoint of coerciveness, then, the Court did not delineate between post-invocation and post-waiver defendants. For the comparatively few who do invoke their \textit{Miranda} rights, the Court has promulgated clear procedural safeguards to protect both the right to silence and to counsel.\textsuperscript{23}

\textbf{A. MICHIGAN V. MOSLEY – “SCRUPULOUSLY HONORING” THE RIGHTS OF THE DEFENDANT}

In \textit{Michigan v. Mosley}, the Court clarified and established a factor-based analysis to ensure that individuals who invoke their right to silence are protected.\textsuperscript{24} First, interrogation must cease immediately upon the invocation

\textsuperscript{17}Relative to post-waiver protections, which are sparse to non-existent, post-invocation protections of the rights to silence and counsel are established with great clarity.


\textsuperscript{19}Id.

\textsuperscript{20}Miranda, 384 U.S. at 467.

\textsuperscript{21}Strauss, supra note 18, at 776.

\textsuperscript{22}Id.; Miranda, 384 U.S. at 436.

\textsuperscript{23}Strauss, supra note 18; Miranda, 384 U.S. at 436.

\textsuperscript{24}Michigan v. Mosley, 423 U.S. 96, 104 (1975).
of one’s right to silence. Although the Court stated that the questioning moratorium does not extend indefinitely, it requires interrogators to “scrupulously honor” a defendant’s expressed right to silence.  

Determining whether a defendant’s right to silence was honored requires a consideration of the totality of that defendant’s circumstances, examining the procedure for a post-invocation of that right to silence. Importantly, before further custodial interrogations, post-invocation defendants must be appraised of their *Miranda* rights again, and they must intelligently waive those rights prior to further custodial interrogation. Though the Mosley defendants were clearly aware of their rights at the outset of interrogation, dispensing the coercive atmosphere requires full *Miranda* warnings again before further questioning.

**B. Edwards v. Arizona – Honoring the Defendant’s “Cry for Help”**

In similar fashion, in *Edwards v. Arizona* the Supreme Court established a bright-line procedural safeguard for defendants who invoke their right to counsel. Similar to Mosley, *Edwards* requires interrogation to cease immediately upon invocation of that right. Yet rather than employing a fact intensive factor test, the procedural safeguard outlined in *Edwards* is a bright-line rule that bars interrogation until counsel is present.

Further, even if counsel is present or the defendant has initiated questioning, interrogators must re-Mirandize the defendant and obtain a valid waiver prior to any future interrogation. Like Mosley, full re-Mirandization is necessary prior to further custodial interrogation even after complete adherence to all procedural safeguards.

In *Maryland v. Shatzer*, the Court clarified its holding in *Edwards* and established another bright-line rule with regard to procedural safeguards for post-invocation of the right to counsel. In *Shatzer*, the Supreme Court held that a defendant may be interrogated again after experiencing a fourteen day

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25 Id.
26 Strauss, *supra* note 18; Mosley, 423 U.S. at 104. This analysis requires cessation of interrogation, the passage of a significant period of time, and additional *Miranda* warnings. 21A Am. Jur. 2d Criminal Law § 920.
27 These defendants are clearly aware of their rights by virtue of their initial *Miranda* warnings.
29 Id. at 482.
30 Id. at 482.
31 Id. Unless the defendant initiates contact with police; See also Minnick v. Mississippi, 498 U.S. 146 (1990).
32 *Edwards*, 451 U.S. at 482.
break in Miranda custody. Of course, this interrogation must follow full re-Mirandizement, in order to secure a proper waiver. Though an admittedly arbitrary time frame in that case, the judicial rule eased the burden of application to ensure equal treatment of a defendant in custody.

II. CASE COLLECTION OF POST-WAIVER PROCEDURAL SAFEGUARDS

The Supreme Court has never issued, outlined, promulgated or offered any safeguards similar to Mosley, Edwards, or Shatzer for post-waiver defendants. Accordingly, that mantle has been taken up, with various degrees of intensity and success, by individual state and federal courts. A survey of how individual jurisdictions have implemented procedural safeguards for post-waiver defendants illustrates the void in a consistency of safeguards between post-invocation and post-waiver defendants.

A. FEDERAL CIRCUIT DECISIONS

Federal appellate courts have addressed the issue of post-waiver procedural safeguards and when it is proper to re-Mirandize defendants. The overarching focus of those courts has been the time lapse between initial Miranda warnings and further interrogation. In 1968, the Ninth Circuit established the status quo model for analyzing this issue in Maguire v. United States. In that case, despite a passage of three days after initial Miranda warnings were issued, the court held that the post-waiver defendant did not need to be reminded of his Miranda rights prior to further custodial interrogations. Passage of time was the entire focus of the Ninth Circuit’s analysis, and this method was reaffirmed by that court in 1995. Other federal appellate courts followed suit in their own analyses.

Two years after Maguire, for example, the Fifth Circuit was faced with a similar situation and followed the Maguire analysis by citing the lack of a “significant time-lapse” between initial Miranda warnings and further custodial interrogation, holding that the post-waiver defendant was not entitled to further warnings. The Fifth Circuit returned to the issue in 1975, and held that ten days was not a significant enough passage of time to warrant

33 Id.
34 Id.
35 Id. (“[I]t is certainly unusual . . . to set forth precise time limits governing police action, [but] it is not unheard-of . . . failure to say where the line falls short . . . and leaving that for future case-by-case determination, is . . . not at all less arbitrary”).
36 Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968).
37 People of Territory of Guam v. Dela Pena, 72 F.3d 767, 770 (9th Cir. 1995).
38 United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970).
a full review of *Miranda*. The Fifth Circuit’s analysis of those post-waiver procedural safeguards remained unchanged thirty-five years later in its 2005 decision in *United States v. Clay*. In *Clay* the Fifth Circuit held that a passage of two days did not necessitate fresh *Miranda* warnings as a procedural safeguard prior to further custodial interrogation.

The Seventh Circuit also focused on the passage of time in *United States ex rel. Henne v. Fike*, when it affirmed a passage of nine hours after warnings as adequate. The Eighth Circuit followed suit in 2010 in *United States v. Nguyen*, when it held that the passage of a full day between *Miranda* warnings and further custodial interrogations was permissible. Relying heavily on the Fifth Circuit’s analysis, the Eleventh Circuit held that the passage of a full week between initial *Miranda* and further custodial interrogation did not require any further warnings as a procedural safeguard.

The Fourth Circuit dealt with the issue of a post-waiver defendant and passage of time in *United States v. Gordon*, ruling that a short passage of time did not require further *Miranda* warnings. That court reaffirmed the ruling in *United States v. Frankson*. The Sixth Circuit addressed the issue of whether defendants were entitled to be reminded of their rights in *U.S. v. Weekly*, and also framed the issue as one centering on the passage of time.

The Third Circuit took a different approach in *United States v. Pruden* and adopted a time-focused two-prong inquiry in determining if full *Miranda* warnings are needed prior to further custodial interrogations. In *Pruden*, the court noted that the passage of about a day constituted a “significant” passage of time and was “at the upper end of the permissible range,” but

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39 Biddy v. Diamond, 516 F.2d 118, 121 (5th Cir. 1975).
40 United States v. Clay, 408 F.3d 214, 221 (5th Cir. 2005).
41 U. S. ex rel. Henne v. Fike, 563 F.2d 809, 814 (7th Cir. 1977). The Seventh Circuit also noted that there was “no authority” upon which to require additional warnings. *Id*. This further supports a new approach implemented by the Supreme Court.
42 United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010). The Third Circuit admitted that Nguyen’s “command of the English language is debatable.” *Id*. However, this had no bearing on the outcome of the case.
43 The Court felt *Biddy* controlled in this case, Martin v. Wainwright, 770 F.2d 918, 930 (11th Cir. 1985) opinion modified on denial of reh’g, 781 F.2d 185 (11th Cir. 1986).
44 *Id*.
46 United States v. Frankson, 83 F.3d 79, 83 (4th Cir. 1996).
47 United States v. Weekley, 130 F.3d 747, 751 (6th Cir. 1997). At issue here is whether the *Miranda* rights given by the FBI agents to Weekley following his arrest were still in force when the agents interrogated Weekley approximately one hour later. *Id*. “The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners.” *Id*. (quoting United States v. Andaverde, 64 F.3d 1305, 1312 (9th Cir.1995), cert. denied, 516 U.S. 1164, 116 S.Ct. 1055, 134 L.Ed.2d 199 (1996)).
49 *Id*. This is notably in direct contrast to the Fifth Circuit’s definition of a significant amount of time (and in *Miranda*’s “substantial” passage of time).
that it was still permissible despite acknowledging the countervailing factors.\(^{50}\)

Finally, the First Circuit tangentially addressed the issue of post-waiver procedural safeguards in *Gorman v. United States*.\(^{51}\) There, the court rejected an automatic requirement for the subsequent reading of *Miranda* rights.\(^{52}\) Though the case did not deal specifically with the issue of a post-waiver defendant and custodial interrogation, it has nonetheless influenced other jurisdictions dealing with post-waiver defendants.\(^{53}\)

## B. *State Judicial Decisions*

Many state courts have also addressed the issue of procedural safeguards for post-waiver defendants. Among them are a wider variety of approaches. Some states prefer an analysis framed around the passage of time alone, others look at several factors and default back to time, and some employ a pure factor test. However, there is no general consensus in approach, and the passage of time remains the default focus for judicial analysis. Most state courts follow the lead of the early Ninth and Fifth Circuit decisions\(^{54}\) discussed above, though some states have been more progressive in altering that approach to post-waiver safeguards. Nonetheless, there are three basic approaches taken by the states as discussed below.

### 1. A Pure Time-Lapse Approach

The most common approach taken by state courts focuses strictly on the period of time which has transpired between the initial *Miranda* warnings given a defendant and any subsequent interrogations.

Following the lead of the Ninth and Eighth Circuits, Alabama Supreme Court looked at a passage of three days and the lack of “any extraordinary circumstances,” in holding that the post-waiver defendant was not entitled to

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\(^{50}\) Id. at 247.

\(^{51}\) *Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967).

\(^{52}\) Though the context of *Gorman* dealt with a police search, the court nevertheless addressed the issue of *Miranda* reminders. Id. “In the first place, advocacy of an automatic second-warning system misunderstands and downgrades the warnings required by *Miranda*. Their purpose was not to add a perfunctory ritual to police procedures but to be a set of procedural safeguards.”

\(^{53}\) See *People v. Hill*, 39 Ill. 2d 125, 132, 233 N.E.2d 367, 371 (1968). “To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by *Miranda*.”

\(^{54}\) One can see the influence of Maguire and Hopkins on many of the early state decisions, and this reliance created a status quo reliance on Time-lapse analyses.
procedural safeguards prior to further custodial interrogation. Nonetheless, Alabama did establish some semblance on an upper limit of time-lapse in *Ex Parte J.D.H.* when it held that a passage of sixteen days exceeded permissible limits. Similarly, the Arizona Supreme Court upheld the passage of twelve and thirty-six hours between initial warnings and later interrogation, as adequate citing a lack of an “unduly extensive” passage of time.

Iowa has also rejected the notion that post-waiver defendants should be entitled to reminders of their *Miranda* rights unless the passage of time is extensive. Accordingly, in *State v. Russell*, the Supreme Court of Iowa upheld the time-lapse of three days between initial warnings and further questioning. Arkansas and California approved the passage of one day, and, in like fashion, Oklahoma upheld the passage of one day by relying on the holding from *Maguire*. Washington also relied heavily on *Maguire* in upholding a passage of four days. Finally, Wyoming upheld a passage of eleven hours in like manner.

While other states have grappled with time lapses of several hours and several days between warnings and further questioning, the Supreme Court of Indiana upheld a time lapse of several months as adequate between *Miranda* warnings and further interrogation. In reaching its conclusion, the court held that the defendant’s waivers in October and November preserved

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55 Johnson v. State, 56 Ala. App. 583, 588, 324 So. 2d 298, 302 (Crim. App. 1975). However, Alabama also acknowledged “Even so, the reasons that require Miranda warnings before an in-custody interrogation logically apply to an interrogation that takes place such a long period of time after warnings and waiver that under the circumstances it is to be reasonably concluded that defendant was not impressed thereby in making a confession.”

56 *Ex parte J.D.H.*, 797 So. 2d 1130, 1132 (Ala. 2001).

57 *State v. Gilreath*, 107 Ariz. 318, 319, 487 P.2d 385, 386 (1968). Although this case was decided before Miranda, it is analogized to Miranda. Also, it may be helpful here to note the fact that the actual passages of time may not seem significant in and of themselves, but the problem is the undue focus on this factor. Such a focus detracts from the myriad other factors potentially weighing on post-waiver defendants.

58 *State v. Davis*, 261 Iowa 1351, 1354, 157 N.W.2d 907, 909 (1968). “An accused need not be advised of his constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time from one another.”

59 *State v. Russell*, 261 N.W.2d 490, 495 (Iowa 1978). “[W]hen defendant responded to the questions asked of him at the second interrogation, he was fully apprised of his right to remain silent and thus had intelligently waived his right. No second warnings were required.”


61 *People v. Long*, 263 Cal. App. 2d 540, 545, 69 Cal. Rptr. 698, 701 (Ct. App. 1968). This approval came despite allegations that he was drunk and deprived of food.


63 *State v. Blanchey*, 75 Wash. 2d 926, 931, 454 P.2d 841, 845 (1969). This decision is despite the fact that defendant had travelled to Canada. See also *Maguire*, 396 F.2d at 331.

64 Mitchell v. State, 982 P.2d 717, 722 (Wyo. 1999). This decision was reached despite the fact that the defendant underwent surgery in the time between initial warnings and subsequent interrogation.

the admissibility of statements later received in the middle of January.\(^6\) While the length of that extensive time lapse is an outlier, the court adopted an approach that did not take into account any factors aside from time lapse.

By contrast, the Court of Criminal Appeals in Tennessee held that passage of four months would likely necessitate repeated *Miranda* warnings.\(^7\)

Further, the Supreme Court of Illinois looked exclusively at the time lapse between initial *Miranda* warnings and further questioning in upholding a confession.\(^8\) In reaching its decision, the court relied on the reasoning from the First Circuit’s decision in *Gorman*, which had rejected an automatic repeat of those warnings.\(^9\) Similarly, the Supreme Court of Kansas followed the reasoning from *Gorman* in rejecting the notion that *Miranda* warnings must be repeated at the onset of subsequent custodial interrogations.\(^10\)

Like these states, Louisiana rejects an automatic requirement of repeated *Miranda* warnings, fearing that such reminders would “denigrate into a formalistic ritual.”\(^11\) Nonetheless, when faced specifically with the issue of procedural safeguards afforded to post-waiver defendants, Louisiana also defaulted to a time-lapse consideration.\(^12\)

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\(^6\) *Id.* “On January 16, the defendant was visited by his girl friend, under the supervision of a police detective. . . . He had been advised of his rights in October, at which time he executed a written waiver, and three times in November, at which times he made statements to the police.” *Id.*

\(^7\) *State v. Walker*, 729 S.W.2d 272, 274 (Tenn. Crim. App. 1986). While this admission was held to violate the Fifth Amendment, the Court felt the error was harmless. *Id.*

\(^8\) *People v. Hill*, 39 Ill. 2d 125, 132, 233 N.E.2d 367, 371 (1968). “To adopt an automatic second-warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by Miranda.” *Id.*

\(^9\) *Id.* This case illustrates how dependence on *Gorman* is harmful because *Gorman* stands in opposition to procedural safeguards for post-waiver defendants.


\(^11\) “[O]nce the mandate of Miranda is complied with at the threshold of the interrogation, . . . the warnings need not be repeated at the beginning of each successive interview. To adopt an automatic second warning system would be to add a perfunctory ritual to police procedures rather than provide the meaningful set of procedural safeguards envisioned by Miranda.”

(Quoting *Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967)).

\(^12\) *State v. Harvill*, 403 So. 2d 706, 709 (La. 1981). “Absent some significant break in the interrogation process . . . repetition of these warnings prior to the taping of defendant’s statement is not required. A requirement that the Miranda warnings be repeated before each separate interrogation period would quickly degenerate into a formalistic ritual.”

However, I think a case can be made that *Miranda* itself is a “formalistic ritual” insomuch as it is one of the most recognizable and quoted tenets of criminal law. Nonetheless, this sentiment has been echoed elsewhere. “It is divorced from reality to suppose that the defendant . . . had forgotten over the weekend the Miranda warnings administered late on the previous Friday. It is equally implausible that the conduct of the defendant . . . would have been influenced by a repetition of the Miranda warnings.” *Com. v. Doe*, 37 Mass. App. Ct. 30, 37, 636 N.E.2d 308, 312 (1994).

\(^13\) *State v. Stone*, 570 So. 2d 78, 80 (La. Ct. App. 1990). “In view of the fact that this was only a short break following the detailed discussion of defendant’s Miranda rights we are not persuaded
The Supreme Court of Montana similarly defaulted to a pure time-lapse analysis when determining if a defendant was entitled to a re-warning. Mississippi has reached this same conclusion, as has New York, despite the presence of several factors that are pertinent in other jurisdictions.

2. A Factor Test with Time-Lapse

Beyond looking exclusively at the lapse of time between the initial Miranda warnings and subsequent interrogations, some states acknowledge a “totality of the circumstances” approach or other specific factors to indicate that Miranda warnings might need to be repeated before ultimately deferring to a time-lapse analysis alone. When it comes to analyzing the issue, these states tend to treat the time factor as dispositive. Accordingly, despite the presence of other pertinent factors, the issue is resolved so long as these courts deem the passage of time acceptable.

Though the Supreme Judicial Court of Maine cites several factors to consider in determining whether post-waiver defendants are entitled to further procedural safeguards, the court upheld the passage of seventeen

by this argument. Demma was not required to start all over again and repeat all that he had previously covered with him.” Id. In this case, there was no relevance given to the fact the defendant was a minor.

73 State v. Lenon, 174 Mont. 264, 274, 570 P.2d 901, 907 (1977) abrogated by State v. Cope, 250 Mont. 387, 819 P.2d 1280 (1991). In this case, the time between the first verbal Miranda warning and the confession was less than nine hours. Such a brief Time-lapse between the verbal warning and the confession did not by itself, under the facts of this case, create a duty to verbally repeat those warnings.

74 See People v. Manley, 40 A.D.2d 907, 907, 337 N.Y.S.2d 759, 760 (App. Div. 1972); People v. Caruso, 45 A.D.2d 804, 805, 356 N.Y.S.2d 902, 904 (App. Div. 1974) (“There is no requirement that Miranda warnings be repeated immediately prior to questioning. Here, the warnings were given within an hour of the commencement of the interrogation and any claim that defendant forgot them in that brief interval is incredible.”) (citation omitted) Id.; People v. Crosby, 91 A.D.2d 20, 29, 457 N.Y.S.2d 831, 837 (App. Div. 1983) (“Nor is there any requirement that the Miranda warnings be intoned every single time a suspect in custody is subjected to separate series of questioning within a short time interval.”) Id.

75 Caruso, 45 A.D.2d at 805. (“The other factors advanced by the defendant in support of his contention that the confession was involuntary are the failure of the police to reissue Miranda warnings immediately prior to questioning and the low I.Q. (87) of the defendant and his ninth grade education.”); Crosby, 91 A.D.2d at 29.

76 State v. Myers, 345 A.2d 500, 502 (Me. 1975).

Several objective indicia are significant in determining when an accused must be reinforced of his constitutional rights. They are: (1) the Time-lapse between the last Miranda warnings and the accused's statements; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last Miranda warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by Miranda warnings.
hours as permissible between *Miranda* warnings and subsequent interrogation. 77 This period was deemed permissible despite the presence of the delineated factors, 78 and the court focused on time lapse alone when the passage of time was shorter. 79

Similarly, like the Sixth Circuit, the Supreme Court of Missouri framed the issue of re-*Mirandizing* post-waiver defendants as one of adequate time lapse. 80 Despite discussing other relevant factors, the Missouri Court of Appeals ultimately focused on time lapse and relied on *Maguire* in upholding the passage of two days. 81

The Appeals Court of Massachusetts did not explicitly list factors to consider in determining the need for post-waiver procedural safeguards, but it nonetheless found that warnings should have been repeated to the defendant following the passage of three days. 82 A similar approach has been adopted in New Hampshire as well. 83

The issue of a factor-based analysis was also addressed by the Supreme Court of Nevada, and that court explicitly stated that time was “certainly the most relevant factor.” 84 Nonetheless, despite the passage of time being the most relevant factor in Nevada, and despite the court

(footnote continued)

77 Id.

78 Id. In *Myers* the defendant spent the night in jail and his subsequent statement was far different than that initial post-waiver statement.

79 State v. Peterson, 366 A.2d 525, 528 (Me. 1976). “We conclude that the evidence supports the conclusion . . . that defendant effectively waived his *Miranda* rights at the time Officer Philibrown informed him of those rights, and this waiver continued effective, despite the lapse of three hours, to the time of Detective Ames’ conversation with the defendant.” Id. However, the Court here does not seem to be disturbed with the defendant’s possible intoxication or impairment.

80 State v. Groves, 646 S.W.2d 82, 85 (Mo. 1983). “The mere lapse of time between the receipt of *Miranda* warning and the giving of inculpatory statements does not require the exclusion of the statements.” (emphasis added). See also Com. v. Silanskas, 433 Mass. 678, 687, 746 N.E.2d 445, 456 (2001). It seems from *Silanskas* that Massachusetts framed the issue around time-lapse.


The original warnings, on Friday evening, were insufficient to carry over to the interrogation by Detective Bianchi on Monday morning . . . and the period between the warning and the resumption of interrogation exceeded by far those Time-lapses which have been found insignificant for purposes of determining the validity of the defendant’s knowing, voluntary, and intelligent waiver of his rights.

*Id.* Further, though this was the decision of an intermediate Court, the Supreme Court of Massachusetts cited it in support. Jones v. State, 119 S.W.3d 766, 799 (Tex. Crim. App. 2003) (footnote 55). See also *Silanskas*, 433 Mass. at 687. It seems from *Silanskas* that Massachusetts framed the issue around time-lapse.

83 State v. Monroe, 142 N.H. 857, 868, 711 A.2d 878, 886 (1998). “Rather, the need for an additional warning is determined by the totality of the circumstances.”

84 Koger v. State, 117 Nev. 138, 142, 17 P.3d 428, 431 (2001). “Certainly, the most relevant factor in analyzing whether a former *Miranda* admonition has diminished is the amount of time elapsed between the first reading and the subsequent interview. Most courts addressing the time factor have considered instances involving only a few hours.” (emphasis added) *Id.*
acknowledging that the longest analogous case they were aware of involved the passage of seven days, it upheld the passage of twelve days as permissible,\textsuperscript{85} despite the presence of other pertinent factors as well.\textsuperscript{86}

Another common approach is exemplified by the Supreme Court of Minnesota’s analysis of the post-waiver issue. Despite framing the analysis around the “totality of the circumstances,” that court upheld the passage of seven days as not requiring a re-warning without actually considering any other relevant circumstances.\textsuperscript{87}

3. A Pure Factor Test

Despite the preceding categories, there are a number of states that adopt specific factors for analysis and attempt to give those factors relatively equal importance in determining whether to re-	extit{Mirandize} defendants. While the results do not always favor defendants, these states provide the most progressive procedural safeguards for post-waiver protections. Accordingly, they represent a departure from time-lapse focused analyses and provide a framework of safeguards that resemble the framework of post-invocation \textit{Miranda} safeguards.

Pennsylvania represents a notable departure from the status quo of states focusing on time passage alone, by employing a factor-based analysis. The Supreme Court of Pennsylvania adopted a full factor test in determining whether post-waiver defendants are entitled to repeated \textit{Miranda} warnings.\textsuperscript{88} In \textit{Commonwealth v. Wideman} that court invalidated incriminatory statements upon consideration of the enumerated factors.\textsuperscript{89} New Jersey

\textsuperscript{85} \textit{Id.} at 143. Thus, the longest period allowed in the cases fairly analogous to the instant matter is one week as discussed in \textit{Martin}, (citing Martin v. Wainwright, 770 F.2d 918, 930 (11th Cir. 1985) opinion modified on denial of reh'g, 781 F.2d 185 (11th Cir. 1986).


\textsuperscript{87} \textit{State v. Ganpat}, 732 N.W.2d 232, 241 (Minn. 2007). \textit{See also United States v. Yunis}, 859 F.2d 953 (D.C. Cir. 1988). In this federal case, the defendant was seasick, the temperature was uncomfortable, he was subjected to seven interrogations, he did not speak English well, he had been injured, and he had been medicated. \textit{Id.} Nonetheless, despite all this, the defendant was evidently not entitled to additional warnings. \textit{Id.}


[\textit{W}e have considered (1) the Time-lapse between the last \textit{Miranda} warnings and the accused's statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last \textit{Miranda} warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by \textit{Miranda} warnings.

\textit{Id.}

\textsuperscript{89} \textit{Wideman}, 460 Pa. at 706-07.
implemented a similar analysis that accounts for a "totality of the circumstances."\(^{90}\)

In *Ledda v. State*, the Supreme Court of Delaware employed a factor-based analysis that took account of various factors weighing on the defendant.\(^{91}\) This approach was affirmed and clarified in *DeJesus v. State*.\(^ {92}\) where Rhode Island employed an analysis that considered several pertinent factors in considering the need to remind a post-waiver defendant of his rights.\(^ {93}\) Maryland followed a similar path in holding that incriminating statements were not admissible because the pertinent factors weighed in favor of the post-waiver defendant.\(^ {94}\) North Carolina has also advocated the use of a somewhat similar analysis,\(^ {95}\) and Ohio,\(^ {96}\) South Carolina,\(^ {97}\) South

\(^{90}\) State v. Disposto, 189 N.J. 108, 124, 913 A.2d 791, 800 (2007). “We reject that bright-line approach and retain instead the more measured and traditional standard that allows for a totality-of-the-circumstances assessment.”

\(^{91}\) Ledda v. State, 564 A.2d 1125, 1130 (Del. 1989). (“Several factors must be considered when determining whether Miranda warnings, once given, must be readministered, including the Time-lapse since prior warnings, change of location, interruptions in interrogation, whether the same officer who gave the warning also interrogated, and significant differences of statements.”) Id.

Further, though the Court found against the post-waiver defendant in *Ledda*, the factor test employed by the Court represents an actual procedural safeguard, as opposed to a simple analysis of time-lapse.

\(^{92}\) DeJesus v. State, 655 A.2d 1180, 1195 (Del. 1995).

This Court has adopted a five-part test to determine whether police are obligated to repeat once-administered *Miranda* warnings. These factors include: (1) the Time-lapse between the last *Miranda* warnings and the accused's statements; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings is also conducting the interrogation resulting in the accused's statement; and (5) whether there is a significant difference between statement elicited during the interrogation being challenged and other preceding statements.


We think the circumstances in the case at bar did not justify the trial judge's implicit finding that Brown knowingly and intelligently relinquished his constitutional rights. We point to (1) the Time-lapse, (2) the distance to the location of the second interrogation, (3) the difference in interrogators and (4) to the difference in the statements obtained.


\(^{96}\) State v. Lester, 126 Ohio App. 3d 1, 6, 709 N.E.2d 853, 856 (1998).

\(^{97}\) State v. Smith, 259 S.C. 496, 499, 192 S.E.2d 870, 872 (1972). “The above cases soundly hold that a confession is not necessarily invalid because the Miranda warnings are not repeated at each state of the interrogation process, but look to the circumstances of each case to determine whether the defendant, having been once warned, voluntarily and intelligently waived his rights.”
Dakota,98 and Connecticut99 have followed suit as well. In fact, North Carolina invalidated a passage of nineteen hours after considering all the relevant circumstances. However, states that do not consider all relevant circumstances uphold much long passages of time.100 Though it seemed to focus slightly on time-lapse,101 the Court of Criminal Appeals in Texas employed a factor-based analysis.102

The most stringent procedural safeguard afforded to post-waiver defendants comes from the Supreme Court of Appeals for West Virginia, in the form of a full factor test with an attendant bright-line time limit as well.103 In State v. DeWeese, that state adopted a factor test similar in form to the tests used in Pennsylvania, Rhode Island, and Texas.104 However, as a matter of public policy, West Virginia went further by adopting a bright line rule of


[T]he defendant was continuously in the company of the police, was questioned on the same subject by the same officers throughout that time, and confessed within four hours of . . . the warnings. The defendant's mental condition was not shown to have so affected his memory . . . to render the earlier warnings ineffective.

Id.

100 State v. Stokes, 150 N.C. App. 211, 223, 565 S.E.2d 196, 204 (2002) rev'd, 357 N.C. 220, 581 S.E.2d 51 (2003). “In this case . . . the passage of nineteen hours diluted the first and only warning given to defendant. Defendant's waiver on 1 April 1998 was invalid as to [the] . . . custodial interrogation of defendant on 2 April 1998 and the statements arising from that interrogation.”
102 Id.

While these are considerations, the point is that the various courts have used a totality of the circumstances analysis, in which these are just factors to be weighed. By treating these factors as dispositive, the Court seems to reject the totality of the circumstances analysis employed by other courts. While there are factual differences between this case and those cited, some of the facts in this case compare favorably to the others.

Id.

104 Id.

[W]e hold that in determining whether the initial Miranda warnings become so stale as to dilute their effectiveness so that renewed warnings should have been given due to a lapse in the process of interrogation, the following totality-of-the-circumstances criteria should be considered: (1) the length of time between the giving of the first warnings and subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statement differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

Id.
seven days after which post-waiver defendants must be given renewed
Miranda warnings prior to further custodial interrogation.\textsuperscript{105}

III. POST-WAIVER SAFEGUARDS SHOULD BE ENHANCED TO MIRROR
POST-INVOCATION SAFEGUARDS

A. JUSTIFICATIONS FOR PROPORTIONAL PROCEDURAL SAFEGUARDS

There is a profound discrepancy among courts between post-
invocation protections and post-waiver protections, though logic dictates that
similar guidelines would be in place for both. This assumption rightfully
rests on Miranda’s tenet that custodial interrogations are inherently coercive
as to all defendants,\textsuperscript{106} and that a decision made in one interrogation should
not profoundly change the protection surrounding further interrogations.

Post-waiver defendants are not entitled to any delineated safeguards.
Further, while post-invocation protections receive more attention from
courts and legal scholarship in general, this does not diminish the need to
address and enhance post-waiver protections. Under the current system, if
post-waiver defendants receive safeguards, they are typically scattered and
unclear.

Comparatively, once a defendant invokes his Miranda rights, clear
safeguards and guidelines govern when additional interrogations may
occur.\textsuperscript{107} Within the invocation of Miranda rights, there is delineation
between the right to counsel and the right to silence.\textsuperscript{108} Those who invoke
their right to counsel receive the most stringent and bright-line protections.\textsuperscript{109}
Those who invoke their right to silence receive somewhat similar
protections, but there is greater leniency with regard to re-interrogation.\textsuperscript{110}
This leniency has prompted several legal scholars to conclude that
defendants who invoke their right to silence should receive constitutional
protection equal to those who invoke their right to counsel.\textsuperscript{111} However, if

\textsuperscript{105} Id. ("As a matter of public policy in West Virginia, a lapse of seven days between an initial
waiver of the rights enunciated in the Miranda warnings and a subsequent interrogation requires
renewed warnings before the subsequent interrogation may occur.") Id.
\textsuperscript{107} See supra notes 27-35 and accompanying text.
\textsuperscript{108} Miranda, 384 U.S. at 470.
\textsuperscript{109} See supra notes 21-35.
\textsuperscript{110} See supra note 29 and accompanying text.
\textsuperscript{111} Christopher S. Thrutchley, Minnick v. Mississippi: Rationale of Right to Counsel Ruling
defendants who invoke their right to silence are entitled to greater protection, those who waive those important rights are doubly entitled to it.

1. The rights at risk in post-invocation and post-waiver interrogations are equally important

Although Miranda stands for all defendants being protected from coercion at all times during all interrogations, clear safeguards are afforded only to post-invocation defendants, while few to no articulated safeguards are afforded to post-waiver defendants. This discrepancy does not comport with the protections inherent in Miranda. The rights involved in both post-invocation and post-waiver scenarios includes the constitutional right against self-incrimination. Even if a criminal defendant waives those rights and cooperates with interrogators initially, the fundamental right against self-incrimination is still in full force and may be invoked at any point. In fact, the opening paragraphs of the Miranda decision support the idea that the protected rights are in force despite waiver of Miranda rights. The sentence immediately following enumeration of the Miranda rights themselves states that defendants may waive “effectuation” of these rights, meaning that they simply waive the fruition or effect of the Miranda rights themselves and not the overarching right against self-incrimination. That right remains in full force throughout the entire custodial process and may be asserted at any time.

The gap between safeguards for post-waiver and post-invocation defendants makes little sense, and the lack of safeguards for post-waiver defendants means that their fundamental right against self-incrimination is not being protected. The Miranda Court explicitly states that “the Fifth Amendment privilege serves to protect persons in all settings in which their freedom of action is curtailed in any significant way . . . . “ This quote is poignant when viewed in the following context from the Miranda Court: “[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces cannot be otherwise than under compulsion to speak . . . . [T]he compulsion to speak in the isolated setting

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112 Miranda, 384 U.S. at 440.
113 Id. at 445 (1966).
114 Id.
115 Id.
116 Id.
117 Id. ("Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.") Id.
of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”

Following the reasoning of Miranda, then, post-waiver defendants must be entitled to safeguards because of their ever-present privilege against self-incrimination, and because those subjected to further custodial interrogation are constantly under a “compulsion to speak.” Moreover, a lack of safeguards would leave post-waiver defendants vulnerable to all of the coercive pressures described in Miranda. Post-waiver safeguards must be increased to check any further unrestrained coerciveness.

Accordingly, the current void of post-waiver safeguards fails to sufficiently protect post-waiver defendants. Therefore, post-waiver defendants deserve, and in fact must have, increased protections. Miranda warnings never give defendants an indication of how long their waiver will maintain viability.

Absent additional safeguards, current procedures - in direct contradiction to Miranda – seem to falsely impute to defendants the knowledge that they may invoke their rights at any point during any interrogation. Courts are comfortable imputing the implicit knowledge of Miranda rights to post-waiver defendants, despite the passage of time and other factors. However, the Miranda Court refused to “pause to inquire in individual cases whether the defendant was aware of his rights.”

2. Post-waiver safeguards are important because the vast majority of criminal defendants initially waive

Studies show 80% of criminal defendants waive their Miranda rights during initial questioning. Further, of those who waive their rights initially, less than 4% ever invoke their Miranda rights at a later time. Because the
number of criminal defendants who waive their rights is so high, guidelines protecting those who waive their rights implicates the majority of criminal defendants in all jurisdictions. While the rights to silence and counsel both enjoy very clear protections and protocols, and have attracted sizable attention from legal scholars, the cases appealing this issue represent 20% of criminal defendants. Accordingly, addressing those who waive their rights without appeal will have a profound effect on the criminal justice system. Furthermore, studies show that the conviction rate for those who waived their rights is 10% higher than the same rate for those who invoked their rights. Because the majority of criminal defendants who waive their rights vastly outweighs the number of defendants who invoke their rights, and because those who waive their rights are more likely to be convicted, ensuring that proper protections are in place for those that waive them would have widespread effect on the most commonly encountered and convicted defendants.

A. MIRRORING POST-WAIVER AND POST-INVOCATION SAFEGUARDS

The current post-invocation protection guidelines provide a perfectly analogous framework for mirroring them to post-waiver protections, since post-waiver and post-invocation defendants’ experiences mirror one another. Both post-waiver and post-invocation defendants are subjected to coercive pressures, they are entitled to the same rights, and they experience similar intervening circumstances. Protections for post-waiver and post-invocation defendants should likewise mirror one another.

The United States Supreme Court has handed down decisions that articulate post-invocation protections, and these protections should be directly applicable to post-waiver defendants as well. These decisions include the right to silence protections articulated in *Michigan v. Mosley* and the right to counsel protections articulated in *Edwards v. Arizona* and *Maryland v. Shatzer*. The protections in both lines of cases can be mirrored and applied to post-waiver defendants. Further, these protections should be extended in order to address the void in protections currently acknowledged to post-waiver and post-invocation defendants.

1. The Mosley correlative for post-waiver safeguards

The “totality of the circumstances” test from *Mosley* offers superior protection than the time-lapse protection now afforded those who initially waived their *Miranda* rights. And by holding that such an invocation may

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124 *Id.*

125 *Id.*
be overcome by the presence of these circumstances, the Court provided a correlative justification for a waiver being overcome by the same exact circumstances.\textsuperscript{126} The reason for superiority is clear: there are many factors, coercive and non-coercive, that weigh on criminal defendants in custody.\textsuperscript{127} The Mosley Court understood this and provided for those myriad factors. These factors indicate whether an invocation may be overcome, and whether further interrogation may take place after fully repeated \textit{Miranda} warnings.\textsuperscript{128} The Mosley Court believed that post-invocation defendants are entitled to a full reminder of their rights under certain circumstances. Surely defendants who have waived and experienced similar circumstances are entitled to be reminded of those same rights.

Further, in \textit{Wyrick v. Field}, the Court advocated a “totality of the circumstances” approach in determining whether to repeat \textit{Miranda} warnings after a polygraph examination. This proves that the Supreme Court understands that many circumstances may be simultaneously weighing on defendants, and that those circumstances may necessitate repeated \textit{Miranda} warnings.\textsuperscript{129} Mirroring the Mosley correlative to post-waiver defendants will account for all circumstances that a post-waiver defendant experiences.

\ \ \ \ \ \ \ \ a. \ A multi-factor analysis is needed to ensure that post-waiver defendants are properly protected

Although passage of time is easily quantifiable, many other circumstances should be considered in determining whether repeated \textit{Miranda} warnings are needed. Simply assessing the passage of time between \textit{Miranda} warnings fails to account for myriad other circumstances that weigh on criminal defendants. Along with passage of time, circumstances such as a change in the location of interrogation, a change in interrogators, an increase in charges, and the emotional state of the defendant all indicate that repeated \textit{Miranda} warnings are needed.\textsuperscript{130}

Moreover, focusing only on time fails to take into account whether the defendant was mentally handicapped,\textsuperscript{131} the defendant underwent surgery between initial warnings and subsequent interrogations,\textsuperscript{132} the defendant had

\textsuperscript{126} Michigan v. Mosley, 423 U.S. 96, 104-05 (1975).
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Wyrick v. Fields, 459 U.S. 42, 48, 103 S. Ct. 394, 397, 74 L. Ed. 2d 214 (1982).
\textsuperscript{130} See supra note 105.
since travelled outside the country, the defendant was a minor, the defendant struggled understanding and speaking English, or if the defendant slept for hours between warnings and interrogation. Defendants who have experienced any combination of these factors should be entitled to repeated Miranda warnings and the attendant opportunity to invoke those rights and enjoy greater protections.

Furthermore, time alone is an inadequate consideration because of the large discrepancy, and oftentimes contradiction, among various jurisdictions on what is an acceptable passage of time. First, it is important to note that in Michigan v. Mosley the high court viewed the passage of two hours between warning and subsequent interrogation as “a significant period of time.” However, it is evident that the federal circuit courts and state courts do not always follow the lead of the United States Supreme Court in this regard. In Hopkins, the Fifth Circuit based its decision on the lack of a significant time-lapse, and subsequently upheld a passage of at least ten days in Biddy. Therefore, both the Supreme Court and the Fifth Circuit specifically referenced “significant” passages of time, but the Supreme Court held that two hours was significant, while the Fifth Circuit held that ten days was not significant. In those decisions, what was deemed “significant” was inconsistent at best.

Federal courts have upheld the acceptable passage of time as anywhere from nine hours to several days. The same is true of state courts. The time range upheld by the states runs the gamut between several hours and several months. The point is that there is no consistent approach to a time-lapse analysis. As a result, defendants suffer because there is a lack of authority to justify overturning those cases. Accordingly, a time-lapse consideration alone is neither sufficient nor efficient in analyzing the adequacy of post-waiver safeguards.

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135 United States v. Nguyen, 608 F.3d 368, 375 (8th Cir. 2010).
138 Michigan v. Mosley, 423 U.S. 96, 106, 96 S. Ct. 321, 327, 46 L. Ed. 2d 313 (1975) ("... [R]esumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings . . . .") Id.
139 United States v. Hopkins, 433 F.2d 1041, 1045 (5th Cir. 1970).
140 Biddy v. Diamond, 516 F.2d 118, 121 (5th Cir. 1975).
141 U. S. ex rel. Henne v. Fike, 563 F.2d 809, 814 (7th Cir. 1977).
142 Biddy, 516 F.2d 118, 121 (5th Cir. 1975); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968).
145 Fike, 563 F.2d at 814.
b. Factors indicate a new interrogation

An implicit principle of Mosley is that the “totality of the circumstances” analysis often indicates that an entirely new interrogation is taking place. This new interrogation allows interrogators to re-Mirandize and re-interrogate defendants who invoked their rights in a previous interrogation.\footnote{Michigan v. Mosley, 423 U.S. 96, 114-15 (1975).} In fact, the Court reasons that if the interrogation is in a new location, with different interrogators, or regarding a different offense, then the post-invocation defendants can be interrogated because it is an entirely new interrogation.\footnote{Id. ("After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete Miranda warnings at the outset of the second interrogation.") Id.} Accordingly, because these factors indicate a new interrogation, it follows logically that procedures for initial interrogations should be followed because the defendant is being subjected to an entirely separate interrogation from the one in which their initial waiver of rights was obtained.

Furthermore, the Miranda decision stands for the notification of such warnings at the outset of every interrogation. The Miranda Court states that any person subjected to any interrogation “must first be informed in clear and unequivocal terms” of his Miranda rights at the “outset” of the interrogation.\footnote{Miranda v. Arizona, 384 U.S. 436 (1966). ("prior to any questioning . . . .") Id.} Therefore, the distinction that post-waiver defendants are being subjected to a second, separate interrogation is important. If a post-waiver defendant is being subjected to a separate interrogation, then he is entitled to Miranda warnings because they are “an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”\footnote{Id.}

e. Factors indicate an increase in coerciveness

Furthermore, a fundamental tenet of Miranda is that custodial interrogations are coercive to the point of necessitating Miranda warnings, so factors indicating a new interrogation must also indicate an increase in an interrogation’s attendant coerciveness. If the inherent coerciveness of such interrogation mandates full Miranda warnings for all criminal defendants, then defendants experiencing a new interrogation are entitled to repeated Miranda warnings. Custodial interrogations are the nucleus of the Miranda...
and it is clear that Miranda warnings are needed to dispel the coerciveness of such interrogation. The Miranda Court stated that when “an individual [is] swept from familiar surrounding into police custody [and] surrounded by antagonistic forces” then he is clearly under compulsion to speak. These pressures quickly mount on defendants, and the Court held that a “once stated warning” is not sufficient to overcome the coerciveness of all interrogations. Accordingly, it can be inferred that if one warning is not sufficient, subsequent warnings are clearly necessary to dispel the coerciveness of subsequent interrogations.

d. Current post-waiver safeguards fall short of the Mosley safeguards

The most glaring justification for embracing a Mosley correlative for post-waiver defendants is the fact that defendants experiencing similar circumstances now receive entirely different treatment and protections. A pure time-lapse analysis is a fatally impotent test as compared with Mosley, because a lapse in time alone does not account for the myriad circumstances facing defendants. Courts merely paying lip service to a “circumstances” analysis also employ a less rigorous one. This is clearly evident in many cases, but perhaps most evident in People v. Crosby. In Crosby, the defendant experienced a change in location, a change in interrogators, a change in charges, and he slept for only five hours after he initially waived his Miranda warnings. Under Mosley, a post-invocation defendant under those exact circumstances would be given repeated Miranda warnings. Therefore, if a defendant had initially invoked his right to silence and subsequently experienced a change in venue, interrogators, or an increase in charges, he would be reminded of his rights and afforded greater

150 Id. ("[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.") Id.
151 Id.
152 Id.
153 See supra notes 131-38.
155 Id.
Accordingly, the initial decision to waive one’s *Miranda* rights has a profound impact on subsequent protections and causes defendants under identical circumstances to receive markedly different protections – a scenario which must change.

2. The *Edwards* correlative for post-waiver safeguards

Further, a bright-line protection in the vein of *Edwards* would elegantly alleviate any potential strain on judicial resources and would simplify enforcement by prosecutors and police interrogators. *Edwards* requires interrogators to cease interrogation immediately upon invocation of the right to counsel. The Supreme Court has noted that the benefit of *Edwards* is in its clarity and the ease by which it can be enforced. This clarity helps to ease the judicial burden of adjudicating cases falling under the *Edwards* rule.

The correlative of *Edwards* to post-waiver defendants is the benefit of implementing a bright-line rule that would provide clarity in applying post-waiver protections. Such a bright-line rule applied alongside a *Mosley*-like analysis would provide optimal protection. Where the *Mosley* correlative accounts for all circumstances and provides exhaustive protections, an *Edwards* correlative would provide an elegant bright-line rule. Within *Edwards*’ progeny is *Maryland v. Shatzer*, and it provides an easily analogized rule.

a. Post-waiver safeguards should include a bright-line rule analogous to *Maryland v. Shatzer*

The bright-line time limit of *Shatzer* should be analogized to post-waiver defendants by setting a bright-line time limit after which all defendants must be given repeated *Miranda* warnings. Although *Shatzer*’s fourteen-day rule necessarily draws an arbitrary line, it provides clarity for enforcement. According to the Supreme Court’s holding, it takes fourteen-days to “shake off any residual coercive effects of his prior custody.”

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157. These are the factors employed in Pennsylvania, Rhode Island, and West Virginia. See *supra* notes 89-105 and accompanying text. Such factors would certainly come into the purview of the totality test from *Mosley*.

158. *Maryland v. Shatzer*, 559 U.S. 98, 111, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045 (2010) (“To be sure, we have said that “[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.””) *Id*.

159. *Id*.

160. This is exactly what West Virginia did.

161. *Id*.
within that time limit defendants are clearly subjected to residual coercive pressures. Further, though time-lapse alone is an incomplete consideration, it is already widely applied by courts. Implementing a bright-line time limit provides clarity and alleviates the need for other fact-intensive analyses.\textsuperscript{162}

Further, simultaneously employing a \textit{Mosley} correlative alongside a bright-line time limit has already been employed by the West Virginia Supreme Court\textsuperscript{163} and, in addition to its clarity, it also provides an additional safeguard for post-waiver defendants. Though any bright-line limit is arbitrary to an extent,\textsuperscript{164} it would provide valuable guidance to law enforcement officials and would alleviate the need for fact-intensive determinations in cases that extend beyond the bright-line limit.\textsuperscript{165}

\textbf{b. Courts should analogize \textit{Shatzer} to post-waiver safeguards by requiring repeated \textit{Miranda} warnings after at most seven days}

The limit imposed by West Virginia after which post-waiver defendants must be given repeated \textit{Miranda} warnings is seven days\textsuperscript{166} and, while this certainly falls within the period of residual coercion identified in \textit{Shatzer}, it is with the purview of states to impose even stricter bright-line

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item State v. DeWeese, 213 W. Va. 339, 351-52, 582 S.E.2d 786, 799 (2003) ("As a matter of public policy in West Virginia, a lapse of seven days between an initial waiver of the rights enunciated in the \textit{Miranda} warnings and a subsequent interrogation requires renewed warnings before the subsequent interrogation may occur.") \textit{Id}.
\item \textit{Shatzer}, 559 U.S. 98, 110, 130 S. Ct. 1213, 1223, 175 L. Ed. 2d 1045 (2010)
\item And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard-of. . . [W]e specified 48 hours as the time within which the police must comply with the requirement . . . that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.
\item Id.
\item Id.
\item The concurrence criticizes our use of 14 days as arbitrary and unexplained. . . But in fact that rests upon the same basis as the concurrence's own approval of a 2 \(\frac{1}{2}\)-year break in custody: how much time will justify "treating the second interrogation as no more coercive than the first." Failure to say where the line falls short of 2 \(\frac{1}{2}\) years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary.
\item Id.
\end{enumerate}
\end{footnotesize}
Further, after seven days it is likely that defendants will have experienced many, if not all, of the circumstances described in Mosley.\textsuperscript{168} Because it is within the purview of states to implement stricter protections, courts that resist a Mosley correlative but embrace a time-lapse analysis could increase protections by implementing a bright-line limit shorter than seven days. Implementation of such a limit would easily comport with the already widespread analysis of time lapse. However, a resistance to implementing this factor test should be met with an attendant decrease in the number of days required to necessitate repeated Miranda warnings. Therefore, while the Edwards correlative could be implemented on its own, an approach implementing both the Mosley correlative alongside an Edwards correlative would provide optimal protection.

\subsection*{A. ENHANCEMENT OF POST-WAIVER SAFEGUARDS SHOULD COME IN THE FORM OF FULL MIRANDA WARNINGS}

In both Mosley and Edwards, post-invocation defendants must be given repeated Miranda warnings prior to further interrogation. Likewise, the same constitutional protections should require full Miranda warnings to post-waiver defendants. Those warnings are the surest way to inform defendants of their rights and to rid interrogations of their inherent coerciveness.\textsuperscript{169} Simple reminders of Miranda, or “Miranda-Lite,”\textsuperscript{170} may retain a semblance of full Miranda warnings, but they are insufficient to completely dispel coerciveness and they may lead to further complications.

1. Full Miranda warnings offer defendants a chance to invoke and take advantage of post-invocation safeguards

\textsuperscript{167} Michigan v. Mosley, 423 U.S. 96, 120, 96 S. Ct. 321, 334, 46 L. Ed. 2d 313 (1975) (“In light of today’s erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law. . . .”) Id.

\textsuperscript{168} See supra notes 54-105 for a litany of cases where defendants experienced all manner of circumstances. Note that very few of the cases dealt with time passages greater than seven days.

\textsuperscript{169} Miranda v. Arizona, 384 U.S. 436 (1966) (“More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”) Id.

\textsuperscript{170} Miranda-Lite is a term I coined to describe the manner of Miranda reminders that fall short of full Miranda warnings. Reminders simply allude back to previous warnings and the exact aspects of Miranda that the defendant is reminded of can be cherry-picked by interrogators. For instance, an interrogator might remind defendants that they are entitled to an attorney, but they might not remind defendants that they can terminate questioning at any point. Such a reminder is Miranda-Lite.
Full *Miranda* warnings are significant because they give post-waiver defendants a chance to invoke their *Miranda* rights and take advantage of all attendant post-invocation protections. Defendants may invoke their rights at any time during any interrogation, and courts must not impute this knowledge to defendants. Justification against such imputation can be found in the requirement that all criminal defendants be “*Mirandized*” prior to custodial interrogations regardless of prior experience in the criminal justice system.\(^{171}\) Courts do not impute the knowledge of *Miranda* to defendants upon subsequent arrests for subsequent crimes. Accordingly, we should not impute to post-waiver defendants the knowledge that they may invoke their rights at any future time. Full *Miranda* warnings prevent the need for such imputation.\(^{172}\)

2. *Miranda*-Lite warnings do not satisfy initial warning requirement

Generalized recitations of *Miranda* rights, or *Miranda*-Lite warnings, do not satisfy the initial *Miranda* requirement and should not suffice to protect post-waiver defendants from being subjected to new interrogations.\(^{173}\) Such short-hand reminders might include a reminder of one aspect of *Miranda*, such as the right to an attorney, but may fail to inform defendants that they may terminate questioning at any point.\(^{174}\)

Since *Miranda*-Lite reminders are insufficient to initially inform a defendant of his rights, they must also be insufficient in a new interrogation or in order to fully dispel the residual or inherent coerciveness of questioning.\(^{175}\) The Supreme Court cautions against single warnings or reminders because defendants must be aware of all their rights throughout

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The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation.

\(^{172}\) *Id.*

\(^{173}\) *Id.*

\(^{174}\) *Id.* (“In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process.”)


\(^{176}\) *Id.* at 407 (“We find that Detective Davis’s statement to DuPont, that his *Miranda* rights still applied, was not a proper *Miranda* warning.”).
the entire interrogation process.\textsuperscript{176} Further, only explicit statements of rights ensure that defendants are guaranteed the ability to exercise those rights.\textsuperscript{177}

3. \textit{Miranda}-Lite leaves discretion to coercive parties

Requiring full \textit{Miranda} warnings both alleviates the possibility of subtle coerciveness and saves courts from having to inquire into the validity or sufficiency of each individual \textit{Miranda}-Lite warning in each specific case.\textsuperscript{178} Another pointed problem with \textit{Miranda}-Lite warnings is the discretion given to coercive parties. Discretion in \textit{Miranda}-Lite warnings only increases the chances of coercion since those warnings may or may not include specific reminders that defendants may invoke all rights at any time or that they have the right to have an attorney present.\textsuperscript{179}

In each specific case, leaving out a portion of \textit{Miranda} may in itself be a form of coercion, and safeguards would be rendered impotent if the very agents of coercion are vested with the discretion to make generalized reminders of \textit{Miranda}.\textsuperscript{180} The Supreme Court has noted that fully informing a defendant of his rights is the quickest and clearest way to fully ensure that the defendant is aware at all times of his fundamental rights and, because those rights are fundamental, warnings that fall short of full recitation are needlessly ineffective.\textsuperscript{181}


Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end.

\textsuperscript{177} Id. ("As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it").


\textsuperscript{179} Id. ("As the case has been presented, there is no disagreement that the warning about the possible consequences of forgoing the privilege to remain silent was omitted from the second round of \textit{Miranda} warnings at the station house").

\textsuperscript{180} Id.

The question . . . reduces to whether the complete set of warnings given at the time of arrest carried over to the events relatively soon after at the station house . . . . Into consideration of that question we must weave the principle that the government always bears a heavy burden in establishing . . . waiver of the right to remain silent.

\textsuperscript{181} \textit{Miranda} v. \textit{Arizona}, 384 U.S. 436 (1966).
IV. ENHANCING POST-WAIVER SAFEGUARDS WOULD BENEFIT PROSECUTORS AND DEFENDANTS

Protecting post-waiver defendants and ensuring that post-waiver defendants are given repeated *Miranda* warnings benefits both prosecutors and defendants.

A. CLEAR GUIDELINES PRESERVE ADMISSIBILITY OF INCriminating Statements

Ensuring that defendants are aware of their rights also benefits prosecutors by preserving the admissibility of incriminating statements made by those defendants.\(^\text{182}\) Therefore, if measures are taken to ensure that defendants are aware of their rights throughout, it is unlikely that those same defendants can get their statements suppressed at trial or cases reversed on appeal on *Miranda* grounds.\(^\text{183}\) Accordingly, if prosecutors are transparently proactive about ensuring that defendants are aware of their rights, it is much more likely that courts will side with prosecutors in holding that any statements obtained are admissible.\(^\text{184}\)

In addition, prosecutors will also benefit from the implementation of a bright-line rule indicating when to repeat *Miranda* warnings because the current system is inconsistent and unclear.\(^\text{185}\) If jurisdictions adopt a bright-line limit on when it is proper to remind a defendant of his *Miranda* rights, then it will make the actual implementation of those safeguards much more practical.\(^\text{186}\)

Finally, though there may be a fear that repeated warnings might hamper the criminal justice system, it is important to note that more than eighty percent of criminal defendants initially waive their *Miranda* rights.\(^\text{187}\) Those same statistics indicate that fewer than two percent of those who waived their rights then changed their mind and invoked them.\(^\text{188}\) Therefore, simply ensuring that defendants are aware of their fundamental rights

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182 *Id.* at 476-77. (“The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant”).

183 *Id.*

184 *Peterka v. State*, 640 So. 2d 59, 67 (Fla. 1994). In this case, the defendant was given his *Miranda* warnings on several occasions, and the court was satisfied that he was fully aware of his rights at all times.

185 *See supra* notes 139-41.

186 *See supra* note 35.

187 *See supra* notes 123-26.

188 *Id.*
throughout interrogation will not necessarily result in an attendant exponential increase in those defendants actually invoking them.

B. THE NUMBER OF PEOPLE WHO WAIVE MAGNIFIES BENEFITS TO DEFENDANTS

Additionally, because the majority of defendants waive their Miranda rights, an increase in post-waiver protections would have widespread positive impact across all jurisdictions. Clear protections for post-waiver defendants allows the opportunity for them to invoke their rights at a later time, and ensures awareness of their right to invoke greater protections at any time.

Further, defendants who invoke rights are less likely to be convicted, so there is a profound benefit to post-waiver defendants if they are allowed the opportunity to invoke. However, this would only be the case for post-waiver defendants who change their minds and decide to invoke later on. Given that the overwhelming majority of defendants waive Miranda rights, it is unlikely that they would change their minds en masse, but in the aggregate and across all jurisdictions the small percentage is not without significance. Accordingly, enhanced protections for post-waiver defendants are less likely to have a profound impact on convictions rates than they are to simply ensure that defendants are aware of and have an opportunity to invoke their rights.

Moreover, while this measure might have the consequence of increasing litigation over the protections granted post-waiver defendants, clear guidelines would also eliminate litigation stemming from vague protections. Therefore, the increase in post-waiver safeguards should not unduly burden prosecutors, law enforcement agencies and judiciaries.

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

189 Id.
190 Id. The prevalence of this is around 1%.
191 See supra note 35.
192 See Miranda v. Arizona, 10 Ohio Misc. 9, 86 S. Ct. 1602, 1631, 16 L. Ed. 2d 694 (1966).
Clarity in the protections themselves would prevent additional litigation from being too burdensome at the outset.\textsuperscript{193}

\textbf{CONCLUSION}

Currently there is no clear answer to when, or if, a post-waiver defendant is ever entitled to additional \textit{Miranda} warnings. Meanwhile, this problem is continually litigated and addressed in all fifty states and every federal circuit. However, the Supreme Court has offered no clear guidance to consolidate the vastly different approaches undertaken by the various judiciaries. Accordingly, the current inconsistent landscape of post-waiver safeguards has left the vast majority of criminal defendants unprotected. Fortunately, current post-invocation safeguards can be easily analogized to those now granted to post-waiver defendants. By implementing a factor test akin to \textit{Mosley}, and a bright-line rule akin to \textit{Edwards} and \textit{Shatzer}, post-waiver defendants can be protected in equal proportion to their post-invocation counterparts.

As evidenced in the fifty-state and twelve-circuit survey referenced above, a few states have adopted a factor test to protect post-waiver defendants, and one state has adopted such a test alongside a bright-line rule to provide optimal post-waiver safeguards. Nonetheless, many states and almost all of the federal circuits rely solely on the time which has lapsed between initial \textit{Miranda} warnings and further interrogation. However, this is an incomplete analysis and leaves the majority of defendants with only vague and inconsistent safeguards. Luckily, the solution to this problem has been implemented in at least one jurisdiction, and by analogizing the post-invocation safeguards already in place in all jurisdictions, consistent post-waiver safeguards can easily be applied to the benefit of both prosecutors and defendants. In so doing, the multitude of defendants who have been left without clear protection would enjoy safeguards that reflect the original intent of \textit{Miranda}.

\textbf{APPENDIX}

\textsuperscript{193} See Maryland v. Shatzer, 559 U.S. 98, 116-17, 130 S. Ct. 1213, 1226, 175 L. Ed. 2d 1045 (2010) (“The concurrence criticizes our use of 14 days as arbitrary and unexplained . . . [but] [f]ailure to say where the line falls short . . . and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary”).
This appendix categorizes the manner in which all fifty states and twelve federal circuits (I was unable to locate a relevant case for the Federal Circuit) analyze the issue of post-waiver protections and whether post-waiver defendants are entitled to repeated Miranda warnings as of January 2015. The approaches can be summarized into three basic categories: Pure Time-Lapse, Factor Test With Time-Lapse Emphasis, and Pure Factor Test.

There are some cases that do not fit perfectly in a single category, but they have all been categorized according to the predominate approach in analyzing this issue. It is important to note that a few jurisdictions simply offer an outright rejection of repeated Miranda warnings without offering any analysis whatsoever, and these jurisdictions have been categorized as “Pure Time-Lapse” jurisdictions because they neglect any meaningful analysis of relevant factors. South Dakota is considered a “Pure Factor Test” for the purposes of this table, but their analysis focuses on whether the interrogation was custodial. Such an analysis considers all relevant factors. Nonetheless, for this reason South Dakota has been marked with an asterisk.

Finally, I have determined that this information is expressed most effectively in a table. Furthermore, some jurisdictions have more than one case that give particular insight into its analysis, and in those jurisdictions I have included multiple case citation.

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### Federal Circuit Survey of Post-Waiver Protections

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A LENDER’S VORPAL SWORD: EXPUNGENT AFFIDAVITS & THEIR POWER TO VOID SHERIFF’S SALES & REVERT MORTGAGES BACK TO THE HOMEOWNER

JOSHUA LABAR**

When confronted with a foreclosure, homeowners across Michigan find themselves susceptible to a unique and dire scenario. After losing their homes at a sheriff’s sale, homeowners face the possibility that their lenders will execute an “expungement affidavit,” a document that, for all purposes, voids the sheriff’s sale, reverts the mortgage and title of the home back to the foreclosed homeowner, and leads to a second foreclosure that the homeowner is forced to endure.

This Note presents four arguments: 1) the authority under Michigan’s statutes expressly forbids this lender practice, 2) the expungement affidavit is an irregularity in the foreclosure process under Michigan common law, 3) the laws of numerous other states lend support to the proposition that Michigan courts should stop lenders from continuing this practice, and 4) there are multiple policy reasons for disallowing this practice. In the end, this Note aims to shed light on a questionable practice that has the ability to cause further harm to homeowners in Michigan and could ultimately spread to foreclosure processes in other states.

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** Michigan State University College of Law, J.D. Candidate 2016. Thank you to Dr. Clark C. Johnson for your invaluable insight throughout this process. I also want to thank the Dartmouth Law Journal for all their work to bring this piece to publication.
2. One State’s Reaction to the Use of Affidavits Affecting Property

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CONCLUSION

INTRODUCTION

Like many Americans across the country, Michigan residents have faced a staggering number of foreclosures in the last few years. In 2009, Laura Buttazzoni was one of the many Michigan homeowners facing the dire reality that she was going to lose her home. After Buttazzoni’s failed attempt to sell her home, her bank initiated its own sheriff’s sale in late 2009. After the statutory redemption period expired, Fannie Mae evicted Buttazzoni and relisted the home in 2011. Even though Buttazzoni’s home was foreclosed


3 Id.

4 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 569-70 (5th ed. 2007) (introducing the concept of redemption rights).

5 Buttazzoni, 2014 WL 1031278, at *1.
upon, sold at a sale, and relisted on the market—she was not done with the property. In June 2012, nearly three years after Buttazzoni’s eviction, Fannie Mae executed an “expungement affidavit,” which voided the 2009 sheriff’s sale and reverted the mortgage back into Buttazzoni’s name.

Initially, this event may have seemed like a blessing to Buttazzoni, since she was once again the homeowner of her previous residence. However, Buttazzoni quickly realized her home was no longer in the condition she had left it in, and many problems awaited this new ownership. She was not better off financially and would soon face the foreclosure process once again. The inevitable struck in 2013 when Buttazzoni’s property was foreclosed upon a second time, which allegedly affected her credit score. Buttazzoni filed suit against her lender for improper foreclosure, among other claims. Buttazzoni alleged the use of an “expungement affidavit” was an irregularity in the foreclosure process. The court, however, disregarded this claim with little explanation except that it reasoned the affidavit and first foreclosure had no bearing on the second foreclosure. The court held that Buttazzoni’s allegations lacked merit and dismissed her case. She was left without relief.

This scenario, involving an expungement affidavit, has played out in various forms solely across Michigan within the last five years. An expungement affidavit is a piece of paper a lender notarizes, which usually states a foreclosure sale has been “inadvertently held” and will be treated as “void ab initio” without stating further reasoning in the document. Filling out such an affidavit will effectively void a foreclosure sale and convey the

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6 See id.
7 Id.
8 Id. (stating that Buttazzoni “was once again the homeowner of the property”).
9 Id. Buttazzoni alleged heating oil had been delivered to her home while in Fannie Mae’s possession, which leaked by way of the underground reservoir. Further, the boiler had been removed and the furnace was no longer in working order, which in turn caused the pipes to freeze and burst. Buttazzoni alleged substantial damages to the property caused an environmental hazard.
10 Id.
11 Id. (stating that Buttazzoni’s “credit was then damaged a second time through no fault of her own”).
12 Id. In addition to improper foreclosure, Buttazzoni alleged intentional infliction of emotional distress, slander of title, slander of credit, and an allegation under the Fair Credit Reporting Act. Id.
13 Id. at *3. Buttazzoni claimed that “a foreclosure following the expungement was an irregularity requiring the voiding of the second foreclosure.” Id.
14 Id. (“Plaintiff ha[d] not include[d] even one allegation concerning how the expungement affected the second foreclosure process.”).
15 Id. at *4.
16 Id.
17 See infra Part II.
18 See, e.g., Connolly v. Deutsche Bank Nat’l Trust Co., 580 F. App’x 500, 502 (6th Cir. 2014) (explaining the lender filed an expungement affidavit that only reasoned the sheriff’s sale was “inadvertently held”).
original mortgage back to the homeowner.\textsuperscript{19} Usually the homeowner is then forced through the foreclosure process a second time, which harms his or her credit, and the redemption period and price changes.\textsuperscript{20} Lenders continually use the expungement affidavit as a means to revive and revert foreclosed homes back to homeowners, despite these negative effects on the homeowner.\textsuperscript{21} The unilateral use of an expungement affidavit is an illegal instrument under current statutory and common law, is at odds with all other state foreclosure processes, and is an unjustified means of power with little benefit to lenders and many consequences for residential homeowners.

Part I of this Note discusses the background of residential foreclosure law.\textsuperscript{22} Part II examines Michigan’s recent influx of cases involving expungement affidavits and the process of voiding sheriff’s sales around the United States.\textsuperscript{23} Part III argues the expungement affidavit is an unlawful use of authority under Michigan statutory law, case law, and is plainly at odds with public policy and other state foreclosure practices.\textsuperscript{24} In concluding, a short solution will prove the unilateral use of expungement affidavits should be deemed unlawful in all situations, except when the affidavit is used mutually amongst homeowners and lenders to avoid the costly judicial process in circumstances of loan modifications and instrument errors, which can benefit both Michigan and all other states.\textsuperscript{25}

I. MORTGAGE FORECLOSURE LAW

Foreclosure is a process lenders use to recoup property when a borrower has failed to make mortgage payments.\textsuperscript{26} The actual process varies widely state to state,\textsuperscript{27} but can be divided into two groups — judicial and non-judicial foreclosures.\textsuperscript{28} In all instances where a lender uses an expungement affidavit,

\textsuperscript{19} See discussion \textit{infra}, Section II.A (discussing the statutory authority that allows the affidavit to convey property back to the homeowner).
\textsuperscript{20} See, \textit{e.g.}, Connelly, 580 F. App’x at 502 (the redemption price went from $108,750 to $172,000).
\textsuperscript{21} Id.
\textsuperscript{22} See discussion \textit{infra} Part I.
\textsuperscript{23} See discussion \textit{infra} Part II.
\textsuperscript{24} See discussion \textit{infra} Part III.
\textsuperscript{25} See discussion \textit{infra} Part III.
\textsuperscript{26} See \textsc{Black’s Law Dictionary} 762 (10th ed. 2014) (Foreclosure is “[a] legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property”).
\textsuperscript{27} See Prentiss Cox, \textit{Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach} 45 HOUS. L. REV. 683, 686 (2008) (discussing some of the many differences between foreclosure processes among states).
\textsuperscript{28} See \textsc{Black’s Law Dictionary}, supra note 26 (defining judicial foreclosure as “[a] costly and time-consuming foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of a complaint, service of process, notice, and a hearing.”) A “[j]udicial foreclosure is available in all jurisdictions and is the exclusive
the lender also uses the non-judicial foreclosure process. The non-judicial method is used in Michigan, as well as in the majority of other states. Homeowners, when facing the expungement affidavit, are subject to a set of non-judicial foreclosure procedures and may seek to set aside the foreclosure when certain defects occur.

A. THE NON-JUDICIAL FORECLOSURE PROCESS

The major difference between non-judicial and judicial foreclosure is that the former process is quicker and less costly, as it is done without court oversight. In contrast, the judicial process is often costly and time-consuming because it requires court supervision of the foreclosure. The non-judicial process gives lenders the “power of sale,” where the actual lender oversees the foreclosure independently. This process makes sense for lenders using expungement affidavits because the judiciary is not involved, and the lender has control over the entire proceeding, allowing the unchecked use of the affidavit.

Once a lender using the non-judicial process sends the homeowner the proper statutory notices, the lender may initiate a sale of the property through a third party, who is often a sheriff. States such as Michigan and Minnesota allow the mortgagee—the holder of the mortgage note—to actually purchase its own mortgaged property at a sheriff’s sale. In many states, a mortgagee does not have this opportunity to purchase its own property. Typically, the mortgagee purchasing the property is the lender and only bidder in attendance at the sheriff’s sale. Reasons for this include the fact non-judicial foreclosure processes allow notice of the sale to be posted in a local newspaper with limited circulation, as well as the fact lenders already have equity in the property, allowing them to purchase the

or most common method of foreclosure in at least 20 states.” Id. In contrast, a “non-judicial foreclosure” is “[a] foreclosure method that does not require court involvement.” Id.


See Nelson & Whitman, supra note 4.

See discussion infra Section I.B.

See NELSON & WHITMAN, supra note 4.

See discussion infra Section I.A.

See discussion infra Section I.B.

See Cox, supra note 27, at 699.

See id. ("Judicial foreclosure procedures generally are more costly for the lender and take much longer to complete."); see also supra note 26 and accompanying text.

See Cox, supra note 27, at 700.

See id. at 699-70

See id. at 650.

Id. at 650.

Id. at 760.
property without upfront costs. These, among other reasons, are why mortgagees usually end up as the only bidder at a foreclosure sale. Importantly, all cases involving a lender’s use of an expungement affidavit take place after the lender bought its own property at a sheriff’s sale.

In twenty-two states, a homeowner has a statutory right to purchase back or “redeem” the property after it is sold at a foreclosure sale. The amount of time allowed to redeem varies by state and ranges from six months to two years. In Michigan, the redemption statute sets the standard that properties less than ten acres have a redemption period of six months and properties larger than ten acres have a redemption period of twelve months. The time is very important because once the redemption period expires, the rights of the homeowner are greatly limited, if not completely eliminated.

When a homeowner redeems the property, he pays the foreclosure sale price plus any other additional costs. At that time, the homeowner is restored to the title he had before the foreclosure sale.

As a final step in the general non-judicial foreclosure process, a lender may seek a deficiency judgment against a homeowner if the foreclosure sale price of the property is less than the obligation owed on the mortgage. For example, if a homeowner owes $70,000 on his mortgage, but the property is sold at auction for $60,000, the homeowner may have to pay a deficiency judgment in the amount of $10,000.

There are limitations

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41 Id.
42 Id. (“There are several reasons for this phenomenon. First, because the mortgagee can bid up to the amount of the mortgage debt without putting up new cash, he has a distinct bidding advantage over a third party bidder, who will have out-of-pocket expense from the first dollar bid. Second, while foreclosure statutes require notice by publication to potential third party bidders, the notice, especially in urban areas, is published in legal newspapers of limited circulation. Moreover, because the publication is technical in nature, a potential third party purchaser has little idea what real estate is being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty of ascertaining if a purchaser will receive good and marketable title. Fourth, when a mortgagee forecloses on improved real estate, potential bidders often find it difficult to inspect the premises prior to sale.”) (citations omitted).
43 See discussion infra Part I.C.
45 NELSON & WHITMAN, supra note 4, at 745-46. A few states with a six-month redemption period include Colorado and Minnesota. Id. (citing COLO. REV. STAT. § 118-9-2 (1963); MINN. STAT. ANN. § 580.23 (1967)). Some states have a two-year redemption period, such as Tennessee. Id. (citing TENN. CODE ANN. §§ 66-8-101 to 102 (1991)).
47 See discussion infra, Section I.B.
48 NELSON & WHITMAN, supra note 4, at 570.
49 Id., at 754.
50 Id. at 708 (explaining deficiency judgments occur whether or not the homeowner redeems the property and, in most states, regardless of the foreclosure method).
51 RESTATEMENT (THIRD) OF PROPER.: MORTGS. § 8.4 cmt. b, illus. 1 (1997) (listing an example as to how a basic deficiency judgment works).
on deficiency judgments that vary by state.\textsuperscript{52} The Third Restatement of Property takes an approach that limits the amount a lender can obtain through a deficiency judgment to the fair market value of the property.\textsuperscript{53} This is especially beneficial to homeowners when the obligation on the mortgage is of greater value than the actual value of the property because, no matter what they actually owe, homeowners will not have to pay a deficiency judgment.\textsuperscript{54} Michigan is one of the states that follow the Restatement approach.\textsuperscript{55} Once a lender sells a foreclosed property, a homeowner may attempt to use the legal process to set aside that sale, arguing the property was wrongfully foreclosed.\textsuperscript{56}

\section*{B. Setting Aside a Non-Judicial Foreclosure Sale}

States differentiate between two types of wrongful foreclosure: one grounded in law and one grounded in equity.\textsuperscript{57} A homeowner may seek a remedy at law if the lender forecloses on the property without there actually being a justified default on the mortgage.\textsuperscript{58} Even further, a homeowner may seek a remedy at law under a tort claim for damages under the same wrongful foreclosure theory.\textsuperscript{59} The homeowner’s claim must support the fact that the

\textsuperscript{52} See NELSON & WHITMAN, supra note 4, at 708-09 (discussing how various states approach deficiency judgments).
\textsuperscript{53} RESTATEMENT (THIRD) OF PROP.: MORTGS. § 8.4(b) (explaining “the deficiency judgment is for the amount by which the mortgage obligation exceeds the foreclosure sale price”). Further on, it limits the above provision by stating that:

\begin{quote}
[a]ny person against whom such a recovery is sought may request in the proceeding in which the action for a deficiency is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale . . . If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value.
\end{quote}

\textit{Id.} § 8.4(c)-(d).
\textsuperscript{55} See id. § 8.4 com. b, illus. 3.
\textsuperscript{56} See MICH. COMP. LAWS ANN. § 600.3280 (West 2014) (“[I]t shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff’s claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.”).
\textsuperscript{57} See discussion infra, Section I.B.
\textsuperscript{58} See 123 AM. JUR. 3D Proof of Wrongful Mortg. Foreclosure § 6 (2011).
\textsuperscript{59} Id. (citing Dobson v. Mortg. Elec. Registration Sys., Inc./GMAC Mortg. Corp., 259 S.W.3d 19 (Mo. Ct. App. 2008)).
initial foreclosure proceeding should not have occurred because there was no default.\textsuperscript{60}

In contrast, a wrongful foreclosure claim in equity admits that there was a default, but the foreclosure sale should be set aside due to an irregularity in the foreclosure process.\textsuperscript{61} While many homeowners will allege both claims, the expungement affidavit issue has to be settled through an attempt to set aside the non-judicial foreclosure grounded in equity because it is not the underlying default at issue, but a lender’s later actions.\textsuperscript{62} As in many states, Michigan courts have held that a wrongful foreclosure action to set aside a sale must show that the lender violated the non-judicial foreclosure statute.\textsuperscript{63} Many cases in Michigan, however, require heightened scrutiny to set aside the sheriff’s sale when the statutory redemption period expires.\textsuperscript{64} In order for a homeowner in Michigan to prevail in an action to set aside a foreclosure after the expiration of a redemption period, he must allege: “(1) fraud or irregularity in the foreclosure procedure; (2) prejudice to the mortgagor; and (3) a causal relationship between the alleged fraud or irregularity and the alleged prejudice, i.e., that the mortgagor would have been in a better position . . . absent the fraud or irregularity.”\textsuperscript{65} Virtually all wrongful foreclosure actions that include a challenge to an expungement affidavit require the homeowner to prove this heightened standard.\textsuperscript{66}

As a final note, the statutory redemption period in Michigan is not tolled upon the filing of an action against the lender.\textsuperscript{67} This causes serious problems when an expungement affidavit severs the redemption period because it becomes difficult to determine when the redemption period expires or whether it even exists anymore.\textsuperscript{68} If a homeowner cannot toll the redemption period, then it is likely that this statutory right will expire before a court reaches any type of resolution, subjecting the homeowner to heightened scrutiny.\textsuperscript{69} In conclusion, the expungement affidavit is used exclusively in non-judicial foreclosure proceedings, is always challenged under a wrongful foreclosure suit in equity, and is usually subject to heightened scrutiny because the filing of a lawsuit does not toll a redemption period.

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} See id.
\textsuperscript{63} See White v. Burkhardt, 60 N.W.2d 925, 927 (Mich. 1953) (“Such statutory foreclosures should not be set aside without some good reason therefor.”) (citing Markoff v. Tournier, 201 N.W. 888 (Mich. 1925); Detroit Trust Co. v. Agozzino, 273 N.W. 747 (Mich. 1937)).
\textsuperscript{65} Id. (citing Kim, 825 N.W.2d at 337).
\textsuperscript{66} See discussion infra, Section I.C.
\textsuperscript{67} Conlin v. Mortg. Elec. Registration Sys., 714 F.3d 355, 360 (6th Cir. 2013) (“[T]he filing of a lawsuit is insufficient to toll the redemption period.”) (internal quotation marks omitted).
\textsuperscript{68} See Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 502-03 (6th Cir. 2014) (finding that the redemption period reset after the second sheriff’s sale).
\textsuperscript{69} See Diem, 2014 WL 5285460, at *3.
period. Next, it is important to understand the statutory authority and case law behind Michigan’s expungement affidavit and how it contrasts with other states’ procedures for voiding sheriff’s sales.

II. THE EXPUNGEMENT AFFIDAVIT

The term “expungement affidavit” or “affidavit of expungement” is relatively new. An “affidavit” is a document with facts written down and sworn in front of an officer authorized to administer oaths, and “expunge” means “[t]o erase or destroy.” Therefore, an expungement affidavit can be defined as a sworn set of facts with the purpose to erase or destroy something. With this in mind, an expungement affidavit voids a previously held sheriff’s sale when the purchaser of the property executes the affidavit, which is usually the previous mortgagee. The expungement affidavit finds its roots in Michigan statutory law, has been upheld in state and federal case law, and has never been used in any other state outside of Michigan.

A. STATUTORY BASIS FOR THE USE OF AN EXPUNGEMENT AFFIDAVIT

Many states have statutes that allow for the use of an affidavit as a way to put homeowners on notice concerning the status of property, including title, encumbrances, or anything else that may affect the property.

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70 See discussion supra, Part I.
71 See discussion infra, Part II.
72 See Freund v. Trott & Trott, No. 299011, 2011 WL 5064248, at *2 (Mich. Ct. App. Oct. 25, 2011). The Michigan Court of Appeals faced the expungement affidavit for the first time. Id. (“According to the supplemental pleadings filed after oral argument before this Court, an Affidavit Expunging Sheriff’s Deed on Mortgage Sale Filed Pursuant To MCLA 565.451a was filed with the county Register of Deeds on May 17, 2011.”) (emphasis added).
73 BLACK’S LAW DICTIONARY. supra note 26, at 68 (defining an affidavit as “[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.”)
74 Id. at 702.
75 Id. at 68, 702 (combining the definitions of “affidavit” and “expunge”).
76 See Freund, 2011 WL 5064248, at *2 (“In that document [the expungement affidavit] MERS asserts that it will not rely on said foreclosure sale and will treat such sale as having not been held and void ab initio”) (internal quotation marks omitted).
77 See discussion infra Section II.A.
78 See discussion infra Section II.B.
79 See discussion infra Section II.C.
80 See, e.g., OHIO REV. CODE ANN. § 5301.252 (West 2013-14); PA. CONS. STAT. ANN. § 3129.1 (West 2014).
In Michigan, courts have continually used M.C.L. § 565.451a to justify the expungement affidavit as an “affidavit affecting real property.” Particularly, the affidavit is executed as a way to express “[k]nowledge of the happening of any condition or event which may terminate an estate or interest in real property,” pursuant to the statute. In that way, lenders argue the affidavit is giving notice to the homeowner that the property was improperly sold and must be reverted back to the homeowner.

While other states have similar statutes, Michigan courts have interpreted its property statute in a way that allows expungement affidavits to effectively void sheriff’s sales. Statutes in Ohio and Pennsylvania use almost identical language as the Michigan statute, and yet, in those states, there has never been a single instance where an affidavit was executed as a way to expunge a sheriff’s sale. This leads to a critical statutory interpretation of § 565.451a as it relates to expungement affidavits. In addition to this interpretation, another provision of the Michigan statute is of great importance.

No Michigan court has discussed M.C.L. § 565.451d. This section gives affidavits that affect property authority to cure various errors in a

81 See, e.g., Freund, 2011 WL 5064248, at *2; see also Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 505-06 (6th Cir. 2014).
82 MICH. COMP. LAWS ANN. § 565.451a (West 2014) states in part:
Sec. 1a. An affidavit stating facts relating to any of the following matters which may affect the title to real property in this state made by any person having knowledge of the facts or by any person competent to testify concerning such facts in open court, may be recorded in the office of the register of deeds of the county where the real property is situated:
(a) Birth, age, sex, marital status, death, name, residence, identity, capacity, relationship, family history, heirship, homestead status and service in the armed forces of parties named in deeds, wills, mortgages and other instruments affecting real property;
(b) Knowledge of the happening of any condition or event which may terminate an estate or interest in real property.
84 See § 5301.252(B)(3) (“The affidavits provided for under this section may relate to the following matters: The happening of any condition or event that may create or terminate an estate or interest.”); see also PA. R. CIV. P. 3129.1 (the rule does not specifically list language detailing any condition or event that may create or terminate an estate or interest in real property).
85 See discussion infra, Section III.A.
86 See MICH. COMP. LAWS ANN. § 565.451d (West 2014).
87 § 565.451d states in relevant part:
Sec. 1d. (1) An affidavit to correct the following types of errors or omissions in previously recorded documents may be recorded in the office of register of deeds for the county where the real property that is the subject of the affidavit is located:
(a) Errors and omissions relating to the proper place of recording.
(b) Scrivener’s errors and scrivener’s omissions.
(2) All of the following apply to an affidavit under subsection (1):
previously recorded document, such as a deed. The statute also establishes the limitations on how far an affidavit can go to cure an error. Most importantly, the statute limits an affidavit from affecting any “substantive rights” of any party, unless those rights belong to the party executing the affidavit. While Michigan courts have interpreted § 565.451a as a way to justify the expungement affidavit, no court has addressed § 565.451d and how it may affect this interpretation. Armed with only § 565.451a, Michigan state and federal courts have allowed the use of expungement affidavits in almost every case.

B. EXPUNGEMENT AFFIDAVITS AND MICHIGAN’S DEVELOPING CASE LAW

In 2012, the first case to interpret § 565.451a was Cordes v. Great Lakes Excavating & Equipment Rental, Inc., and it upheld the validity of the expungement affidavit. In Cordes, the parcel owner executed a mortgage in favor of the plaintiff, Cordes. Not long after, Cordes, as the lender, mistakenly executed a discharge of the mortgage. In order to repair the mistake, the parcel owner executed an expungement affidavit as a way to re-establish the mortgage in favor of Cordes. A year later, however, the parcel owner executed a second mortgage that ultimately went to defendant JBN, Inc. When Cordes sought to foreclose on the property after this transfer, the trial court held that the earlier expungement affidavit “rehabilitated the constructive notice of [Cordes’] mortgage” that had been accidentally discharged.

On appeal, the Michigan Court of Appeals further ruled that § 565.451a(b) applied because the affidavit concerned “the happening of any

(a) The affidavit shall be made by a person who has knowledge of the relevant facts and is competent to testify concerning those facts in open court and shall meet the requirements of section 1c.
(b) The affidavit does not alter the substantive rights of any party unless it is executed by that party.

99 See e.g., Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 505-06 (6th Cir. 2014) (discussing the validity of the expungement affidavit, but only mentioning § 565.451a).
95 See discussion infra, Section II.B.
94 No. 304003, 2012 WL 2052789, at *2 (Mich. Ct. App. June 7, 2012) (“In this case, the recorded documents (and in particular the affidavit) were sufficient to put interested persons on notice that the parcel was encumbered by a mortgage and that Cordes’ discharge of the mortgage was erroneous.”).
93 Id. at *1.
92 Id.
91 Id.
90 Id. (the mortgage was assigned to JBN, Inc. from Independent Bank).
89 Id.
condition or event which may terminate an estate or interest in real property.”

Because the discharge of the mortgage was an event that terminated an interest in real estate, the affidavit applied pursuant to § 565.451a(b). In addition, the court disagreed with JBN, Inc.’s argument that an affidavit cannot resurrect a mortgage. In denying JBN, Inc.’s argument, the court emphasized the fact recording statutes like § 565.451a put others on notice of the new encumbrance that allowed the resurrection of the mortgage. Two years later, the ruling in Cordes was upheld and expanded to allow affidavits under § 565.451a to both revive mortgages and void sheriff’s sales.

In Connolly v. Deutsche Bank National Trust Co., the United States Court of Appeals for the Sixth Circuit expanded the Cordes ruling. There, the Michigan homeowner endured a sheriff’s sale, which initiated a twelve-month redemption period. Nearly seven months into the redemption period, the defendant, Deutsche Bank, executed an expungement affidavit, declaring the sheriff’s sale “inadvertently held,” which then severed the redemption period and reverted the mortgage back to the plaintiff, Connolly. Four months later, Connolly filed suit before her original redemption period would have expired, but because there is no way to toll the period to redeem, it did expire, and she was left to prove her claim under a higher level of scrutiny.

Connolly now had to prove the expungement affidavit was an irregularity in the foreclosure process, but the court disregarded her argument and did so without mentioning § 565.451d and the limitations that it places on affidavits affecting real property. With Connolly, the Sixth Circuit expanded the affidavit’s effect, declaring “that such an affidavit can effectively void a sheriff’s sale” by putting interested persons on notice. A distinguishing feature between Cordes and Connolly is that in Cordes the mortgage was accidentally discharged and both lender and homeowner

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100 Id. (citing § 565.451a(b)).
101 Id. (citing § 565.451a(b)).
102 Id.
103 See id. at *3.
105 Id. (citing Cordes, 2012 WL 2052789, *2) (“As the Michigan Court of Appeals has decided the validity of an expungement affidavit in the case of a mortgage discharge, we similarly hold that such an affidavit can effectively void a sheriff’s sale.”).
106 Id. at 502; see discussion supra Section I.A (discussing the redemption procedure).
107 Connolly, 581 F. App’x at 502.
108 Id.
109 See id. (citing Conlin v. Mortg. Elec. Registration Sys., 714 F.3d 355, 360 (6th Cir. 2013)).
110 See id. at 504.
112 Connolly, 581 F. App’x at 506.
sought its revival. In contrast, *Connolly* involved a lender that unilaterally used the affidavit to void a sheriff’s sale, not simply revive a mortgage. While these two cases are the controlling authority supporting expungement affidavits, the most recent case to come out of Michigan denied the use of the expungement affidavit.

In *Trademark Properties of Michigan, L.L.C. v. Federal National Mortgage Ass’n*, the Michigan Court of Appeals for the first time denied a lender’s attempt to use the expungement affidavit as a way to convey property. However, unlike *Cordes* and *Connolly*, the homeowner was not a party in *Trademark Properties*; rather, the plaintiff and defendants were lenders and lien holders of a condominium. The defendant GMAC Mortgage, a lender for Mortgage Electronic Registration System, Inc. (MERS), filed an expungement affidavit as a way to reinstate the mortgage it held on the property.

To begin a long string of conveyances, GMAC Mortgage foreclosed on the homeowner and held a sheriff’s sale, selling the property to Fannie Mae. The redemption period expired and Fannie Mae was left with the title to the property, subject to a lien the condominium association held. The association initiated a foreclosure proceeding on Fannie Mae when the lien was not paid, which led to a second sheriff’s sale where the property was sold to the plaintiff, *Trademark Properties*. The attorney for GMAC and MERS attempted to void its sale of the property to Fannie Mae even though the property had already been sold to *Trademark Properties*. Therefore, unlike *Cordes* or *Connolly*, it was not the purchaser at the second sheriff’s sale that executed the expungement affidavit, it was the original mortgagee from the first sale, which no longer had a right in the property.

The court in *Trademark Properties* distinguished itself from *Connolly*, explaining this case did not involve a void sheriff’s sale like in *Connolly*. Here, the court refused to accept GMAC’s argument that the

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114 See *Connolly*, 500 F. App’x at 502 (“Deutsche, through its attorney, executed an Affidavit Expunging the Sheriff’s Deed.”).


116 Id. at *1.

117 Id. (stating the original homeowner was an individual resident).

118 Id.

119 Id. at *1.

120 Id.

121 Id.

122 Id.

123 Id.

124 Id. at *3 n.3 (“[U]nlike this case where the foreclosure sale was not void despite the subsequently-filed affidavit that provided otherwise, *Connolly* involved a sheriff’s sale that was
property was “void ab initio”\textsuperscript{125} without proof, something no court had questioned before.\textsuperscript{126} Requiring GMAC to prove the sale was void solved the issue in \textit{Trademark Properties}, but the court upheld the decision in \textit{Connolly}, because the lender there had stated on the affidavit that the property was “inadvertently held,” which seemed to be enough proof to find the sheriff’s sale void.\textsuperscript{127}

After \textit{Cordes} and \textit{Connolly}, the Michigan courts all but carved in stone the use of expungement affidavits; however, \textit{Trademark Properties} narrowed a lender’s ability to use the affidavit.\textsuperscript{128} Despite \textit{Trademark Properties}, it is apparent lenders may still unilaterally void a sheriff’s sale by claiming it was “inadvertently held” in the affidavit, so long as the affidavit is executed before further conveyances of the property have been made and other third-party lien-holders do not hold an interest in the property.\textsuperscript{129} Essentially, any situation between an original homeowner and lender, like in \textit{Connolly}, will allow the use of the expungement affidavit.\textsuperscript{130} While these three cases ruled directly on the expungement affidavit, the Michigan courts have continually sidestepped the issue, which has allowed expungement affidavits to void sheriff’s sales in multiple contexts.\textsuperscript{131}

1. Courts Continually Sidestep a Ruling on the Expungement Affidavit

There is a string of cases out of Michigan where the court makes a decision on a foreclosure action involving an expungement affidavit without questioning the affidavit’s use.\textsuperscript{132} One of the most revealing cases on this matter is \textit{Phh Mortgage v. O’Neal}.\textsuperscript{133} In that case, the lender, Phh Mortgage, submitted the property for a sheriff’s sale, giving its counsel, Trott & Trott, extremely low bidding instructions.\textsuperscript{134} Only one other bid was made at the sale, and the sheriff executed a deed in favor of Phh Mortgage for only

\textit{See discussion infra} Subsection II.B.1.

\textit{Compare} \textit{Connolly v. Deutsche Bank Nat’l Trust Co.,} 580 Fed. App’x 500, 506 (6th Cir. 2014) \textit{with} \textit{Trademark Props.,} 2014 WL 6461712, *3 (the court in \textit{Connolly} allows an affidavit to void the property and \textit{Trademark Props.}, through its holding, puts limitations on circumstances when such an affidavit can take effect).

\textit{See, e.g.,} \textit{Phh Mortg. v. O’Neal,} No. 311233, 2013 WL 3025566, at *4 (E.D. Mich. June 18, 2013) (both counts were based off of clerical and scrivener’s errors).
$1,000.\textsuperscript{135} Thereafter, the party with the rights under the property attempted to redeem the home for $1,000.\textsuperscript{136} On the same day, an attorney with Trott & Trott executed an expungement affidavit that sought to void the sheriff’s deed.\textsuperscript{137} Even more interesting, instead of relying fully on the expungement affidavit, Phh Mortgage filed a complaint seeking quiet title to the property and to set aside the sheriff’s deed.\textsuperscript{138}

The court was able to rule against Phh Mortgage without discussing the validity of the attempted expungement affidavit because Phh Mortgage did not try to seek its validity as an effective way to void the sheriff’s sale.\textsuperscript{139} What separates this case from most other expungement cases is that the lender, rather than the homeowner, was the party that failed to raise the expungement affidavit issue.\textsuperscript{140} Further, Phh Mortgage was also the party that sought to set aside the sheriff’s sale,\textsuperscript{141} which is in contrast to most cases involving expungement affidavits.\textsuperscript{142}

Michigan courts have sidestepped the expungement issue for a few reasons. The ultimate reason is that the plaintiff usually fails to make any allegations that directly refute the affidavit’s validity.\textsuperscript{143} Another reason is that sometimes the plaintiff’s ultimate relief sought is cured because of the affidavit’s effect, which may be to have the foreclosure sale set aside and the mortgage reverted back to the plaintiff.\textsuperscript{144} In other cases, the courts do not look to the validity of the affidavit because both parties agreed to the affidavit’s use.\textsuperscript{145}

In sidestepping the expungement issue for these reasons, many Michigan courts have ignored the expungement affidavit’s most problematic provision—one line that states the sheriff’s sale was “void ab initio.”\textsuperscript{146}

\textsuperscript{135} Id. (besides Trott & Trott, only one other bidder was present at the sale).
\textsuperscript{136} Id. (the original homeowner assigned her rights in the property to a third party who was actually at the sheriff’s sale).
\textsuperscript{137} Id.
\textsuperscript{138} Id. at *2.
\textsuperscript{139} Id. at *2 (Phh Mortgage only filed a two-count complaint alleging clerical and scrivener’s error in the bidding instructions).
\textsuperscript{140} Compare Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278, at *3 (E.D. Mich. March 14, 2014) (the court did not reach a ruling on the expungement affidavit’s validity because Buttazzoni did not include an allegation that supported an argument of irregularity) with Phh Mortgage, 2013 WL 3025566, at *2 (the lender filed a two-part complaint).
\textsuperscript{141} Phh Mortgage, 2013 WL 3025566, at *2.
\textsuperscript{143} See, e.g., Buttazzoni, 2014 WL 1031278, at *3; Phh Mortgage, 2013 WL 3025566, at *2.
\textsuperscript{144} See Freund, 2011 WL 5064248, at *2 (“Because this is the relief ultimately sought by plaintiff, we could offer no further relief to plaintiff, and the issue regarding the validity of the foreclosure proceeding is moot.”).
\textsuperscript{145} See discussion infra, Subsection II.B.2.
\textsuperscript{146} See, e.g., Freund, 2011 WL 506428, at *2; Verified Complaint for Equitable Relief and Jury Demand at 6, Wells Fargo Bank, N.A., No. 12-10174, 2012 WL 4450502 (E.D. Mich. Sept. 25,
Beginning with *Freund v. Trott & Trott, P.C.* in 2011, the court allowed an “affidavit expunging a sheriff’s deed,” which the lender stated it would “not rely on said foreclosure sale and will treat such sale as having not been held and void *ab initio.*” The term “void *ab initio,*” in the foreclosure context, means a sheriff’s sale is void from the start because it seriously conflicts with law or public policy. In addition, the defect in the foreclosure process must be “so substantial” that the lender had no right to sell the property in the first place. The court in *Freund* did not inquire into whether the sheriff’s sale had a substantial defect that would conflict with law or public policy.

Without the court questioning why or how the first sheriff’s sale was void *ab initio,* the lender rationalized the cancelled sale and subsequent reinstatement of the mortgage by stating those three magic words — void *ab initio.*

The court’s decision in *Freund* was only the beginning, multiple lenders used the same language in their affidavit to that of the lender in *Freund.* In 2012, the homeowner in *Dixon v. Wells Fargo Bank, N.A.* attempted to sue his lender for wrongful foreclosure and negligence, basing one of his claims on the use of the expungement affidavit that stated the sheriff’s sale was “void *ab initio.*” The court, however, only mentioned the affidavit while explaining the facts of the case and did not address the validity of the affidavit or how it could be void, though the plaintiff briefed the issue.

By 2013, the court in *Mellentine v. Ameriquest Mortgage Co.* simply explained in its opinion the foreclosure was “inadvertently held” without

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147 *Freund,* 2011 WL 506428, at *2.

148 BLACK’S LAW DICTIONARY, supra note 26, at 1805 (defining void *ab initio* as “[null from the beginning, as from the first moment when a contract is entered into. A contract is void *ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract”).

149 See NELSON & WHITMAN, supra note 4, at 636-37 (an example of a void sheriff’s sale would be if the lender sold the property when there was no underlying default on the mortgage). This is in contrast to a sale that is “voidable,” meaning the sheriff’s sale could only be cancelled upon the election of one party. See id. at 636-40 (discussing the distinction between “void” and “voidable” foreclosure sales).

150 See *Freund,* 2011 WL 506428, at *2 (the court concludes that because the lender said, through the use of the affidavit, that the sheriff’s sale was void *ab initio,* the original mortgage would automatically “remain in full force and effect”).

151 *Id.*


154 See *Dixon,* 2012 WL 4450502, *1-2; *see also* Plaintiff’s Response to Defendant’s Motion to Dismiss at 3-4, Dixon v. Wells Fargo Bank, N.A., No. 12-10174, 2012 WL 4450502 (2012) [hereinafter Plaintiff’s Response] (arguing that an expungement affidavit, stating a sale was “void *ab initio*” and “inadvertently held,” constituted negligence on the part of the lenders).
mentioning that it was actually an expungement affidavit that voided the foreclosure sale. In addition, the Mellentine court did not question the fact the expungement affidavit was “void ab initio.” Each year, courts continue to face homeowners’ challenges to a lender’s use of expungement affidavits based on simple statements as “inadvertently held” and “void ab initio” without any support for either claim. While Trademark Properties may be the first decision to produce a sliver of light at the end of the tunnel, its ruling has left much unsettled despite being the first case to question the “void ab initio” rationale. Despite many adversarial situations among lenders and homeowners and the lack of support of expungement affidavits, some uses of the affidavit have proven beneficial to both parties.

2. Use of Expungement Affidavits to Cure Mutual Defects

In some instances, an expungement affidavit can be mutually executed for the beneficial use of both the lender and homeowner. Beginning with Cordes in 2012, the mortgagee accidentally discharged the mortgage and had to execute an expungement affidavit with the property owner’s signature as a way for the two parties to mutually cure the error. The expungement affidavit has revealed other beneficial uses. A prime example is found in Maltbie v. Bank of America, where the affidavit was used as a way for the bank to re-establish the mortgage in the homeowner’s name because the parties subsequently agreed on a loan modification. After the bank foreclosed on the property, the parties initiated negotiations that led to a favorable loan restructure. Instead of having to execute a whole new mortgage or go through the court system to void the sale, the bank

158 515 F. App’x 419, 421 (6th Cir. 2013).
159 Appellant’s Brief at 13, Mellentine v. Ameriquest Mortg. Co., 515 F. App’x 419 (6th Cir. 2013) (stating that both parties understood the first sheriff’s sale should not have happened, but not explaining exactly why that was).
161 See id. at *3 n.3 (distinguishing the Connolly case, which leaves intact much of the affidavit’s power).
164 Id. (“O’Connor signed an affidavit which stated that the Cordes mortgage should not have been discharged and that the mortgage remained in effect.”).
166 Id. (“After the Maltbies elected to participate in the TPP, BOA rescinded the prior foreclosure sale by filing an Affidavit of Expungement with the Kent County Register of Deeds.”). A homeowner can negotiate a loan modification to lower the monthly mortgage payment as a way to prevent foreclosure. See Avoiding Foreclosure, U.S. DEPT. OF HOUSING AND URBAN DEVELOP., http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure (last visited Feb. 20, 2015).
167 Maltbie, 2013 WL 6078945, at *2
was able to use the expungement affidavit as a tool to revitalize the homeowner’s mortgage.\textsuperscript{165}

In the right circumstances, it is clear that an expungement affidavit may work to both parties’ advantage.\textsuperscript{166} In the case of accidental rescission\textsuperscript{167} or subsequent loan modifications after the foreclosure sale,\textsuperscript{168} the mortgagee and homeowner can utilize this affidavit for each other’s benefit. Furthermore, cases like \textit{Freund}, where the affidavit’s effect was in the form of the ultimate relief sought, prove that future use of the expungement affidavit in order to cure a mutual defect is available through the affidavit.\textsuperscript{169} This is possible when the lender desires to void the sale and the homeowner desires to have the property back.\textsuperscript{170} As long as both parties are on board, a court has little reason for invalidating the affidavit’s use.\textsuperscript{171}

\textbf{C. Setting Aside Sheriff’s Sales Outside of Michigan}

The use of an expungement affidavit as a way to void sheriff’s sales is unique to Michigan.\textsuperscript{172} While other states have similar statutes regarding affidavits affecting real property,\textsuperscript{173} no court outside Michigan has faced a lender’s use of an expungement affidavit, whether unilaterally or mutually executed.\textsuperscript{174} Even in a state like Ohio, which has a similar statute as Michigan, the courts have yet to face the affidavit’s effect.\textsuperscript{175} This raises the question of what other states exactly do to void sheriff’s sales.\textsuperscript{176} Further, how do other states view the precarious use of affidavits? Much can be gathered from looking at how other states handle challenges to sheriff’s

\begin{footnotesize}
\begin{enumerate}
\item[165] Id.
\item[166] See id.
\item[168] See \textit{Maltbie}, 2013 WL 6078945, at *2.
\item[170] See id.
\item[171] See, e.g., Maltbie, 2013 WL 6078945, at *2 (both the lender and homeowner desired to void the sheriff’s sale pursuant to a loan modification).
\item[172] See discussion \textit{infra}, Section II.B.
\item[173] See discussion \textit{supra}, Section II.A.
\item[174] But see, e.g., Sixty-01 Ass’n of Apartment Owners v. Parsons, No. 89805-7, 2014 WL 4109432, at *1 (Wash. Aug. 21, 2014) (en banc) (rather than filing an affidavit expunging the sheriff’s deed, the lender used the judicial process, seeking to set aside an erroneous bid at a sheriff’s sale).
\item[175] But cf. United Cos. Lending v. Greenberg, No. 80803, 2002 WL 31087627, at *1 (Ohio Ct. App. Sept. 19, 2002) (the court was faced with a situation where the lender accidentally initiated a sheriff’s sale, requiring a court to set the sale aside).
\item[176] See discussion \textit{infra}, Subsection II.B.1.
\end{enumerate}
\end{footnotesize}
sales, as well as how states have reacted to the use of other property affidavits.\footnote{See discussion infra, Subsections II.C.1–2.}

1. Using the Judicial Process to Set Aside Sheriff’s Sales Outside of Michigan

An Ohio court in \textit{United Companies Lending v. Greenberg} was faced with a very familiar fact pattern regarding homeowners and their lender.\footnote{See Greenberg, 2002 WL 31087627, at *1.} Homeowners Joel and Sharon Greenberg were enduring a foreclosure before filing bankruptcy.\footnote{Id.} The court issued a stay on the Greenberg’s property, but the home was still sold at a sheriff’s sale.\footnote{Id. (The court explained “[a] sheriff’s sale was inadvertently held during this stay”).} The lender, understanding that it should not have sold the home, motioned to the court to have the sale set aside.\footnote{Id.} The court quickly granted the motion because the sheriff’s sale was “inadvertently held.”\footnote{Id.} Despite Ohio and Michigan’s similar property statutes,\footnote{Compare OHIO REV. CODE ANN. § 5301.252 (West 2013-14) with MICH. COMP. LAWS ANN. § 565.451a (West 2014).} the lender in Ohio had to resort to the judicial system to void the sheriff’s sale rather than attempt to void the sale through the use of an affidavit affecting property.\footnote{See discussion supra, Section II.B.}

In \textit{Sixty-01 Ass’n of Apartment Owners v. Parsons}, the Washington Supreme Court, sitting en banc, made it very clear that a purchaser of property from a sheriff’s sale cannot attempt to unilaterally withdraw its successful bid.\footnote{Sixty-01 Ass’n of Apartment Owners v. Parsons, No. 89805-7, 2014 WL 4109432, at *1 (Wash. Aug. 21, 2014) (en banc).} When the purchaser of two condominiums realized that one of the properties purchased had an encumbrance on the land, the purchaser sought to have the sale set aside.\footnote{Id.} While the court acknowledged that it had the ability to administer a remedy in equity with a showing of irregularity, it did not believe the situation merited such a remedy.\footnote{Id.} Had these events taken place in Michigan, it seems apparent the bidder could have filed an affidavit in order to revert the mortgage back to the homeowner and subsequently hold another sale.\footnote{Id.}
In Pennsylvania, the courts have made it clear that proper cause must be shown in order to set aside a sheriff’s sale. The facts in *EMC Mortgage Corp. v. Olde City Place Partnership* are rather complicated, involving multiple assignments of a mortgage and two concurrent sheriff’s sales by different mortgagees, but the underlying rule in the case is that cause must be shown to set aside a sale. Even further, the court made it clear that once property is sold at a sheriff’s sale, the old mortgage is extinguished and no longer exists. Such a statement is at odds with Michigan’s expungement affidavit process because the affidavit allows the revival of a mortgage even though it was extinguished at the sheriff’s sale.

The Indiana Court of Appeals utilizes a similar rule as that of the Pennsylvania court. In *Smith v. Federal Land Bank of Louisville*, the court, on the lender’s request, set aside a sheriff’s sale after the lender purchased the property. The facts entail a lender believing it had full rights to the property that it was bidding on. With this belief, the lender bid the full price for the property, which resulted in an overbid. Had these actions been in Michigan, the lender’s recourse would be simple—the lender could unilaterally execute an expungement affidavit, explaining that the property was “inadvertently held” like so many mortgagees in Michigan have done. This would be enough to put other parties on notice, and the mortgage could be reverted back to the original homeowner. The mortgagor in *Smith*, however, did not attempt to take this course of action. Instead, it

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189 *EMC Mortg. Corp. v. Olde City Place P’ship*, No. 001827, 2002 WL 34078147 (Trial Order) (Pa. Com. Pleas July 29, 2002) (“Upon petition of any party in interest before delivery of the sheriff’s deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.”).
189 *Id.*
190 *Id.* (“[W]hen Citizens foreclosed the mortgage to the Premises and purchased the property at sheriff’s sale, the mortgage was extinguished . . . . It naturally follows, therefore, that if the mortgage was extinguished . . . there existed no mortgage . . . to foreclose upon in February 2000.”).
191 See discussion supra, Section II.B (discussing the fact the sheriff’s sale reverts an extinguished mortgage back to the homeowner).
193 See *Id.* (“These counsel advised the court that they were in agreement with respect to setting aside the sheriff’s sale. An order to this effect was tendered to the court and was signed by the court on December 6, 1983, with copies served upon all counsel.”).
194 *Id.* (In fact, a third party had rights in the Smiths’ mortgage).
195 *Id.*
196 See, e.g., *Connolly*, 2014 WL 4435962, at *1 (“The affidavit states that the sheriff’s deed must be expunged because the sheriff’s sale was ‘inadvertently held.’”); *see also* Mellentine v. Ameriquest Mortg. Co., 515 F. App’x 419, 421 (6th Cir. 2013) (explaining the foreclosure was inadvertently held and the sheriff’s deed was expunged.).
197 See discussion supra, Section II.A (discussing the Michigan’s property statute and its purpose for giving notice).
198 See discussion supra, Section II.B (discussing the effect of the expungement affidavits, which is to revert the mortgage back to the homeowner).
199 *Smith*, 472 N.E.2d at 1300.
sought the judicial system to set aside the sheriff’s sale.\textsuperscript{201} The trial court, after holding a hearing, justified its reasoning for setting aside the sheriff’s sale because not doing so would lead to an inequitable result.\textsuperscript{202} The appellate court affirmed the trial court’s ruling.\textsuperscript{203}

These are just a few of the cases in which state law relies on the judicial process as the method to void a sheriff’s sale.\textsuperscript{204} State rules and statutes are in line with this method; for instance, in \textit{EMC Mortg. Corp.}, the court supports its holding with state rules of procedure, which allow a court to set aside a sale so long as proper cause is shown and would be just and proper under the facts of that case.\textsuperscript{205} Washington’s statute similarly requires that an objection to a sheriff’s sale must be made with a showing of substantial irregularity.\textsuperscript{206} Whether it is pursuant to statute, procedural rules, or case law, states have been consistent on following the judicial process as a means for aggrieved purchasers or homeowners to set aside a sheriff’s sale.\textsuperscript{207} In addition to challenging sheriff’s sales, courts around the country have faced an epidemic of another kind regarding affidavits that affect property.\textsuperscript{208}

2. One State’s Reaction to the Use of Affidavits Affecting Property

In 2011, the Maryland Court of Appeals put in place an emergency rule entitled, “Maryland Emergency Rule: Affidavits in Foreclosure Proceedings.”\textsuperscript{209} According to the new rule, courts would not only be permitted to heavily scrutinize any statute affecting property, but would actually encourage Maryland courts to do so.\textsuperscript{210} The rule was implemented

\begin{itemize}
\item \textsuperscript{201} \textit{See id.} (explaining the lender filed a petition to have the sale set aside).
\item \textsuperscript{202} \textit{Id.} at 1301 (“The order setting aside the sale, constituted an exercise of equitable jurisdiction by this court to rectify what would otherwise have been an inequitable result.”).
\item \textsuperscript{203} \textit{Id.} at 1304.
\item \textsuperscript{204} \textit{See NELSON} & \textit{WHITMAN}, supra note 4, at 640 (introducing specific reasons for requiring a court to set aside a sheriff’s sale).
\item \textsuperscript{205} Pa. R. Civ. P. 3132 states:
\begin{quote}
Upon petition of any party in interest before delivery of the personal property or of the sheriff’s deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.
\end{quote}
\item \textsuperscript{206} Wash. Rev. Code Ann. § 6.21.110 (West 2014) (“If objections to confirmation are filed, the court shall nevertheless allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting.”).
\item \textsuperscript{207} \textit{See discussion supra Subsections II.C.1.}
\item \textsuperscript{208} \textit{See discussion infra Subsection II.C.2.}
\item \textsuperscript{210} \textit{Id.} (“[T]he Rule permits and encourages Maryland courts to scrutinize affidavits.”).
\end{itemize}
in response to nationwide foreclosure fraud.\textsuperscript{211} The Maryland court was looking to scrutinize instances where lenders had not personally read and signed the affidavit, though such an affidavit was signed.\textsuperscript{212}

While this rule does not address the issue with expungement affidavits in Michigan,\textsuperscript{213} it is revealing.\textsuperscript{214} Lenders have used affidavits as a tool to obtain quick results while handling thousands of foreclosures.\textsuperscript{215} As the saying goes, when one door closes, another door opens, and recent occurrences of the expungement affidavit\textsuperscript{216} prove that lenders are adapting to the scrutiny they have received in the wake of their poor foreclosure procedures.\textsuperscript{217} It is not surprising that lenders, after facing scrutiny dealing with fraudulent foreclosure procedures, have found a tool meant to cure “inadvertently held” sheriff’s sales.\textsuperscript{218} Michigan could very well be ground zero in the spread of a new unscrupulous use of an affidavit.\textsuperscript{219} The question becomes whether expungement affidavits are lawful under statutory and common law theories, whether the use of these affidavits is justified, and whether their use should be stopped before it spreads into foreclosure proceedings around the country.\textsuperscript{220}

\textsuperscript{211} Id. (explaining the rule was proposed “in response to allegations of foreclosure fraud nationwide”).

\textsuperscript{212} Id. (stating the “affidavit may be invalid because of any of the following reasons: (1) the affiant has not read or personally signed the affidavit; (2) the affiant lacks a sufficient basis to attest to the accuracy of the facts stated in the affidavit; or (3) if applicable, because the affiant did not appear before the notary as stated, the court may order the party to show cause why the affidavit should not be stricken, and if it is stricken, why the action should not be dismissed or other relief granted”).

\textsuperscript{213} See discussion infra Section III.D (discussing the ramifications of the Maryland affidavit on the situation with expungement affidavit).

\textsuperscript{214} See Holahan, Ornstein & Yoon, supra note 209 (stating the rule was to be implemented because of lender fraud).

\textsuperscript{215} See generally Gloria J. Liddell & Pearson Liddell, Jr., Robo Signers: The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact Upon Stakeholders, 16 CHAP. L. REV. 367 (2013) (the most popular tool would seem to be the infamous robo-signatures on affidavits, which plague the foreclosure process). Lenders resorted to robo-signing to keep up with the massive amounts of foreclosures that they undertook. Id. at 377 (“[M]ortgage companies employ only one person to sign up to 10,000 foreclosure affidavits per month.”).

\textsuperscript{216} See discussion supra, Section II.B (discussing the recent influx of cases involving expungement affidavits).

\textsuperscript{217} See Liddell & Liddell, Jr., supra note 215, at 377.

\textsuperscript{218} Compare id. with discussion supra, Section II.B.

\textsuperscript{219} See discussion supra, Section II.B.

\textsuperscript{220} See discussion infra, Part III.
III. LENDERS’ USE OF EXPUNGEMENT AFFIDAVITS AND THEIR LEGALITY

The expungement affidavit unnecessarily gives lenders the power to void a sheriff’s sale and revert a mortgage back to the previous unsuspecting homeowner by simply filing a piece of paper.\textsuperscript{221} With that said, Michigan courts have almost always allowed its effect without requiring an explanation from the lender.\textsuperscript{222} However, a lender’s unilateral use of an expungement affidavit should be deemed unlawful for multiple reasons.\textsuperscript{223} First, interpreting Michigan’s statutes show that the unilateral use of the expungement affidavit is unlawful.\textsuperscript{224} Second, no matter the statutory interpretation, the expungement affidavit should be held unlawful as an irregularity in the foreclosure proceeding under Michigan case law.\textsuperscript{225} Third, courts should look at the harm to the homeowner and all policy reasons for rendering the affidavit unlawful in all contexts, excluding mutual execution between the lender and homeowner.\textsuperscript{226}

A. FILING AN AFFIDAVIT PURSUANT TO M.C.L. § 565.451A SHOULD NOT EFFECTIVELY CONVEY PROPERTY

The expungement affidavit is derived from M.C.L. § 565.451a,\textsuperscript{227} which Michigan courts interpret as statutory authority for lenders to use affidavits as a means to void sheriff’s sales.\textsuperscript{228} In relevant portion, the statute allows an affidavit to be filed based on the “knowledge of the happening of any condition or event that may terminate an estate or interest in real property.”\textsuperscript{229} With this language, the Michigan Court of Appeals in\textit{Cordes v. Great Lakes Excavating & Equipment Rental, Inc.}\textsuperscript{230} upheld the affidavit’s effect of reviving a discharged mortgage.\textsuperscript{230} The true purpose of § 565.451a should be to strictly give notice of encumbrances, including previously

\textsuperscript{221}See discussion supra, Section II.B.
\textsuperscript{223}See discussion \textit{infra}, Sections III.A–D.
\textsuperscript{224}See discussion \textit{infra}, Sections III.A–B.
\textsuperscript{225}See discussion \textit{infra}, Section III.C.
\textsuperscript{226}See discussion \textit{infra}, Section III.D.
\textsuperscript{227}MICH. COMP. LAW ANN. § 565.451a (West 2014).
\textsuperscript{228}See discussion supra, Section II.B.
\textsuperscript{229}§ 565.451a(b).
\textsuperscript{230}No. 304003, 2012 WL 2052789, at *2 (Mich. Ct. App. June 7, 2012) (“Accordingly, the affidavit contained information within the scope of MCL 565.451a(b).”).
voided sheriff’s sales.\textsuperscript{231} However, lenders have abused this statute so as to make the distinction between notice and conveyance nearly non-existent.\textsuperscript{232} Only a handful of cases, beginning with \textit{Cordes}, have directly discussed this statute and what its effect on property rights actually includes.\textsuperscript{233}

In \textit{Cordes}, the mortgagor and mortgagee agreed to reinstate a mortgage that was accidentally discharged.\textsuperscript{234} The court explained that because the expungement affidavit at issue spoke to the discharge of the earlier mortgage, which in turn spoke to the termination of an interest in property, the court upheld the affidavit’s validity under § 565.451a.\textsuperscript{235} The court’s interpretation correctly points out that the rescission and later resurrection of the mortgage would be considered an “event that may terminate an estate or interest in real property” under the Michigan statute.\textsuperscript{236} However, the court shortchanged the most critical aspect of the interpretation: whether the statute may resurrect a mortgage or simply put others on notice of such an event.\textsuperscript{237}

The statute is able to put others on notice of the “happening” of an event, but it should not have the ability to convey land and affect an interest in property, such as resurrecting mortgages.\textsuperscript{238} Despite what the court in \textit{Cordes} said, the effect of the affidavit\textsuperscript{239} was not to resurrect a mortgage, but to notify a later mortgagee that the land was already encumbered because the earlier lender and the parcel owner made a mutual agreement to reinstate the discharged mortgage.\textsuperscript{240} Because the parcel owner executed the affidavit and

\textsuperscript{231} See § 565.451a (an affidavit is meant to be sworn facts written down in order to put others on notice).

\textsuperscript{232} See Connolly v. Deutsche Bank Nat’l Trust Co., 580 F. App’x 500, 505-06 (6th Cir. 2014) (the court holds that an affidavit can void a sheriff’s sale, despite the lack of any evidence that the underlying sale was actually voided from the beginning, thereby making no true distinction between an affidavit giving notice and an affidavit actually conveying land back).


\textsuperscript{234} Cordes, 2012 WL 2052789, at *2.

\textsuperscript{235} Id. at *2 (“In the O’Connor affidavit, paragraph 2 reads as follows: ‘2. A document granting a discharge of liens for the Bank of Alpena and Kenneth H. Cordes over the premises is recorded at Liber 446, Page 53 with the Alpena County Register of Deeds.’ The Cordes discharge referenced in the affidavit plainly presented a condition that could terminate an interest in the parcel.”). The plaintiff had accidentally discharged the mortgage, and the mortgagee aimed to revive the mortgage using the expungement affidavit. Id. at *1.

\textsuperscript{236} § 565.451a(b)

\textsuperscript{237} See Cordes, 2012 WL 2052789, at *1 (the court stated the affidavit allowed the discharged mortgage to “remain[] in effect with Cordes as the lender,” which essentially revitalized a discharged mortgage

\textsuperscript{238} See discussion supra, Section II.A (an affidavit affecting property is simply a sworn set of facts that may notify others of encumbrances on the land); see also Cordes, 2012 WL 2052789, at *2 (allowing the resurrection of the mortgage).

\textsuperscript{239} See Cordes, 2012 WL 2052789, at *2 (the effect was to reinstate a mortgage that was accidentally discharged).

\textsuperscript{240} Id. at *1.
reinstated the mortgage with the register of deeds, persons were put on notice of this arrangement between the parcel owner and the earlier lender. When the expungement affidavit is used to send notice of a mutual agreement, there seems to be little reason to challenge the affidavit’s purpose; however, had the parcel owner been unaware of the lender’s actions in filing the affidavit, the lender could not have unilaterally filed the affidavit without first seeking permission from either the parcel owner or through the judicial process. This case, though sound in its particular factual circumstances, set an unfortunate precedent that justifies and expands the use of § 565.451a to not only revive a discharged mortgage, but void a sheriff’s sale.

While Connolly v. Deutsche Bank National Trust Co. followed the holding in Cordes, it expanded the application of § 565.451a by allowing expungement affidavits to void sheriff’s sales. Unlike Cordes, the defendant in Connolly unilaterally filed the expungement affidavit, stating the sheriff’s sale was “inadvertently held.” This rationale was all that the court required to rule the sheriff’s sale void. The court in Connolly failed to discuss the crucial difference between Cordes, where the lender and parcel owner agreed to the effect of the affidavit, and Connolly, where the lender’s unilateral act disrupted the foreclosure process without the homeowner’s consent or acknowledgement. The lender gave no further reason why the first sheriff’s sale was void, and allowed the affidavit to effectively revert the mortgage back to the original homeowner.

The Michigan Court of Appeals did distinguish Connolly in its later decision, Trademark Properties of Michigan L.L.C. v. Federal National Mortgage Ass’n. According to the court in Trademark Properties, the Connolly court dealt with an already void foreclosure sale before the affidavit was filed; therefore, the use of the affidavit was lawful under Michigan statute because its purpose was to notify all persons of the voided sale. Such an interpretation is in line with § 595.451a and Cordes because the affidavit’s only purpose would be to notify all interested parties of the

241 Id. at *2.
242 See discussion infra, Part III.B (due to § 565.451d, a party may not alter, through using an affidavit, the substantive rights of another party).
244 See id.
245 Id. at 505-06.
246 Id. at 502.
247 Id. at 505-06.
249 Connolly, 581 F. App’x at 502.
250 Id.
252 Id.
“happening of any condition” with the property. This does not, however, solve many key questions from Connolly, namely why or how the sheriff’s sale was “inadvertently held” and why such an inadvertently held sale is automatically rendered void without further support. The court in Trademark Properties takes the court in Connolly at its word that the property was already void before the affidavit was filed. Interestingly, the court in Trademark Properties takes the time and conducts an extensive analysis as to whether the sheriff’s sale in that case was actually void ab initio.

If the true purpose of § 565.451a is to give notice of encumbrances, including previously voided sheriff’s sales, then courts, as in Trademark Properties, should take more time understanding why a sheriff’s sale is void to begin with. Unfortunately, courts in Michigan rarely make such inquiries and homeowners like Connolly and Laura Buttazzoni are left to endure a second foreclosure process without any question as to whether the sheriff’s sale was ever really void. While Trademark Properties seems to be a step in the right direction, Michigan courts will continue to interpret its property statute to allow the resurrection of mortgages and the voiding of sheriff’s sales because its decision does not disturb the numerous cases that came before it, such as Connolly. Another state, however, takes an entirely different approach to voiding a sheriff’s sale, though its property statute is nearly identical to Michigan.

In United Companies Lending v. Greenberg, the lender, understanding it had “inadvertently held” the sheriff’s sale, sought the judiciary’s approval to set aside that sale. Even though Ohio has a nearly identical statute as Michigan, the lender’s recourse was channeled through the court system rather than the recording system when the lender faced

253 § 565.451a(b).
254 See Connolly, 581 F. App’x at 502, 505-06 (holding that an affidavit under § 565.451a can void a sheriff’s sale despite any discussion as to how the sheriff’s sale was inadvertently held). The property statute allows for an affidavit to cite facts that are in existence at the time of the filing; therefore, an affidavit cannot be filed as a way to create a fact, such as voiding a sale, without the sale actually being void at the outset. See § 565.451a.
255 See Trademark Properties, 2014 WL 6461712, at *3 n.3.
256 See id. (the court determined the sheriff’s sale was not actually void ab initio).
257 See discussion supra, Subsection II.B.1 (discussing how Michigan courts do not inquire into whether a sheriff’s sale is actually void ab initio).
258 See Connolly, 581 F. App’x at 502.
260 See discussion supra, Part II.
261 See discussion supra, Subsection II.B.1 (discussing how Michigan courts continue to allow the expungement affidavit without any rationale).
factual circumstances requiring a sheriff’s sale to be set aside.\textsuperscript{264} Even assuming that lenders in Michigan have truthfully filed the expungement affidavit because the property sold at the sale should not have been sold, as in \textit{Greenberg}, the courts in Ohio would nonetheless require the lender to use the judicial system to set aside a sheriff’s sale, despite its recording statutes.\textsuperscript{265}

In the end, § 565.451a allows lenders to file affidavits to notify interested persons of the “happening of any condition or event that may terminate an estate or interest in real property,” which means there must have been some underlying event or happening, such as a mutual agreement among parties.\textsuperscript{266} Michigan courts continually allow the affidavit to void a sheriff’s sale on the premise that it is void \textit{ab initio}, which can be seen as an event that meets § 565.451a.\textsuperscript{267} Even if Michigan lenders could file the affidavit according to § 565.451a because the sheriff’s sale was truly void, the lenders may not correct title in this manner according to a statutory provision courts fail to take into account.\textsuperscript{268}

\textbf{B.} \textit{MICHIcAN COURTS CONTINUALLY FAIL TO ACKNOWLEDGE M.C.L. § 565.451D AND ITS POTENTIAL EFFECT ON THE EXPUNGEMENT AFFIDAVIT}

Two violations of § 565.451d may arise when lenders file the expungement affidavit.\textsuperscript{269} First, the correction sought through an expungement affidavit is not one allowed under the statute.\textsuperscript{270} Second, the unilateral use of the affidavit to correct title affects the “substantive rights” of the homeowner.\textsuperscript{271} According to § 565.451d, affidavits filed with the register of deeds may “correct errors or omissions in previously recorded documents.”\textsuperscript{272} The types of corrections allowed are limited to “errors and omissions relating to the proper place of recording” and “[s]crivener’s errors and scrivener’s omissions.”\textsuperscript{273} Not only does the statute limit the type of corrections allowed, the statute will only permit a correction if “[t]he

\textsuperscript{264} Id. (the inadvertently held sheriff’s sale was void from the beginning because there was a stay in bankruptcy that disallowed the home to be sold).
\textsuperscript{265} Id.
\textsuperscript{267} See, e.g., Freund v. Trott & Trott, No. 299011, 2011 WL 5064248, at *2 (Mich. Ct. App. Oct. 25, 2011); Complaint, \textit{supra} note 146 (explaining the affidavit purported to expunge the sheriff’s sale because it was “void \textit{ab initio}”).
\textsuperscript{268} See discussion \textit{infra} Section III.B.
\textsuperscript{269} See § 565.451d(1)(a), (2)(b).
\textsuperscript{270} See § 565.451d(1)(a).
\textsuperscript{271} See § 565.451d(1)(a).
\textsuperscript{272} See § 565.451d(2)(b).
\textsuperscript{273} § 565.451d(1).
\textsuperscript{274} § 565.451d(1)(a)-(b).
affidavit does not alter the substantive rights of any party unless it is executed by that party.\footnote{274} Lenders continually file affidavits pursuant to § 565.451a in order to correct title of property that was sold during an allegedly void sheriff’s sale, but they fail to acknowledge these limitations in § 565.451d.\footnote{275}

First, because the statute at issue is limited to two types of corrections, errors dealing with the place of recording\footnote{276} and simple scrivener’s errors or omission on a document,\footnote{277} it follows that any kind of correction going beyond this is outside the authority granted under § 565.451d.\footnote{278} Expungement affidavits have the purpose of correcting legal title, which is a far more significant event than correcting the place of recording or other common scrivener’s errors.\footnote{279} Even if the sheriff’s sale is properly void \textit{ab initio}\footnote{280} and the affidavit was meant to put all persons on notice, the ultimate effect of the affidavit is to correct the deed by conveying title back to the original homeowner.\footnote{281} Such a correction violates the plain meaning of the statute because such a conveyance does not constitute either one of the two corrections specified in the statute—place of recording and scrivener’s errors.\footnote{282}

Second, even if conveying title is a correction allowed under the statute, the lender that files the affidavit cannot affect the “substantive rights” of the non-filing party.\footnote{283} According to the statute, only the party who is executing the affidavit can have its rights affected; therefore, the statute limits the severity of the correction.\footnote{284} With this in mind, the expungement affidavit’s effect of reinstating a previously extinguished mortgage clearly alters the rights of both parties because property is conveyed from one party to the other.\footnote{285} Therefore, allowing an affidavit to reinstate the extinguished mortgage will alter the rights of the homeowner, whose interest in the

\footnotesize
\begin{itemize}
  \item \footnote{274} § 565.451d(2)(a).
  \item \footnote{275} See discussion supra, Subsection II.B.1.
  \item \footnote{276} § 565.451d(1)(a).
  \item \footnote{277} § 565.451(1)(b)
  \item \footnote{278} § 565.451d.
  \item \footnote{279} See § 565.451d(1)(a)-(b) (these provisions provide the only two types of corrections allowed under the statute).
  \item \footnote{280} See discussion supra, Part II.B.2.
  \item \footnote{281} See Dixon v. Wells Fargo Bank, N.A., No. 12-10174, 2012 WL 4450502, at *1 (E.D. Mich. Sept. 25, 2012) (the affidavit was meant to “correct[] record title to show that Plaintiffs’ . . . mortgage was in full force and effect”).
  \item \footnote{282} See § 565.451d(1)(a)-(b).
  \item \footnote{283} See § 565.451(2)(b).
  \item \footnote{284} See § 565.451(1)(a)-(b) (the errors that are allowed are not serious since the corrections are limited to the place of recording and scrivener’s errors that do not affect substantive rights of the non-filing party).
\end{itemize}
property was wiped clean after the foreclosure. Because an expungement affidavit alters the homeowner and lender’s rights in the property, the statute should bar the use of the affidavit.

The procedure for correcting issues with sheriff’s sales outside Michigan provides further support to why lenders should not have the ability to correct title through unilaterally voiding sheriff’s sales. A prime example comes from Sixty-01 Ass’n of Apartment Owners v. Parsons, where the purchaser of property at a sheriff’s sale in the State of Washington could not simply fix its successful overbid by filing an affidavit and reverting the property back to the homeowner. The purchaser’s only recourse was the judicial system and showing such a correction was warranted due to an irregularity in the foreclosure process. Lenders should not have the ability to overbid on property to just, in turn, void the sale and re-foreclose on the home in order to obtain the property for a lower price.

As another example, Pennsylvania requires a showing of cause in court to correct title and order a resale of the property. In no case outside of Michigan has a lender had the privilege to foreclose on a homeowner, initiate a sale of the home, void the sale unilaterally as a way to correct title, resurrect and reinstate the extinguished mortgage, and then re-foreclose on the homeowner again. Unfortunately, lenders have had this ability for the last five years, and the stark contrast with many judicial procedures required outside of Michigan. Though adversarial situations between the lender and homeowner should require judicial oversight, Michigan leads the way for a more cost-effective way of handling corrections in title when there is mutual agreement among the lender and homeowner.

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286 See discussion supra, Section I.A (Often, lenders cannot recoup their loss from the homeowner through a deficiency judgment because the fair market value of the property is worth less than the amount owed on the mortgage).
287 See § 565.451d(2)(b).
288 See discussion supra, Subsection II.C.1 (discussing the different methods of correcting title and setting aside sheriff’s sales through the judicial process).
290 Id.
291 Id.
293 Contra Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278 (March 14, 2014) (The homeowner was foreclosed initially in 2009 and again in 2013, yet she never redeemed the property or sought to have her mortgage reinstated).
294 See discussion supra, Subsection II.C.1.
295 See, e.g., Parsons, 2014 WL 4109432, at *1 (the court required a judicial finding to determine if an overbid merited the setting aside of a sheriff’s sale).
296 See discussion supra, Subsection II.B.2 (discussing the expungement affidavit’s ability to cure mutual defects).
There are a handful of Michigan cases where both parties have mutually used the expungement affidavit to correct title.\textsuperscript{297} Using the affidavit in this way should not violate § 565.451(d)(2)(b) because an affidavit may alter substantive rights of the party executing the affidavit.\textsuperscript{298} If both parties agree to the affidavit’s effect and execute the affidavit together, then the statute should not be violated.\textsuperscript{299} Unfortunately, the correction both parties seek would be in violation of § 565.451d(1) even if the correction was done mutually because conveying property to fix title is clearly outside the scope of § 565.451d(1).\textsuperscript{300}

This is one area of the statute that should be revised because if the parties are in agreement, it would be in both the parties’ and judiciary’s interest to allow the recording affidavit to make substantial corrections, which can save time and money from having to use the court system.\textsuperscript{301} Reasons for allowing mutual use of the affidavit to correct title can take place in instances of loan modifications between the lender and homeowner after the sheriff’s sale,\textsuperscript{302} as well as when there has been an accidental rescission, as in Cordes.\textsuperscript{303} In the end, the unilateral and mutual execution of the expungement affidavit is in violation of § 565.451d; however, the lender and homeowner’s mutual use of the affidavit should be allowed for cost-saving reasons.\textsuperscript{304} Despite the statutory implications of § 565.451a and § 565.451d, the unilateral use of the expungement affidavit should be considered unlawful under Michigan’s case law regarding wrongful foreclosure actions.\textsuperscript{305}

C. A LENDER’S USE OF THE EXPUNGEMENT AFFIDAVIT SHOULD NOT BE UPHeld IN HOMEOWNER’S WRONGFUL FORECLOSURE ACTION

While a statutory analysis should be enough to render expungement affidavits unlawful, these affidavits should also be impermissible when

\textsuperscript{298} § 565.451d(2)(b).
\textsuperscript{299} Id. (An affidavit cannot “alter the substantive rights of any party unless it is executed by that party”).
\textsuperscript{300} See id. § 565.451d(1) (the statute only allows corrections of errors and omissions relating to the place of recording and other scrivener’s errors or omissions).
\textsuperscript{301} See, e.g., Cordes, 2012 WL 2052789, at *2 (the lender and parcel owner used the expungement affidavit to correct title by reviving a mortgage, which saved them from the time and hassle of going through the judicial system).
\textsuperscript{303} Cordes, 2012 WL 2052789, at *2.
\textsuperscript{304} See discussion supra, Section III.B.
\textsuperscript{305} See discussion supra, Section III.C.
challenged in a wrongful foreclosure action.\textsuperscript{306} A wrongful foreclosure action to set aside a foreclosure sale is almost always going to require the heightened standard established in \textit{Kim v. JPMorgan Chase Bank, N.A.}\textsuperscript{307} because the filing of a wrongful foreclosure lawsuit cannot toll the redemption period.\textsuperscript{308} Since almost every expungement case involved the expiration of the redemption period, it is best to analyze the affidavit against this standard.\textsuperscript{309} This heightened standard consists of a three-prong test, requiring a court to set aside a sheriff’s sale only on (1) the showing of fraud or irregularity in the foreclosure process; (2) prejudice to the homeowner; and (3) a causal relationship between the fraud or irregularity and the prejudice.\textsuperscript{310} Even under this heightened standard, the expungement affidavit is an unlawful legal instrument that cannot pass muster.\textsuperscript{311}

1. The Expungement Affidavit Constitutes Fraud or Irregularity in the Foreclosure Process

The standard for fraud or irregularity in a Michigan foreclosure procedure is high, and often courts fail to address the prejudice prong because plaintiffs are unable to get over this first hurdle.\textsuperscript{312} In \textit{Dixon v. Wells Fargo Bank, N.A.}, the court laid out the fraud or irregularity test.\textsuperscript{313} To prove fraud or irregularity, there must be a showing of: (1) misrepresentation; (2) the misrepresentation must be false; (3) the lender must know about the false or misleading statement; (4) the lender intends for the homeowner to rely on it; (5) the homeowner must have relied on it; and (6) the homeowner must suffer injury as a result.\textsuperscript{314} Even under this heightened scrutiny, the unilateral use of the expungement affidavit meets this test; therefore, it should be deemed unlawful.\textsuperscript{315}

The principal issue for declaring fraud or irregularity is whether the first two prongs of the test have been met; that is, whether the affidavit is a

\textsuperscript{306} See discussion \textit{supra}, Section I.B.

\textsuperscript{307} 825 N.W.2d 329, 337 (Mich. 2012).

\textsuperscript{308} See \textit{Conlin v. Mortg. Elec. Registration Sys.}, 714 F.3d 355, 360 (6th Cir. 2013) (“[T]he filing of a lawsuit is insufficient to toll the redemption period.”) (internal quotation marks omitted).

\textsuperscript{309} See discussion \textit{supra}, Section II.B.

\textsuperscript{310} See discussion \textit{infra}, Subsections III.C.1–2 (analyzing expungement affidavits under the Michigan wrongful foreclosure framework).

\textsuperscript{311} See \textit{discussion supra}, Part II.B.2; see also discussion \textit{infra} Part III.D (sometimes the affidavit can be beneficial if the lender and homeowner mutually use it; therefore, disallowing such a practical use would be counter-productive).
false misrepresentation. To begin, if a sheriff’s sale is actually “void ab initio,” the sale must have been unlawful or went against public policy. If a lender lies on the face of the affidavit by declaring the sale void ab initio without the sale actually violating law or public policy, that is a false misrepresentation under the first and second prongs of the fraud test.

Beginning with Freund v. Trott & Trott, P.C., the court allowed the use of an expungement affidavit based on the single proclamation that the sheriff’s sale would be treated as “void ab initio.” The court in Freund gave no other rationale why the lender could automatically void the sale. Without more, it is impossible to prove whether or not the statement is actually true.

In most cases, this problem can be solved if courts in Michigan addressed why sheriff’s sales were “inadvertently held” and whether that constituted a properly voided sale. Fortunately, the latest case out of Michigan asked such a question. In Trademark Properties, the court sought to understand why the sale could actually be void; and after doing so, the court found that the sale was not void and that the affidavit was false. This was the first time a Michigan court actually addressed the lender’s underlying rationale for voiding the sale. By distinguishing Connolly, the court in Trademark Properties left open the question of what effect an affidavit would have on a sale that is deemed void ab initio and whether an affidavit that was properly purporting to set aside a truly void sheriff’s sale could still be considered a fraud or irregularity in the foreclosure proceeding. The answer must still be yes.

Under Michigan statute, the expungement affidavit is unlawful pursuant to § 565.451d. Therefore, filing an unlawful affidavit will in

317 See BLACK’S LAW DICTIONARY, supra note 26, at 1805.
318 Dixon, 2012 WL 4450502, at *5 (the second prong of the fraud or irregularity test requires the misrepresentation to actually be false).
320 Id.
321 See id.
324 Id.
325 But see, e.g., Connolly, 581 Fed. App’x at 505 (the sheriff’s sale was “inadvertently held,” but the court did not determine why that was so); Dixon, 2012 WL 4450502, at *1 (the court explains the sheriff’s sale was void because it was “inadvertently held,” but it did not explain why it was inadvertently held).
326 Trademark Props., 2014 WL 6461712, at *3 n.3.
327 Id. ("[W]e need not decide the effect of the filing of an affidavit where a foreclosure sale was void ab initio because, here, the foreclosure sale was not void.").
329 See discussion supra, Section III.B.
essence be a misrepresentation under the fraud or irregularity test because all
interested parties from that point on will rely on an unlawful affidavit
purporting to explain rights in property that do not exist. 330 It does not matter
whether the underlying sheriff’s sale was truly void ab initio. 331 In addition,
the misrepresentation is false because the affidavit advances facts about the
property that are not true, mainly that the owner of the property is the
homeowner when it should still, in fact, be the lender. 332 Therefore, whether
the lender’s false misrepresentation stems from lying on the face of the
affidavit or from the fact that the affidavit itself is unlawful, 334 courts
should find that the use of the affidavit meets the first two prongs of the fraud
or irregularity test. 335
Overcoming the first two prongs of this test is crucial, but once the
court does, there should be no reason the last four prongs cannot be met. The
third prong requires lenders to know the statement is false and misleading. 336
In a case like Freund, the lender most certainly should know that their
proclamation is false. 337 To highlight the point, Trott & Trott attempted to
use an expungement affidavit to cure its own mistake in the subsequent case,
Phh Mortgage Corp. v. O’Neal, despite the fact there was no unlawful
conduct to render the sale void. 338 In addition, all lenders should understand
that an affidavit voiding a sheriff’s sale is unlawful under Michigan statute
and, therefore, a false misrepresentation. 339
The final three prongs of the fraud or irregularity test look first to
the lender to determine whether it intended for the homeowner to rely on the
affidavit, then to the homeowners and whether they relied on the affidavit,
and finally if their reliance caused the homeowner harm. 340 In cases of
expungement affidavits, the lender clearly relies on the homeowner to take

330 See discussion supra, Section III.B (explaining that correcting title for a party that did not
execute the affidavit is an unlawful correction under the Michigan statute and should not be allowed
to change the party’s rights in the property).
331 See discussion supra, Section III.B (explaining that even an affidavit that accurately describes a
voided sale is unlawful under the Michigan statute).
332 See discussion supra, Section III.B (discussing why a truly void sheriff’s sale will still lead to
an invalid expungement affidavit).
2013) (the lender said the sheriff’s sale was void ab initio when in reality the lender accidentally
underbid at the sale and was attempting to avoid the homeowner’s redemption).
334 See discussion supra, Section III.B.
336 Dixon, 2012 WL 4450502, at *5 (the third prong of the fraud or irregularity test is for the lender
to know the statement is false or misleading).
337 If a lender is stating something is void ab initio, but understands that there is no law being
violated, then that lender should know that what is being said is false and misleading.
339 See § 565.451d.
the property back;\textsuperscript{341} the homeowners rely on the affidavit, understanding it is again their home;\textsuperscript{342} and the homeowners often suffer injury resulting from enduring another foreclosure and sheriff’s sale, among other things.\textsuperscript{343} This last point concerning injury leads into the second and third prongs of the overall wrongful foreclosure test: prejudice and a causal connection between the fraud or irregularity and the prejudice.\textsuperscript{344}

2. \textsc{The Expungement Affidavit Prejudices the Homeowner and Such Prejudice is Directly Connected to the Affidavit’s Irregularity in the Foreclosure Process}

Once a court finds fraud or irregularity, the homeowner must prove prejudice, meaning “she would have been better positioned to preserve her interest in the property” had it not been for the fraud or irregularity.\textsuperscript{345} In addition, \textit{Kim} also requires that the fraud or irregularity be the cause of that prejudice.\textsuperscript{346} Assuming, for the sake of argument, that the use of an expungement affidavit constitutes fraud or irregularity in the foreclosure process, a homeowner should be able to equally prove prejudice from the affidavit statute.\textsuperscript{347}

In \textit{Buttazzoni v. Nationstar}, the plaintiff’s claim of fraud or irregularity was based partially on the expungement affidavit, but her claim for prejudice was based on a completely separate notice statute.\textsuperscript{348} For this reason, the court did not address whether the expungement affidavit would constitute prejudice.\textsuperscript{349} However, had the issue been posited, the plaintiff would have to succeed.\textsuperscript{350} The homeowner, Buttazzoni, was foreclosed on twice, her credit score was affected twice, she endured foreclosure proceedings for nearly four years on the same property, and she was left with a home that was significantly damaged once it was reverted back to her.\textsuperscript{351} All of this occurred because the expungement affidavit was allowed to

\begin{footnotes}
\item See \textit{Freund}, 2011 WL 5064248, at *2 (the lender states in the affidavit that it will no longer rely on the original foreclosure sale and expects the homeowner to take the title, as if the sale never happened).
\item See \textit{Dixon}, 2012 WL 4450502, at *2 (the plaintiffs continued to seek a loan modification after the foreclosure sale was voided).
\item See Plaintiff’s Response, \textit{supra} note 154, at 3 (the plaintiff alleges the expungement affidavit harmed their ability to seek a loan modification, among other claims).
\item See discussion \textit{infra}, Section III.D (discussing many of the damaging aspects of the affidavit’s effect).
\item \textit{Buttazzoni}, 2014 WL 1031278, at *3.
\item See \textit{id} (the prejudice claim was based on MICH. COMP. LAWS ANN. § 600.3205 (West 2014)).
\item See \textit{id} at *1 (the homeowner alleged the affidavit caused injury, predominantly in the form of a second foreclosure that affected her credit score).
\item See \textit{id}.
\end{footnotes}
convey property back to Buttazzoni.\textsuperscript{352} Therefore, Buttazzoni would have been in a much better position had the affidavit under the property statute never been used because she would have never regained title to the home, causing a second foreclosure proceeding three years later that would affect her credit score.\textsuperscript{353}

As another example of prejudice, the plaintiffs’ attorney in \textit{Dixon v. Wells Fargo Bank, N.A.}\textsuperscript{354} explained the homeowner’s lender, due to the expungement affidavit, “caused the necessary loss mitigation efforts to languish for several months and resulted in an even more difficult problem to solve.”\textsuperscript{355} In that case, the homeowners faced an expungement affidavit in the middle of their process to work out a loan modification and dealings with the FHA Home Affordable Modification Program.\textsuperscript{356} Had it not been for the expungement affidavit, the Dixons could very well have re-worked a loan modification and still have their home; thus, prejudice resulted.\textsuperscript{357} Unfortunately, the court in \textit{Dixon} never got to the question of prejudice and dismissed the claim.\textsuperscript{358}

The final element at issue in the wrongful foreclosure analysis is whether the fraud or irregularity and prejudice have a causal connection.\textsuperscript{359} There is such a connection if the affidavit at issue is an irregularity in the foreclosure process\textsuperscript{360} and, because of that irregularity, the homeowner endures prejudice in the form of multiple foreclosures, sheriff’s sales, and missed opportunities.\textsuperscript{361} In \textit{Buttazzoni v. Nationstar}, the homeowner would have not have received a home in disrepair three years later had it not been for the filing of the affidavit.\textsuperscript{362} In \textit{Dixon}, the plaintiff may have had the chance to successfully modify the loan if it was not for the delays caused from the affidavit.\textsuperscript{363} The causal connection is clear, since the homeowners in both situations would not have been harmed had it not been for the expungement affidavit.\textsuperscript{364} Because the expungement affidavit proves fraud or irregularity in the foreclosure process, the expungement affidavit

\textsuperscript{352}See \textit{id.}
\textsuperscript{353}See \textit{id.}
\textsuperscript{355}Plaintiff’s Response, \textit{supra} note 154, at 3.
\textsuperscript{356}Id. at 3-4.
\textsuperscript{357}See \textit{id. at 4.}
\textsuperscript{358}Dixon, 2012 WL 4450502, at *4.
\textsuperscript{360}See discussion \textit{supra}, Subsection III.C.1 (discussing fraud and irregularity stemming from the foreclosure process).
\textsuperscript{361}See discussion \textit{supra}, Subsection III.C.2 (discussing the prejudice that results from the fraud or irregularity in the foreclosure process).
\textsuperscript{363}See Plaintiff’s Response, \textit{supra} note 154.
prejudices the homeowner, and there is a connection between the two, courts should discontinue the acceptance of lender’s arguments in wrongful foreclosure actions.365

As a final matter, the proper remedy for successfully proving wrongful foreclosure is problematic for aggrieved homeowners.366 According to Dixon, the remedy for proving wrongful foreclosure is to have the foreclosure set aside and the property reverted back to the homeowner.367 The problem is, of course, the fact the homeowner is suing because the foreclosure was unlawfully set aside once already, which caused the need to argue wrongful foreclosure in the first place.368 In Freund v. Trott & Trott, P.C., the court found the wrongful foreclosure issue moot because the effect of the affidavit was that of the ultimate relief sought—to have the title reverted back to the homeowner.369 The wrongful foreclosure argument, however, should still be raised for a few reasons.370 First, the court may still deem the acts of the lender unlawful under the test for purposes of declaratory relief.371 Second, the court may award monetary damages if there is actual monetary harm.372 If lenders face these two methods or recourse enough times, they may eventually refrain from unlawfully executing the expungement affidavit.373 Therefore, the wrongful foreclosure analysis proves the unilateral use of an expungement affidavit is unlawful and that

365 See discussion supra, Subsection III.C.
368 See, e.g., Freund, 2011 WL 5064248, at *2 (“Because this is the relief ultimately sought by plaintiff, we could offer no further relief to plaintiff, and the issue regarding the validity of the foreclosure proceeding is moot.”).
369 Id.
371 See id. (explaining that for declaratory relief, there must be an “actual controversy” that “encompasses a probable future controversy relating to the legal rights and duties of the parties”).
372 See, e.g., Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278, at *1 (E.D. Mich. March 14, 2014) (the homeowner’s credit score was affected, which amounts to such monetary harm).
373 See Holahan, Ornstein & Yoon, supra note 209 (Maryland courts still instituted a rule to scrutinize fraudulent affidavits that had little real effect on the foreclosure process).
relief is still viable for a homeowner in such an action.\textsuperscript{374} Even more, further policy reasons prove courts should find this use unlawful.\textsuperscript{375}

\textbf{D. \textit{FOR MULTIPLE EQUITABLE AND POLICY REASONS, COURTS SHOULD DISALLOW THE USE OF EXPUNGEMENT AFFIDAVITS TO CORRECT TITLE}}

Three major policy reasons should persuade future courts to find the expungement affidavit unlawful.\textsuperscript{376} First, the harm and inconvenience to the homeowner should outweigh the lender’s need to use the expungement affidavit.\textsuperscript{377} Second, Michigan continues to receive challenges to the affidavit’s use in situations where other states require judicial oversight,\textsuperscript{378} and if Michigan follows in line with the rest of the country, there will be no need for homeowners to litigate the issue in the future.\textsuperscript{379} Finally, lenders have continued to adapt their methods, evidenced by misconduct with other affidavits, and courts should stem this behavior before it becomes a firmly established practice in Michigan and potentially in other states.\textsuperscript{380}

In multiple Michigan cases, homeowners experience monetary and emotional harm and inconvenience when lenders revert a mortgage back into the homeowner’s name.\textsuperscript{381} Further, expungement affidavits lead to confusion because they can disrupt the statutory redemption period if the affidavit is executed during that time.\textsuperscript{382} Often, the redemption price will be for a different value than the first sale, and homeowners will not know exactly when the redemption period expires or for what price.\textsuperscript{383} Even if the affidavit included such information or the lender sent notices of the new terms, the

\textsuperscript{374} See discussion supra, Subsections III.C.1–2.
\textsuperscript{375} See discussion supra, Section III.D.
\textsuperscript{376} See discussion supra, Section III.D.
\textsuperscript{377} See, e.g., Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 502-03 (6th Cir. 2014) (the homeowner’s redemption period was severed, which amounted to a new redemption price that was roughly $64,000 higher); Buttazzoni, 2014 WL 1031278, at *1 (the homeowner’s credit was affected twice).
\textsuperscript{378} See discussion supra, Section II.C.
\textsuperscript{379} Compare United Cos. Lending v. Greenberg, No. 80803, 2002 WL 31087627, at *1 (Ohio Ct. App. Sept. 19, 2002) with Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 505-06 (6th Cir. 2014) (the Sixth Circuit was forced to resolve the affidavit issue, whereas the underlying issue in Greenberg was not the inadvertently held sheriff’s sale, but an entirely different issue).
\textsuperscript{380} See Holahan, Ornstein & Yoon, supra note 209.
\textsuperscript{381} See Buttazzoni, 2014 WL 1031278, at *1 (The plaintiff had stated she believed her credit rating was damaged again when foreclosed on a second time).
\textsuperscript{382} See discussion supra, Part I.B; see also Connolly, 581 Fed. App’x at 502 (explaining the plaintiff’s redemption period was severed seven months in, which was before it was set to expire).
\textsuperscript{383} Id. at 502-03 (explaining the plaintiff was foreclosed on and had to pay $108,750 to redeem; however, after the new sheriff’s sale, she was required to pay a $172,000 redemption price).
homeowner would be left to take the lender at its word, which leaves the homeowner vulnerable to the will of the lender.³⁸⁴

In contrast, the lender’s purpose for executing the affidavit is either unjustified³⁸⁵ or unknown.³⁸⁶ The lender’s actions are unjustified when there is no way the sheriff’s sale was actually void.³⁸⁷ For instance, in Maltbie v. Bank of America, the court allowed the lender and homeowner to set aside the sheriff’s sale even though there was no evidence the first sale was void.³⁸⁸ This however, does not necessarily run up against public policy because both the homeowner and lender can quickly come to a resolution about reinstating the mortgage. However, often the lender has made a mistake, as in Phh Mortgage Corp. v. O’Neal.³⁹⁰ Similarly, lenders should not be allowed to use expungement affidavits when the reason for executing the affidavit is unknown to the court.³⁹⁰ When the affidavit simply states the sale was “inadvertently held,” courts should automatically take this as a sign that more investigation is needed.³⁹¹ In almost every case, lenders have gotten away with this rationale whether or not the affidavit was justified.³⁹² Therefore, courts would be well advised to discontinue the unilateral use of the affidavit because in almost all cases the affidavit was either unjustified or was filed for an unknown reason.³⁹³

Secondly, Michigan should fall in line with the rest of the country because the current state of the law has led to consistent litigation.³⁹⁴ If courts followed states like Ohio, the lender would have to seek the judiciary’s approval before setting the foreclosure sale aside.³⁹⁵ For instance, in Greenberg, the court quickly resolved the inadvertently held sheriff’s sale after the lender’s motion.³⁹⁶ There, the court rightfully set the foreclosure

³⁸⁵ See id. (The lender’s attorney filed an expungement affidavit to void a sheriff sale the lender gave poor bidding instructions on).
³⁸⁶ See e.g., Connolly, 581 Fed. App’x at 502 (the court does not explain why the sheriff’s sale was inadvertently held); Mellentine v. Ameriquest Mortg. Co., 515 Fed. App’x 419, 421 (6th Cir. 2014) (same).
³⁸⁹ O’Neal, 2013 WL 3025566, at *1.
³⁹⁰ See Connolly, 581 Fed. App’x at 502 (the court does not explain why the sheriff’s sale was inadvertently held).
³⁹² But see id. at *3.
³⁹³ See discussion supra, Section II.B.
³⁹⁴ See discussion supra, Section II.B (the case law on expungement affidavits began in 2011 and multiple cases on the subject comes out every year).
³⁹⁶ Id.
sale aside. In **Parsons**, the court did not allow the lender to set the sheriff’s sale aside even though the lender entered an overbid and sought to void the sale. Michigan’s courts give the lenders all the power over the sheriff’s sale process, even though the lenders already have power of sale and large latitude to run the foreclosure proceedings. The expungement affidavit becomes an extra arrow in the lender’s already full quiver because it permits the unlawful conveyance of land without judicial oversight. With this idea, the third policy reason concerns a broader look at how lenders have acted through a trying time for homeowners.

The final policy reason concerns lender behavior beginning with the financial crisis and the subsequent fall of the housing market. Maryland courts saw a major problem concerning lenders falsifying affidavits through robo-signatures. For that reason, the Maryland Court of Appeals instituted an emergency rule to heighten the scrutiny under which such affidavits were reviewed. The court specifically targeted instances where the affiant had not actually signed the affidavit or could not attest to the facts in the affidavit. This is revealing in two ways. First, it proves that the expungement affidavit would not be the first time lenders have attempted to cut corners during the foreclosure process. Second, it also proves lenders will take steps to ensure the process is fulfilled the way they expect it to be. However, Michigan courts are less able to ensure a fair process for both the lender and homeowner if courts do not first review the affidavit closely, such as Maryland began doing in 2011.

Whether the policy reason is grounded in helping the homeowner or righting the litigation process, the answer seems clear: expungement

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397 Id.
399 Id.
400 See discussion supra, Section I.B.
401 See discussion supra, Sections III.A–C.
402 See discussion supra, Subsection II.B.3 (affidavits affecting property became a big issue for Maryland).
403 See Henry, Reese & Torres supra note 1.
404 See Holahan, Ornstein, & Yoon, supra note 209 and accompanying text; see generally Don Mayer, Anita Cava, & Cathryn Baird, *Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515 (2014) (discussing a more in-depth look at other issues in foreclosure law on a national scale); see also Liddell & Liddell, Jr., supra note 215 (same).
405 See Holahan, Ornstein, & Yoon, supra note 209 and accompanying text.
406 Id.
407 Id.
408 Id.
affidavits can harm homeowners, work at odds with other state foreclosure processes, and continue a long line of unscrupulous behavior among lenders.\textsuperscript{410} For such policy reasons, courts should deem the unilateral use of expungement affidavits unlawful.\textsuperscript{411}

CONCLUSION

Michigan lenders have relied on a process to void sheriff’s sales and re-foreclose on homeowners that is simply counter-intuitive.\textsuperscript{412} At first, this process may not seem precarious, because a homeowner is regaining possession of the mortgage.\textsuperscript{413} However, repossessing a mortgage can lead to dire consequences, such as the imminent possibility of a second foreclosure that may affect the homeowner’s credit.\textsuperscript{414} If the mortgage does go to a second sheriff’s sale, the bid may change the redemption price that the homeowner must pay in order to keep the property.\textsuperscript{415} If anything, this lender practice has caused great confusion among homeowners throughout Michigan.\textsuperscript{416} Unneeded litigation has ensued and many homeowners feel the judicial system has betrayed them.\textsuperscript{417}

There are many ways in which this problem can be solved.\textsuperscript{418} The simplest and most straightforward solution is legislative action.\textsuperscript{419} The power of this lender practice has been initially fueled through statute.\textsuperscript{420} It would not be difficult for the Michigan Legislature to simply enact a provision that clarifies the power of affidavits affecting real property.\textsuperscript{421} Though this may be the most straightforward solution, it is not the only solution. As Michigan’s statute is written, it could be construed in various ways to

\textsuperscript{410} See discussion supra, Section III.D.
\textsuperscript{411} See discussion supra, Section III.D.
\textsuperscript{412} Compare discussion supra, Section II.B. with discussion supra, Section II.C (proving Michigan is the only state that allows the expungement affidavit to void sheriff’s sales; whereas, other states require the judicial process to void sheriff’s sales).
\textsuperscript{413} See, e.g., Connolly v. Deutsche Bank Nat’l Trust Co., 581 F. App’x 500, 502 (6th Cir. 2014).
\textsuperscript{415} Connolly, 581 F. App’x at 502 (the first sale was for $108,750, but the second sale was for $172,000).
\textsuperscript{416} Complaint, supra note 146 (the plaintiff alleges that the affidavit caused her “loss mitigation efforts to languish for several months and resulted in an even more difficult problem to resolve”).
\textsuperscript{417} See discussion supra, Section II.C (discussing how homeowners in other states do not have the issue of whether the lender will unilaterally void sheriff’s sales because the judicial process takes over).
\textsuperscript{418} See discussion supra, Part III (discussing how the expungement affidavit is unlawful).
\textsuperscript{419} See discussion supra, Section II.C (discussing how the legislature can narrow the use of the expungement affidavit according to Michigan’s statute).
\textsuperscript{420} See §§ 565.451a, d.
\textsuperscript{421} See § 565.451a
become more aligned with the public’s interest. In addition, Michigan courts can continue on the path of Trademark Properties and scrutinize whether sheriff’s sales are actually void. These approaches could greatly frustrate lenders and their ability to effectively void sheriff’s sales.

This lender practice is a novel and unique process that has not gained much attention as other issues in foreclosure law. One reason may be that the use of expungement affidavits has not yet spread out of control. However, as banks perfect the practice in Michigan, the problem may more easily spread into other states’ legal systems and infect those states’ affidavit statutes regarding real property. Rather than wait to see just how far lenders will take the practice of voiding sheriff’s sales, reverting mortgages, severing redemption periods, re-foreclosing on homeowners, and extending the overall mortgage foreclosure process, it is imperative that the courts and legislature act now to disarm this vorpal sword lenders have armed themselves with.

422 See discussion supra, Sections III.A–B (discussing how the legislature should uphold the statutes’ provisions while incorporating a way for lenders and homeowners to mutually correct conveyances).


424 See, e.g., Holahan, Ornstein & Yoon, Supra note 209 (the court’s emergency rule was enacted to quell the increase in fraudulent affidavits).

425 See, e.g., Mayer, Cava & Baird, supra note 404; Liddell & Liddell, Jr., supra note 215.

426 See discussion supra, Section II.C (discussing the way in which lenders must void sheriff’s sales outside of Michigan).

427 See discussion supra, Section II.A (discussing how many property statutes are nearly identical to those in other states).

428 See discussion supra, Part III (discussing the reasons why the expungement affidavit is unlawful).

429 See discussion supra, Section III.D (discussing the many policy reasons for rendering the expungement affidavit unlawful).