THE

Elder Law

JOURNAL

VOLUME 6 NUMBER 2 1998

PRODUCED BY STUDENTS OF THE UNIVERSITY OF ILLINOIS COLLEGE OF LAW, URBANA-CHAMPAIGN

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JOURNAL

VOLUME 6 NUMBER 2 1998

Member, National Conference of Law Reviews

The Elder Law Journal (ISSN 1070-1478) is published twice annually for $25 per volume by the University of Illinois at Urbana-Champaign, College of Law, 504 East Pennsylvania Avenue, Champaign, IL 61820. Single issues are available for $15 per copy. Orders for new subscriptions, renewal of subscriptions, and single issues must be accompanied by payment.

POSTMASTER: Send address changes to *The Elder Law Journal*, 244 Law Building, 504 East Pennsylvania Avenue, Champaign, IL 61820.

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Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics

Steven Keith Berenson

Because older and younger Americans bring vastly different life-perspectives to dialogic encounters, the current generations of older and younger Americans have difficulty discussing solutions to national problems that will affect both groups, such as health care and Social Security reform. The author, however, postulates that the two groups will be better able to communicate despite their different experiences if both groups meet in a common social milieu. Mr. Berenson suggests that because elder law clinics encounter issues similar to the national problems faced by both age groups, they are ideal arenas within which dialogic encounters can take place between older and younger Americans. Mr. Berenson concludes the article with a discussion of ethical issues that elder law clinic practitioners may face during such dialogic encounters.

I. Introduction

According to the popular press, America may be headed toward a full-blown generation war.[1] The projected conflict

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Mr. Berenson would like to thank Greg Alexander and Deanna Sampson for their helpful comments on earlier drafts of this article.

1. *See, e.g.*, James A. Barnes, *Age-Old Strife*, 23 NAT'L J. 216 (1991); Christopher John Farley, *Taking Shots at the Baby Boomers: A New—and Young—Breed of Social Activists Issues a Call to Arms*, TIME, July 19, 1993, at 30; Lucy Howard & Ned Zeman, *Generation War*, NEWSWEEK, Feb. 10, 1992, at 8; Paul Magnusson, *Young*

focuses on issues such as the federal budget deficit and major federal programs including Medicare and Social Security, which are often portrayed as being excessively beneficent to senior citizens while being excessively burdensome to younger Americans.[2] Though this account may overstate the problem, a broad national dialogue concerning the content and scope of programs involving intergenerational transfers of wealth is both necessary and likely to occur in the near future. The outcome of any such dialogue will have a direct impact on current senior citizens and younger Americans. However, these two groups are poorly situated to discuss the important issues at stake in such a debate.

The ability of individuals to communicate with and to understand one another is largely determined by the social environment in which they are situated and by the collection of life experiences that each brings to dialogic encounters.[3] In the case of senior citizens and younger Americans, these factors are likely to be so different that genuine communication across generational lines becomes extremely difficult. However, dialogic encounters can moderate those differences in ways that will make future communications across generational lines more successful. Unfortunately, there are few opportunities for dialogic encounters between older and younger Americans in contemporary society.

This article examines law school elder law clinics as small-scale, but promising, sites for dialogic encounters between older and younger Americans. The result of such communication is certainly consistent with the broad educational goals of law school clinics. However, the standard conception of attorney-client relationships used in most law school clinics does not encourage, and may even be actively hostile to, the kind of dialogue that is necessary to intergenerational learning. One purpose of this article, therefore, is to sketch an outline of a more dialogic alternative to this standard conception. In addition to providing this intergenerational learning, such an alternative must deliver high-quality legal services and be consistent with existing ethical requirements for lawyers. This article's effort to de-

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America's Rallying Cry: "Dis the Deficit," BUS. WK., Aug. 9, 1993, at 37; *Seniors, Boomers and Youth: Will It Be War?*, 25 NAT'L J. 803 (1993).

2. *See* Barnes, *supra* note 1; Farley, *supra* note 1; Howard & Zeman, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

3. *See, e.g.*, Steven M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679 [hereinafter Feldman, *Republican Revival*].

velop such an alternative is achieved largely through the use of a hypothetical case involving the common elder law issue of counseling a client on advance health-care directives.

II. The Coming Generation War?

To a follower of the mass circulation press in America in the mid-1990s, an all-out generation war seemed to loom on the horizon.[4] A number of advocacy groups, purportedly representing the interests of "Generation X," began advancing the claim that American social policy unduly favors the interests of older persons at the expense of younger generations.[5] Such groups featured provocative names such as "Lead . . . or Leave"[6] (Lead or Leave) and "Third Millennium,"[7] and cultivated images and tactics that were much more confrontational than conversational. For example, in the words of Jon Cowen, one of Lead or Leave's young and charismatic leaders who was fond of referring to the federal budget deficit as "my generation's Vietnam," "[w]e have to ask ourselves how [the elderly] can in good conscience sell out their children and their grandchildren's future."[8]

At around the same time as this activity among younger Americans, the chief advocacy group in support of the interests of older Americans, the American Association of Retired Persons (AARP), found itself under attack in Washington.[9] Congress held hearings addressing the question of whether the organization should lose its tax-exempt status.[10] The Republican Party's "Contract with America"—the plan on which the party based its recapture of a majority in the House of Representatives in 1994—contained planks calling for reforms to programs that primarily benefitted, and were extremely pop-

4. *See* Barnes, *supra* note 1; Farley, *supra* note 1; Howard & Zeman, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

5. *See* Farley, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

6. *See Seniors, Boomers and Youth: Will It Be War?*, *supra* note 1. Lead or Leave derived its name from a pledge it asked Congresspersons to sign that promised that they would leave office if the federal budget deficit were not cut in half within four years. *See also* Magnusson, *supra* note 1.

7. *See* Farley, *supra* note 1.

8. *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

9. *See* Eric Weissenstein, *Senators, Not-for-Profits Set for Duel*, MOD. HEALTHCARE, June 19, 1995, at 5, 5.

10. *See, e.g.*, Thomas McArdle, *Golden Oldies: American Association of Retired Persons' Liberalism*, NAT'L REV., Sept. 11, 1995, at 44; Thomas Rosenteil, *Buying Off the Elderly*, NEWSWEEK, Oct. 2, 1995, at 40; Weissenstein, *supra* note 9, at 5.

ular with, older Americans.[11] Some writers went so far as to describe the current generation of older Americans as the "self-centered set," willing to do whatever it takes to preserve the current government largesse of which they are the beneficiaries.[12]

Of course, notions of intergenerational division are not new to American public consciousness. In his famous inaugural address, John F. Kennedy evoked just such an image in stating "[l]et the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans."[13] Later in the 1960s, Yippie icon Jerry Rubin coined the unforgettable aphorism "never trust anyone over 30."[14] More recently, in his 1993 inaugural address, President Clinton sought to invoke imagery similar to that used by President Kennedy when, after "thank[ing] the millions of men and women whose steadfastness and sacrifice triumphed over depression, fascism and communism," he proclaimed that "[t]oday, a generation raised in the shadows of the cold war assumes new responsibilities."[15]

Nonetheless, the more recent expressions of intergenerational conflict seem to differ from those just mentioned, and not only in terms of the harshness of their rhetoric. Whereas the earlier expressions of intergenerational conflict have their roots in broad conceptions of generational attitudes, experiences, and orientations, the roots of the more recent expressions of conflict are in the more mundane world of debits and credits concerning federal budgetary figures.[16] When organizations such as Lead or Leave and Third Millennium first achieved prominence during the first years of the 1990s,[17] the annual

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11. *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 3-7, 115-23 (Ed Gillespie & Bob Schellhas eds., 1994).

12. *See* Barnes, *supra* note 1.

13. Theodore Otto Windt, Jr., *President John F. Kennedy's Inaugural Address, 1961*, *in* THE INAUGURAL ADDRESSES OF TWENTIETH CENTURY PRESIDENTS 181, 186 (Halford Ryan ed., 1993).

14. *See generally* Michael Tobin, *Yippie to Yuppie*, INDUSTRY WK., June 5, 1995, at 11.

15. Halford Ryan, *President Bill Clinton's Inaugural Address, 1993*, *in* THE INAUGURAL ADDRESSES OF TWENTIETH CENTURY PRESIDENTS, *supra* note 13, at 299, 304.

16. *See* Russ Wiles, *Boomers, Generation X'ers May Fight over Benefit Scraps*, ARIZ. REPUBLIC, Feb. 4, 1995, at E1.

17. These organizations did not appear on the scene without precedent. In the mid-1980s, Paul Hewitt, an aide to former Minnesota Senator David Durenberger, founded the organization Americans for Generational Equity (AGE), which, prior to its demise in 1990, advanced themes similar to those advanced by Lead or Leave and Third Millennium. *See* Heather R. McLeod, *The Sale of a Genera-*

federal budget deficit swelled to nearly 300 billion dollars,[18] and the public debt of the U.S. Treasury exceeded four trillion dollars.[19] Interest payments on this debt amounted to more than fourteen percent of the 1993 federal budget.[20] At the time of this writing, the public debt stands at nearly five and one-half trillion dollars.[21] Given recent reductions in the rate of growth in spending for numerous other federal programs, the percentage of the federal budget devoted to debt service will likely increase at an even greater rate.[22] Many young persons view this debt, and the mandatory payments that are likely to be necessary to finance it into the distant future, as a legacy left to them by prior generations.[23]

Medicare and Social Security, the two federal programs that are the primary source of public benefits to older Americans, are of particular concern to many younger and older Americans. These programs are huge sources of public expenditures.[24] The cost of the Medicare program in 1991 was 102 billion dollars,[25] and benefits paid pursuant

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tion, AM. PROSPECT, Spring 1995, at 93. In 1992, former Senators Paul Tsongas and Warren Rudman, and former U.S. Commerce Secretary and Wall Street financier Peter Peterson formed the Concord Coalition, which shares many of the above-named organizations' budgetary priorities, if not their rhetoric of intergenerational conflict. Interestingly, Lead or Leave, AGE, and the Concord Coalition have all relied heavily on Peterson's financial support. *See id.*; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1. Those organizations and Peterson also have both financial and programmatic links to former presidential candidate Ross Perot and his Reform Party. *See* McLeod, *supra*. Indeed, former Colorado Governor Richard Lamm, who ran against Perot for the Reform Party's presidential nomination in 1996, is a former chairman of AGE. *See* Barnes, *supra* note 1, at 216.

18. The federal budget deficit reached $290,403 billion in 1992. *See Receipts/Outlays/Deficit History* (visited Aug. 17, 1998) <http://ibert.org/deficit.html> (listing annual federal budget surpluses and deficits according to annual presidential budget submissions).

19. The U.S. Treasury reported the public debt to be $4,064,620,655,521.66, as of September 30, 1992. *See The Public Debt to the Penny* (visited Aug. 17, 1998) <http://www.publicdebt.treas.gov/opd/opdpenny.htm> (the Treasury Department's daily, monthly and yearly listings of the public debt).

20. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., INTERIM REPORT TO THE PRESIDENT 10-11 (1994).

21. *See The Public Debt to the Penny* (visited Aug. 17, 1998) <http://www.publicdebt.treas.gov/opd/opdpenny.htm> (public debt as of November 25, 1997).

22. *See* Christopher Georges, *Budget Deficit at End of Fiscal Year Shrank to the Lowest Gap Since 1974*, WALL ST. J., Oct. 28, 1997, at A24.

23. *See* Magnusson, *supra* note 1.

24. *See generally* Mark Weinberger, *Social Security: Facing the Facts, Soc. Sec. Privatization*, SSP NO. 3, Cato Institute, Apr. 10, 1996.

25. *See* RICHARD A. POSNER, AGING AND OLD AGE 265 n.5 (1995) (citing U.S. SENATE SPECIAL COMMITTEE ON AGING ET AL., AGING IN AMERICA: TRENDS AND PROJECTIONS 239 tbl.8.1 (1991)). If other federal programs that provide medical benefits

to the Social Security program amounted to 332 billion dollars in 1995.[26] In 1993, total expenditures on Medicare, Medicaid, and Social Security amounted to about eight percent of the U.S. economy as measured by the total gross domestic product (GDP).[27]

Moreover, there is reason to expect that these numbers will increase substantially with the coming "greying" of America. Currently, the percentage of Americans over the age of sixty-five is around thirteen percent.[28] However, that figure is projected to increase to approximately seventeen percent by the year 2020.[29] What Richard Posner describes as the "dependency ratio," that is, the proportion of those Americans of "retirement age" (sixty-five or older) to those of "working age" (twenty to sixty-four), is likely to increase dramatically as well.[30] Thus, while there are currently nearly five working age persons for each person over age sixty-five in America, that figure is expected to drop by the year 2030 to fewer than three working age persons for each person over age sixty-five.[31]

These numbers certainly seem daunting as they relate to Medicare. Older persons (those over sixty-five) already account for a disproportionately large percentage of medical expenditures in this country.[32] Specifically, older persons account for more than one-third of total medical expenditures despite making up less than thirteen percent of total population.[33] Therefore, the increase in the dependency ratio is likely to mean an increase in aggregate health care costs.[34] Unless the government makes changes to the program, the Medicare Public Trustees forecast that Part A of the program, which

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to the elderly (such as Medicaid) were included, this amount would increase to 126 billion dollars. *See id.*

26. *See* Richard L. Kaplan, *Top Ten Myths of Social Security*, 3 ELDER L.J. 191, 193 (1995) (citing George J. Church & Richard Lacayo, *Social Insecurity*, TIME, Mar. 20, 1995, at 24, 28).

27. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 14-15.

28. *See* POSNER, *supra* note 25, at 35 tbl.2.1.

29. *See id.*

30. *See id.* at 39. Posner properly points out that use of the dependency ratio figure is somewhat misleading, because not all persons over the age of 65 are "dependent" on "working age" persons in that older persons may not be retired or may be able to rely on accumulated savings for support. Additionally, not all persons of working age are "independent" in that many are not actually working. *See id.* at 40.

31. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 14.

32. *See* POSNER, *supra* note 25, at 36.

33. *See id.*

34. *See id.*

primarily covers inpatient hospital costs,[35] will be insolvent by the year 2001.[36] Moreover, if the extraordinary growth in health care costs that characterized the 1980s and early 1990s returns, the President's Bipartisan Commission on Entitlement and Tax Reform (the Kerrey-Danforth Commission) predicts that the percentage of GDP attributable to Medicare and Medicaid will increase nearly fourfold between 1993 and 2030 to approximately eleven percent.[37]

The impact of the changing dependency ratio on Social Security may be even more daunting given the implicit "intergenerational compact," which is the key to the program.[38] While in 1995, the Social Security program took in $58 billion more in revenues than it paid out in benefits, current estimates are that the changing dependency ratio will cause benefit payments to exceed revenues collected by the year 2013.[39] Unless changes are made to the program, the Social Security "trust fund"[40] is expected to run out of money entirely by the year 2029.[41] Moreover, from the perspective of current workers, the "deal" of Social Security looks significantly less like a good one than it did from the perspective of previous generations of workers. The first generation of retirees under Social Security received a "windfall" in

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35. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 474 (2d ed. 1997). Medicare Part B, known as Supplemental Medical Insurance, primarily covers physician care expenses. *See id.*

36. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 16-17.

37. *See id.* at 14-15. The Commission's more conservative estimate, excluding the return of "extraordinary" health care cost increases, is that the percentage of GDP attributable to Medicare and Medicaid will nonetheless more than double, from 3.3% in 1993 to 7.2% in 2030. *See id.*

38. In using the term "intergenerational compact" here, I am referring particularly to Social Security's "pay-as-you-go" structure, pursuant to which contributions by current workers, in the form of payroll taxes, go to pay for benefits paid to current retirees, with the at least implicit expectation that future generations will similarly be willing to foot the bill for the current generation of workers' retirement. *See generally* Kaplan, *supra* note 26, at 193.

39. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 18-19.

40. As Richard Kaplan points out, the term "trust fund" is something of a misnomer, because there is no pool of money sitting around, in the sense of a bank account, to pay future Social Security benefits. *See* Kaplan, *supra* note 26, at 192-94. However, to the extent that the government has dedicated previous surpluses in the Social Security program to other governmental purposes, it is obligated to pay those funds back. *See id.* Thus, there is a sense in which past surpluses can be expected to be available to pay benefits in excess of annual receipts for some period into the future.

41. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 18-19.

the sense that they received benefits without having made any payments into the system.[42] In light of the relatively low tax burden imposed by the program,[43] and the unlimited duration of the benefits that the program paid in its early years, the average retirees for the next few generations still collected on average much more in Social Security benefits than they paid into the system in taxes.[44] However, with the changing dependency ratio, increases in the amount of Social Security taxes collected from each person,[45] and reductions in the amount of benefits paid, it is becoming increasingly likely that future generations may not be able to "recover" their full "investments" in the Social Security system.[46] While still receiving some benefit, many in future generations will not take in amounts greater than or equivalent to the full amount paid by them in taxes.[47] Of course, this news might not sound all that bad to the vast majority of young Americans who do not believe that Social Security will be around to pay them *any* benefits by the time they retire.[48] Indeed, in the *Top Ten Myths of Social Security*, Richard Kaplan points to a widely cited survey that revealed that nearly twice as many young Americans believe that UFOs exist than believe that Social Security benefits will be available to them when they retire.[49]

Despite the rather ominous picture painted above, the indicators of an all-out generation war seem to have died down a bit in the last couple of years. Lead or Leave closed its doors in 1995 amid accusations that it had greatly overstated its membership and degree of support.[50] As of the end of Fiscal Year 1997, the federal budget deficit had shrunk to a "mere" $22.6 billion.[51] In his 1998 State of the Union Address, President Clinton announced projections that the federal budget will show a surplus beginning in Fiscal Year 1999.[52] The extraordinary inflation that characterized increases in medical costs dur-

42. *See* POSNER, *supra* note 25, at 282-83.
43. *See* Kaplan, *supra* note 26, at 196-97.
44. *See id.* at 197.
45. *See id.* at 197-98.
46. *See id.* at 198. The reductions in benefits paid include those that will result due to the increase in retirement age.
47. *See id.*; *see also* POSNER, *supra* note 25, at 283.
48. *See* Kaplan, *supra* note 26, at 198.
49. *Id.* (citing Wiles, *supra* note 16).
50. *See* Martha Brant, *Gen X's Dynamic Duo Flames Out*, NEWSWEEK, May 22, 1995, at 22.
51. *See* Georges, *supra* note 22.
52. *Transcript of the State of the Union Message from President Clinton*, N.Y. TIMES, Jan. 28, 1998, at A19.

ing the 1980s and early 1990s abated significantly with the widespread implementation of managed care and other cost-cutting measures in the health care industry.[53] This fact should make addressing the Medicare budgetary crisis considerably more manageable.[54] Moreover, there is good reason to believe that the Social Security system's long-term viability could be ensured through relatively minor changes, such as a small increase in the payroll tax and a very gradual rise in the retirement age one must reach to qualify for full benefits.[55] Also important is President Clinton's pledge reserving 100% of any future federal budget surplus to fund Social Security until there is an assurance of the program's solvency.[56]

III. Impediments to Dialogue and Understanding Between Senior Citizens and Twenty-Somethings Regarding the Nature and Scope of Future Changes to Public Programs

The continuing debates over the degree of changes necessary to ensure viability of the Medicare and Social Security systems, or whether such programs ought to be preserved at all, are fierce and are likely to continue indefinitely into the future.[57] The issues are sufficiently complex that a detailed analysis of the policy choices available would go beyond the scope of this article. What seems clear, nonetheless, is that the required changes will be of sufficient magnitude and consequence as to warrant a broad national debate over the form, substance, and degree of any such changes.[58] Although President Clinton has initiated a series of public forums to discuss possible changes to the Social Security program,[59] it is far from clear that these will lead to

53. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 16-17.

54. *See id.*

55. *See id.* at 18. The Bipartisan Commission that was appointed to "fix" the Social Security system in 1983 found that the system would remain solvent for the next 45 years through the enactment of minor changes. *See* Kaplan, *supra* note 26, at 213. Of course, there are many who disagree significantly with this conclusion, and a variety of dramatic alterations to the program have been proposed. *See, e.g.*, Weinberger, *supra* note 24.

56. *See Transcript of the State of the Union Message from President Clinton*, *supra* note 52.

57. *See generally* Barnes, *supra* note 1; Farley, *supra* note 1.

58. *See generally* Church & Lacayo, *supra* note 26, at 24.

59. *See* Richard W. Stevenson, *Clinton Opens Campaign for Quick Action on Social Security*, N.Y. TIMES, Feb. 10, 1998, at A16.

a broader national dialogue. Moreover, there is reason to believe that the two constituencies with perhaps the most at stake in such a debate—the current and near-future beneficiaries of these programs and the newly employed, Generation X workers—are ill-suited to carrying on such a broad dialogue with each other over the future of these programs.

A number of factors are likely to impede a genuine dialogue between senior citizens and twenty-somethings regarding the proper future scope of social programs affecting transfers of wealth between generations.[60] This article will discuss two; namely, that (1) senior citizens and younger Americans generally inhabit very different physical and social realms;[61] and, (2) given that the formative stages of life for senior citizens and younger Americans occur during very different time periods, fundamentally different social variables are likely to have shaped the thinking and understanding processes of the two generations with very different results.[62] Each of these factors is likely to have a negative impact on any efforts by older and younger Americans to communicate with and understand one another regarding major public policy issues.

To an increasingly large extent, older and younger Americans tend to inhabit separate physical and social environments.[63] For example, increasingly large numbers of older Americans reside in a variety of age-restricted housing communities.[64] Older persons do not generally spend much time in the locations where younger persons most frequently tend to congregate, such as schools and workplaces.[65] Also, most older and younger persons tend to spend their social and recreational time in different settings from the other.[66]

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60. *See generally* Barnes, *supra* note 1; Farley, *supra* note 1; Church & Lacayo, *supra* note 26.

61. *See* Magnusson, *supra* note 1.

62. *See generally* Wiles, *supra* note 16.

63. *See generally* Magnusson, *supra* note 1.

64. *See generally* Senior Civil Liberties Ass'n, Inc. v. Kemp, 761 F. Supp. 1528 (M.D.Fla. 1991); Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, 511 So. 2d 962 (Fla. 1987); Taxpayers Ass'n of Weymouth v. Weymouth Township, 364 A.2d 1016 (N.J. 1976); Mary Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977).

65. This has been exacerbated by the fact that the median age of retirement (i.e., exit from the workplace) has been declining for decades and is expected to reach age 62 by the year 2000. *See* POSNER, *supra* note 25, at 36-37 & fig.2.3.

66. *See generally id.* at 122-56 (discussing a wide variety of behaviorial differences between the young and old).

The fact that older and younger persons spend so much of their time in different settings is likely to inhibit their ability to communicate with and understand each other. A person's understanding of another's communicative actions is heavily influenced by the social environment within which the receiver of the communication is situated. In the words of literary critic Stanley Fish, all hearers are members of "interpretive communities."[67] Such communities constitute "a form of life," which includes certain "objects, purposes, goals, procedures, values, and so on" that influence and shape the way we hear and interpret other's statements.[68]

A classic example from Fish comes from the title question of his essay, "Is There a Text in This Class?"[69] Upon hearing this question, students in the typical college classroom are likely to interpret it as an inquiry into whether there is an assigned textbook for the course.[70] However, students in a literary criticism course would likely view the same question as an inquiry regarding the appropriate theory of literary interpretation for the class. Each of these conflicting interpretations would be equally "correct" in the different setting within which the question was heard.[71] Thus, meaning depends upon the situation within which the interpreter is located.[72]

In other words, all understanding is contextual.[73] "A sentence is never apprehended independently of the context in which it is perceived, and therefore, we never know a sentence except in the stabi-

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67. *See* Feldman, *Republican Revival*, *supra* note 3, at 707 & n.169. The discussion throughout the remainder of this section draws on understandings developed in the fields of interpretation or hermeneutics. The two theorists primarily relied upon, Stanley Fish and Hans-Georg Gadamer, have done most of their work regarding the interpretation of literary texts and works of art respectively. *See* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 35 (1988 ed.); Feldman, *Republican Revival*, *supra* note 3, at 705 n.161. Nonetheless, the principles articulated by these theorists can be applied to "any meaningful thing, event or action that can be understood or read as if it were text." Feldman, *Republican Revival*, *supra*, note 3, at 707 n.167. Speech and other communicative actions between members of different generations plainly qualify as such "text-analogues." *Id.*

68. Feldman, *Republican Revival*, *supra* note 3, at 707 & n.169 (quoting Stanley Fish, *Is There a Text in this Class?*, *in* IS THERE A TEXT IN THIS CLASS? 303-04 (1980) [hereinafter Fish, *Is There a Text*]).

69. Fish, *Is There a Text*, *supra* note 68.

70. *See id.* at 303-04.

71. *See id.*

72. *See id.*

73. *See* Feldman, *Republican Revival*, *supra* note 3, at 709.

lized form a context has conferred already."[74] However, a statement's meaning can change as the context within which it is received changes.[75] Thus, senior citizens and younger Americans appear to inhabit different interpretive communities given the extent to which the two groups' social circumstances differ. The contexts in which each group will interpret communicative efforts regarding social policy issues may be so different that each will attach different meanings to similar statements, making effective communication across the generations difficult or impossible.

Not only are persons' understandings of communicative actions shaped by their current interpretive communities, but such understandings are also shaped by the personal histories and the wealth of life experiences that each person brings to each communicative encounter.[76] Philosopher Hans-Georg Gadamer refers to these collective reservoirs of meaning as "traditions."[77] "Our historical consciousness is always filled with a variety of voices in which the echo of the past is heard. Only in the multifariousness of such voices does it exist: this constitutes the nature of the tradition in which we want to share and have a part."[78] Such traditions direct and constrain our understanding.[79] Thus, older and younger Americans are likely to have differing interpretations of communications across the generations to the extent the two groups have gone through different stages of their lives during different historical periods.

While this perspective seems to suggest that understanding across generational lines is extremely difficult, the good news is that, although traditions in the above-described sense are constraining, they also are enabling.[80] In Gadamer's terms, from tradition, we de-

74. *Id.* at 710 n.178 (quoting Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases, in* INTERPRETIVE SOCIAL SCIENCE: A READER 243, 256 (Paul Rabinow & William M. Sullivan eds., 1979).

75. *See id.* at 709.

76. *See id.* at 707.

77. *See id.* at 707 n.168 (quoting HANS-GEORG GADAMER, TRUTH AND METHOD 284 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989) [hereinafter GADAMER, TRUTH AND METHOD]).

78. *Id.*

79. *See id.* at 707.

80. *See id.* at 708; *see also* Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2249 & n.34 (1993) [hereinafter Feldman, *Persistence of Power*].

velop certain "prejudices."[81] However, Gadamer does not view the term "prejudice" in its current pejorative form, meaning an unthinking bias against someone or something.[82] Rather, Gadamer views prejudices as those preexisting cognitive structures allowing us to experience or understand statements in the first place.[83] "[P]rejudices, in the literal sense of the word, constitute the initial directness of our whole ability to experience. Prejudices are biases of our openness to the world."[84]

Moreover, not only are such prejudices enabling in that they allow us to understand, but both prejudices and the traditions they spring from are mutable, and new experiences can alter them.[85] In fact, the very statements we are trying to understand alter our prejudices and traditions, reshaping them as part of the very act of interpretation itself.[86] Stephen Feldman describes this interpretation as a dialogue: "[I]t requires one to question the text, to probe for its meaning, to ask new questions, to listen to the answers, and to continue in this dialogical process as if in conversation."[87] The "fore-understandings" that one brings to the dialogic encounter as a result of one's prejudices and traditions are thus transformed by the communicative actions themselves.[88]

Where the "text" to be interpreted *is* another person, the analogy to dialogue becomes more than a metaphor. "In a dialogue, meaning and understanding arise in the give and take between the two speakers."[89] As Gadamer writes: "To reach understanding in a dialogue is not merely a matter of putting oneself forward and successfully as-

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81. Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem*, *in* JOSEF BLEICHER, CONTEMPORARY HEREMENEUTICS 128, 133 (1980).

82. *See* BERNSTEIN, *supra* note 67, at 127.

83. *See* Feldman, *Republican Revival*, *supra* note 3, at 707 n.170.

84. *Id.* at 709 n.173 (quoting GADAMER, TRUTH AND METHOD, *supra* note 77, at 133).

85. *See id.* at 712-13.

86. *See* Feldman, *Persistence of Power*, *supra* note 80, at 2249-50 & n.37.

87. Feldman, *Republican Revival*, *supra* note 3, at 711.

88. *See id.* Here, Feldman relies on Gadamer's concept of the "hermeneutic circle." In its most basic form, the concept refers to the relationship between a text and its constituent parts. A text as a whole can only be understood by understanding its separate parts. However, the meaning of the separate parts is dependent upon understandings of both the other separate parts and the text as a whole. *See id.* Expanded to dialogic encounters, Feldman describes the hermeneutic circle in terms of complex relationships between text, interpreter and tradition, in which all three must account for, but at the same time change, the others. *See id.* at 711-12.

89. Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 684 (1991) (quoting GADAMER, TRUTH AND METHOD, *supra* note 77, at 377).

serting one's own point of view, but being transformed into a communion in which we do not remain what we were."[90] Thus, encouraging dialogic encounters that focus on factors that keep older and younger Americans apart is one method of overcoming communication barriers regarding urgent public policy matters.

IV. Elder Law Clinics as a Space for Dialogic Encounters Between Young and Old

Through dialogic encounters, senior citizens and younger Americans can break down the physical separation inhibiting communication between them and begin to moderate their radically different perspectives of contemporary social problems. Unfortunately, for reasons set forth earlier, there are few settings within which such dialogic encounters can take place.[91] However, one promising location for such encounters is law school elder law clinics. A growing number of law schools maintain elder law clinics,[92] as elder law itself is a growing practice area.[93] Student-attorneys in such clinics work with elderly clients regarding a wide range of legal issues that affect older persons, including estate planning, health-care planning, capacity, Medicare, Medicaid, and Social Security benefits, housing, and age discrimination in employment issues.[94] Within the student-attorney/client relationships that develop, students and elders experience firsthand how their different perspectives on such legal problems may lead to different approaches to and desirable resolutions of the legal issues at hand.[95]

One particular area of practice where such differing perspectives are likely to manifest themselves in law school elder law clinics relates

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90. *Id.* at 684 (quoting GADAMER, TRUTH AND METHOD, *supra* note 77, at 379).

91. *See supra* notes 63-68 and accompanying text.

92. *See, e.g.*, Suzanne J. Levitt & Rebecca J. O'Neill, *A Call For a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect and Exploitation: One Legal Clinic's Experience*, 5 ELDER L.J. 195 (1997); Jay Lawrence Westerbrook, *In Memoriam: Michael P. Rosenthal*, 68 TEXAS L. REV. i, vi (1989); Molly M. Wood, *Changing with the Times: The KU Elder Law Clinic and the Kansas Elder Law Network*, 44 KAN. L. REV. 707 (1996).

93. *See generally* Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1 (1993).

94. *See id.* at 3-4.

95. For purposes of this article, I assume most of the student-attorneys in such law school clinics are part of the twenty-something generation. In doing so, I do not mean in any way to disparage the place or work of the many older students who are valuable members of law school communities.

to advance health-care directives. Advance health-care directives are "written instructions concerning the level of medical care to be given a person in the event of his or her incapacity."[96] The two most common forms of such directives are "living wills" and durable powers of attorney.[97] A living will is a legal instrument in which an individual gives specific instructions regarding future medical treatment in the event that person becomes terminally ill or enters a "persistent vegetative state."[98] The living will describes the forms of treatment a person is willing or unwilling to undergo, as well as whether and under what circumstances the person desires to have life-sustaining treatments administered or withheld.[99] In contrast, durable powers of attorney are more general legal instruments that name a surrogate decision-maker who has authority to act in the event that the person who executed the instrument becomes incapacitated.[100] Although such instruments can cover a wide range of circumstances, they are often intended to cover decisions relating to the provision or withholding of certain forms of medical treatment.[101]

Most states now have statutes providing for living wills in certain circumstances,[102] and a large number of states also now have statutes that provide for durable health-care powers of attorney.[103] With the enactment of such statutes, counseling regarding the drafting of such instruments is likely to become a larger component of elder law practice, both in private practice and in law school clinics. Such advance health-care directives present an excellent example of a situation in which the very different life circumstances and perspectives of elderly clients and young student-attorneys are likely to cause the two groups to have very different opinions as to the advisability of entering into and the appropriate nature and scope of such instruments.

For example, for young people, the thought of being connected to life-sustaining equipment in their old age, such as a respirator or an intravenous feeding tube, is one of the most horrifying images that

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96. WAGGONER ET AL., *supra* note 35, at 491.
97. *See id.*
98. *Id.*
99. *See id.*
100. *See id.* at 493.
101. *See id.*
102. *See id.* at 492. Statutory provisions detailing the requirements for and circumstances under which living wills will be upheld are complex and vary a great deal from state to state. A detailed discussion of the range of such provisions is beyond the scope of this article.
103. *See id.* at 493.

they can conceive.[104] Young people tend to state adamantly that they would not want to receive such life-sustaining treatments at the end of their lives.[105] Thus, it is my hypothesis that younger law students are likely to view advance health-care directives favorably and to think it nearly irrational for older persons to have any reluctance whatsoever to execute such instruments.[106]

In contrast, it is my belief that elderly persons are likely to be much less enthusiastic than their student-attorneys regarding the desirability of executing advance health-care directives. One of the greatest fears of older persons is that they will lose control over their lives.[107] Advance health-care directives, at least in varying degrees, ask persons prospectively to surrender control over future fundamental, perhaps even "life and death," decisions.[108] Moreover, the value of life may seem very different to a person in the last stages of life than it would to a person in life's younger stages.[109] Indeed, despite how difficult it is for younger persons to fathom, evidence suggests that the

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104. Of course, for many younger persons, the mere thought of themselves as older persons is extremely distressing.

105. According to the results of a Gallup Poll published in James Lindgren's article *Death by Default*, 56 LAW & CONTEMP. PROBS. 185, 233 tbl.8 (1993), 85% of persons ages 18-29 stated that they would want treatment withheld if they were on life support systems without hope of recovery.

106. Students' support for such instruments is also likely to be bolstered by the excessively "legalistic" perspective that is often taken by new law students. For example, it seems law students are much less likely than experienced attorneys to be aware of the fact that there is strong evidence that, even for the small percentage of persons who have executed advance health-care directives, such instruments are widely disregarded by medical personnel. *See* WAGGONER ET AL., *supra* note 35, at 492. In any event, my hypothesis regarding law student enthusiasm for advance health-care directives was supported by in-class discussions regarding the issue in a seminar on Elder Law conducted at Harvard Law School during the fall 1997 term.

107. *See, e.g.*, Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1151 (1994).

108. To the extent that advance health-care directives apply only in the event of incapacity, they may not properly be described as surrendering control, because, by definition, they will not take effect until such control has already been lost. Nonetheless, executing such instruments requires persons to acknowledge and face up to the prospect of the loss of control over oneself at a time when it is extremely difficult and unpleasant for many people to do so.

109. Richard Posner offers a telling anecdote of his mother, who, while still robust at the age of 65, upon seeing a woman in a wheelchair, whispered to Posner's wife: "If I ever become like that, shoot me." POSNER, *supra* note 25, at 87. However, two decades later, when she became "just like that," Posner's mother expressed no desire to die. *See id.* To the contrary, Posner was of the view that his mother, at that time, had quite a strong desire to live. *See id.*

elderly are in fact *happier* than younger persons.[110] The differing outlooks that people have towards basic issues, such as life and death at different stages of their lives, have led theorists to introduce the concept of "multiple selves."[111] This concept proposes that the younger and elder stages of a single person's life should be effectively treated as two different lives of two different persons.[112]

Senior citizens and younger student-attorneys are likely to have different conceptions regarding the advantages and disadvantages of advance health-care directives. The dialogue surrounding these instruments appears to present a great opportunity for the modification of Gadamerian prejudices and the altering of traditions that yield those prejudices. Additionally, it allows for the type of "enlarged thinking" that comes from considering other perspectives that differ radically from one's own. However, the traditional attorney-client relationships that are modeled in law school clinics do not necessarily contemplate the kind of free-flowing exchange of ideas that is necessary to allow for the kind of dialogic encounters discussed in the previous section. Thus, there may be a conflict in the law school clinic between learning to be a lawyer and learning from communication across generational lines.

V. The Standard Conception and Dialogic Lawyering

A. The Standard Conception

In his 1980 article, *Moral Responsibility in Professional Ethics*,[113] Gerald Postema coined the phrase "the standard conception."[114] This phrase describes the dominant view of lawyers' professional role and responsibilities created by relevant "institutional structures and public expectations, as well as the personal attitudes and self conceptions of [lawyers]."[115] Postema also addressed two central ideals that mark the standard conception:[116] partisanship and

110. More particularly, Posner cites evidence "that the percentage of people who are 'very happy' is greater among octogenarians than among people in their thirties or forties." *Id.* at 110 & fig.5.1.

111. *See, e.g., id.* at 84-94.

112. *See id.*

113. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

114. *Id.* at 73.

115. *Id.*

116. The term "standard conception" has become a familiar phrase in the vernacular of discussions about lawyer professional responsibilities and appropriate

neutrality.[117] According to Postema, the partisanship ideal requires that "the lawyer's sole allegiance [be] to the client."[118] "[T]he lawyer is committed to the aggressive and single-minded pursuit of the client's objectives."[119] On the other hand, the neutrality ideal requires the lawyer to pursue the client's objectives regardless of the lawyer's opinion regarding the substance of those objectives.[120]

Although these two ideals are obviously interrelated, and are, in some sense, mutually reinforcing in the context of legal practice,[121] the latter concept is of concern here. In William Simon's earlier critique of the standard conception,[122] he described the neutrality principle as prescribing "that the lawyer remain detached from his client's ends. The lawyer is expected to represent people who seek his help regardless of his opinion . . . of their ends."[123] In a quote that is often repeated in support of this ideal, Samuel Johnson once wrote, "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the Judge."[124] Because the standard conception requires the lawyer to remain detached from the client's ends, there is little room for dialogue between an attorney and a client regarding the substance of those ends. Under the standard conception's neutrality tenet, it is inappropriate for an attorney to engage the client in deliberations regarding the substance of the client's desired ends unless requested by the client.

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lawyer roles. *See, e.g.*, DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 135 & n.1 (1995 ed.).

117. *See* Postema, *supra* note 113, at 73.

118. *Id.*

119. *Id.*

120. *See id.*

121. *See* William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37.

122. Simon used the phrase "ideology of advocacy" to describe the system of beliefs about lawyers' professional role and responsibility that Postema described as the standard conception. *See id.* at 30-31.

123. *Id.* at 36. In addition to the principles of neutrality and partisanship, Simon also identifies the notions of procedural justice and professionalism as being central concepts in the ideology of advocacy. *See id.* at 38. For a further description of the neutrality principle, using the term "nonaccountability," see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978).

124. Postema, *supra* note 113, at 73-74 n.28 (quoting SAMUEL JOHNSON, BOSWELL'S JOURNAL OF A TOUR TO THE HEBRIDES, Aug. 15, 1773, at 14 (F. Pottee & C. Bennett eds., 1936)).

The ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct are the closest approximations to "official" codifications of the standard conception in that they both reflect and support the above-described neutrality ideal.[125] For example, according to Disciplinary Rule 7-101 of the Model Code, "[a] lawyer *shall not* . . . [f]ail to seek the lawful objectives of his client through reasonably available means."[126] Ethical Consideration 7-7 further provides that "the authority to make decisions [relating to the representation] is *exclusively* that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[127] This provision further states that "a lawyer is not expected to give advice until asked by the client."[128] Similarly, Rule 1.2 of the more recent Model Rules of Professional Conduct provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation."[129] Moreover, the comment to Model Rule 2.1 clearly states the general rule that "a lawyer is not expected to give advice until asked by the client."[130]

Certainly, one of the primary objectives of clinical legal education is to help students develop a familiarity with and facility in applying professional responsibility standards of the type just discussed.[131] Another objective is to help students understand the broader conception of the professional role and responsibilities of an attorney that is part of the standard conception.[132] Thus, the standard conception's neutrality tenet will likely influence practice in law school clinics. This statement should not be read as a failure to acknowledge the substantial number of clinical law teachers who struggle mightily to get their students to adopt a critical stance toward the

125. MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1997); MODEL RULES OF PROFESSIONAL CONDUCT (1997).

126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1997) (emphasis added).

127. *Id.* at EC 7-7 (emphasis added).

128. *Id.*

129. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1997).

130. *Id.* at cmt.5.

131. *See generally* ASSOCIATION OF AMERICAN LAW SCHOOLS AND AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUC. (1980) [hereinafter GUIDELINES FOR CLINICAL LEGAL EDUC.]; Kate E. Bloch, *Subjunctive Lawyering and Other Clinical Paradigms*, 3 CLINICAL L. REV. 259 (1997); Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 219 (1989); Stephen Wizner & Dennis Curtis, *"Here's What We Do:" Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673, 678 (1980).

132. *See generally* GUIDELINES FOR CLINICAL LEGAL EDUC., *supra* note 131; Bloch, *supra* note 131; Motley, *supra* note 131; Wizner & Curtis, *supra* note 131.

standard conception. Nonetheless, it is my belief that student practice in most law school elder law clinics reflects the standard conception's neutrality tenet to a large degree.

B. A Hypothetical Case

For the reasons discussed above, the standard conception's neutrality principle weighs heavily against the prospect of genuine dialogue between elderly clients and their student-attorneys in elder law clinics regarding the substantive issues related to advance health-care directives. A hypothetical case will help illustrate what is likely to occur when dialogue aligned with the standard conception is used in the law school clinic setting. Assume Ms. Walker, an elderly widow, desires a law school clinic's assistance in drawing up a simple will.[133] Ms. Walker divulged to her student-attorney that the reason why she wants to write a will now is that she was recently diagnosed by her doctor as suffering from the beginning stages of Alzheimer's Disease.[134] However, the student-attorney has no reason to believe that Ms. Walker presently lacks testamentary capacity.[135] During the course of her discussions with her student-attorney, Ms. Walker mentioned that she was not terribly disturbed by her recent diagnosis of Alzheimer's, because, having suffered from a couple of forms of cancer previously, she did not think she had very much longer to live anyway.

To our thoughtful student-attorney, Ms. Walker represents the perfect case for execution of an advance health-care directive. Her diagnosis of Alzheimer's disease makes it likely that she will lose the capacity to make decisions concerning her health-care treatment sometime in the not-too-distant future. Yet, the fact that she has suffered previously from cancer makes it all the more likely that difficult treatment decisions will need to be addressed. However, given that Ms. Walker's purpose in seeking legal representation was the drafting

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133. Ms. Walker expects to have some assets to distribute upon her death, but does not have so many as to disqualify her from receipt of the clinic's services.

134. For a brief discussion of Alzheimer's Disease, see POSNER, *supra* note 25, at 21-22.

135. For a thoughtful discussion of issues raised by the client of questionable capacity, see Rein, *supra* note 107. *See also* Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Competence*, 62 FORDHAM L. REV. 1073 (1994); Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 FORDHAM L. REV. 1429 (1994); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515.

of a testamentary will, the standard conception seems to discourage our student-attorney from even raising the question of advance health-care directives with Ms. Walker.[136] Nevertheless, the standard conception probably does not absolutely prohibit a student-attorney from raising the issue of advance health-care directives, either. Indeed, Comment Five to Model Rule 2.1 states that while "[a] lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted . . . a lawyer may initiate advice to a client when doing so appears to be in the client's interest."[137] Because our student-attorney genuinely believes that an advance health-care directive would be in Ms. Walker's best interest, the student would seem to fall within the contemplation of the above-quoted provision in offering such advice.

Let us further assume, however, that our student-attorney's initial inquiry as to whether Ms. Walker has given any consideration to an advance health-care directive was rejected by Ms. Walker out of hand and without explanation. According to the standard conception, it appears that our student-attorney should go no further.[138] Recall Comment Five to Model Rule 2.1 and Ethical Consideration 7-7's warning against attorneys giving unwanted advice.[139] The client is the ultimate arbiter of the ends to be pursued by the representation and, in the case of our hypothetical, Ms. Walker has rightfully determined that the purpose of her representation is to draft a simple testamentary will and nothing more. Therefore, the standard conception defines our student-attorney's role at this point as simply drafting Ms. Walker's will as zealously,[140] and diligently,[141] as possible.

Despite becoming a more proficient drafter of wills and improving client-interviewing skills, our student-attorney has not fully exploited the educational opportunities available during the representation of Ms. Walker. Our student-attorney is likely to conclude the representation of Ms. Walker without having the student-

136. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1997) ("a lawyer is not expected to give advice until asked by the client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt.5 (1997) ("a lawyer is not expected to give advice until asked by the client").

137. MODEL RULES OF PROFESSIONAL CONDUCT 2.1 cmt.5 (1997).

138. *See generally supra* note 136 and accompanying text.

139. *See supra* notes 127-28 and 130 and accompanying text.

140. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1997) ("A lawyer should represent a client zealously within the bounds of the law.")

141. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1997) ("A lawyer shall act with reasonable diligence and promptness in representing a client.")

attorney's belief in the advisability of advance health-care directives challenged or altered in any way. Indeed, the experience may affirm the student's stereotypes of older persons as stubborn, unthinking, and unwilling to change their views. On her end, Ms. Walker lost the benefit of our student-attorney's "professional expertise" regarding the advisability of advance health-care directives, as well as the youthful perspective that the student would bring to the discussion of such issues. Thus, the appropriate question is whether an alternative exists to the standard conception that would allow for a broader type of learning across the generations while providing clinical law students with appropriate instruction regarding lawyering skills and elderly clients with adequate legal services.

C. Previous Efforts to Incorporate Dialogic Principles into Legal Practice

A few legal scholars have challenged the standard conception by attempting to introduce dialogic principles into settings related to legal practice. For example, in his article *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*,[142] Joel Handler addresses the issue of incorporating dialogic principles into interactions between dependent people and representatives of the modern social welfare state.[143] Although Handler does not focus directly on legal practice or attorney-client relationships, it is possible to analogize the relationship between dependent persons and government bureaucrats engaged in the delivery of social services to the attorney-client relationship in the legal services setting generally,[144] and in law school clinics in particular.[145]

Handler believes that introducing the theory of dialogism into citizen/state interactions regarding the delivery of social services would serve the values of autonomy, participation, and community.[146] However, Handler also believes that before the introduction of dialogic principles into such interactions can occur, the power imbalance

142. Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988).
143. *See id.* at 1001.
144. *See* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1104-09 (1990) [hereinafter Trembley, *Toward a Community*].
145. *See* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 721 (1994).
146. *See* Handler, *supra* note 142, at 1001.

between dependent persons and the social services bureaucrats that they deal with must be redressed.[147] Handler does not think that genuine dialogue can take place where there is a great imbalance of power between the would-be dialogic partners.[148]

I agree with Handler that power imbalances between participants inhibit dialogue, and I also agree with those who have highlighted the particular disparities in power between lawyers and clients in the legal services setting.[149] Such disparities, I believe, are somewhat lessened in the law school clinic setting due to the relative youth and lack of experience of student-attorneys. More importantly, the Gadamerian perspective outlined earlier suggests that dialogue itself is inherently equalizing. It forces one to recast prejudices, traditions, and ideologies that create unequal power in the first place.[150] Therefore, I offer the dialogic approach as a means towards equalizing power. Interestingly, Handler offers professional norms as one means to incorporate the dialogic perspective in the delivery of social services setting.[151] Earlier, I argued that dialogism in legal practice is inhibited by the standard conception's affect on professional norms. In the next section, I will attempt to describe a set of professional norms that will encourage attorney-client dialogue in the legal practice setting.

Anthony Alfieri's *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment* is another example of an effort to apply dialogic principles to a legal practice setting.[152] This work represents Alfieri's conception of a poverty law practice that focuses on awakening the poor's critical consciousness so that they view themselves as a historical class capable of effecting its own social, economic, and political transformation.[153] Alfieri sees dialogue as a necessary element in achieving empowerment among the poor.[154] He bases his conception of dialogic legal practice on the writings of theologian Martin

147. *See id.* at 1078.
148. *See id.* at 1101.
149. *See, e.g.*, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 691-92 (1987-88) [hereinafter Alfieri, *The Antinomies*].
150. *See supra* notes 77-90 and accompanying text.
151. *See* Handler, *supra* note 142, at 1094.
152. Alfieri, *The Antinomies*, *supra* note 149.
153. *See id.*
154. *See id.* at 695-96. In addition to focusing on lawyer/client dialogue, Alfieri also views client/client and client/community dialogue as being central components of his theory. *See id.* at 701, 704. However, the latter two concepts go beyond the scope of this article.

Buber.[155] According to Alfieri, Buber offers a "relational theory of dialogue" in which dialogic partners "destroy the 'barrier of separation'" between them and enter into a "real relation" in which each person gives everything and "may withhold nothing of himself."[156] Alfieri criticizes poverty lawyers for failing to enter into such real relations with their clients.[157]

I am skeptical of Alfieri's theory of dialogue in that it requires lawyers and clients to step outside of themselves in a way that may not be possible. Gadamer persuasively argues that no one can step outside of their traditions entirely.[158] According to Gadamer, we all enter into dialogue from the vantage point of our "horizon" and cannot avoid viewing another from it.[159] Thus, there is no such thing as a "view from nowhere."[160] Gadamer also believes that our dialogic interactions constantly change our traditions and horizons.[161] Therefore, while Gadamer's interpretive theory may not provide for the kind of immediate radical transformation that Alfieri would like to see, it does provide a vision of dialogue that is both transforming and empowering.[162]

Both Handler and Alfieri identify basic conditions that must be present in order for dialogic approaches to be successful. For Handler, those factors are trust,[163] equality of power, and participation.[164] For Alfieri, those factors are faith, practical wisdom, respect, and sympathy.[165] Developing an entire model for a dialogic approach to practice in an elder law clinic based on these factors would go beyond the scope of this article; however, our earlier hypothetical case may serve as a context for a tentative sketch of a more dialogic approach.

D. Dialogic Lawyering and Our Hypothetical Case

It seems that, at a minimum, a dialogic approach to legal practice would require our student-attorney to inquire into the reasons for Ms.

155. *See id.* at 696.
156. *Id.* (quoting MARTIN BUBER, I AND THOU 77, 99-100, 110-11 (1937)).
157. *See id.*
158. *See* GADAMER, TRUTH AND METHOD, *supra* note 77, at 302, 306-07.
159. *See id.*
160. *See* Feldman, *Persistence of Power*, *supra* note 80, at 2251 n.45 (quoting Linda J. Nicholson, *Introduction* to FEMINISM/POSTMODERNISM 1, 9 (Linda J. Nicholson ed., 1990)).
161. *See* GADAMER, TRUTH AND METHOD, *supra* note 77, at 306-07.
162. *See id.*; Alfieri, *The Antinomies*, *supra* note 149, at 696.
163. *See* Handler, *supra* note 142, at 1076.
164. *See id.* at 1080.
165. *See* Alfieri, *The Antinomies*, *supra* note 149, at 698.

Walker's opposition to an advance health-care directive. It would also require, at some point in the discussion, that our student-attorney share some of the student's knowledge and perspectives regarding advance health-care directives. Although doing so is an essential component of the conversation that is necessary to dialogic learning, the student-attorney would have to avoid imposing his views on her. The literature on lawyering is filled with justifiable criticism of lawyer domination of clients. This is particularly true where the client lacks the power, education, and/or status of the attorney, as is the case with poor and elderly clients.[166]

Combatting lawyer domination of poor clients is partly the intent of Alfieri's "Theory of Dialogic Empowerment."[167] However, in our hypothetical case, the goal of dialogic lawyering is *not* to have Ms. Walker necessarily accept our student-lawyer's view regarding the wisdom of advance health-care directives. Rather, it is that both the attorney and the client learn from and are changed by the other's perspectives. Thus, both parties reach a deeper, if not different, decision regarding whether or not to proceed with such an instrument in the particular case.

As pointed out above in part V.A, the standard conception certainly does not encourage such a dialogic approach to legal practice. However, I do not believe that the authoritative texts of the standard conception, the Model Code of Professional Responsibility and the

166. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Gerald F. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990). I think that the problem of lawyer domination is much less likely to occur in the case of law school clinics than in traditional legal services offices. *See infra* notes 176-82 and accompanying text. However, some troubling anecdotal evidence that I heard from students working in a law school clinic around the time of this writing may suggest otherwise. Those students indicated that advance health-care directive "forms" were routinely given to elderly or other terminally ill clients as part of the packet of forms they were asked to fill out as part of their representation with regard to estate planning issues. The implicit pressure on clients simply to fill out such forms without asking any questions is great, and the students spoken to suggested that they had little, if any, discussion with their clients about the advance health-care directive forms. Although the use of some such forms may be appropriate in the "triage" type of practice that may be necessary in the legal services setting, *see* Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123, 133 (1992), their use seems particularly troubling with regard to "life and death" matters such as advance health-care directives. Moreover, their use is at odds with the dialogic conception of lawyering being advanced here.

167. Alfieri, *The Antinomies*, *supra* note 149, at 674-75.

Model Rules of Professional Conduct, absolutely prohibit such an approach. In what Deborah Rhode and David Luban describe as a "counter-text" to the ethics codes' stance towards the standard conception,[168] Ethical Consideration 7-8 of the Model Code provides:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.[169]

This provision should not be read as an invitation to lawyer domination of clients. In fact, the provision goes on to state that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."[170] Nevertheless, the above-quoted provision suggests that the student-attorney who wishes to engage the client in dialogue regarding the advantages and disadvantages of advance health-care directives is on firm ground as far as the prevailing ethics codes are concerned.[171]

Indeed, in what is perhaps the most lucid defense of the standard conception, Professor Steven Pepper agrees that there is a place in legal practice for "moral dialogue" between attorney and client.[172] Pepper's conception of moral dialogue, however, is not directly applicable to the situation presented in our hypothetical case. He presents moral dialogue as a possible solution to the problem that the combination of the attorney's "amoral" role with a legal realist view of law leaves little in the way of restraints on client conduct that may be injurious to third parties or society at large.[173] I have refrained from introducing such collateral effects into our hypothetical case, although it is quite clear that the end-of-life decisions addressed by advance health-

168. *See* RHODE & LUBAN, *supra* note 116, at 135.
169. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1997).
170. *Id.*
171. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt.1 (1997).
172. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613, 630-31 (1986).
173. *See id.*

care directives may have substantial impact on third parties. For instance, family members may bear financial and emotional costs associated with providing life-sustaining treatments to elderly patients.[174] Also, society as a whole may be saddled with financial costs related to life-sustaining medical treatments; not to mention the intangible costs in terms of the "value of life" that may result from widespread use of advance health-care directives.[175] In any event, if Pepper's conception of the attorney and client in moral dialogue is not inconsistent with ethical requirements, then the dialogic conception of legal practice advanced in this article is not inconsistent with those requirements either.

It should be pointed out that Pepper believes that the occurrence of the attorney and client engaged in moral dialogue should be the rare exception to the lawyer's traditional amoral role.[176] In contrast, I agree with Pepper's critics who believe that such a moral dialogue should be a more frequent and central part of the lawyer's role.[177] Nonetheless, Pepper points out two drawbacks to the moral dialogue approach, which are relevant to the dialogic approach advocated here.[178] The first is that dialogue between attorney and client is expensive, because dialogue takes time and "time is money" in legal practice.[179] It is a partial, but not a complete, response to suggest that this concern is much less significant in non-fee-for-service settings such as law school clinics.

Nonetheless, an entity with limited resources, such as a law school clinic, serves fewer clients when it spends more time on a particular lawyer-client relationship. Also, given the great scarcity of resources available for the provision of legal services to low-income

174. Indeed, the impact of issues raised in an elder law practice on family members may be so significant that some writers have argued that in certain circumstances, the entire family unit should be treated as a single client for purposes of legal representation. *See, e.g.*, Patricia M. Blatt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Steven H. Hobbs & Faye Wilson Hobbs, *The Ethical Management of Assets for Older Clients: A Context, Role, and Law Approach*, 62 FORDHAM L. REV. 1411, 1421 (1994). *But see* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994) (critiquing family unit representation).

175. *See generally* Posner, *supra* note 25, at 240-41.

176. *See* Pepper, *supra* note 172, at 634-35.

177. *See, e.g.*, David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637 (1986).

178. *See* Pepper, *supra* note 172, at 631-32.

179. *See id.* at 631.

persons, any decision to emphasize quality of representation over its quantity is fraught with moral overtones.[180] However, I agree with those who advocate the rationing of legal services in order to increase the quality of poverty lawyering.[181] It is my view that the provision of high-caliber professional services by a lawyer and the receipt of high-quality legal services by a client outweigh competing interests to serve as many people as possible subject to some minimal standard of care. This argument is even stronger with regard to law school clinics, which are generally not considered to be the primary providers of legal services to the poor in the communities in which they are located.[182] On top of this, the law school clinics' additional obligation to educate their students weighs heavily in favor of the dialogic approach. Of course, this argument may not be as strong when applied to a private practice context, because there is a much weaker obligation in that setting to educate attorneys by exposing them to dialogue with persons of radically different views.

Pepper states that the second drawback of the moral dialogue approach is that some clients may be unable or unwilling to engage in moral dialogue with their lawyers.[183] Although this is certainly true to a limited degree, I believe that Pepper overstates the problem. It is true that some clients may lack the capacity to engage in dialogue with their attorneys, and this problem may occur more frequently in elder law clinics where the question of capacity is always lurking in the background more so than in other settings.[184] However, recent literature from the poverty lawyering context argues persuasively that lawyers typically underestimate their clients' capacity to contribute to the effectiveness of legal representation.[185] Questions about elderly clients regarding their capacity to engage in dialogue with their lawyers may result more from stereotypes regarding the capabilities of older persons than from genuine client limitations.[186] For example,

180. *See* Gary Bellow & Jean Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Tremblay, *Toward a Community*, *supra* note 144.

181. *See* Bellow & Kettleson, *supra* note 180, at 354-62.

182. *See* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1647 n.203 (1991).

183. *See* Pepper, *supra* note 172, at 632.

184. *See supra* note 135 and accompanying text.

185. *See supra* note 166.

186. An interesting, but seldom asked question regarding dialogue between lawyers and clients is whether the *lawyers* are in fact capable of engaging their clients successfully in dialogue about issues that go beyond narrow or technical

where an elderly client's life is at issue, the client need not be conversant in the terminology of biomedical ethics in order to contribute in a meaningful way to a discussion concerning the advisability of entering into an advance health-care directive.

Of course, there are cases where the client will not engage in a dialogue with the attorney despite having the capacity to do so. In such cases, both the ethics codes,[187] and basic notions of dignity and autonomy suggest that the client's wishes must be respected.[188] Thus, in our hypothetical case, if Ms. Walker persists in her unwillingness to talk about or to consider an advance health-care directive, the student-attorney must respect her wishes. However, as stated above, I believe that Pepper overestimates the likelihood of this occurrence, at least in the elder law practice context. An elderly client might view an invitation into dialogue by a concerned student-attorney very positively, particularly because the client has reached a stage in life when the client's views are not sought very often, or where those views are marginalized by the listener, or where the opportunities for social interaction are increasingly few. Therefore, elderly clients might relish the opportunity to contribute to the mutual learning that can result from dialogic exchange, as an alternative to being a passive recipient of services from a law school clinic.

VI. Conclusion

This article has begun an attempt to sketch out an outline of a dialogic approach to legal practice for use in law school elder law clinics. This approach provides for the kind of intergenerational dialogue necessary for successful communication across generational lines re-

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questions of law. *See* Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 11 (1995).

187. *See supra* note 136 and accompanying text.

188. An interesting question is whether, in the context of our law school clinic, a refusal by a prospective client to engage in dialogue with a student-attorney would be considered proper grounds to refuse acceptance of the case. It seems pretty clear that if an attorney-client relationship has been formed, withdrawal would not be permitted for this reason under existing ethics guidelines. *See* MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.16 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1997). I tend to believe that refusal of representation to the recalcitrant prospective client in such circumstances would be unduly harsh. Moreover, it seems quite possible that a person who is initially unwilling to engage in dialogue might have a change of heart over the course of the representation if the attorney-client relationship develops on the basis of mutuality, caring, and trust. *See supra* notes 163-65 and accompanying text.

garding major issues of public policy in the future. Such a dialogic approach would not be inconsistent with either existing ethical requirements or with the provision of high-quality legal services to elderly clients. Additionally, such an approach broadens the perspectives of younger student-attorneys in that they must account for the perspectives of their older clients. The promise of the dialogic approach is that it will ensure encounters between older and younger persons, in which both are changed for the better, and are moved toward a common understanding of the appropriate ends of their collective efforts.

THE HOME HEALTH CARE CRISIS: MEDICARE'S FASTEST GROWING PROGRAM LEGALIZES SPIRALING COSTS

Brian E. Davis

Home health care was developed with the benevolent intention of providing a cost-effective alternative to existing forms of long-term health care, while permitting beneficiaries to receive needed short-term, posthospitalization, acute care in their own homes. However, the home health care segment of Medicare recently sustained an unprecedented and explosive growth in program cost. As a result of this alarming expansion, home health care has become the fastest growing expense of the overwhelmingly complex Medicare program and is in danger of spiraling out of control.

This article begins with a review of the current structure and administration of the home health care program under the Health Care Finance Administration (HCFA). Mr. Davis details the requirements of Home Health Agencies and their patients to qualify for full Medicare reimbursement under the home health care program. Current practices, based on lenient administrative and judicial interpretations of these qualifications, have resulted in growing demand for home health services and the resulting increase in program cost. Mr. Davis explores the primary limitations on the home health care program, including the overemphasized potential for fraud and abuse, billing and budget inefficiencies, the overavailability of services, the ease of entry into the home health care market, the lack of meaningful physician or patient involvement, and the lack of any insurance copayment or deductible.

Mr. Davis critiques contemporary solutions offered to cure the program's incredible cost growth, including Medicare amendments from the Balance Budget Act of 1997 and new HCFA initiatives. Mr. Davis, wary of the effectiveness of these solutions, argues that other solutions which have eluded Congress and HCFA are more promising. These solutions include a revision of the prospective payment system, the imposition of an insurance copayment or deductible, increasing the role of the physi-

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cian and patient in the provision of services, a legislative reduction in the availability of services, and a more contained approach to remedying fraud and abuse. The article concludes by emphasizing that the most fundamental problems facing the home health care program are perfectly legal practices and, therefore, the current focus on fraud prevention is largely misplaced. Mr. Davis suggests that only through a comprehensive solution addressing all of these cost factors will the home health care program remain a viable and cost-justified program within the Medicare system.

I. Introduction

Home health care is the fastest growing expense in the Medicare program.[1] The rapid expansion began in 1988, when, as the result of a lawsuit, changes in the Medicare regulations expanded the eligibility for home health care services and effectively eliminated the cap on the number of permissible visits by home health care personnel.[2] In less than ten years, the total amount of expenditures on home health care has grown from around $2 billion per year in 1987,[3] to over $18 billion per year in 1996,[4] and the number of home health care agencies providing such services has grown to more than 10,000 agencies.[5] The number of beneficiaries receiving home health care services has grown from 1.7 million in 1990 to more than 3.9 million in 1996.[6] These trends appear to have no end in sight. The Congressional Budget Office recently reported a projected annual growth rate of 8.6% in home health expenditures over the next twenty years,[7] a pace that would be unmatched by any other Medicare program.

Seeking to halt the spiraling costs of home health care, President Clinton on September 15, 1997, issued an unprecedented moratorium on all new home health agencies (HHAs) seeking Medicare certifica-

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1. *See* Meris L. Bergquist, *Home Health Care: What Is It and Who Pays for It?*, VT. B.J. & L. DIG., Dec. 1991, at 35, 35.

2. *See* Duggan v. Bowen, 691 F. Supp. 1487 (D.D.C. 1988) (holding that HHS's interpretation of Medicare provision pertaining to "part-time or intermittent care" as not covering home health aide services if required more than four days a week was arbitrary and capricious).

3. *See* MEDICARE: HOME HEALTH UTILIZATION EXPANDS WHILE PROGRAM CONTROLS DETERIORATE, U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, U.S. SENATE SPECIAL COMMITTEE ON AGING 6 (1996) [hereinafter GAO REPORT I].

4. *See* Elizabeth Shogren, *Clinton Plan Targets Surging Medicare Fraud*, L.A. TIMES, Sept. 16, 1997, at A1.

5. *See* Robert Pear, *Citing Fraud in Home Care, Clinton Halts New Permits*, N.Y. TIMES, Sept. 16, 1997, at A1.

6. *See* Shogren, *supra* note 4.

7. *See* CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS ch. 5 tbl.5-2 (1997).

tion.[8] The moratorium "erects a sudden dam in what has become by far the fastest-growing part of Medicare, with nearly 100 new companies signing up each month."[9] One onlooker aptly characterized "[t]he moratorium [a]s a drastic action. It's an admission that the Government may not have the program under control."[10]

This article explores the provision of home health care through Medicare-certified HHAs with an emphasis on curbing the recent explosion in the number of participants and the amount of delivery costs. Part II reviews the overall structure of the program, consisting of the federal regulators, intermediaries, and the HHA. Part III examines the intricacies of the provision of home health services and its requirements for coverage under Medicare. Part IV exposes the limitations on the home health care system that underlie the exponential growth in cost. Building on these limitations, Part V analyzes solutions to the home health care crisis. Subsections A and B analyze the recent efforts of Congress and the Health Care Finance Administration to address the problem. This analysis reveals that the focus of reform efforts (chiefly reducing fraud and abuse) is entirely too narrow. Finally, subsection C proposes several solutions left unattended and analyzes the merits of such solutions in light of the structure of the current system. Subsection C also illustrates the complexities of the home health care crisis and reinforces the need for a comprehensive solution to a program that, under its current formulation, legalizes spiraling costs.

II. Structure of the Program

The Medicare program, originally authorized under Title XVIII of the Social Security Amendments Act of 1965 (the 1965 Act),[11] is a health insurance program that covers all Americans aged sixty-five years and older. The program provides insurance protection in two parts. Part A, the hospital insurance, covers in-patient services, post-hospital care in skilled nursing homes, and home health care.[12] Part B is a supplementary medical insurance program that covers primarily

8. *See* Amy Goldstein, *President Acts to Curb Home Health Care Fraud*, WASH. POST, Sept. 16, 1997, at A4.
9. *Id.*
10. Pear, *supra* note 5, at A1.
11. Pub. L. No. 89-97, 79 Stat. 286 (codified in scattered sections of 42 U.S.C.).
12. *See* 42 U.S.C. §§ 1395c to 1395i-4 (1994 & Supp. II 1996). Nearly 98% of home health care is financed under Part A. *See* Bergquist, *supra* note 1, at 35.

physician services but also covers home health services not otherwise provided under Part A.[13]

The provision of Medicare-reimbursed, home health services and certification is governed primarily by sections 1814, 1835, 1861, and 1866 of the 1965 Act,[14] the Code of Federal Regulations,[15] the Medicare Home Health Agency Manual,[16] and the Medicare Intermediary Manual.[17] Despite occupying just a few sections in the U.S. Code, the home health care system is wrought with vague and ambiguous regulations and requirements. At least thirty-seven states and the District of Columbia also impose licensing requirements for home health care agencies.[18] The coverage of these statutes vary among the states, though most state statutes resemble the federal Medicare statutes.[19] Commentators note that the states' incorporation of Medicare statutory provisions "reflects the continued reliance on the Medicare

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13. *See* 42 U.S.C. §§ 1395j to 1395w-4.

14. *Id.* §§ 1395f, 1395n, 1395x, 1395cc.

15. There are home helath provisions codified in scattered sections of 42 C.F.R.

16. Health Care Fin. Admin., Medicare Home Health Agency Manual (last modified Feb. 20, 1997), *available for download at* <http://www.hcfa.gov/pubforms/hhaman/hhatoc.htm> [hereinafter Medicare Home Health Agency Manual].

17. Health Care Fin. Admin., Pub. No. 13, Medicare Intermediary Manual (last modified May 5, 1997), *available for download at* <http://www.hcfa.gov/pubforms/pub13/pub13toc.htm> [hereinafter Medicare Intermediary Manual].

18. *See* ARIZ. REV. STAT. § 36-425 (West Supp. 1997-98); CAL. HEALTH & SAFETY CODE § 1725 (West 1990); CONN. GEN. STAT. ANN. § 19a-490 (West 1997); DEL. CODE ANN. tit. 16, § 122(3)0.1 (1986); D.C. CODE ANN. § 32-1302 (1988); FLA. STAT. ANN. § 400.461 (West 1998); GA. CODE ANN. § 31-7-151 (Harrison 1996); HAW. REV. STAT. § 321-11 (Michie 1997); IDAHO CODE § 39-1303 (1993); 210 ILL. COMP. STAT. ANN. 355/1-14 (West 1992); IND. CODE ANN. § 16-27-1 (Michie 1998); KAN. STAT. ANN. § 65-5102 (West 1992); KY. REV. STAT. ANN. § 216B.105 (Banks-Baldwin 1992); LA. REV. STAT. ANN. § 40:2116.31-.40 (West Supp. 1998); ME. REV. STAT. ANN. tit. 22, § 2143 (West 1992); MD. CODE ANN., HEALTH-GEN. § 19-401 (1996); MINN. STAT. ANN. § 144A.46 (West 1998); MISS. CODE ANN. § 41-71-3 (1993); MO. REV. STAT. § 197.405 (West 1996); MONT. CODE ANN. § 50-5-201 (1997); NEB. REV. STAT. § 71-2018 (Michie 1996); NEV. REV. STAT. § 449.030 (Michie 1997); N.H. REV. STAT. ANN. § 151:2 (West Supp. 1997); N.J. STAT. ANN. § 30:4E-2 (West 1997); N.M. STAT. ANN. § 24-1-5 (Michie 1998); N.Y. PUB. HEALTH LAW § 3605 (McKinney 1998); N.C. GEN. STAT. § 131E-138 (1997); N.D. CENT. CODE § 23-17.3 (1997); OR. REV. STAT. § 443.015 (1992); PA. STAT. ANN. tit. 35, § 448.801 (West 1993); R.I. GEN. LAWS § 23-17-4 (1996); S.C. CODE ANN. § 44-69-30 (Law. Co-op. 1997); TENN. CODE ANN. § 68-11-202 (1996); TEX. HEALTH & SAFETY CODE ANN. § 142.002 (West Supp. 1992); UTAH CODE ANN. § 26-21-8 (1997); VA. CODE ANN. § 32.1-162.9 (Michie 1997); WASH. REV. CODE § 70.127 (West 1997); WIS. STAT. § 50.49 (1997).

19. *See* Sandra H. Johnson, *Quality-Control Regulation of Home Health Care*, 26 HOUS. L. REV. 901, 934 (1989).

certification system as the primary if not sole, public regulatory scheme for home health care."[20]

The Medicare program is administered through the Health Care Finance Administration (HCFA), an arm of the Department of Health and Human Services (HHS). HCFA has currently designated nine regional intermediaries that service HHAs within each region.[21] These intermediaries serve as communication channels between the HHAs and HCFA,[22] and are responsible for negotiating and approving contractor budgets with the HHA.[23] In addition, these intermediaries process claims and make reimbursement decisions.[24] They are also expected to perform the "policing" elements of auditing and abuse prevention programs.[25]

Traditionally, virtually all home health care was provided by either public (governmental) or private entities.[26] In recent years, however, hospitals have entered the field of home health care, creat-

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20. *Id.*

21. The nine regional intermediaries and their respective regions are as follows:

- Associated Hospital Service of Maine—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont
- Independence Blue Cross (Philadelphia)—Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia
- Blue Cross and Blue Shield of South Carolina—Kentucky, North Carolina, South Carolina, and Tennessee
- Aetna Life and Casualty—Alabama, Florida, Georgia, and Mississippi
- Blue Cross and Blue Shield United of Wisconsin—Michigan, Minnesota, New Jersey, New York, Puerto Rico, the Virgin Islands, and Wisconsin
- Health Care Service Corporation (Chicago)—Illinois, Indiana, and Ohio
- New Mexico Blue Cross and Blue Shield, Inc.—Arkansas, Louisiana, New Mexico, Oklahoma, and Texas
- Blue Cross of Iowa, Inc.—Colorado, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, and Wyoming
- Blue Cross of California—Alaska, Arizona, California, Hawaii, Idaho, Oregon, Nevada, and Washington

See Medicare Home Health Agency Manual, *supra* note 16, § 140(A).

22. *See* GAO REPORT I, *supra* note 3, at 4.

23. *See* Medicare Intermediary Manual, *supra* note 17, § 1202.

24. *See* Medicare Home Health Agency Manual, *supra* note 16, § 140(A).

25. *See id.*

26. *See* Kenneth Brummel-Smith, *Home Health Care: How Long Will It Remain "Low Tech"?*, 65 S. CAL. L. REV. 491, 493 (1991). Home health care providers can be divided into three categories: government, for-profit, and nonprofit. As of 1994, the percentage share of the total number of HHAs is described in the following graphic:

ing their own programs.[27] These HHAs must meet certain requirements before becoming "Medicare-certified."[28] Once certified, these HHAs are entitled to 100% reimbursement of costs from Medicare for the provision of home health services, provided such services qualify for reimbursement.[29] Though numerous ancillary and home health aide services fall within the Medicare program, nursing care is the "cornerstone" of home health care.[30] The HHA acts as the primary caregiver, acting only on the initial instructions of the patient's physician, and interacting with intermediaries usually only for billing and reimbursement purposes.[31] The care provided by the HHA is intended to be short-term, posthospitalization, acute care.[32] Medicare does not cover full-time nursing care.[33]

Up to seventy-five percent of frail and disabled older persons receive home-care services through these organizations.[34] Beneficiaries receiving home health services are typically female and over seventy-five years old.[35] Beneficiaries consistently prefer home health

HHA Type	Number	Percent of Total*
Government	1,353	17.20
For-Profit	3,815	48.51
Nonprofit	2,696	34.28

* percentages may not add to 100 due to rounding.
See GAO REPORT I, *supra* note 3, at 10.

27. *See* Brummel-Smith, *supra* note 26, at 493. Brummel-Smith adds that one reason for this trend is "the expansion of Medicare coverage for skilled nursing care provided in the home." *Id.* Another reason, though not contemplated by Brummel-Smith, is that home health services are 100% reimbursable through Medicare, whereas hospitalization expenses are only partially reimbursable. This presents a large potential for fraud. *See infra* Part IV.

28. *See* 42 U.S.C. § 1395x(o) (1994).

29. *See generally id.* § 1395x(v)(1)(A) (discussing reimbursable costs).

30. *See* Brummel-Smith, *supra* note 26, at 494.

31. *See* Interview with Director, Medicare-Certified Home Health Agency, in Pittsburgh, Pa. (Oct. 16, 1997) (Interviewee and Agency have requested that their identities remain confidential) [hereinafter Interview (Oct. 16, 1997)].

32. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, MEDICARE: COMPARISON OF TWO METHODS OF COMPUTING HOME HEALTH CARE COST LIMITS (1990) [hereinafter GAO REPORT II]; GAO REPORT I, *supra* note 3, at 5; S. Mitchell Weitzman, *Legal and Policy Aspects of Home Health Care Coverage*, 1 ANNALS HEALTH L. 1 (1992); Interview (Oct. 16, 1997), *supra* note 31. In fiscal year 1994, the average number of visits per year per beneficiary was 57, while the median number of visits was 34. *See* GAO REPORT I, *supra* note 3, at 8. The difference indicates that minorities of beneficiaries are receiving far more than 57 visits per year. Other data suggest that such visits are conducted by *private* HHAs, as such agencies averaged nearly 70 visits per year. *See id.* at 12.

33. *See* Brummel-Smith, *supra* note 26, at 494.

34. *See id.*

35. *See* GAO REPORT I, *supra* note 3, at 4.

care to the analogue nursing home.[36] Home health care offers skilled nursing, home health assistance, and simple companionship, all without a price tag.[37] Perhaps home health care's appeal will prove to be its undoing.

III. The Home Health Agency

A home health agency is a public agency or private organization primarily engaged in providing skilled nursing and other therapeutic services.[38] Provided certain conditions are met, the HHA is entitled to

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36. *See* Bergquist, *supra* note 1, at 35 (citing a study by the AARP which shows that 86% of the elderly want to live out the remainder of their lives in their own homes).

37. *See id.*

38. *See* 42 U.S.C. § 1395x(o) (1994). The text of the definition is as follows:

> (o) Home health agency
>
> The term "home health agency" means a public agency or private organization, or a subdivision of such an agency or organization, which—
>
> > (1) is primarily engaged in providing skilled nursing services and other therapeutic services;
> > (2) has policies, established by a group of professional personnel (associated with the agency or organization), including one or more physicians and one or more registered professional nurses, to govern the services (referred to in paragraph (1)) which it provides, for supervision of such services by a physician or registered professional nurse;
> > (3) maintains clinical records on all patients;
> > (4) in the case of an agency or organization in any State in which State or applicable local law provides for the licensing of agencies or organizations of this nature, (A) is licensed pursuant to such law, or (B) is approved, by the agency of such State or locality responsible for licensing agencies or organizations of this nature, as meeting the standards established for such licensing;
> > (5) has in effect an overall plan and budget that meets the requirements of subsection (z) of this section;
> > (6) meets the conditions of participation specified in section 1395bbb(a) of this title and such other conditions of participation as the Secretary may find necessary in the interest of the health and safety of individuals who are furnished services by such agency or organization; and
> > (7) meets such additional requirements (including conditions relating to bonding or establishing of escrow accounts as the Secretary finds necessary for the financial security of the program) as the Secretary finds necessary for the effective and efficient operation of the program; except that for purposes of part A of this subchapter such term shall not include any agency or organization which is primarily for the care and treatment of mental diseases.

Id.

reimbursement from Medicare for the provision of services.[39] As a threshold requirement, the person receiving services must be an eligible Medicare beneficiary.[40] Four types of individuals are considered eligible for Medicare:

(1) Individuals who have reached the age of sixty-five and are entitled to receive Social Security benefits, widow's or widower's insurance benefits, or Railroad Retirement benefits;
(2) Disabled persons of any age who have received Social Security benefits, widow's or widower's insurance benefits, or Railroad Retirement benefits for twenty-five months;
(3) Persons with end-stage renal disease who require dialysis treatment for a kidney transplant; and
(4) Persons over age sixty-five who are not eligible for either Social Security or Railroad Retirement who purchase Medicare coverage by payment of a monthly premium.[41]

The HHA providing the services must have a valid agreement in effect to participate in the Medicare program.[42] This agreement essentially states that the provider will not charge any individual or other person for items and services covered by the health insurance program other than allowable charges and deductibles and will return any monies incorrectly collected.[43] The agreement between HHS and each HHA is not limited in duration.[44] The agreement remains in effect until there is a voluntary termination, an involuntary termination, or an invalidation of the agreement by reason of a change in the ownership of the HHA.[45] First, the HHA may terminate its agreement at any time by filing a written notice of its intent to terminate with HCFA.[46] HCFA may accept the termination date or select another date that is within six months from the date the HHA's notice was filed.[47]

39. *See id.* § 1395(g).
40. *See id.* § 1395(f).
41. *See id.* § 426.
42. *See id.* § 1395cc(a).
43. *See id.*
44. *See* Medicare Home Health Agency Manual, *supra* note 16, § 132.
45. *See id.* § 142. However, the termination of participation does not immediately abrogate all of the HHA's responsibilities, and, in some cases, responsibilities may extend beyond the effective date of termination. *See id.* The provider also continues to be responsible for filing a final cost report and/or repayment of any coverage. *See id.*
46. *See* 42 U.S.C. § 1395cc(b)(1).
47. *See id.*

Second, HCFA may terminate an agreement with an HHA if it determines that one of the following conditions exists:

(1) The HHA is not complying substantially with the provisions of the agreement or with the applicable provisions of Title XVIII of the Act and Regulations; or
(2) The HHA no longer meets the appropriate conditions of participation; or
(3) The HHA has failed to supply information that is necessary to determine whether payments are due and the amounts of such payments; or
(4) The HHA refuses to permit examinations of fiscal and other records, including medical records; or
(5) The HHA has knowingly and willfully made, or caused to be made, false statements or representations with respect to facts material to the right to payment; or has submitted, or caused to be submitted, requests for payment for amounts substantially in excess of the costs incurred; or has furnished items or services which are either substantially in excess of the individual's needs, harmful, or grossly inferior in terms of quality.[48]

HCFA must give the HHA fifteen-days notice prior to termination of the agreement.[49] An HHA may request a hearing to review HCFA's determination in accordance with the appeal procedures set forth in the Regulations.[50]

The third method of terminating a Medicare participation agreement concerns a transfer of the HHA's ownership. When an HHA with a valid provider agreement undergoes a change of ownership, the agreement is automatically assigned to the successor owner.[51] An assigned agreement is subject to all applicable laws under which it was initially issued.[52] If the previous owner ceases to do business, the Regulations treat such action as a termination.[53] If, however, the previous owner survives the change, the Regulations are unclear as to

48. Medicare Home Health Agency Manual, *supra* note 16, § 142.2; *see also* 42 U.S.C. § 1395cc(b)(2).
49. *See* Medicare Home Health Agency Manual, *supra* note 16, § 142.2.
50. *See* 42 C.F.R. § 405, Subpt. H (1997).
51. *See id.* § 489.18(c); *see also* Medicare Home Health Agency Manual, *supra* note 16, § 145. The Home Health Care Manual recommends that a participating HHA that plans to change ownership submit an advance notice of such to HCFA. *See id.*
52. *See* 42 C.F.R. § 489.18(d).
53. *See id.* § 489.52(b)(3).

whether the previous owner retains any liability under the provider agreement.[54]

An HHA that files an agreement to participate in Medicare's health insurance program agrees to provide Medicare beneficiaries with care, treatment, and other services ordinarily furnished to its patients.[55] Each HHA may impose additional restrictions upon its patients; however, the Medicare Home Health Care Manual cautions that the "law does not contemplate that such restrictions . . . apply only to Medicare beneficiaries as a class."[56]

Another requirement for participation in the Medicare program is that the HHA demonstrate that its beneficiaries qualify for coverage of home health services.[57] This requirement introduces four key limitations or "sub-conditions."[58] First, the Act requires that a physician certify in all cases that the patient is "confined to his home."[59] The Medicare Home Health Care Manual, which describes this as the "homebound" determination, elaborates on its limitation:

> An individual does not have to be bedridden to be considered as confined to the home. However, the condition of these patients should be such that there exists a normal inability to leave home and, consequently, leaving home would require a considerable and taxing effort. If the patient does in fact leave the home, the patient may nevertheless be considered homebound if the absences from the home are infrequent or for periods of relatively short duration, or are attributable to the need to receive medical treatment.[60]

As a general matter, if the patient has a condition that restricts her ability to leave the home except with the aid of supportive devices, the individual is considered homebound.[61] The standard for "homebound" status has proven to be highly subjective, as both the physician and HHA retain considerable discretion in making this de-

54. Section 489.18 of title 42 of the Regulations focuses only on the effect of the agreement on the successor owner and does not discuss residual liability resting on the assignor. *See id.* § 489.18.
55. *See id.* § 134.
56. *Id.*
57. *See id.* § 204.1(A).
58. *See id.* § 204.5(A).
59. 42 U.S.C. § 1395f(a)(2) (1994).
60. Medicare Home Health Agency Manual, *supra* note 16, § 204.1(A).
61. *See id.*

termination.[62] Consequently, the limitation has not interposed any significant obstacle to the provision of home health care services.[63]

Second, the HHA must provide its services under a plan of care established and approved by a physician.[64] This plan must contain: "all pertinent diagnoses, the frequency of visits [necessary], prognosis, rehabilitation potential, functional limitations, permitted activities, nutritional requirements, all medications and treatments, safety measures to protect against injury, instructions for timely discharge or referral, and any [other] additional items [deemed necessary] by the HHA or physician."[65] The physician must sign the plan of care before the HHA submits any bill for reimbursement.[66] Under the supervision of an HHA professional, the physician who established the plan of care must review and sign the plan at least once every sixty-two days.[67] Though the Act, Regulations, and guidance manuals appear to require specificity in these plans, in reality these plans have become little more than "rubber stamps" enabling the HHA personnel to commence treatment.[68]

Third, the patient must be under the care of a physician who is qualified to sign a certification statement and plan of care.[69] However, the physician is not required to see the patient.[70] The Home Health Care Manual, though recognizing the absence of a visitation requirement, "expect[s]" that a physician will see the patient during this time.[71] Again, in practice, the physician usually has no contact with

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62. *See* GAO REPORT I, *supra* note 3, at 15.

63. *See id.* ("One intermediary official said that the [intermediary] made fewer that 10 denials a year based on the homebound criteria."). Congress recently approved legislation requiring the HHS Secretary to conduct a study on the criteria that should be applied, and method for applying criteria, to the determination of whether an individual is considered "homebound." *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4613, 111 Stat. 251, 474.

64. *See* 42 U.S.C. § 1395x(m).

65. Medicare Home Health Agency Manual, *supra* note 16, § 204.2.

66. *See id.* § 204.2(C)-(D). However, the regulations permit the use of verbal orders from the physician. *See* 42 C.F.R. § 242.22 (1997). In that case, the physician may give a verbal order that is then transcribed and signed by the registered nurse or qualified therapist. *See* Medicare Home Health Agency Manual, *supra* note 16, § 204.2(E). The HHA personnel are then permitted to provide the necessary services to the patient. *See id.* However, the HHA may not submit the bill for these services unless and until the physician countersigns the transcribed order. *See id.*

67. *See* Medicare Home Health Agency Manual, *supra* note 16, § 204.2(F).

68. *See* Interview (Oct. 16, 1997), *supra* note 31.

69. *See* 42 C.F.R. § 424.22.

70. *See* Medicare Home Health Agency Manual, *supra* note 16, § 204.3.

71. *See id.*

the patient beyond that which is necessary to effectuate the HHA's provision of services.[72]

Fourth, the patient must require at least one of several types of skilled services. One such service may be skilled nursing care that is "reasonable and necessary" and is needed on an "intermittent" basis.[73] If the patient's needs continue, other services will include physical therapy, speech-language pathology services, and occupational therapy.[74]

The physician must certify to HCFA that the HHA has complied with the foregoing four key requirements.[75] This certification is valid for a period of no more than sixty-two days,[76] at which time the physician may recertify.[77] This recertification process can usually be accomplished at the same time the physician amends or confirms the continuance of a plan of care.[78]

To be eligible for Medicare participation, the HHA must also establish an overall plan and budget for administrative expenses.[79] HCFA makes funds available, through the intermediaries, for administrative costs related to the functions performed by the HHA.[80] To receive the funds, the HHA must first submit to HCFA an estimate of the administrative costs that are anticipated for the ensuing fiscal year.[81] The HHA must predicate this budget on the Budget and Performance Requirements (BPR) issued by HCFA and on the HHA's previous experience with Medicare reimbursement.[82] From there, the principles for determining reimbursable administrative costs, as set forth in Chapter 31 of the Federal Acquisition Regulations (FAR), govern the determination of the budget.[83] HCFA disburses payments to the HHA for those administrative costs that are "necessary and

72. *See* Interview (Oct. 16, 1997), *supra* note 31.
73. *See* Medicare Home Health Agency Manual, *supra* note 16, § 205.1.
74. *See id.* § 205.2.
75. *See id.* § 204.5(A).
76. *See id.* § 204.5(B).
77. *See id.*
78. *See* 42 C.F.R. § 424.22(b) (1997).
79. *See* 42 U.S.C. § 1395x(o)(5) (1994); Medicare Intermediary Manual, *supra* note 17, § 1200.
80. *See* Medicare Intermediary Manual, *supra* note 17, § 1200.
81. *See* 42 U.S.C. § 1395x(z)(1). HCFA follows a fiscal year that begins October 1st and ends September 30th each year. *See* Medicare Intermediary Manual, *supra* note 17, § 1200.
82. *See* Medical Intermediary Manual, *supra* note 17, § 1200.
83. *See id.* § 1211.

proper" as determined by the Principles of Reimbursement.[84] The amount of settlement is subject to the auditing procedures of HCFA.[85]

HHAs must also adhere to certain limitations concerning the nature, frequency, and duration of services provided. To be eligible for home health care services, the patient must have a need for either intermittent skilled nursing care, physical therapy, speech-language pathology services, or a continuing need for occupational therapy.[86] To be covered as a "skilled nursing service," the service must require the skills of a registered nurse or a practitioner under the supervision of a registered nurse and must be reasonable and necessary for the treatment of the patient's illness.[87] In addition, the service must be reasonable and necessary for the diagnosis and treatment of the patient's illness within the context of the patient's medical condition, with appropriate consideration given towards the plan of treatment established for the patient.[88]

The defining parameters of "reasonable and necessary," similar to those defining "homebound," have proven elusive and highly subjective. The Medicare Home Health Care Manual outlines several functions which may be viewed as lying at the outer limits of this definition, though still within the ambit of "reasonable and necessary."[89] For instance, observation and assessment of the patient's condition by a licensed nurse qualifies as reasonable and necessary skilled nursing care[90]—an activity in which HHAs regularly engage in as part of their plan of treatment.[91] However, the Medicare Home Health Care Manual cautions that such activities should be limited only to those situations where the likelihood of change in the patient's condition necessitates a reevaluation of treatment.[92] Skilled nursing visits for management and evaluation of the patient's care plan also fall within the ambit of "reasonable and necessary" skilled nursing serv-

84. *See id.* § 1200.
85. *See id.*
86. *See* 42 U.S.C. § 1395(a)(2)(C).
87. *See* Medicare Home Health Agency Manual, *supra* note 16, § 205.1(A). However, a service is not considered a skilled nursing service solely because it was provided by a registered nurse. Rather, the analysis looks more towards the "inherent complexity of the service, the condition of the patient, and accepted standards of medical and nursing practice." *Id.* § 205.1(A)(1).
88. *See id.* § 205.1(A)(4).
89. *See id.* § 205.1(A), (B).
90. *See id.* § 205.1(B)(1).
91. *See* Interview (Oct. 16, 1997), *supra* note 31.
92. *See* Medicare Home Health Agency Manual, *supra* note 16, § 205.1(B)(1).

ices.[93] Although unlicensed professionals could accomplish these functions, the Manual contemplates that such services are more appropriately delivered by a skilled nurse who is better able to understand the patient's disposition.[94] In addition, teaching and training activities, when geared towards the treatment regimen, qualify as "reasonable and necessary" skilled nursing services.[95] The test of whether such activities constitute a "skilled nursing" service focuses on the level of skill required to teach and not on the nature of what is being taught.[96] Finally, although medications and drugs associated with treatment are specifically excluded from Medicare coverage,[97] if they are reasonable and necessary to the treatment of the illness, the nursing services required to help in the administration of the drugs may be covered.[98]

Medicare may also cover certain home health aide services provided on an intermittent or part-time basis.[99] Home health aide services include personal care services such as feeding, bathing, dressing, hair care, and other hygiene that are needed to facilitate treatment or prevent deterioration of the beneficiary's health.[100] Such services also include changing dressings, applying ointments, and assisting "with medications that are ordinarily self-administered and that do not require the skills of a licensed nurse" for administration.[101]

The "intermittent" requirement in the Act has proven equally elusive, and its interpretation may be the primary cause for the explosion in home health care claims. As stated, the beneficiary must be confined to his or her home; must be under the care of a physician; and must need intermittent skilled nursing care or certain types of physical, speech, or occupational therapy.[102] A beneficiary satisfying these threshold requirements qualifies for "part-time or intermittent" nursing care and "part-time or intermittent" care of a home health aide.[103] Though this language may appear plain, HHS followed a pol-

93. *See id.* § 205.1(B)(2).
94. *See id.* § 205.1(B)(2) (example 1).
95. *See id.* § 205.1(B)(3).
96. *See id.*
97. *See* 42 U.S.C. 1395x(m)(5) (1994).
98. *See* Medicare Home Health Agency Manual, *supra* note 16, § 205.1(B)(4).
99. *See infra* note 122 and accompanying text.
100. *See* Medicare Home Health Agency Manual, *supra* note 16, § 206.2(a).
101. *Id.* § 206.2(b) and (c).
102. *See* 42 U.S.C. § 1395f(a)(2)(C).
103. *See id.* § 1395x(m)(1), (4).

icy since 1966 of denying claims for services that were not both part-time *and* intermittent.[104]

In 1988, the District Court for the District of Columbia appeared to set the interpretation straight in *Duggan v. Bowen*.[105] In that case, seventeen named Medicare claimants, among others, brought a class action against HHS challenging its long-standing interpretation of the "part-time or intermittent" requirement.[106] The plaintiffs contended that HHS's "part-time or intermittent" care policy as applied was too restrictive, in effect requiring the patient to demonstrate a need for both part-time *and* intermittent care.[107] The effect of HHS's policy was to exclude from coverage daily services provided in excess of four days per week[108]—a frequency clearly permissible under the definition of part-time.[109] Though HHS denied having such a policy, it refused to stipulate to the statement: "[t]he Medicare Act provides for part-time or intermittent skilled nursing and home health aide services."[110] The court rejected HHS's interpretation, holding that it was contrary to the plain meaning of the Act.[111] The court agreed that "or" means "or."[112] The court's plain meaning approach effectively lifted any HHS-imposed limitation on the number of days per week that health services could be provided.[113] As support for its interpretation, the court turned to the legislative history of this provision and found that "Congress plainly expressed its desire to permit beneficiaries to obtain realistic home health care to be provided without any limit on the number of days per year if such care is provided less than seven days each week."[114] Though this declaration was certainly precedential, the true impact of *Duggan* can be traced to its remedy. The court issued an injunction against HHS from denying Medicare for home

104. *See* Duggan v. Bowen, 691 F. Supp. 1487, 1492, 1496 (D.D.C. 1988).

105. 691 F. Supp. 1487 (D.D.C. 1988).

106. *See id.* at 1489, 1491-92. The opinion notes that the plaintiffs did not contest HHS's application of the initial eligibility requirements (which uses only the term "intermittent"). *See id.* at 1511 n.38. Rather, plaintiffs challenged HHS's interpretation of the "part-time or intermittent" care accorded to individuals meeting the initial eligibility requirements. *See id.*

107. *See id.* at 1491-92.

108. *See id.*

109. *See id.* at 1495-96.

110. *Id.* at 1492.

111. *See id.* at 1511.

112. *See id.* at 1511 n.39.

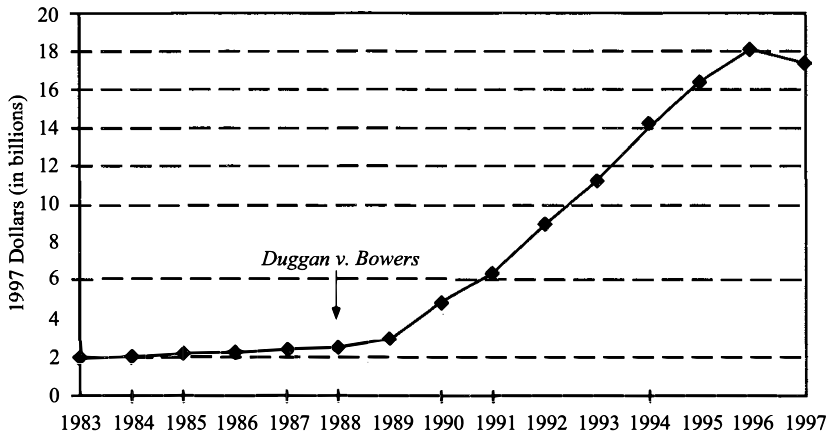
113. *See id.* at 1512.

114. *Id.* at 1513.

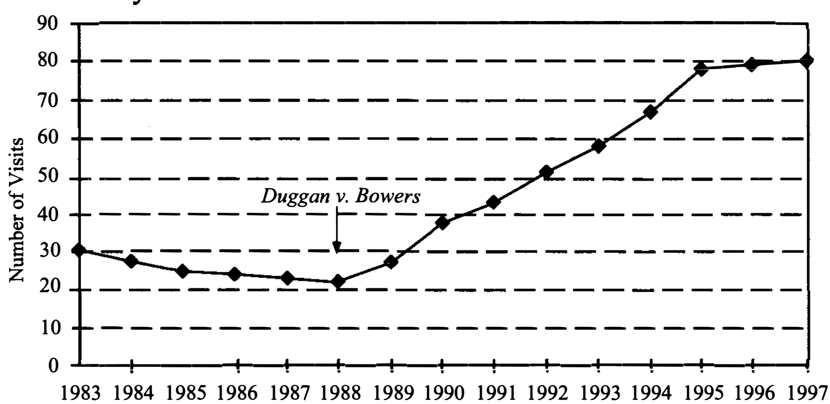
health care services that have or will be denied based on HHS's "part-time or intermittent" policy interpretation.[115]

The *Duggan* decision in 1988 effectively expanded the amount and frequency of services covered by Medicare and prompted a dramatic increase in the amount of expenditures on home health care, as seen in the graph below.

Home Health Care Expenditures 1983-1997[116]



Average Number of Home Health Visits per Medicare Beneficiary 1983-1997[117]



115. *See id.* at 1515.
116. *See* Health Care Fin. Admin., Office of the Actuary, *available at* <http://www.hcfa.gov>.
117. *See id.*

The *Duggan* decision required a series of new policy provisions regarding the frequency of care. The revised Medicare Home Health Care Manual explains the parameters of "intermittence" in two components. The first component pertains to the eligibility of the beneficiary.[118] To meet this first component, the patient must have a "medically predictable recurring need for skilled nursing services."[119] The second component of "intermittent" pertains to the frequency of visits allowed by Medicare in a given time frame.[120] To meet this component, the home health services must be provided on a part-time basis, as that term is defined in the manual.[121] Taken together, these components form the following definition of intermittent:

- Up to and including twenty-eight hours per week of skilled nursing and home health aid services combined on a less than daily basis;
- Up to thirty-five hours per week of skilled nursing and home health aide services combined which are provided on a less than daily basis, subject to review by fiscal intermediaries on a case-by-case basis, based upon documentation justifying the need for and reasonableness of such additional care; or
- Up to and including full-time (i.e., eight hours per day) skilled nursing and home health aide services combined which are provided and needed seven days per week for temporary, but not indefinite periods of time of up to twenty-one days, with allowances for extensions in exceptional circumstances where the need for care in excess of twenty-one days is finite and predictable.[122]

The limitations imposed by the concepts of "intermittent" and "part-time" have proven to be minimal. The definition is devoid of any significant restriction and permits the delivery of daily services as long as such services do not exceed the maximum time limits.[123] Moreover, HHAs appear to operate under a regular acquiescence on

118. *See* Medicare Home Health Agency Manual, *supra* note 16, § 204.1(C).

119. *Id.* The Manual explains that "[i]n most instances, this definition will be met if a patient requires a skilled nursing service at least once every 60 days." *Id.*

120. *See* GAO REPORT I, *supra* note 3, at 17.

121. *See* Medicare Home Health Agency Manual, *supra* note 16, § 206.7(A). This definition is incorporated into the general definition of "intermittent" and is therefore not reproduced here. *See infra* note 122 and accompanying text.

122. Medicare Home Health Agency Manual, *supra* note 16, § 206.7(B).

123. *See id.*

the part of HCFA to not question daily visits during the first twenty-one days.[124]

IV. Limitations on Home Health Care

The most glaring limitation on home health care is its potential for fraud and abuse. Federal investigators estimate that some $4 of every $10 disbursed by Medicare is the result of accidental overbilling or outright fraud.[125] The issue of fraud in home health care has received significant attention in the popular media with the federal investigation of Columbia/HCA Healthcare Corporation (Columbia/HCA), America's largest home health care provider. Columbia/HCA is currently the target of a criminal investigation focusing on whether it overbilled Medicare and other governmental health insurance programs.[126] Among the allegations against Columbia/HCA is that it committed fraud by funneling inpatient hospital patients into home-health agencies owned by the hospital (otherwise referred to as "self-referral").[127] This type of fraud would have enabled Columbia/HCA's hospital to disguise nonreimbursable hospital costs as reimbursable home health care costs.[128] If such allegations are proven true, Columbia/HCA would certainly not be alone in the commission of such fraudulent activities; however, the federal government is treating it as the sacrificial lamb in the government's fight against home health care fraud.

The primary responsibility of identifying fraudulent activities falls upon the regional home health intermediaries who are charged with the responsibility to conduct both prepayment and postpayment audits of HHAs.[129] The Consolidation Omnibus Budget Reconciliation Act of 1985 more than doubled the amount of funds available for

124. *See* GAO REPORT I, *supra* note 3, at 17.

125. *See* Goldstein, *supra* note 8.

126. *See Analysis: Widening Investigation into the Charges of Billing Fraud Against the Columbia/HCA Hospital Chain* (CBS Morning News broadcast, Aug. 19, 1997), *available at* 1997 WL 5619749.

127. *See Hospitals Funnel Patients to Their Home-Care Clinics Issue One Target of Columbia/HCA Probe*, ST. LOUIS POST-DISP., Sept. 3, 1997, at 5C.

128. *See id.*

129. *See* Medicare Intermediary Manual, *supra* note 17, § 1202. Prepayment reviews take the form of a medical review of a claim, which the intermediary has the authority to deny. *See* Interview (Oct. 16, 1997), *supra* note 31. Postpayment review takes the form of audits which can result in Medicare reimbursement, suspension of certification, or other sanctions. *See id.*

medical review and audit of Medicare claims.[130] In fiscal years 1986 and 1987, intermediaries reviewed approximately 62% of all claims and, in the years 1985 and 1987, denied approximately 10% of claims submitted for review.[131] However, due to budget cuts, intermediaries have reduced the number of medical reviews to approximately 3.2% of all claims.[132] As a result, a denial of a claim has become an endangered species, with only 0.6% denied in all of 1994.[133] In fact, intermediaries are now permitted to "assume that the type of services ordered are reasonable unless objective clinical evidence clearly indicates otherwise, or there is a lack of clinical evidence to support coverage."[134]

Intermediaries have also fallen far behind in their postpayment auditing procedures. In fiscal year 1994, intermediaries conducted only fifty-one on-site audits, amounting to less than 1% of all Medicare-certified HHAs.[135] To remedy these deficiencies, HHS in concurrence with the President's moratorium, assured that it would double the number of audits conducted by intermediaries to 1,800 annually.[136] Nevertheless, HHS's proposal is still quite modest considering that the program has some 10,000 providers with nearly 20 million claims filed annually.[137]

In addition, the nine intermediaries appear overburdened in their task of monitoring the claims and cost formulations of the over 10,000 HHAs with any sufficient detail.[138] The intermediaries make

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130. *See* GAO REPORT I, *supra* note 3, at 20.
131. *See id.*
132. *See id.*
133. *See id.*
134. *Id.* at 18. This report criticizes the current HCFA billing form for not requesting adequate information to make this determination. *See id.* at 19.
135. *See id.* at 21. The lackluster performance may well be explained as follows:

> Intermediaries are required to perform 10 on-site [audits] each year for all provider types, including, for example, outpatient, skilled nursing, and rehabilitation facilities. An HCFA representative noted that [audits] are so resource intensive that they may be done only in instances where a high level of return is expected. Because HHA claims may comprise a relatively small portion of an intermediary's total claims volume, the intermediary may not do *any* home health [audits].

Id. (emphasis added).
136. *See* Goldstein, *supra* note 8.
137. *See id.*
138. *See, e.g.*, Chaves County Home Health Serv. v. Sullivan, 732 F. Supp. 188, 189 (D.D.C. 1990) (stating that HHS supported a sampling method to calculate overpayments because of a "logical impossibility of affording an individual review to every Medicare claim").

reimbursement payments to providers at least monthly based on an estimated cost basis.[139] Monthly payments are subject to retroactive adjustment only at the end of the provider's cost reporting period.[140]

In response, several intermediaries have turned to questionable auditing procedures, such as the use of statistical methods instead of case-by-case review.[141] These practices conflict with the provisions of the Medicare Home Health Care Manual, which focus on individualized need and not "rule of thumb" determinations.[142] This conflict appears to call for a less-attenuated reimbursement system that is based more on actual cost than on formulation.

To fully understand the ineffectiveness of monitoring this overbilling, one only needs to look at the study of just eighty high-dollar claims reported to Congress by the General Accounting Office (GAO).[143] In this study, an independent claims contractor studied eighty high-dollar claims submitted in May 1995 and found that some $135,000 in charges (about 43% of total charges submitted) should have been denied under current law.[144] The findings are consistent with prior federal investigations, one of which estimated that in February 1993 alone, Medicare paid $16.6 million in claims that should not have been submitted.[145]

Though the evidence of overbilling is overwhelming, proving fraud remains an arduous task. Criminal prosecution for Medicare fraud can be based on any number of statutes,[146] the most notable being the set of statutes designed specifically for Medicare and Medicaid fraud.[147] These statutes govern three methods of fraud: false claims,

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139. *See* 42 C.F.R. § 413.64(a)-(b) (1997).

140. *See id.* § 413.64(f)(1); *see also infra* notes 155-57 and accompanying text.

141. *See Sullivan*, 732 F. Supp. at 189.

142. See Rizzi v. Shalala, Medicare & Medicaid Guide (CCH) ¶ 42,768, at 42,309, *available at* 1994 WL 686630, at *4 (D. Conn. Sept. 29, 1994) ("The revised guidelines also contain numerous provisions designed to insure that coverage determinations are based on individual needs.").

143. *See* U.S. General Accounting Office, Letter Report to Sen. Tom Harkin, Ranking Minority Member, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Committee on Appropriations, Medicare: Need to Hold Home Health Care Agencies More Accountable for Inappropriate Billings, at 1 (July 13, 1997) [hereinafter Inappropriate Billings Hearings].

144. *See id.*

145. *See id.*

146. Criminal prosecution can be based on the Social Security Act, the False Statements Act, or more generic criminal fraud statutes. *See* Kristine DeBry et al., *Health Care Fraud*, 33 AM. CRIM. L. REV. 815, 818 (1996).

147. *See* 42 U.S.C. § 1320a-7b (1994 & Supp. II 1996).

"kickbacks," and self-referrals.[148] Though each method carries significant penalties,[149] the requirement that the government prove a *mens rea* severely limits successful prosecution.[150]

The analogue to fraud, or purposeful overbilling, is *legal* billing—a practice that ironically contributes more to runaway health care costs than fraud itself.[151] Indeed, legislators criticize the President's focus on fraud, claiming the solution lies not merely in curbing fraud, but in reducing demand for the program.[152] One commentator aptly stated that what ails home health care are billing practices that are perfectly legal under the current system.[153] Indeed, *Duggan* caused an exponential growth in health care expenditures because it created a very wide breadth of coverage.[154]

Under the current system,[155] providers must file annual cost reports with their respective intermediaries for the reimbursement of costs.[156] The intermediary then determines the amount of reimbursement based upon its analysis and audit of this cost report and sets forth its determination in a Notice of Program Reimbursement.[157] The amount payable under the program is based upon the "reasonable cost" of the services provided to the beneficiary.[158] "Reasonable costs" are the "cost[s] actually incurred, excluding therefrom any part of the

148. *See id.* §§ 1320a-7b, 1395nn.

149. Penalties under the false claims section or antikickback prohibition may include a fine not exceeding $25,000, imprisonment for not more than five years, or both. *See id.* §§ 1320a-7b(a), (b). Under the self-referral section, any number of the following penalties may be imposed: (1) denial of payment; (2) mandatory refunds to individuals who were billed; (3) a civil penalty (of not more than $15,000 for each bill or claim); and/or, (4) exclusion from Medicare and Medicaid. *See id.* § 1395nn.

150. Under the false claims section, the government must prove that the defendant knowingly and willfully made the statement. *See id.* § 1320a-7b(a). Under the antikickback prohibition, "the [g]overnment must prove that the defendants 'knew their conduct was unlawful.'" The Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995); *see also* 42 U.S.C. § 1320a-7b(b). Under the self-referral provisions, the only apparent requirement for mens rea is the imposition of civil fines. *See id.*; *see also* DeBry, *supra* note 146, at 829 (stating that for imposition of civil fines, government must prove that defendant "knows or should know" the claim violates the self-referral law).

151. *See* George Anders & Eva M. Rodriguez, *By the Book: Never Mind the Fraud; What Ails Medicare Is Often Perfectly Legal*, WALL ST. J., Oct. 9, 1997, at 1.

152. Senator Harkin of Iowa characterized the President's moratorium as "about a half step." Goldstein, *supra* note 8 (quoting Senator Tom Harkin).

153. *See* Anders & Rodriguez, *supra* note 151.

154. *See supra* notes 105-16 and accompanying text and graph.

155. *See infra* notes 219-26 (discussing shift to prospective payment system).

156. *See* 42 C.F.R. § 413.20 (1997).

157. *See id.* § 405.1803.

158. *See id.* § 413.64(a), (b).

incurred cost found to be unnecessary in the efficient delivery of needed health services."[159] This formulation gives the HHA a dollar-for-dollar cost reimbursement based on *actual* cost of delivering the service.[160] For example, if an HHA compensates a therapist or nurse on a per-visit basis, the HHA receives a dollar-for-dollar reimbursement according to the number of visits. In this situation, both the employee and the HHA have an incentive to maximize visits or even overvisit the beneficiary. In *In Home Health, Inc. v. Shalala*,[161] the District Court for the District of Minnesota found this practice to be within the rules, at least where the HHA is using its own employees.[162] Such practices, however, lead to overuse and overbilling.[163]

One current means of controlling the "valve" on overbilling is the statutory provision giving HHS the ability to offset the "actual cost" by that amount "found to be unnecessary in the efficient delivery of needed health services."[164] HHS has developed a policy for computing these cost limitations.[165] The analysis of cost limitations involves two components: (1) computing the cost limitation across all HHAs and (2) applying the cost limitation to each HHA.[166] However

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159. 42 U.S.C. § 1395x(v)(1)(A) (1994).

160. This proposition is limited to HHAs using their own employees and is not the rule for services furnished by outsiders. This latter situation is governed by 42 C.F.R. § 413.106. *See infra* note 162.

161. Medicare & Medicaid Guide (CCH) ¶ 45,129 (D. Minn. Mar. 5, 1997), *available at* 1997 WL 269486.

162. *See id.* ¶ 53,215. The regulations provide the following formulation designed specifically for "physical or other therapy services," for "outside" providers:

> The reasonable cost of services of physical therapists . . . furnished under arrangements . . . with a provider of services . . . may not exceed an amount equivalent to the *prevailing salary* and additional costs that would reasonably have been incurred by the provider . . . had such services been performed by such person in an employment relationship.

Id. ¶ 53,212 (quoting 42 C.F.R. § 413.106(b)(1)) (alterations in original) (emphasis added).

The "prevailing salary" is defined as "the hourly salary rate based on the 75th percentile of salary ranges paid by providers in the geographic area by type of therapy, to therapists working full time in an employment relationship." *Id.* ¶ 53,213. This "prevailing wage" theory, though certainly not the solution to the problem, at least addresses some mechanism of cost control. *See* Interview (Oct. 16, 1997), *supra* note 31.

163. Many HHAs compensate their employees based upon a fixed-rate salary to avoid this temptation. *See* Interview (Oct. 16, 1997), *supra* note 31.

164. 42 U.S.C. § 1395x(v)(1)(A).

165. *See* GAO REPORT II, *supra* note 32, at 11.

166. *See id.*

noble this restraint, the cost limitations, as currently structured, pose no threat to spiraling costs.

The current method of computing the foregoing cost limitations is a primary (though surprisingly not well known) contributor to the rising cost of home health care. Until 1985, HCFA set cost limitations using the percentile method.[167] Under this method, HCFA ranked the standardized costs for each type of visit category ranging from the highest-cost HHA to the lowest-cost HHA.[168] Based on this ranking, the overall HHA cost limit for the applicable type of visit was set equal to the amount that fell at the seventy-fifth percentile mark within the rankings for that specific type of visit.[169] In 1985, HCFA shifted its policy of computation to the percentage-of-mean method.[170] Under this method, the average or mean standardized cost of all HHAs is computed.[171] This mean is then multiplied by the applicable percentage, currently 112%,[172] to arrive at the cost limit.[173] Although this change seems little more than an algebraic exercise, the GAO concluded that the use of the percentage-of-mean approach, as opposed to the percentile method, increases the cost limits.[174]

Another key deficiency in the cost limitations is HHS's method in applying these limitations. Beginning in 1979, HHS established a system for applying cost limits on what Medicare will pay for home health care.[175] A maximum amount is set for each type of visit: skilled nursing; physical, speech, or occupational therapy; medical social services; and home health aide services.[176] The maximum amount an HHA could seek in reimbursement was determined by summing the products of the number of each type of visit provided by the cost limit for each type of visit.[177] Thus, the costs exceeding the limit for one type of visit could be offset to the extent that the HHA's costs were below the limit for another type of visit.[178] Thus, notwithstand-

167. *See id.* at 24.
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.*
172. Congress recently took steps to reduce the cost limitation to 105% of mean; this change will take effect in 1999. *See infra* Part V (discussing Balanced Budget Act of 1997).
173. *See* GAO REPORT II, *supra* note 32, at 24.
174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*

ing individual cost limitations, HHAs considered cost limitations in the aggregate.[179] In 1985, HHS changed its regulations on cost limitations to effectively eliminate this means of aggregation.[180] However, no sooner had HHS changed such policy, it reverted back to the aggregation method in 1986.[181]

In a 1990 study of home health care, GAO estimated that if HHA cost limits had been applied by type of visit and without offset, Medicare payments would have been $49 million lower for the previous year.[182] Some critics argue, however, that this approach may cause decreased access to care if home health agencies dropped certain services or stopped participation because of lower limitations on reimbursement.[183] Additionally, the cost reductions may correspondingly lead HHAs to decrease their quality of care.[184] However, GAO addressed both of these concerns and found only negligible impact.[185] Although a potential reduction in quality of care may be difficult to quantify, GAO concluded that only one-half of the HHAs it surveyed would be affected, and even those would have cost reductions representing less than 1% of their Medicare revenues.[186]

Another glaring problem with the current structure is the amount and frequency of nonmedical services provided. Recall that home health aide services, though perhaps containing no medical basis, are reimbursable expenses if coupled with otherwise reimbursable nursing services.[187] This structure creates a system of federally funded companionship.[188] Again, these services are perfectly legal under the current Medicare reimbursement scheme.

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179. *See id.*
180. *See id.* at 12.
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See* Medicare Home Health Agency Manual, *supra* note 16, § 205.1(B)(4); *see also infra* notes 188-90 and accompanying text.
188. Carolyn Hughes Crowley writes that a *skilled* nurse "should discuss nonmedical matters, such as the plumber's and electrician's names and telephone numbers, the shut-off valve for the furnace, exits, family members' phone numbers and the establishment of a logbook." Carolyn Hughes Crowley, *Solving the Home Health-Care Equation; When Aging Parents Ail*, WASH. POST, Oct. 29, 1996, at E5. Though Crowley was trying to paint a picture of a compassionate caregiver giving assistance to an ailing patient, her article only serves to fuel the debate over whether such services (ranging in cost from $50-100 per hour) should come at the expense of Medicare's home health care program.

This problem is exacerbated by the sheer frequency of visits, a natural by-product of the ineffectiveness of the "part-time" or "intermittent" requirement.[189] Even with the "part-time" and "intermittent" policy limitations, advocates have successfully appealed Medicare denials of coverage for services provided in excess of thirty-five hours per week.[190] Certainly, the *Duggan* decision is the source of the dilemma. Discussing the post-*Duggan* reimbursement policies, one scholar states that the "lesson [learned] from this experience is that statutory coverage standards are not able to serve as cost-containment vehicles because, when applied retrospectively, they unduly curtail discretion and harm beneficiaries."[191] Moreover, the statutory methods for limiting visitations do not reflect the consensus of the medical community about the delivery of care.[192] However, as one scholar properly notes, providers who find themselves in a situation of overvisiting the beneficiary in the medical sense, yet still within the visitation limits in the legal sense, are faced with the ethical dilemma of deciding whether to terminate the provision of services.[193]

Likewise, the "homebound" limitation is ineffective in filtering out undeserving beneficiaries. For instance, federal investigators found evidence that some home health care beneficiaries were declared "homebound" for simply not owning a car.[194] Another purportedly "homebound" beneficiary postponed treatments so she could go fishing.[195]

The problems of overbilling individual claims, accidental or otherwise, sheds light on a more global problem: the ease of entry

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189. "The average patient's frequency of use of home health services has surged from twenty-two visits per beneficiary in 1980 to thirty-three visits in 1990 to seventy-six visits in 1996." Merrill Goozner, *Pay Shrinks as Home Health Care Grows: For-Profits Cut Benefits to Keep Costs Low*, HOUS. CHRON., May 28, 1997, at 7.

190. *See* JOE BAKER, MEDICARE HEALTH MAINTENANCE ORGANIZATIONS: NUTS AND BOLTS 127 (PLI Tax Law & Estate Planning Course Handbook Series No. D4-5270, 1997). The process of commencing an appeal of an initial denial of coverage is quite simple and may involve merely a one-line letter directed to the intermediary. For a discussion on the appeals process of Medicare coverage determinations, see Anthony Szcygiel, *Long Term Care Coverage: The Role of Advocacy*, 44 U. KAN. L. REV. 721, 756-59 (1996).

191. Eleanor D. Kinney, *Medicare Managed Care from the Beneficiary's Perspective*, 26 SETON HALL L. REV. 1163, 1188 (1996).

192. *See id.* at 1188-89.

193. *See* Brummel-Smith, *supra* note 26, at 499. The issue of ethics in the provision of home health care has received only limited scholarly attention and has been overshadowed by the larger issue of cost-containment.

194. *See* R.A. Zaldivar, *Battle Looming on the Home Front: Health Care Cost Key Element in Proposals*, FLA. TIMES-UNION, May 22, 1997, at A1.

195. *See id.*

into and continuance in the home health care market. Medicare imposes twelve conditions of participation, covering areas such as patient rights; acceptance of patients, plans of care, and medical supervision; and skilled nursing services.[196] HCFA can reimburse only those HHAs that have been surveyed and certified as meeting these conditions of participation.[197] Notwithstanding this "filter" process, these conditions pose an insignificant barrier to entry into the home health care market. First, the HHA is permitted to self-certify that many of the conditions for certification are or will be met.[198] Second, the survey accompanying the certification process is limited in its scope and investigation.[199] The weakness of this barrier to entry is cited by critics to be one of the primary reasons why some 100 new HHAs were being certified every month.[200]

Since the date of the moratorium, HHS has considered the promulgation of new rules aimed primarily at restricting new HHA entry into the Medicare program.[201] Some of these rules include requiring

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196. *See* 42 C.F.R. § 484 (1997). The conditions of participation include the following:

(1) Patient rights, *see id.* § 484.10;
(2) Compliance with federal, state and local laws, disclosure of ownership information, and compliance with accepted professional standards and principles, *see id.* § 484.12;
(3) Organization, services, and administration standards, *see id.* § 484.14;
(4) Group of professional personnel (which includes at least one physician and one registered nurse), *see id.* § 484.16;
(5) Acceptance of patients, plan of care, and medical supervision requirements, *see id.* § 484.18;
(6) Skilled nursing services, *see id.* § 484.30;
(7) Therapy services, *see id.* § 484.32;
(8) Medical social services, *see id.* § 484.34;
(9) Home health aide services, *see id.* § 484.36;
(10) Qualifying to furnish outpatient physical therapy or speech pathology services, *see id.* § 484.38;
(11) Maintaining clinical records of patients, *see id.* § 484.48;
(12) Evaluation of HHA by professional personnel, the HHA staff, consumers, or outside professionals, *see id.* § 484.52.

197. *See* 42 U.S.C. §§ 1395x(o), 1395bbb(a) (1994).

198. *See Medicare Home Health Agencies: Certification Process Is Ineffective in Excluding Problem Agencies, Hearing Before the Senate Special Comm. on Aging*, 105th Cong. 2 (1997) (statement of Leslie G. Aronovitz, Associate Director of Health Finance and System Issues; Health, Education, and Human Services Division).

199. *See id.* Interestingly, the Social Security Act does not require HHA owners to have any prior health care experience. *See id.* Aronovitz testified that they found one HHA owner whose most recent work experience was driving a taxi cab and another who was operating a pawn shop in addition to his HHA. *See id.*

200. *See id.* This of course excludes the recent moratorium, which effectively halted *any* new certifications. *See supra* Part II.

201. *See Combating Medicare Waste, Fraud and Abuse Through Information Technologies, Hearings Before the Subcomm. on Oversight & Investigations of the House Comm.*

the HHA to: "(1) post surety bonds of at least $50,000; (2) show proof that they have served a specified number of patients; and (3) submit detailed information about their business operations."[202] These rules, however, focus solely on restricting Medicare-certified market entry for HHAs and do not address the larger problem of cost-containment.

Another significant drawback of the home health care system is the lack of any meaningful involvement by the physician.[203] The most obvious reason for this limitation is found in the law *itself*, as nothing in the Act or regulations requires the physician be involved in the delivery of home health care beyond certification and plan approval.[204] Interestingly, when Congress expanded Medicare to include home health care in 1965, it was purportedly seeking to "increase the dwindling physician involvement in home health care by conditioning the provider's reimbursement on physician supervision."[205] Currently, however, the *only* substantive physician-related requirement, the physician's signature, "represent[s] little more than a tacit accommodation to permit third party reimbursement of the agency."[206]

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on Commerce, 105th Cong. (1997) (statement of Bruce Merlin Fried, Director, Center for Health Plans and Providers, Health Care Financing Administration).

202. Elizabeth Shogren, *supra* note 4. For a detailed discussion of these rules, see *infra* Part V.B.

203. *See* Brummel-Smith, *supra* note 26, at 497; Weitzman, supra note 32, at 27 ("[M]eaningful physician involvement in home care services is mediocre at best . . . ."); Susan Cowan Atkinson, Comment, *Medicare 'Cost Containment' and Home Health Care: Potential Liability for Physicians and Hospitals*, 21 GA. L. REV. 901, 910 (1987). Ms. Atkinson states:

> That physicians are rather detached from the process of providing patients with home health care is not particularly surprising, for Medicare does not reimburse physicians for their supervision. Notwithstanding the requirement that they participate, there is no incentive other than goodwill for doctors to become involved with patients receiving home care, and plans frequently end up drawn entirely by the home health care provider.

Id. at 911 (citation omitted).

204. The Medicare Home Health Agency Manual provides:

> It is not intended that you [the HHA] contact the physician's office to account for patient's visits. It is expected but not required for coverage that the physician who signs the plan of care will see the patient, but there is no specified interval of time within which the patient is expected to be seen. Your intermediary evaluates the patient's medical condition. *Visits are not denied solely on the basis that the physician does not see the patient.*

Medicare Home Health Agency Manual, *supra* note 16, § 234.8 (emphasis added).

205. Atkinson, *supra* note 203, at 910.

206. Weitzman, *supra* note 32, at 27. Once more, courts have upheld a physician's certification as valid even when made retroactively. *See, e.g.*, Hayner v. Weinberger, 382 F. Supp. 762 (E.D. N.Y. 1974) (holding that physician could retroactively certify need for extended care treatment of patient). The implication is

Another reason for the absence of physician participation is the low level of compensation, if any, for home health care.[207] Physicians are neither compensated nor reimbursed for telephone consultations or other monitoring services provided to the beneficiary.[208] Also, Medicare does not reimburse "house calls" in furtherance of monitoring activity, thereby exacerbating the disincentive for physicians to become involved in the delivery of home health care services.[209] Costs alone give physicians no incentive to make home visits in order to inspect the level of care being provided and no reason to deny home health care by not prescribing it.

Another key limitation to the home health care system is its lack of copayments or deductibles. As the system currently exists, so long as the HHA meets its certification requirements, the services provided are fully reimbursable by Medicare.[210] Contrast this policy with Medicare's hospital insurance program,[211] its skilled nursing facility program,[212] and its hospice care program,[213] all of which impose numerous deductibles and coinsurance payments. Congress has proposed deductibles or cost-sharing alternatives for home health care, though no such provision has found its way into the Code.[214]

clear: the physician's signature is solely a precondition to reimbursement—and does not act as a filter to limiting the provision of care.

207. *See id.*; Brummel-Smith, *supra* note 26, at 497-98.

208. *See* Weitzman, *supra* note 32, at 27.

209. *See id.* at 27-28.

210. *See* 42 U.S.C. §§ 1395d, 1395f(a)(2)(D) (1994).

211. Medicare covers 90 days of hospital care per spell of illness plus an additional 60 exhaustible lifetime reserve days. *See id.* §§ 1395d(a)(1), 1395e(a)(1). Medicare imposes a $540 first day deductible per spell of illness, *see* 42 C.F.R. § 409.80 (1997); a $135/day coinsurance payment for the 61st through 90th day of care, *see id.* § 409.83; and a $270/day coinsurance payment for each lifetime reserve day. *See id.* § 409.83.

212. Limited coverage for skilled nursing facilities is available for up to 100 days during a spell of illness. *See* 42 U.S.C. § 1395d. A beneficiary under this plan of care is subject to a coinsurance premium of $67.50 for days 21 through day 100. *See* 42 C.F.R. § 409.85.

213. Medicare places no limits upon the number of days that it will cover for hospice care. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4006(a), 104 Stat. 1388, 1388-43. The hospice patient is responsible for five percent of the cost of respite care and the lesser of five dollars or five percent per prescription. *See* 42 U.S.C. § 1395e(a)(4).

214. The Senate passed an amendment to the bill which ultimately became the Balanced Budget Act of 1997, that would have established a five-dollar per visit copayment for home health services, however the amendment was ultimately defeated. H.R. CONF. REP. NO. 105-2015 (1997), 143 CONG. REC. H6237. Congress has also considered and rejected a 20% cost-sharing requirement. *See* Long-term Care Family Security Act of 1992, H.R. 4848, S. 2571, 102d Cong.

Aside from these primary limitations, "lesser known" limitations permeate the home health care system. Take, for example, one commentator's view that home health care actually reduces an elderly person's autonomy.[215] This view is a certain departure from what many assumed to be true: home health care offers more freedom than the alternative choice of skilled nursing facilities.[216] The point, however, is still well taken. Indeed, patients in home health care have little if any input in the provision of services.[217] They are not involved in the development of a plan of care.[218] Moreover, they do not review or even receive billing statements.[219] Though having little bearing on costs to the system, these types of alternative limitations are nonetheless useful in understanding the more universal limitations on the home health care system.

V. Solutions

A. Congress's First Step Towards a Solution: The Balanced Budget Act of 1997

It seems all too appropriate that on the eve of the ten-year anniversary of *Duggan*, Congress took its first steps towards curbing the home health care crisis with the passage of the Balanced Budget Act of 1997.[220] Unfortunately, a close analysis of the Act reveals that these "steps" are insufficient in reversing the trend that *Duggan* helped initiate.

Perhaps the most significant measure of the Act is the establishment of a prospective payment system.[221] The Act requires HHS to develop and implement a prospective payment system for payments for home health services.[222] The prospective payment system for home health care seems to borrow from the limited success that the

215. *See* Peter J. Ferrara, *Expanding the Autonomy of the Elderly in Home Health Care Programs*, 25 NEW ENG. L. REV. 421, 427-28 (1990).

216. *See* Bergquist, *supra* note 1, at 35 ("A profound loss of autonomy accompanies placement in a nursing home.").

217. *See* Ferrara, *supra* note 215, at 434 ("No mention is made of any role by the recipient in selecting the provider.").

218. *See* Interview (Oct. 16, 1997), *supra* note 31.

219. *See id.*

220. Pub L. No. 105-33, 111 Stat. 251.

221. *See id.* § 4603(a), 111 Stat. at 467 (codified at 42 U.S.C.A. § 1395fff(a)(West Supp. 1998)).

222. *See id.*

prospective payment system has had on hospitalization costs.[223] Providing limited guidance,[224] Congress has left the design of such a payment system to the wisdom of HHS.[225] However, at its essence, the prospective payment system will be based on a standardized payment amount, based initially on prior cost reporting data, "that eliminates the effects of variations in relative case mix and wage levels among different home health agencies."[226] The Act provides a series of adjustments to this standardized payment amount[227] and a means to annually increase or index the amount.[228]

The Act effectively reduces the cost per visit limitations from 112% of mean labor-related and nonlabor visit costs to 105% of the

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223. *See* 143 CONG. REC. E1720-01 (daily ed. Sept. 10, 1997) (statement of Rep. Hamilton) ("Medicare's prospective payment system for hospitals has helped curb payments to providers. [This system] has created incentives for hospitals to be more efficient.").

224. The Act provides:

> In defining a prospective payment amount under the system under this subsection, the Secretary shall consider an appropriate unit of service and the number, type, and duration of visits provided within that unit, potential changes in the mix of services provided within that unit and their cost, and a general system design that provides for continued access to quality services.

Balanced Budget Act of 1997 § 4603(a), 111 Stat. at 468 (codified at 42 U.S.C.A. § 1395fff(b)(2)).

225. HHS's discretion to develop this system seems unfettered. Indeed, Congress precluded administrative or judicial review of HHS's establishment of the payment amounts and all applicable adjustments. *See id.* § 4603(a), 111 Stat. at 470 (codified at 42 U.S.C.A. § 1395fff(d)(1)-(6).

226. *Id.* § 4603(a), 111 Stat. at 468 (codified at 42 U.S.C.A. § 1395fff(b)(3)(A)(i)).

227. *See id.* The Act provides the following adjustments:

Case Mix Adjustment—"The Secretary shall establish appropriate case mix adjustment factors for home health services in a manner that explains a significant amount of the variation in cost among different units of service." *Id.* § 4603(a), 111 Stat. at 469 (codified at 42 U.S.C.A. § 1395fff(b)(4)(B)).

Area Wage Adjustment—"The Secretary shall establish area wage adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of home health services in a geographic area compared to the national average applicable level." *Id.* § 4603(a), 111 Stat. at 469 (codified at 42 U.S.C.A. § 1395fff(b)(4)(c)).

Outliers—"The Secretary may provide for an addition or adjustment to the payment amount otherwise made in the case of outliers because of unusual variations in the type or amount of medically necessary care. The total amount of the additional payments or payment adjustments made under this paragraph with respect to a fiscal year may not exceed 5 percent of the total payments projected or estimated to be made based on the prospective payment system under this subsection in that year." *Id.* § 4603(a) 111 Stat. at 469 (codified at 42 U.S.C.A. § 1395fff(b)(5).

228. *See id.* § 4603(a) 111 Stat. at 468 (codified at 42 U.S.C.A. § 1395fff(b)(3)(B). Interestingly, Congress chose not to preclude judicial review of HHS's determination of the annual percentage increases.

median of such costs.[229] The Act requires HHS to eventually incorporate these cost limitations in its prospective payment system.[230] In the meantime, the Act introduces a system of interim payment limits whereby Medicare will reimburse HHAs for the lowest of: (1) actual costs; (2) the per visit limits; or (3) an annual blended agency-specific per beneficiary limit.[231]

In addition, home health services will be paid based on the location where the service is provided, rather than where the service is billed.[232] Though HCFA touts this provision as having the potential to reduce the Medicare payments,[233] it has this effect *only* where the HHA is located in an urban area and the particular patient is located in a rural area. It may well have the reverse effect if the HHA is located, say, in a suburban area (which meets the HCFA's standards for rural) and the patient is located in an urban area.

The Act also includes a "bookkeeping" measure whereby home health services will be gradually transferred from Part A to Part B.[234] Currently, Part A is financed through separate payroll contributions paid by employees, employers, and self-employed persons.[235] Part B is financed by monthly premiums of those who voluntarily enroll in the Medicare program and by the federal government which makes contributions from general revenues.[236] Collectively, these funds are deposited in a separate account known as the Federal Supplementary Medical Trust Fund.[237] Under the Balanced Budget Act, Medicare Part A will continue to cover the first 100 visits following a three-day stay in a hospital or skilled nursing facility.[238] Beyond this, expenditures for home health care will gradually transfer from Part A to Part B in a six-year phase-in period.[239] Accompanying the shift of expendi-

229. *See id.* § 4602(a), 111 Stat. at 466.

230. *See id.* § 4603(a) 111 Stat. at 468 (codified at 42 U.S.C.A. § 1395fff(b)(3)(A)).

231. *See id.* § 4602(c), 111 Stat,. at 466.

232. *See id.* § 4604(a), 111 Stat. at 472.

233. *See Hearing on Health Care Fraud Before the Subcomm. on Health of the House Ways & Means Comm.*, 105th Cong. (1997) (statement of Linda A. Ruiz, Director of Program Integrity, Health Care Financing Administration) (discussing provisions of Balanced Budget Act of 1997).

234. *See* Balanced Budget Act of 1997 § 4611(a), (e), 111 Stat. at 472-73.

235. *See* Medicare Home Health Agency Manual, *supra* note 16, § 102.

236. *See id.*

237. *See id.*

238. *See* Balanced Budget Act of 1997 § 4611(a), 111 Stat. at 472.

239. *See id.* § 4611(e). The transition from Part A to Part B will occur in constant increments, beginning with 1/6 in 1998, 1/3 in 1999, and so on, until the transition is 100% complete in 2003. *See id.* § 4611(e)(2), 111 Stat. at 473.

tures to Part B is an increase in the Part B premium, which will be phased in over a seven-year period.[240] The primary purpose of transfer is the preservation of the life of the Hospital Trust Fund of Part A.[241] However, the maneuver has been labeled "a shell game" and a "way to avoid real Medicare reform."[242] Indeed, one commentator aptly characterized the transfer as "really only bookkeeping, and it's merely a shifting from the left hand to the right hand."[243]

The Act requires the Secretary of HHS to submit annual reports to Congress that include an estimate of the outlays expected for home health care for fiscal years 1998 through 2002.[244] The Secretary must also submit annual reports that compare the actual expenditures to these estimated outlays.[245] If actual outlays are found to be greater than the estimated outlays for any given annual report, the report must include recommendations to reduce growth, such as beneficiary copayments or other methods.[246] This provision appears to be little more than a matter of paperwork. If Congress is willing to await the Secretary's reports, the imposition of beneficiary copayments could be delayed for another four to five years.[247] The reports do nothing to analyze the current data surrounding the ten-year boom in home health care costs.[248] Moreover, the reports are focused on aligning es-

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240. *See id.* § 4611(e), 111 Stat. at 473. The phase-in will occur in constant increments, beginning with an increase in premium equal to 1/7 of the extra costs due to the transfer in 1998, a 2/7 increase in 1999, and so on, until the phase-in is 100% complete in 2004. *See id.* § 4611(e)(3), 111 Stat. at 473. The increase in premium is the apparent response to Republicans' criticism that earlier plans of the President, which provided for the shift from Part A to Part B without any accompanying increase in premiums, exposed the burdens of home health care to the general revenues (thus risking a general tax hike). *See* Brian Tumulty, *Republican's Rap Clinton's Plan on Medicare Home Health Care Costs*, GANNET NEWS SERV., June 6, 1996, *available at* 1996 WL 4379311.

241. *See* Tumulty, *supra* note 240. HCFA seems to have found another reason, stating that the measure will "allow for better payment control." HCFA Press Release, *HHS Halts Certification of Home Health Agencies; New Regulations Will Fight Fraud and Abuse* (Sept. 15, 1997), *available at* <http://www.hcfa.gov/news/n970915.htm>.

242. Geri Aston & Vida Foubister, *Delegates Oppose Shift in Home Health Care Costs*, AM. MED. NEWS, July 14, 1997, at 4.

243. *Id.* (quoting Donald C. Brown, M.D.).

244. *See* Balanced Budget Act of 1997 § 4616(a), 111 Stat. at 475.

245. *See id.* § 4616(b), 111 Stat. at 475.

246. *See id.*

247. Because the Balanced Budget Act calls for the estimation of costs from 1998 to 2002 and the annual comparison of actual costs to these estimated costs, Congress would not have the full extent of these reports until 2002. *See id.* § 4616(a), (b), 111 Stat. at 475.

248. *See supra* notes 3-5 and accompanying text (discussing increases in amount of money spent and agencies serving home health care).

timated costs with actual costs and do nothing to simply reduce cost, estimated or otherwise.[249]

The Act makes very little progress in addressing the frequency of visits or patient eligibility. First, the Act merely clarifies the "part-time" or "intermittent" requirements in conformity with the *Duggan* interpretation.[250] The inability to address the substantive elements of this requirement seems to reflect a fundamental misunderstanding of the effect of *Duggan*.[251] Second, the Act does nothing to alter the ever-expanding definition of "homebound."[252] Rather, the Act merely requires the Secretary of HHS to conduct a study on the criteria for determining whether an individual is "homebound" and submit the findings to Congress by October 1, 1998.[253]

B. HCFA's Response

Acting on the mandates of the Balanced Budget Act and the President's moratorium, HCFA proposed a series of new regulations aimed primarily at curbing fraud and abuse, with only a tangential focus on quality of care.[254] These proposed rules do little more than respond to the mandates of the Balanced Budget Act of 1997.

HCFA recently proposed rules, requiring all HHAs to post a surety bond and meet certain minimum capitalization requirements, whether or not the HHA is currently certified.[255] Under this rule, an HHA would be required to obtain a surety bond that is the greater of $50,000 or 15% of the annual amount paid to the HHA by Medicare.[256] Moreover, the HHA would be required to demonstrate that it has sufficient capital available to start and operate an HHA for the first three months.[257] However, this latter requirement appears less concerned

249. *See* Balanced Budget Act of 1997 § 4616, 111 Stat. at 475.

250. *See id.* § 4612, 111 Stat. at 474.

251. Perhaps, however, there is another explanation: a statutory reversal of *Duggan* at this point would seem to strike the greatest blow to participation in the program—and would certainly represent a step far greater than those which Congress seemed willing to take in late 1997.

252. *See supra* notes 60-63 and accompanying text.

253. *See* Balanced Budget Act of 1997 § 4613, 111 Stat. at 474.

254. *See infra* notes 259-65 and accompanying text.

255. *See* Medicare & Medicaid Programs, Surety Bond and Capitatlization Requirements for Home Health Agencies, 63 FED. REG. 292 (1998).

256. *See id.*

257. *See id.*

with fraud and abuse and more concerned with quality of patient care.[258]

HCFA also proposed a rule which would incorporate the prohibitions against self-referrals found in sections 1877 and 1903(s) of the Social Security Act into HHS regulations.[259] These regulations prohibits a physician from making a referral to an HHA with which that physician or a member of the physician's family has a financial relationship.[260] These rules are undoubtedly an outgrowth of the HCA/Columbia debacle and the President's policy of cutting down on fraud in the form of self-referrals.[261] In furtherance of this policy, HCFA has decided to reexamine its interpretations of Medicare regulations pertaining to compensation arrangements between the certifying physicians and HHAs.[262]

In addition to these rules, HHS Secretary Donna Shalala vowed to increase the number of claim reviews from 200,000 per year to 250,000.[263] Further, HCFA announced that it will double the number of home health agency audits.[264] Again, Shalala acknowledged that the measures are designed for the more limited purpose of combating fraud and abuse.[265]

HCFA has given only limited attention to matters unassociated with fraud and abuse. The only evidence of HCFA's effort in this regard is its proposed rule governing the computation of cost limitations, which incorporates the shift to the 105% of median limitation.[266] This rule does nothing more than incorporates the Balanced Budget Act's mandate for a restructured cost limitation.[267]

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258. Indeed, HCFA states that "[u]ndercapitalized providers represent a threat to the quality of patient care." *Id.*

259. *See* Medicare & Medicaid Programs, Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships, 63 FED. REG. 1659 (1998).

260. *See id.*

261. *See supra* notes 127-28 and accompanying text (discussing self-referrals).

262. *See* Medicare Program, Home Health Agency Physician Certification Regulations, 62 FED. REG. 59,818 (1997).

263. *See* HCFA Press Release, *HHS Halts Certification of Home Health Agencies; New Regulations Will Fight Fraud and Abuse* (Sept. 15, 1997), *available at* <http://www.hfca.gov/news/n970915.htm>.

264. *See id.*

265. *See id.*

266. *See* Medicare Program, Schedule of Limits on Home Health Agency Costs Per Visit for Cost Reporting Periods Beginning on or After October 1, 1997, 63 FED. REG. 89 (1998). HHS declared this as a "major rule" under 5 U.S.C. § 804(2) (1994), and found that prior notice and comment procedures are impracticable and unnecessary. *See* 63 FED. REG. 90 (1998). This schedule of limits is effective for cost reporting periods beginning on or after Oct. 1, 1997. *See id.*

267. *See supra* notes 227-29 and accompanying text.

C. Solutions the Government Left Behind

Home health care is Medicare's fastest growing program—and for all practical purposes, such growth is without control. Congress and HCFA, having only recently recognized the crisis, worked diligently in the last quarter of 1997 to address the problems confronting home health care. In fact, the President was so confident in this diligence that on January 13, 1998, he decided to prematurely lift the moratorium on certifying new HHAs.[268] HHS Secretary Donna Shalala boasted: "[w]e now have more new rules in place that will fight fraud and abuse by keeping unprepared and fly-by-night home-health operators out of Medicare."[269] Shalala's statement, however, underscores two significant shortcomings to the recent reform efforts. First, her statement reflects a continued emphasis on the more narrow solution of simply curbing fraud and abuse. Second, her statement implies that, insofar as home health care reform is concerned, Congress and HCFA's work is done.

The solution, however, is not quite so easy. Most of the problems facing the home health care system are entirely legal. The system, with its $0 deductible, *nearly* full-time, personalized care is without question the preferred choice among elderly seeking skilled nursing or therapy services.[270] However, the system's benefits are the very cause of the system's failure. Building on the outlined limita-

268. *See Home-Health Moratorium Imposed Sept. 15 Is Lifted*, WALL ST. J., Jan. 14, 1998, at B2. The President originally imposed a six-month moratorium, which would have continued through March. *See id.* Moreover, HCFA lifted the moratorium after merely *proposing* certain rulemakings and did not await the final action on any one regulation.

Another, perhaps more interesting, reason that the President and HCFA may have acted so quickly in lifting the moratorium is the questionable constitutionality of the moratorium. The Home Health Services and Staffing Association raised this very objection in a hearing before Congress one month after the imposition of the moratorium. *See Hearing on Medicare Home Health Before the Subcomm. on Oversight & Investigation of the House Comm. on Commerce*, 105th Cong. (1997) (statement of Home Health Services and Staffing Association by James C. Pyles, counsel). Indeed, the language of the statute governing certification is clearly mandatory, not permissive: "[a]ny provider of services . . . *shall be qualified* to participate under this subchapter and shall be eligible for payments under this subchapter if it first files with the Secretary an agreement." 42 U.S.C. § 1395cc(a)(1) (1994 & Supp. II 1996) (emphasis added).

269. *Home Health Moratorium Imposed Sept. 15 Is Lifted*, WALL ST. J., Jan. 14, 1998, at B2. Perhaps Shalala spoke prematurely, as most of these proposed rules were in the notice and comment period, and not one rule was "final," as of the date of her statement.

270. *See* Marcus Montoya, *Home Is Where Health Care Is: Rising Hospital Costs, Patients' Desire to Stay Home Pump Life Into Industry*, COLO. SPRINGS GAZETTE TELEGRAPH, Dec. 3, 1996, at B1.

tions, the analysis will now shift to a close review of several potential solutions.

First, HCFA must revisit its policies for reimbursing home health care costs, including the prospective payment system. The current system, whether by reimbursement *or* prospective payment, permits and at times even encourages overbilling and overuse. One widely discussed solution is the imposition of cost limitations based upon the type of visit with a prohibition against offsetting—a method HCFA once practiced, however briefly.[271] The original purpose of cost limitations was to give HHAs a financial incentive to police themselves on cost containment.[272] However, the current system permits HHAs to aggregate their costs over all types of visits.[273] GAO asserts that "[c]hanging the method of formulating cost limitations—from aggregate to type-of-visit—would give HHAs increased incentives to control costs for each type of visit."[274] Having researched this issue extensively, GAO found that the criticisms of this proposal were insignificant in light of the potential cost savings.[275] Moreover, taking GAO estimated savings of $49 million in 1990,[276] together with the six-fold increase in home health care expenditures,[277] current savings from this conversion alone could equal $300 million per year.

Congress addressed the methods of reimbursement in several provisions of the Balanced Budget Act of 1997. For instance, Congress first did so by reducing the cost limits of home health care from 112% of the mean labor-related/nonlabor per visit costs to 105% of median.[278] In addition, Congress included a provision for a *prospective* reimbursement.[279] Although at first glance, these measures seem to attack the potential for abuse from the dollar-for-dollar payment system, the conferees themselves conclude that the prospective payment method does nothing to reduce the cost per visit or the volume of visits.[280] Likewise, although the cost limitations have the potential for reducing costs, the measure does not address the issue of aggregation

271. *See supra* Part IV (discussing aggregate and type-of-visit cost limitations).
272. *See* GAO REPORT II, *supra* note 32, at 17.
273. *See supra* Part IV (discussing aggregate and type-of-visit cost limitations).
274. GAO REPORT II, *supra* note 32, at 23.
275. *See supra* note 185 and accompanying text.
276. *See* GAO REPORT II, *supra* note 32, at 17.
277. *See supra* note 116 and accompanying graph.
278. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4602, 111 Stat. 251, 465.
279. *See id.* § 4603, 111 Stat. at 467.
280. *See id.*

of costs over types of visits. A more comprehensive measure would be to restrict an HHA from carrying over costs, which exceeded one cost limit, to another type of visit, which has not exceeded its limitation.[281]

Second, HCFA must impose a coinsurance payment or deductible to reduce the comparative advantage that home health care affords over other types of care covered under Medicare. Home health care remains as the *only* Medicare program that does not require the beneficiary to bear a portion of the cost.[282] A coinsurance provision would not only reduce demand for home health care, but would also reduce fraud because hospitals would have less incentive (or none at all) to shift their hospital costs to home health care. The Heritage Foundation, in a recent study of home health services, concluded that a 20% coinsurance rate would generate $4.2 billion in savings for 1998 alone, and as much as $25 billion over the next five years.[283] The study noted that much of the growth in home health care expenditures could be attributed to the over-utilization of services that results from the absence of a cost-sharing component.[284] The study concluded:

> A 20 percent coinsurance payment is both reasonable and in line with the rest of Medicare's coinsurance requirements for physician services. Raising the coinsurance payment also would increase beneficiaries' awareness of how much a particular benefit actually costs, and lead to a more appropriate—and lower—utilization of services.[285]

In 1997, Congress was inundated with proposals for making beneficiaries bear a share of the cost of home health care, yet it failed to pass a single measure that would require any such contribution.[286] Given

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281. GAO has conducted some preliminary investigation into a potential third means of reimbursement that is based upon a maximum cost per episode. *See* GAO REPORT I, *supra* note 3, at 13. This report is not conclusive as to any cost savings or reductions in visitations.

282. *See supra* notes 210-13 and accompanying text.

283. *See* Carrie J. Gavora, *Medicare Home Health Care Services, in* BALANCING AMERICA'S BUDGET: ENDING THE ERA OF BIG GOVERNMENT 343, 343 (Scott A. Hodge ed., 1997).

284. *See id.* at 344.

285. *Id.*

286. *See* 143 CONG. REC. E1720-01 (daily ed. Sept. 10, 1997) (statement of Rep. Hamilton) ("This year Congress considered proposals to strengthen Medicare's financial condition by charging extra premiums to wealthier retirees, raising the eligibility age, and imposing a copayment of $5 per visit for home health care services. None of the proposals survived in the final bill . . . ."). Harris Meyer paints an especially bleak picture of the state of home health care:

> [T]he combination of popular demand for more home care, an inexorable increase in the number of frail older Americans, persistent dread

the amount of debate and voluminous testimony that went into the home health care debate, the resulting product did indeed "side-step[ ] the issue."[287]

Third, the physician must be given a greater role in the delivery of home health care. The current system places the physician on the periphery. A logical first step for this measure involves a reevaluation of the compensation scheme for the physician. Also, the HHA may be required to surrender some of its functions to the physician, thereby placing the physician in a more centralized role. The American Medical Association (AMA) has called for the medical profession to take on a larger role in the delivery of home health care services.[288] The AMA has asserted a need for physician review of *all* orders for home health services.[289] Moreover, the AMA has advocated that HHAs provide physicians with itemized billing statements—an element of the process to which physicians were never before privy.[290] One scholar argues that increased involvement of physicians would reduce overbilling and perhaps, more interestingly, reduce the potential for negligence in the delivery of health care services.[291] To accompany such increased involvement, commentators have advocated for a revised reimbursement policy that would adequately compensate physicians for these monitoring functions.[292]

> of nursing homes, and the widespread sense that care can be delivered more cheaply at home than in institutions, strongly suggests that the current political mania for cutting back on home care won't last. Providers are counting on that.

Harris Meyer, *Home Health on the High Wire: In the Search for Medicare Savings, Politicians Sidestep Important Structural Questions*, HOSP. & HEALTH NETWORKS, July 20, 1997, at 26.

287. Harris Meyer, *supra* note 286.

288. *See* Marshall B. Kapp, *Family Caregiving for Older Persons in the Home*, 16 J. LEGAL MED. 1, 2 (1995) (noting that "physicians have largely remained on the periphery of home care"). In a July 14, 1997, meeting, the AMA delegates voted to oppose major portions of the then-proposed Balanced Budget Act of 1997. *See Delegates Oppose Shift in Home Health Care Costs*, AM. MED. NEWS, July 14, 1997, at 4, *available at* 1997 WL 9149425. The primary concern is the Act's shift of home health care costs from the hospital portions of Medicare to the physician side. *See id.* The thought is that such swap could later jeopardize reimbursable costs from physician reimbursement in other areas. *See id.*

289. *See Delegates Oppose Shift in Home Health Care Costs*, *supra* note 288.

290. *See id.*

291. *See* Atkinson, *supra* note 203, at 926. Atkinson appears to be alone on this issue, as the issue of health care provider liability is overshadowed by the larger problem of spiraling costs.

292. *See* Weitzman, *supra* note 32, at 28. Atkinson argues that Congress should be the driving force behind this type of action. *See* Atkinson, *supra* note 203, at 926.

Fourth, Congress must revisit the issue of the frequency of permissible visits under the current system. At present, depending upon the services offered, a provider could be in the home as much as thirty-five hours in any given week.[293] Indeed, *Duggan* (which resolved the most simple issue that "or" meant "or") served as the impetus for the explosion in home health care costs. The Balanced Budget Act of 1997 clarified the definitions of "part-time" and "intermittent," yet did nothing to restrict their scope.[294] This provision merely adopts *Duggan's* long-since accepted interpretation. This provision is little more than a massaging of the text of the statute and by no means imposes a meaningful limitation on the frequency of potential visits. Thus, any statutory solution must reform the more basic definitions of "part-time" and "intermittent." Moreover, in response to criticisms of scholars and physicians, any statutory solution must give the medical community some role in circumscribing the frequency limitations.

Likewise, the beneficiary must be given a greater role in the provision of services. The Balanced Budget Act of 1997 only mildly addresses this point by giving the beneficiary the right to make a written request to any physician or supplier for an itemized statement of Medicare-covered items or services.[295] This provision provides an avenue for the beneficiary to become apprised of the services provided; however, the provision by no means incorporates the beneficiary into a position of control or active participation. Moreover, because this provision was not accompanied by any imposition of cost sharing, one would wonder why the beneficiary would *ever* be concerned about the cost, let alone take the affirmative step of making a written request to his provider.

Finally, home health care is no doubt ridden with fraud. However, addressing this point last is no mere accident. Without question, the government must find new and creative means to cut down on fraud. However, the federal government's current focus on fraud misses the broader problems facing home health care. A "quick fix" solution to the fraud problem will by no means remedy home health care's spiraling costs that the law *itself* currently allows.

Accompanying the need to increase auditing practices to identify fraud is the need to decrease the cost of each individual audit. One

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293. *See supra* note 122 and accompanying text.
294. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33 § 4612, 111 Stat. 251, 474.
295. *See id.* § 4311, 111 Stat. at 384.

solution already discussed in both chambers of Congress is to place the cost of a follow-up audit on HHAs initially found to be engaged in abusive billing.[296] The proposal requires authorizing legislation that gives HCFA authority to broaden its review of claims.[297] In addition, this procedure requires HCFA to establish a procedure for identifying abusive billers.[298]

As a concluding note, HCFA has instituted education initiatives to improve beneficiary and physician awareness of improper billing practices.[299] However, money spent on such initiatives are conceivably more wasteful than the overbilling itself. As noted in Part IV, the physician has little or no role in the provision of home health care.[300] Likewise, the beneficiary is wholly detached from the billing process and receives the same number of visits regardless of what the HHA has elected to record as billable.[301] Accordingly, such education falls on deaf ears.

VI. Conclusion

Home health care's most troubling problems are entirely legal. Home health care was once considered the most cost-effective alternative to skilled nursing, hospitalization, or any other means of long term care. However, beginning with the *Duggan* decision in 1988, recent changes in law and policy governing the program have caused the program to self-destruct.

The cost containment problems now facing home health care are the result of HHAs merely following the law. First, home health care continues to be the only Medicare program that does not come with a price tag for the beneficiary. Accordingly, the beneficiary has no incentive to ration or limit her use of the service. Second, HCFA still utilizes cost computation methods that have been proven cost-inefficient. Moreover, by permitting HHAs to offset their costs among the various types of services, any attempt to cap per-visit costs is ineffec-

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296. *See* Inappropriate Billings Hearings, *supra* note 143, at 5; *see also* 143 CONG. REC. E1930-03 (daily ed. Oct. 2, 1997) (statement of Rep. Stark) ("If providers are willing to foot the bill to fly-in compliance consultants from high profile firms like Coopers & Lybrand, they can surely afford Government audits.").

297. *See* 143 CONG. REC. E1930-03 (1997).

298. *See id.*

299. *See* Inappropriate Billings Hearings, *supra* note 143, at 5.

300. *See supra* notes 203-09 and accompanying text.

301. *See supra* notes 217-19 and accompanying text.

tive. Third, the program promotes overbilling and overvisitation. The program then prevents policing this practice because it fails to give the physician or beneficiary any role in the provision of services. Fourth, Congress has not responded with an appropriate statutory solution to *Duggan*'s interpretation of the terms "part-time" or "intermittent." The *Duggan* decision effectively expanded the reach of home health care along with subsequent legislation, and HCFA policies have only served to bolster its effect. With only limited exceptions, an HHA can now provide nearly full-time service to beneficiaries, and such services can venture far from the realm of medical necessity. These problems exist apart from the issue of fraud and abuse, which has received the most, if not exclusive, attention of the current administration. The current solutions of the administration place heavy emphasis on reducing fraud and illegal billing and fail to address the more comprehensive solution of arresting the growth rate in home health care expenditures.

The home health care cost crisis demands a comprehensive solution that curbs the legal overbilling and over-utilization of the program—and such a solution must embrace more than the mere prosecution of fraud. First, Congress must impose a coinsurance payment or deductible on home health care. Beyond shifting a portion of the burden of funding, such copayment would cause the beneficiary to become a more active participant by creating incentives for self-rationing home health care services. Second, the cost limitations and application of those limitations must be changed to a type-of-visit limitation that prohibits offsets, a policy that GAO has consistently supported. Third, the physician must be given an enhanced, if not central, role in the provision of home health care services. Such a solution requires statutory authorization and increased reimbursements to physicians engaging in home health care plan management or participation. Fourth, Congress must provide a statutory solution to the *Duggan* decision. This solution requires more than a massaging of the definitions of "part-time" and "intermittent" and may require some means for gaining the input of a consensus of the medical community. Finally, Congress must continue to find solutions to identifying and prosecuting fraud. On this issue, the debate over the potential solutions is quite rich. However, this debate has come at the expense of failing to recognize the more global solutions addressed herein. Indeed, home health care's most troubling problems are entirely legal.

To Transfer or Not to Transfer: Congress Failed to Stiffen Penalties for Medicaid Estate Planning, but Should the Practice Continue?

John M. Broderick

The high cost of long-term health care motivates many middle-class and wealthy individuals to transfer their assets in order to qualify for Medicaid. After Congress repealed an unpopular and short-lived law criminalizing such transfers, it enacted a replacement law prohibiting the counseling of others to make such transfers. This new law criminalizes the actions of attorneys who advise their clients to divest themselves of assets in order to qualify for Medicaid. However, U.S. Attorney General Janet Reno declared she will not enforce the statute, citing a concern that such enforcement would criminalize the counseling of an otherwise lawful estate-planning strategy. Questions remain as to whether attorneys should continue to advise their clients to transfer their assets in order to receive government assistance and whether Congress should continue to legislate in this area.

In this note, Mr. Broderick examines the purposes and costs of Medicaid and discusses the current Medicaid eligibility rules. Mr. Broderick then analyzes the history of asset-transfer regulations and discusses why these measures have ultimately failed. Mr. Broderick suggests a better solution would be to remove the motivation to engage in asset transferring by making long-term health care insurance less expensive and more accessible to the elderly. Moreover, Mr. Broderick advocates a continuation in the practice of transferring assets within the context of estate planning, but only if further legislation is developed that protects the elderly from being coerced by their family into divesting their assets in order to maximize the size of the estate left to the family members.

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I. Introduction

Over the last twenty years, Medicaid eligibility rules have become increasingly restrictive.[1] In 1996, the Health Insurance Portability and Accountability Act of 1996[2] criminalized the transfer of assets made for the purpose of becoming eligible for Medicaid.[3] This provision represented the pinnacle of government involvement in regulating such transfers. Amid a subsequent hailstorm of criticism, Congress amended the provision.[4]

In a seemingly vindictive measure, Congress replaced the provision with a criminal sanction against those who counseled others to make such transfers.[5] However, a federal district court judge has held that a constitutional challenge to this provision will most likely be successful.[6] It appears Congress exercised poor judgment and was manipulated by the insurance industry, an industry that was contending with a stagnant long-term care insurance market.[7]

This note will recommend that the practice of Medicaid estate planning should continue. Although recent attempts to legislate in this area have failed, lawmakers still need to address problems associated with Medicaid estate planning, and, in particular, the problems that arise when children want to institutionalize a parent. Part II gives an overview of the purpose and costs of Medicaid, and discusses current Medicaid eligibility rules. Part III analyzes the history of asset-transfer provisions. Part IV then discusses why recent measures to increase the penalties for asset transfers have failed. Finally, part V concludes that the practice should continue and suggests that further legislation is needed.

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1. *See generally* Joshua M. Wiener, *Public Policies on Medicaid Transfer and Estate Recovery: How Much Money to Be Saved?*, GENERATIONS, Sept. 1996, at 72.

2. Pub. L. No. 104-191, 110 Stat. 1936.

3. *See id.* § 217, 110 Stat. at 2008-09.

4. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified at 42 U.S.C.A. § 1320a-7b(a) (West 1998)).

5. *See id.*

6. *See* New York State Bar Ass'n v. Reno, 999 F. Supp. 710 (N.D.N.Y. 1998) (granting a preliminary injunction for the bar association to stay Department of Justice enforcement while the bar association pursues its constitutional challenge).

7. *See* Ira Stewart Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 47 SOC. SEC. REP. SERV. 757, 758 (1995) (discussing the pervasive influence of the insurance industry in this area of legislation).

II. Background

A. Medicare

Created by the Social Security Amendments of 1965,[8] Medicare[9] and Medicaid[10] provide health insurance coverage for most individuals aged sixty-five and older.[11] Medicare is a federal program with uniform eligibility requirements and a standardized benefit structure for the entire nation.[12] The program has three parts: Part A provides for the Hospital Insurance program,[13] Part B provides for Supplemental Medical Insurance which covers such costs as x-rays and physician services,[14] and Part C provides for Medicare+Choice.[15]

Part A coverage is automatically available without cost to all recipients of Social Security Retirement benefits[16] and to all others aged sixty-five and older for a monthly premium.[17] Part A covers ninety consecutive days of hospitalization per episode,[18] subject to a deductible and copayments.[19] Part A partially covers skilled nursing care at an institution for up to 100 days,[20] if that individual was an inpatient for at least three consecutive days before transferring from the hospital to the skilled nursing care facility.[21] Under some circumstances, Part A also covers skilled care at home.[22] Medicare Part B is a non-means-tested program, requiring applicants to be otherwise eligible for Part A coverage, aged sixty-five or older, and to pay a monthly premium.[23] Medicare is intended to cover acute short-term illnesses, most hospitalization costs, and a portion of the costs of physician services.[24]

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8. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.
9. Health Insurance for the Aged Act, Pub. L. No. 89-97, § 100, 79 Stat. 290, 290 (1965) (codified at 42 U.S.C.A. § 1395 (West 1998)).
10. Grants to States for Medical Assistance Programs, Pub. L. 89-97, § 121(a), 79 Stat. 343, 343 (1965) (codified as amended at 42 U.S.C.A. § 1396 (West 1998)).
11. *See* 42 U.S.C.A. §§ 1395c, 1396d(a)(iii).
12. *See* 1 S. REP. NO. 103-403, at 175 (1993).
13. *See* 42 U.S.C.A. §§ 1395c-1395i-4.
14. *See id.* §§ 1395n-j-1395w-4.
15. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 1851(a), 111 Stat. 251, 276 (codified as amended at 42 U.S.C.A. § 1395w-21(a) (West 1998)).
16. *See id.* § 1395c.
17. *See id.* §§ 1395i-2(a), (d).
18. *See id.* § 1395d(a)(1).
19. *See id.* § 1395e(b).
20. *See id.* § 1395d(a)(2)(A).
21. *See id.* § 1395x(i).
22. *See id.* § 1395d(a)(3).
23. *See id.* § 1395o.
24. *See* 1 S. REP. NO. 103-403, at 1, 145 (1993).

B. Medicaid

In order to cover large copayments or extended acute illnesses requiring longer hospital stays, the individual will need either private supplemental coverage, which is referred to as Medigap, or Medicaid.[25] Medicaid is a joint federal-state entitlement program originally intended to give basic medical services only to the poor and disabled.[26] States may develop and administer their own Medicaid programs within federal guidelines.[27] Participating states pay the costs of medical treatment for the needy and are subsequently reimbursed by the federal government.[28]

Medicaid has become a fundamental source of public funds for nursing home care.[29] Approximately one-half of all nursing home residents[30] rely on Medicaid as their primary source of payment.[31] Medicaid reimburses forty-one percent of all elderly nursing home residents, regardless of whether they initially enter the nursing home as eligible, or enter as private payers and subsequently deplete their assets.[32]

Private insurance for long-term care is limited.[33] Insurance is unaffordable for most of the elderly.[34] Thus, estate planning becomes more important for the nation's growing elderly population. However, many individuals do not plan adequately for long-term care because either an unanticipated illness strikes them or they mistakenly rely on Medicare for full coverage.[35]

Medicaid addresses the needs for medical assistance of the medically indigent.[36] Whereas Medicare functions like social insurance,

25. *See id.* at 149.
26. *See id.* at 173-74.
27. *See id.* at 173.
28. *See generally* 42 U.S.C.A. § 1396b.
29. *See* 1 S. REP. NO. 103-403, at 173. Medicaid pays for 90% of all nursing home costs. *See id.*
30. In 1991, 1.3 million residents in nursing homes were aged 65 and over. *See id.* at 174. Current projections estimate that two out of five of all persons aged 65 and over can expect to spend some time in a nursing home. *See infra* note 250 and accompanying text.
31. *See* 1 S. REP. NO. 103-403, at 173-74.
32. *See* Brenda C. Spillman & Peter Kemper, *Lifetime Patterns of Payment for Nursing Home Care,* 33 MED. CARE 280, 293 (1995).
33. *See* Peter M. Macy, *Medicaid Planning After OBRA '93: Placing the Home in a Revocable Trust,* 79 MASS. L. REV. 1, 2 (1995).
34. *See* Joshua M. Wiener, *Can Medicaid Long-Term Care Expenditures for the Elderly Be Reduced?*, 36 GERONTOLOGIST 800, 801 (1996).
35. *See* 1 S. REP. NO. 103-403, at 173.
36. *See id.*

Medicaid is more akin to a welfare program.[37] Medicaid is a means-tested entitlement program for individuals in certain groups who qualify for coverage if their income and resources are sufficiently low.[38] It covers one-half of the population with income below the federal poverty line.[39] As far as the elderly are concerned, Medicaid covered 32% of the elderly population in 1991, accounting for 33% of Medicaid spending.[40]

C. Medicaid Eligibility Categories

Medicaid covers three categories of individuals. They are: (1) the categorically needy,[41] (2) the optional categorically needy,[42] and (3) the medically needy.[43] The elderly who are covered by Medicaid comprise 54% of the individuals in the categorically needy class, 23% in the optional categorically needy class, and 23% in the medically needy class.[44] Federal law requires states to cover the categorically needy.[45] All persons receiving assistance under a welfare program, such as Aid to Families with Dependent Children (AFDC) and most persons who receive assistance from Supplemental Security Income (SSI) qualify for Medicaid benefits.[46] If an individual qualifies for SSI, she must also meet the income and resource requirements of the state in order to receive Medicaid benefits.[47] However, if an applicant does not meet SSI or AFDC eligibility standards, she will not qualify for Medicaid regardless of her income level.[48]

Congress sets federal guidelines of eligibility for use by the states.[49] The Health Care Finance Association (HCFA) further refines those guidelines.[50] If an applicant is over sixty-five and categorically needy, the individual qualifies for assistance.[51] The criteria for deter-

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37. *See* Marshall B. Kapp, *Options for Long-Term Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 724 (1991).
38. *See* 1 S. REP. NO. 103-403, at 175.
39. *See id.* at 176.
40. *See id.*
41. *See* 42 C.F.R. § 435.100 (1995).
42. *See id.* § 435.200.
43. *See id.* § 435.300.
44. *See* S. REP. NO. 103-403, at 176.
45. *See* 42 C.F.R. § 435.110(a).
46. *See id.* §§ 435.110(b), 435.120.
47. *See id.* § 435.121.
48. *See id.*
49. *See, e.g.*, 42 U.S.C.A. § 1396a(a)(10) (West 1998).
50. *See* 42 C.F.R. § 435.
51. *See id.* §§ 435.120-.121.

mining if someone is categorically needy has two components: income and resources.

Income is defined as the amount an individual receives in cash or in kind to pay for food, clothes, or shelter.[52] In contrast, resources are assets that can be converted into cash.[53] For example, Illinois allows a person to hold $2,000 in resources,[54] but certain resources are not counted.[55] Such uncounted resources include the homestead to which a nursing home resident intends to return, any personal effects, and the value of a motor vehicle up to $4,500.[56]

Contrary to the categorically needy group, the optional categorically needy is a class of persons that the state can give assistance to at the state's discretion.[57] These programs extend Medicaid eligibility to applicants who do qualify for welfare or SSI benefits but meet certain other criteria.[58] This category enables many residents in nursing homes to be covered by Medicaid if their income is low enough but, otherwise, would not qualify as categorically needy.[59]

Applicants falling under the third category, the medically needy, are those applicants whose income and resources are large enough to cover daily living expenses, but not large enough to cover medical care.[60] The criteria for determining who is medically needy varies from state to state.[61] A person may be eligible in one state, but not in another.[62]

D. Costs

In 1996, 36.1 million U.S. citizens received Medicaid at a cost of $121.7 billion in vendor payments.[63] Comprising 13% of the Medicaid

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52. *See* 42 U.S.C.A. § 1382a; 20 C.F.R. § 416.1102.
53. *See* 20 C.F.R. § 416.1201.
54. *See* AID FOR THE AGED, BLIND AND DISABLED MANUAL § 505.2 (1996).
55. *See* 42 U.S.C.A. § 1382a(b); 20 C.F.R. § 416.1210.
56. *See* AID FOR THE AGED, BLIND AND DISABLED MANUAL, *supra* note 54, § 505.1.
57. *See* 42 C.F.R. § 435.201.
58. *See id.* § 435.201(a).
59. *See* 1 S. REP NO. 103-403, at 175 (1993).
60. *See* 42 C.F.R. § 435.301.
61. *See* 1 S. REP. NO. 103-403, at 175.
62. *See id.*
63. *See Medicaid Recipients, Vendor, Medical Assistance and Administrative Payments* (visited Sept. 21, 1998) <http://www.hcfa.gov/medicaid/2082-1.htm> [hereinafter *Payments*]. Medicaid has become one of the fastest growing components of both federal and state budgets. *See* S. REP. NO. 103-403, at 132. From 1975 to 1984, Medicaid expenditures increased from $12.2 billion to $34.3 billion—a 180% increase. *See id.* at 133.

population, 4.7 million Medicaid recipients were over the age of sixty-five.[64] However, recipients over the age of sixty-five accounted for 35% of vendor payments, or $40.7 billion.[65]

The 1.7 million recipients in nursing facilities comprised 5% of the Medicaid population.[66] In 1993, nursing home care costs represented 9% of national health-care expenditures.[67] Nursing home costs account for two-thirds of Medicaid payments made on behalf of elderly recipients,[68] representing the most costly and intense long-term care alternative.[69] The typical resident of a nursing home is either frail and requires constant attention or is technologically dependent.[70] States that would like to develop a system to transition residents into other forms of care limit access to nursing homes to Medicaid applicants who require round-the-clock care.[71]

The average annual cost of nursing home care in 1995 was $40,000 per resident.[72] Most of these costs are paid for by either the individual or Medicaid.[73] Approximately half of all elderly nursing home residents rely on Medicaid as their primary source of payment.[74] In 1994, for example, 69% of elderly residents financed at least some part of their nursing home costs through Medicaid.[75]

64. *See Medicaid Recipients and Vendor Payments by Age* (visited Sept. 21, 1998) <http://www.hcfa.gov/Medicaid/2082-6.htm>. The largest percentage of the Medicaid population comprised children ages 0-5 and adults aged 21-44, each of which accounted for 23% of the 36.1 million recipients. *See id.*

65. *See id.* Vendor payments per elderly recipient broke down in terms of age as follows:

Years of Age	Vendor Payments
65–74	$ 5,793
75–84	$ 8,956
85 and over	$12,169

66. *See id.* Illinois had the fifth highest recipient total with 1.5 million residents on Medicaid. The state spent $1.5 billion on recipients in long-term care facilities. *See* ILLINOIS DEP'T OF PUBLIC AID, ANNUAL REPORT: MEDICAL ASSISTANCE PROGRAM FISCAL YEARS 1993, 1994, 1995, LONG TERM CARE FISCAL YEAR 1995, 1, 28 graph 1 (1995). These facilities served 67,540 people per month, of which approximately 51,959 were geriatric. *See id.* at 2.

67. *See* 1 S. REP. NO. 103-403, at 166.

68. *See id.* at 176.

69. *See id.* at 166.

70. *See id.*

71. *See id.*

72. *See* Wiener, *supra* note 34, at 801.

73. *See* 1 S. REP. NO. 103-403, at 172.

74. *See* Kapp, *supra* note 37, at 724.

75. *See* Wiener, *supra* note 34, at 801.

III. Asset Transfer Regulations and Medicaid Eligibility

The history of asset transfer regulation illustrates the tension that exists between competing interests regarding the issue of our nation's long-term care financing. The competing interests include the following: (1) the federal government wanting to limit its expenditures in this area; (2) insurance companies wanting to make long-term care insurance more attractive to consumers; and (3) the individual wanting to conserve personal assets. This section discusses the evolution of asset transfer regulations in Medicaid eligibility requirements.

A. Early Asset Transfer Regulation

Prior to 1980, applicants were able to transfer assets that would have made them ineligible for benefits.[76] The courts enforced this ability to transfer by preventing states from denying Medicaid eligibility to applicants who made asset transfers for less than fair market value.[77] However, Congress responded to the states' efforts to limit the divestiture of resources by applicants.[78]

New legislation added as an amendment to the Parental Kidnapping Prevention Act of 1980[79] prohibited asset transfers made solely for the purpose of qualifying for benefits under the SSI statutes.[80] It allowed states to implement procedures for denying benefits, but did not allow more restrictive procedures than those established by the federal government.[81] The new rule enforced on the states[82] was not applicable to transfers of exempt assets.[83]

Two years later, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[84] which gave states the right to impose liens, recover assets of the applicants for the cost of care, and

76. *See* Timothy N. Carlucci, *The Asset Transfer Dilemma: Disposal of Resources and Qualifications for Medicaid Assistance*, 36 DRAKE L. REV. 369, 372 (1986).

77. *See, e.g.*, Blum v. Caldwell, 446 U.S. 1311 (1980); Fabula v. Buck, 598 F.2d 869 (2d Cir. 1979); Dokos v. Miller, 517 F. Supp. 1039 (N.D. Ill. 1981); Robinson v. Pratt, 497 F. Supp. 830 (D. Mass. 1980); Udina v. Walsh, 440 F. Supp. 1151 (D. Mo. 1977); Buckner v. Maher, 424 F. Supp. 366 (D. Conn. 1976).

78. *See* Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(a), 94 Stat. 3566, 3567 (codified as amended at 42 U.S.C.A. § 1396a(j) (West 1998)).

79. *Id.* §§ 6-10, 94 Stat. at 3568-73.

80. *See* 42 U.S.C.A. § 1396a(j)(1).

81. *See id.*

82. *See, e.g.*, Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982).

83. *See* 42 U.S.C.A. § 1382b(a)(1). The exemption included transfers of the family home. *See id.*

84. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 132(d), 96 Stat. 324, 373 (1982) (codified as amended at 42 U.S.C. § 1396p (1994).

punish applicants who disposed of assets to avoid these measures.[85] This Act also prevented the transfer of homes.[86] TEFRA also provided for more elaborate asset transfer regulations than what was originally provided for in the Boren-Long 1980 amendment.[87]

The amendment allowed states to impose a period of ineligibility on an applicant who transferred an asset for less than fair market value and would have otherwise been ineligible because their assets exceeded allowable limits.[88] The amendment also allowed the states to impose a period of ineligibility on applicants based on the uncompensated value of the home in relation to the cost of twenty-four months of Medicaid benefits.[89] The latter provision was primarily directed toward applicants in medical institutions.[90]

B. COBRA '85 and the MQT

In 1985, Congress included trust assets in Medicaid eligibility determinations to respond to the growing use of trusts as devices for Medicaid planning.[91] These provisions were part of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA '85).[92] COBRA '85 provided that assets transferred to a nontestamentary trust that enabled an individual to retain discretion regarding the trust's distribution would be considered available to the individual.[93] Thus, these assets were considered when determining the individual's eligibility for benefits under Medicaid.[94] Such a trust was called a Medicaid Qualifying Trust (MQT).[95] The MQT was an illustrative case of "doublespeak;"[96] the applicant who established an MQT was automatically disqualified for Medicaid.[97]

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85. *See* 42 U.S.C. § 1396p (1983).
86. *See* 42 U.S.C. § 1396p(c)(1) (1983).
87. *See* 42 U.S.C. § 1396p(c) (1983).
88. *See* 42 U.S.C. § 1396p(c)(1) (1983).
89. *See* 42 U.S.C. § 1396p(c)(2)(B)(i) (1983).
90. *See* 128 CONG. REC. S8586 (daily ed. July 19, 1982).
91. *See* Shawn Patrick Regan, *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care,* 44 CATH. U. L. REV. 1217, 1231 (1995).
92. Pub. L. No. 99-272, 100 Stat. 82 (1986) [hereinafter COBRA '85].
93. *See id.* § 9506(a), 100 Stat. at 210 (codified as amended at 42 U.S.C. § 1396a(k) (1994)).
94. *See id.*
95. *See id.*
96. *See* Link v. Town of Smithtown, 616 N.Y.S.2d 171, 172 n.5 (N.Y. Sup. Ct. 1994).
97. COBRA '85 § 9506(a), 100 Stat. at 210.

Estate planners found ways to circumvent the MQT provisions.[98] One method was to create a "trigger" trust which immediately terminated two provisions in the trust upon an individual's entry into a nursing home.[99] These provisions concerned: (1) "the trustee's discretion to make distributions to the [individual]"; and, (2) "the applicant's ability to revoke the trust."[100] The second method was the use of a "donor" trust, where "an individual transfers" assets to another person who then establishes a trust for the benefit of the donor.[101] MQTs would not be addressed again until 1993.

C. MCCA '88 & OBRA '89

Congress made important changes to the asset transfer rules in the late eighties under the Medicare Catastrophic Coverage Act of 1988 (MCCA '88)[102] and the Omnibus Budget Reconciliation Act of 1989 (OBRA '89).[103] MCCA '88 changed the prior asset transfer restrictions from optional to mandatory for the states.[104] Congress also extended the "look-back" period for asset transfers from twenty-four months to thirty months[105] and exempted noninstitutionalized Medicaid applicants from asset transfer rules.[106] MCCA '88 also made significant changes in the eligibility rules regarding the income and assets of an institutionalized spouse.[107]

Under OBRA '89, Congress restricted asset transfers made by an applicant's spouse.[108] Prior to this restriction, applicants could transfer assets to a third person without being penalized. Applicants did this by first transferring assets to their spouses, who then transferred the assets to a third person.[109]

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98. See Regan, *supra* note 91, at 1232.
99. *See id.*
100. *Id.*
101. *See id.*
102. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1989) [hereinafter MCCA '88].
103. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989) [hereinafter OBRA '89].
104. *See* MCCA '88 § 303(b), 102 Stat. at 760-61.
105. *See* MCCA '88 § 303(b)(C)(1)(A), 102 Stat. at 760-61. For a discussion of the "look back" period, see *infra* notes 116-20 and accompanying text.
106. *See* MCCA '88 § 303(b)(c)(3), 102 Stat. at 761.
107. *See* Louis B. Torch, *Spousal Impoverishment or Enrichment? An Assessment of Asset and Income Transfers by Medicaid Applicants*, 4 ELDER L.J. 459, 465 (1996).
108. *See* OBRA '89 § 6411(e), 103 Stat. at 2271.
109. *See* Regan, *supra* note 91, at 1230 n.60.

D. OBRA '93

The Omnibus Budget Reconciliation Act of 1993[110] (OBRA '93) made comprehensive changes to the Medicaid eligibility rules, changes that are still in effect.[111] The new rules were "designed to restrict individuals from arranging their financial affairs in order to retain the economic benefit of their wealth" while "securing government paid long-term care services."[112] The new rules were more restrictive not for the purpose of making long-term care less accessible to the elderly, but to address perceived abuse of the rules promulgated by MCCA '88.[113]

The structure of the asset transfer rules were the same: if an individual transfers a nonexempt asset to someone other than his spouse for less than fair market value, he will incur a period of ineligibility.[114] The state agency will impose this period of Medicaid ineligibility if the nonexempt transfers were made within a specified time period prior to application.[115] This time period is called the "look-back" period.[116] Currently, the look-back period for most transfers is thirty-six months.[117] If the asset transfer involves certain payments from a trust or portions of a trust that are treated as assets disposed of by the individual, the look-back period is sixty months.[118]

After the state determines that an asset was transferred for less than its fair market value during the look-back period, the state will delay an applicant's eligibility.[119] The period of ineligibility is determined by dividing the uncompensated amount of the assets transferred by the average monthly cost of nursing home care in the recipient's state.[120] Prior to OBRA '93, a state could not impose a pe-

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110. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1994) (relevant provisions codified as amended at 42 U.S.C. § 1396p (1994)) [hereinafter OBRA '93].

111. *See* Regan, *supra* note 91, at 1233-34 (listing changes in over 10 sections of Medicaid eligibility rules); *see also* Torch, *supra* note 107, at 472. *See generally* Wiesner, *supra* note 7 (comparing in depth the new rules in OBRA '93 with previous rules).

112. Wiesner, *supra* note 7, at 757.

113. *See id.* at 758 ("A congressional perception was created that MCCA was being inappropriately manipulated and abused.").

114. *See* 42 U.S.C.A. § 1396p(c)(2)(B) (West 1998).

115. *See, e.g.*, AID FOR THE AGED, BLIND AND DISABLED MANUAL, *supra* note 54, § 505.5(c).

116. *See* 42 U.S.C.A. § 1396p(c)(1).

117. *See id.*

118. *See* Wiesner, *supra* note 7, at 766.

119. *See* 42 U.S.C.A. § 1396p(c)(1)(A).

120. *See id.* § 1396p(c)(1)(E).

riod of ineligibility of more than thirty months; however, OBRA '93 eliminated that limitation.[121] Ineligibility begins on the first day of the first month during or after assets have been transferred for less than fair market value.[122] The individual becomes ineligible for medical assistance under Medicaid for (1) nursing facility services; (2) institutional services at a nursing facility; and (3) home or community-based services.[123] If nonexempt transferred assets are returned, the individual does not incur a period of ineligibility.[124] If the spouse of an applicant makes a transfer that results in a period of ineligibility, a state shall apportion the period of ineligibility among the applicant and the spouse if the spouse later becomes eligible for Medicaid.[125] This provision has also been interpreted to mean that if the applicant dies, the applicant's remaining penalty falls on the surviving spouse.[126]

For the purpose of the ineligibility provision, exempt asset transfers are those made to an individual's spouse for the sole benefit of the spouse,[127] to another person for the sole benefit of the spouse, to a disabled child, or a transfer to a trust for the benefit of a disabled child.[128] A special exemption is made for the transfer of homestead property.[129] An individual can transfer his homestead property to his spouse, a minor or disabled child, or a sibling with an equity interest in the home who has resided in it for at least one year prior to the applicant's institutionalization.[130] Also, an individual can transfer her homestead to a caretaker child who provided the applicant with care for two years prior to the applicant's institutionalization, thus permitting the applicant to have resided at home rather than in an institution.[131]

Since OBRA '93 redefined assets to include income and resources, it also closed the loophole for the disposition of windfalls to the recipient.[132] Under the prior definition, an item did not become a

121. *See* OBRA '93 § 13611(a)(1), 107 Stat. at 622-24 (amending 42 U.S.C. § 1396p(c)(1) and codified as subparagraph (B)(i)).
122. *See* 42 U.S.C.A. § 1396p(c)(1).
123. *See id.*
124. *See id.* § 1396p(c)(2).
125. *See id.* § 1396p(c)(4).
126. *See* Wiesner, *supra* note 7, at 779.
127. *See generally* Torch, *supra* note 108 (discussing asset transfers made for the benefit of the spouse of the institutionalized spouse).
128. *See* 42 U.S.C.A. § 1396p(c)(2)(B).
129. *See id.* § 1396p(c)(2)(a)(iii).
130. *See id.* § 1396p(c)(2)(a)(iv).
131. *See id.*
132. *See* Wiesner, *supra* note 7, at 779.

resource until it was owned for longer than one calendar month;[133] thus, the individual could dispose of lottery winnings or inheritances in the same month and not be subject to the transfer rules.[134] Lastly, OBRA '93 modified the way spouses could manipulate their joint accounts as to the spouse's eligibility.[135] If an asset is held in common, such as a joint bank account, the asset is considered transferred if the individual or other holder performs any act that eliminates or reduces the individual's ownership of the asset.[136]

E. New Rules for Trusts and the Comparability Rule

After OBRA '93, a grantor could no longer control his assets without affecting his Medicaid eligibility.[137] This treatment was consistent with the view that trusts were the "single most offensive Medicaid estate planning vehicle."[138]

Under Medicaid, all trusts are classified as either revocable or irrevocable trusts.[139] The definition for "trust" includes any similar legal instrument or device and nondiscretionary trusts established by a court.[140] Therefore, the group that can establish a trust includes the individual, the individual's spouse, a court, an administrative body or other legal entity.[141]

The individual has established a trust for the purposes of Medicaid if assets of the individual or spouse were used to fund all or part of the corpus of the trust.[142] The corpus of a revocable trust is considered available to the applicant, any payments to or for the benefit of the individual are income, and other payments are transfers of assets.[143] In contrast, an individual may be able to fund an irrevocable trust without the principal being counted for Medicaid eligibility purposes depending on the type of interest an applicant retained in an irrevocable trust.[144]

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133. *See id.*
134. *See id.*
135. *See* 1 S. REP. NO. 103-403, at 189 (1993).
136. *See id.*
137. Trusts established before August 10, 1993 were not subject to OBRA '93. *See id.*
138. *See* Wiesner, *supra* note 7, at 771.
139. *See* 42 U.S.C.A. §§ 1396p(d)(3)(A)-(B) (West 1998).
140. *See id.* § 1396p(d)(6).
141. *See id.* § 1396p(d)(2)(A).
142. *See id.*
143. *See id.* § 1396p(d)(3)(A).
144. *See id.* § 1396p(d)(3)(B).

If an individual retains an interest in an irrevocable trust as a permitted beneficiary, the funding of the trust is not considered an asset transfer.[145] When the applicant is no longer a permitted beneficiary, or distributions are made to third parties from the trust, a transfer will be deemed to have taken place.[146] The assets of the trust will be treated as a countable resource and distributions to the applicant from income or principal are considered income.[147] If the individual does not retain an interest as a permitted beneficiary, the funding of the trust is treated as a transfer.[148] Any portion of the trust, or income from the corpus from which no payment could be made to the individual, is a transfer of assets as of the date the trust is established.[149] If the funding of a trust is considered a transfer of assets, the sixty-month look-back period will apply.[150] If the application of the rules results in undue hardship, the state must waive their application.[151] Payments for the benefit of the individual from an irrevocable trust are considered income,[152] and the corpus from which the payments were made is considered an available resource.[153] If payments were not made for the benefit of the individual, they are considered transfers of assets.[154]

A revocable trust, however, may still have some benefit in Medicaid estate planning.[155] Currently, individuals can transfer property to a revocable trust without penalty, but the property is considered a resource available to the individual.[156] However, some states, such as Massachusetts, impose a penalty period for transferring one's home into a revocable trust.[157] Massachusetts also considers the home an available asset because it is in a revocable trust.[158] Treating the transfer in this way seemingly contradicts the federal regulations and thus violates the "comparability rule."[159] The "comparability rule" requires

145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.* § 1396p(d)(3)(B)(ii).
149. *See id.*
150. *See id.* § 1396p(c)(1)(B)(i).
151. *See id.* § 1396p(d)(5).
152. *See id.* § 1396p(d)(3)(B)(i)(I).
153. *See id.* § 1396p(d)(3)(B)(i).
154. *See id.* § 1396p(d)(3)(B)(II).
155. *See* Macy, *supra* note 33, at 5-6.
156. *See* 42 U.S.C.A. § 1396p(d)(3)(A)(i).
157. *See* Macy, *supra* note 33, at 6.
158. *See id.*
159. *See id.* at 7.

state Medicaid eligibility criteria to be no more restrictive than SSI methodology.[160]

The legislative history of the comparability requirement shows that Congress wanted to prevent the states from enacting more restrictive Medicaid methodologies.[161] Congress was concerned with ensuring that all recipients receive equal treatment.[162] The comparability rule is consonant with the original spirit in which Medicaid was created. In order to prevent inconsistent application among the states, the comparability rule would need to be policed with more vigilance before any further penalty is imposed on applicants and their advisors.

IV. Why Criminal Sanctions for Medicaid Asset Transfers Have Failed

A. Manufacturing Consent and Crimes

1. THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Section 217 of the Health Insurance Portability and Accountability Act of 1996[163] (HIPAA) included an unpopular and short-lived provision that criminalized asset transfers made for the purpose of gaining Medicaid eligibility and caused a period of ineligibility as defined under the rules promulgated under OBRA '93.[164] The general purpose of HIPAA is to make group health insurance plans more accessible for small businesses to purchase for their employees and to make individual health insurance more accessible to those persons who do not possess group insurance.[165] The provision is an example of what Professor Jan Ellen Rein describes as the "wishful thinking, misinformation and self-deception [that] account for this deviation from accommodation to censure of attempts by the disabled elderly to

160. *See* 42 U.S.C.A. §§ 1396a(r)(2)(A)-(B).
161. *See* Macy, *supra* note 33, at 10; *see also* S. REP. NO. 89-404, pt. 1, at 78 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2018-19.
162. *See* S. REP. NO. 89-404, pt. 1, at 78.
163. Pub. L. No. 104-191, 110 Stat. 1936.
164. *See* Pub. L. No. 104-191, § 217, 110 Stat. at 2008-09. Popularly known as the "granny goes to jail" law, it provided a criminal penalty for whoever "knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c)." *See id.*
165. *See* H.R. REP. NO. 104-497(I), at 1 (1996).

preserve sufficient assets for lifetime security and modest transfer at death."[166]

With OBRA '93, the legislature tightened the restrictions on asset transfers based on the perception that nonneedy applicants were gaining benefits through Medicaid eligibility loopholes.[167] In addition, it added a criminal penalty to those restrictions through Section 217.[168] House Speaker Newt Gingrich claimed that a "very common problem" exists in millionaires transferring assets to become eligible for benefits.[169] According to some estimates, the government could save approximately $5 billion per year, or 20% of Medicaid nursing home expenditures, by limiting asset transfers.[170] However, the basis for this perception is anecdotal, not empirical,[171] because no empirical evidence has been evaluated to estimate the impact of estate planning on Medicaid expenditures.[172] In fact, no empirical data exists as to the

166. Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195, 196 (1996). Although she does not discuss section 217 specifically, Professor Rein offers a comprehensive overview of the debate regarding asset transfers, an analysis of the rhetoric from each side, an individual's stake in preserving their property, and the misinformation that formed the basis of the policies which ultimately lead to the passage of section 217. *See generally id.* Regardless, Professor Rein contends that "[n]o matter what happens to the Medicaid program . . . , the issues raised will be debated at the community, state, and federal level for years to come." *Id.* at 195.

167. With OBRA '93, Congress utilized a three-pronged approach toward restricting an individual's ability to arrange finances in order to retain their wealth and still obtain government subsidized long-term care by: (1) increasing the look-back period; (2) restricting an applicant's ability to be a beneficiary of a trust; and (3) enhancing a state's ability to recover payments from estates of deceased recipients. *See* Wiesner, *supra* note 7, at 757.

168. *See id.*

169. *See* Wiener, *supra* note 34, at 802.

170. *See id.*

171. *See* 1 S. REP. NO. 103-403, at 187 (1993) (citing BRIAN BURWELL, MIDDLE CLASS WELFARE, STATE RESPONSES TO MEDICAID ESTATE PLANNING (1993); ARMOND D. BUDISH, AVOIDING THE MEDICAID TRAP: HOW TO BEAT THE CATASTROPHIC COSTS OF NURSING HOME CARE (1989). Much of the anecdotal data consists of interviews with state employees regarding their observations of applicants and conclusions based on thereof about the estate planning practices of the nonpoor elderly. *See, e.g.*, STEPHEN MOSES, THE MAGIC BULLET: HOW TO PAY FOR UNIVERSAL LONG-TERM CARE, A CASE STUDY IN ILLINOIS (1994). It is worth pointing out the limitations of judgments based upon anecdotal evidence versus empirical evidence. People have a tendency to develop misimpressions from easily available information whether it is accurate or not. For instance, if asked which is more common, murder or suicide, one might respond erroneously that murder is more common. However, one selects murder probably because the news media pays more attention to murder than suicide. *See generally* JUDGMENT UNDER UNCERTAINTY: BIASES AND HEURISTICS (Daniel Kahneman & Amos Tversky eds., 1981).

172. *See* 1 S. REP. NO. 103-403, at 187.

extent of such asset sheltering.[173] Furthermore, the congressional agenda with regard to eligibility issues was set by two special interest groups: insurance companies marketing long-term care insurance and state Medicaid authorities.[174]

These special interest groups urged Congress to pass stricter legislation to prevent middle-class and wealthy elderly from transferring their savings and assets to their children so that they may qualify for Medicaid.[175] Their position is summed up in the testimony of Sheldon L. Goldberg, President of the American Association of Homes for the Aging, before the House Energy and Commerce Subcommittee:

> [w]hile Medicaid costs are soaring, attorneys have developed a specialty in helping people legally divest themselves of assets to become eligible for Medicaid . . . yet for every Medicaid dollar spent on someone who has sheltered significant resources, there is one less dollar to spend on those who have no resources but Medicaid.[176]

Goldberg concluded that this situation pressures a state to reimburse a nursing home less for long-term care.[177] In addition, he concluded that restrictions on asset transfers would create an incentive to buy insurance.[178]

Three counter-arguments have been developed to rebut the assertion that transferring assets to become eligible for Medicaid is rampant: (1) studies of asset transfers by Medicaid applicants show that the practice is not widespread, (2) studies of the asset holdings of the elderly show that they do not hold transferrable assets of great value, and (3) analysis of the growth in Medicaid population has not shown a disproportionate increase in comparison to the growth of the elderly population.[179] Elderly nursing home residents who receive Medicaid benefits can be classified in two groups: (1) those who enter the nursing home eligible for Medicaid and (2) those that enter the nursing home as private-pay residents and subsequently deplete their assets paying for medical costs.[180] Twenty-seven percent of the elderly pop-

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173. *See* Rein, *supra* note 166, at 234.
174. *See* Wiesner, *supra* note 7, at 758.
175. *See Medicaid: Congress Urged to Close Medicaid Loopholes For Long-Term Care Funding*, BNA'S MEDICARE REP. LEG. & OTHER DEV., Apr. 9, 1993, at 1, 15.
176. *Id.*
177. *See id.*
178. *See id.*
179. *See* Wiener, *supra* note 34, at 863. It should be noted that only a small amount of the Medicaid population actually make transfers. *See id.*; Rein, *supra* note 166, at 255-56.
180. *See* Spillman & Kemper, *supra* note 32, at 282.

ulation living in nursing homes receive Medicaid throughout their stay.[181] Fourteen percent of the elderly population in nursing homes begin as private pay residents and then spend down their assets to receive Medicaid before the end of their stay.[182] Nursing home residents who deplete their assets paying for nursing home costs obviously are not unlawfully transferring assets for Medicaid benefits. Therefore, only twenty-seven percent of all elderly nursing home residents could potentially have transferred assets to gain Medicaid benefits.

One study by the General Accounting Office (GAO) provides some evidence which undermines the perception that a large portion of the elderly who enter a nursing home eligible for Medicaid are transferring large amounts of assets in order to become eligible.[183] The GAO analyzed the applications of a random sample of 403 Medicaid applicants for nursing home care in Massachusetts, where asset transfer schemes were believed to be widespread.[184] Only forty-nine applicants were found to have transferred assets; of those forty-nine, twenty-six of them were denied eligibility or withdrew their application.[185] Most of the assets transferred amounted to less than $50,000.[186] Asset transfers of larger amounts of money occurred less frequently—seven applicants transferred assets worth more than $100,000.[187] Of those seven, six of them were denied eligibility.[188]

Most applicants in the study did not possess assets of great value. The average amount of the applicants' assets was $38,202, including the value of their residence.[189] Excluding the residence, the average plummeted to $14,875.[190] The applicants averaged an income of $11,227, but over half of them earned less than $10,000 and 92% earned less than $20,000.[191] Clearly, this study indicates that elderly millionaires are not trying to shuffle their portfolios to gain Medicaid benefits.[192]

181. *See id.* at 287.
182. *See id.* at 293.
183. *See* Wiener, *supra* note 34, at 802-03.
184. *See id.* at 802.
185. *See id.* at 803.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See* 1 S. REP. NO. 103-403, at 188 (1993).
190. *See id.*
191. *See id.*
192. The study also suggests that existing asset transfer regulations adequately screen out potential defrauders.

Other studies which analyze the asset holdings of the elderly also undermine the perception that wealthy elderly are transferring assets to receive benefits.[193] The majority of the elderly do not have large amounts of assets to transfer.[194] For instance, approximately one-third of the elderly have incomes below the poverty level.[195] Three-quarters of nursing home residents have nonhousing assets valued at less that $50,000.[196] Almost half of nursing home residents have less than $10,000 in non-house-related assets.[197] Only eleven percent have non-house-related assets valued $100,000 or more, half of which could pay for their nursing home expenses with their income alone.[198]

Furthermore, the population of nursing home residents on Medicaid has grown steadily, not dramatically as might be expected if Medicaid was truly easily accessible. In 1994, over 33 million people were over sixty-five, compared to 28.5 million persons in 1985.[199] Currently, more than two out of five people over sixty-five are expected to spend some time in a nursing home.[200] However, the number of Medicaid participants in nursing homes has increased slowly.[201]

In addition to restricting the "rampant" use of estate planning by millionaires, another important policy behind the enactment of asset transfer restrictions was to motivate the elderly to purchase long-term

193. Existing research, including the GAO study in Massachusetts, only analyze asset transfers that can be known by state property analysts, i.e. transfers made within the look-back period. However, the reasoning behind a long look-back period, such as three years, is to make it burdensome for a potential applicant to do without the transferred assets for a long period of time and to make it difficult to anticipate the need for nursing home care. Hence, the period imposes a great cost on the applicant (and/or the applicant's family) who decides to pursue a course in Medicaid estate planning.

194. *See* Rein, *supra* note 166, at 256 (concluding that there was a "paucity of assets in the nursing home population as a whole").

195. *See* Wiener, *supra* note 34, at 803.

196. *See id.*

197. *See id.*

198. *See id.*

199. *See* Joan F. Van Nostrand, *The Focus of Long-Term Care in the United States: Nursing Home Care*, 15 suppl. CANADIAN J. ON AGING 73, 75 (1996). In fact, the number of Americans age 65 and over "now outnumber the entire population of Canada." *See* Rein, *supra* note 166, at 207.

200. *See* Wiener, *supra* note 34, at 801.

201. *See id.* at 803 ("Between 1990 to 1993, the average annual compound rate of increase in Medicaid nursing home beneficiaries was 3.3% a year, while the increase in the number of nursing home beds was 1.5% a year. All of the excess increase . . . is due to a relatively large increase in Medicaid nursing home residents in one year—1992.").

care insurance.[202] The insurance industry wanted to reinforce the perception that well-to-do elders obtained public subsidies for their nursing home care,[203] in order to argue that the practice undermined the long-term care insurance market.[204] The insurance industry presented health insurance as the proper means for financing long-term care[205] and contended that accessibility to government benefits reduced market pressure to purchase private long-term care insurance.[206] Statistics, however, suggest that fewer individuals are transferring assets than previously thought; therefore, further restrictions on asset transfers will probably not increase demand for long-term care insurance.

Also, long-term care insurance is unaffordable for most older persons.[207] The average annual premium in 1993 for such insurance was $2,137 if the policy was bought at age sixty-five.[208] Studies have shown that no more than 20% of the elderly population can afford long-term care insurance.[209] In the event that all of the elderly who can afford private long-term care insurance purchased it, Medicaid nursing home expenditures would only drop by one to four percent.[210]

When section 217 became effective, Congress came under fire[211] and amended the provision.[212] This self-reversal illustrates the principles at work when a legislative body decides conduct should be treated as criminal and also illustrates the effective utilization of such principles.[213] Generally, whether an act is immoral is not the sole factor in making this decision. The legislature must also consider how people will respond to having a particular aspect of their conduct reg-

202. *See id.* at 801.

203. *See* Wiesner, *supra* note 7, at 758.

204. *See id.* at 761.

205. *See id.* For a detailed and devastating analysis of the claim that long-term care insurance is the cure-all for financing long-term care, see Rein, *supra* note 166, at 278-89.

206. *See* Wiesner, *supra* note 7, at 791.

207. *See* Wiener, *supra* note 34, at 801.

208. *See id.*

209. *See id.*

210. *See id.*

211. The provision became effective on January 1, 1997, and reactions were swift. *See, e.g.*, Henry J. Reske, *A Wider Medicaid Fraud Net*, A.B.A. J., Jan. 1997, at 26; Robert Pear, *Repeal Urged for Law on Giving Away Assets*, N.Y. TIMES, Feb. 18, 1997, at A1; *Rectifying a Legislative Blunder*, N.Y. TIMES, Feb. 24, 1997, at A14.

212. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified as amended at 42 U.S.C.A. § 1320a-7b(a)(b) (West 1998)).

213. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 262 (1968).

ulated.[214] When a legislature wants to apply a criminal sanction to a new category of conduct, it is most effective if it is preceded by other forms of conditioning.[215] It has been said that "[i]t is very doubtful . . . whether . . . enforcement of the criminal sanction against tax evaders would have been nearly as successful if it had not been preceded by the development of a tradition of self-assessment."[216] In addition, the perception that the conduct is immoral must be accompanied by a build-up of public opinion that the law should regulate the conduct.[217]

When Congress passed the sanction against transferring assets in order to become eligible for Medicaid benefits, the prevailing view was that such conduct was immoral.[218] Supporters of the law attempted to sway public opinion in support of the sanction; however, the public did not acquiesce, and the provision faced stiff resistance that eventually led to its repeal. The poor reception of the law demonstrated that the legislature's decision to criminalize the conduct was out of sync with public opinion and that a sense of immorality about the conduct was not enough to make it criminal.

B. Blame Shifting

Congress replaced section 217 with section 4734 of the Balanced Budget Act of 1997.[219] The new rule provides that whoever

> for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX of this Chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396p(c) of this title shall . . . in the case of such a . . . provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both.[220]

Section 4734 is based in part on the perception that attorneys who engage in Medicaid planning are doing something objectionable

214. *See id.* at 262-63.

215. *See id.* at 263.

216. *Id.* A more well-known example of the failure to impose criminal sanction on behavior thought to be immoral is Prohibition. *See id.*

217. *See id.* at 264.

218. *See* Rein, *supra* note 166, at 205.

219. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 706 (codified as amended at 42 U.S.C.A. § 1320a-7b(a)(6) (West 1998)).

220. *Id.*

and punishable as a crime.[221] Not only are their actions criticized for being exploitative of Medicaid loopholes and for making people artificially poor,[222] but they are also accused of "ripping off the system" by sheltering large estates and, in effect, shifting the burden of the long-term care costs of the wealthy to society.[223] Despite such criticisms, most critics concede that the practice is "legal."[224]

C. The Constitutionality of Section 4734

Section 4734 is not the first attempt at punishing attorneys for engaging in this practice.[225] The Ohio Bar proposed to disbar attorneys who advised clients to transfer assets in order to obtain Medicaid eligibility.[226] However, the proponents became stalled in their efforts when confronted with the task of drafting a statute that would punish someone for encouraging another to do something "legal."[227] Congress apparently was undaunted by this issue.[228]

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221. *See* Rein, *supra* note 166, at 230-31 ("Medicaid planning has become a pejorative term.").
222. *See id.*
223. *See id.*
224. *See id.* at 232 n.200 (quoting critics who find the practice to be legal, but that it takes advantage of the complex eligibility rules and places a greater burden on the Medicaid program which was not intended).
225. *See id.*
226. *See id.*
227. *See id.* Although Medicaid planning is perceived as objectionable for a number of reasons, the planning strategies have been perceived as "legal." *See id.*
228. A wide range of communications are punished in our society. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 5 (1989). Professor Greenawalt has compiled a list of twenty-one separate crimes that involve communications. A person may be guilty of a crime if he/she:

1. agrees with another to commit a crime;
2. offers to agree with another to commit a crime;
3. orders another to commit a crime;
4. requests another to commit a crime;
5. induces another to commit a crime (as by a bribe);
6. threatens harm unless another commits a crime;
7. carries out an ordinary criminal purpose by communicating; for example, by telling a blind companion on a mountain path that he can safely step to the right, while wanting to cause his death and knowing that a 2000-foot drop lies to the right;
8. puts another in fear of imminent serious injury by physical menace;
9. participates in a criminal endeavor by communicating; for example, by telling thieving friends the combination of the employer's safe;
10. warns a criminal how to escape from the police;
11. threatens harm if someone does not turn over his wallet, submit to sexual intercourse, or perform some other act he is free not to perform;

This section will discuss how section 4734 violates the Free Speech Clause of the First Amendment. Although a U.S. district court found the provision unconstitutional, the court provided no reasoning, largely due to the fact that U.S. Attorney General Janet Reno decided not to defend the provision.[229] In an effort to give some guidance to policymakers and lawmakers, this section provides an explanation for why holding the statute unconstitutional is consistent with the First Amendment and critiques the reasoning offered by the litigants.

First, this analysis focuses on section 4734 within the free speech doctrine and concludes that, if it could ever be upheld, it must be upheld as a law that punishes the encouragement of illegal action. Second, this section will discuss the punishment of such encouragements. Finally, the section concludes that section 4734 is unconstitutional because it punishes encouragement of lawful action.

1. LOCATING SECTION 4734 IN FIRST AMENDMENT JURISPRUDENCE

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[230] The Supreme Court has

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12. offers to bribe someone or offers to receive a bribe for the performance of an act that should be performed, if at all, free of such inducements;
13. successfully encourages someone to commit suicide;
14. entices a child from custody;
15. uses provocative or insulting language likely to cause angered listeners to commit crimes;
16. engages in speech likely to lead those who are persuaded by its message to commit crimes;
17. perjures himself or engages in other falsehoods with respect to officials;
18. makes a false public alarm;
19. acquires property or some other material advantage by deception;
20. falsely pretends to hold a position in public service with an aim to getting someone else to submit to pretended authority or act otherwise to his prejudice;
21. uses language or representations that are insulting or offensive in some way.

Id. at 6-7 (footnotes omitted).

229. *See* Letter from Janet Reno, U.S. Attorney General, to The Honorable Newt Gingrich 2 (Mar. 11, 1998).

230. U.S. CONST. amend. I. Many theories have been articulated as to what values are protected by the First Amendment. *See, e.g.*, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1161-66 (1982). The most forceful justification is the market place of ideas theory. *See* RICHARD SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:15, at 2-13 (1997). This theory is founded upon the writings of John Milton and John Stewart Mill, *see id.* § 2:15, at 2-12, and adopted by Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919). Holmes wrote that

never accepted the absolutist position that the Free Speech Clause should protect all speech and only conduct should be punished.[231] Justice Holmes said in *Frohwerk v. United States*[232] that the First Amendment was not intended to "give immunity for every possible use of language."[233] Although the Supreme Court has not followed the absolutist approach, it has attempted to develop a test to distinguish speech from conduct in an effort to ensure that its decisions do not place burdens on the values protected by the Free Speech Clause.[234] The Court has rejected the notion that any conduct can be labeled "speech" simply because the person engaged in conduct intends to communicate or express an idea.[235] Currently, the Court determines whether conduct is sufficiently expressive to be within the protection of the First Amendment by requiring both an intent to convey a particularized message and a large probability that the message would be understood by those viewing the conduct.[236]

Although behavior can be defined as communication, the government can still proscribe the behavior based on the behavior's content if such government regulation survives strict scrutiny.[237] In

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"the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630. Because markets can be manipulated, the theory is best understood as a defense of the marketplace. *See* SMOLLA, *supra*, § 2:19, at 2-17; *see also* Cohen v. California, 403 U.S. 15 (1971). On the other hand, the Free Speech Clause has also been interpreted as protecting libertarian values in expression. *See* SMOLLA, *supra*, § 2:24, at 2-24. That is, those who won our independence "valued liberty both as an end and as a means." Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Both justifications are the predominant justifications for protecting speech.

231. *See* SMOLLA, *supra* note 230, § 2:53, at 2-52; *see also* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 403 (1970) ("Government may punish action but not expression.").

232. 249 U.S. 204 (1919).

233. *Id.* at 206.

234. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (referring to *United States v. O'Brien*, 391 U.S. 367 (1968), pointing out that "[t]he *O'Brien* Court thus quite wisely dropped the 'speech-conduct' distinction as quickly as it had picked it up."). The Court, beginning with *Cohen v. California*, 403 U.S. 15 (1971), started anew. *See id.* at 18.

235. *See O'Brien*, 391 U.S. at 376.

236. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

237. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

contrast, government action that proscribes speech, but is content neutral, need not meet the strict scrutiny standard.[238]

In some instances, the Supreme Court has defined categories of punishable speech. This occurs, however, only after the Supreme Court weighs the governmental interest in punishing the speech against the First Amendment values implicated by the speech at issue.[239] Thus, the government may deal more comprehensively with certain forms of individual expression simply by showing that such expression can be placed in one of these categories.[240] The Supreme Court has defined six of these categories: (1) speech that directs or encourages another to commit an unlawful action,[241] (2) speech that may incite the listener to violence,[242] (3) speech that is related to the offer or sale of a good or service,[243] (4) speech that is obscene,[244] (5) speech that depicts child pornography,[245] and (6) speech that constitutes slander or libel.[246]

For section 4734 to survive a constitutional challenge, it must either be justified as a law that punishes the encouragement of an unlawful action or meet the strict scrutiny standard. Justice Holmes stated in *Frohwerk* that it was unreasonable to suppose that "mak[ing] criminal the counseling of a murder . . . would be an unconstitutional interference with free speech."[247] Holmes's statement comports with common sense, but why are encouragements punishable?

2. PUNISHING ENCOURAGEMENTS[248]

The intention behind an encouragement is to get something done; encouragements are utterances meant to produce action by an-

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238. *See, e.g.*, *O'Brien*, 391 U.S. at 377 (defining the test for laws that limit speech by regulating the time, place, and manner of the speech but not its content). This discussion is not meant to cover the full panoply of regulations that limit speech in our society, but need not meet the strict scrutiny standard.

239. *See, e.g.*, *Cohen*, 403 U.S. at 19-20.

240. *See id.* at 20.

241. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

242. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

243. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

244. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957).

245. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982).

246. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

247. Frohwerk v. United States, 249 U.S. 204, 206 (1919).

248. Crimes of solicitation should be distinguished from conspiracy, another form of inchoate crime that may involve the punishment of speech. Generally, a conspiracy is an agreement to violate the law, and, in unusual cases, one may be charged with a conspiracy to advocate criminal acts. *See* PAUL MARCUS,

other person.[249] An encouragement can be categorized as either: (1) pure encouragement to act, or (2) an encouragement tied to an offer or threat that is meant to impose an obligation on another person to act.[250] Section 4734 punishes pure encouragements.

Pure encouragements are so strongly linked to action that the utterances contain little in terms of the values protected by the Free Speech Clause.[251] A pure encouragement "injects the force of the speaker's personality toward a particular result."[252] In other words, the speaker is not asking others to use their judgment and consider the values he asserts.[253] Thus, when the speech is linked to an unlawful action, the state interest in proscribing the action outweighs the infringement on a person's right to freedom of speech, and the speech can be punished based on its content.[254]

Most encouragements, however, do contain evaluations of facts and values, and so some expression is intertwined with the imperative elements.[255] Furthermore, some pure encouragements assert enough fact and value so that the influence upon the listener may be indistinguishable from the influence of an expression of an opinion.[256] In order to prevent the punishment of speech that expresses an opinion about a certain action rather than encourages the action, laws punishing encouragements must meet the test articulated in *Brandenburg v. Ohio*.[257] The Supreme Court in *Brandenburg* held that "[t]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[258]

PROSECUTION & DEFENSE OF CRIMINAL CONSPIRACY CASES § 8.01, at 8-2 (1993). In conspiracy cases, the government must show that the defendants made an agreement to violate the law and then acted in furtherance of the agreement; whereas, in crimes of solicitation, a person is being punished only for communicating to another person about the illegal action. *See* GREENAWALT, *supra* note 228.

249. *See* GREENAWALT, *supra* note 228, at 69.

250. *See id.* at 111.

251. *See id.* at 68. In the end, encouragements are not meant to communicate a truth.

252. *See id.* at 70.

253. *See id.*

254. *See id.* at 113.

255. *See id.* at 70.

256. *See id.*

257. 395 U.S. 444 (1969).

258. *Id.* at 447.

In defining this category of punishable speech, the *Brandenburg* court recognized that a danger lies in laws which punish inchoate crimes in that they may condemn speech which the "Constitution immunized from governmental control."[259] Thus, the Court concluded that government may punish encouragements to the extent that it can show an intent to incite imminent disobedience, but it cannot punish encouragements simply because it reflects the speaker's point of view about whether the underlying action is morally justified.[260] The statute must make this distinction in order to be upheld.[261]

3. CONSTITUTIONALITY OF SECTION 4734

Currently, attacks on section 4734 have properly focused on the nature of the conduct that is being encouraged.[262] The *Brandenburg* test specifically requires that the speech at issue be directed toward inciting "lawless action."[263] For example, in a suit brought by the New York State Bar Association, the complaint alleges that "[s]ection 4734 makes it a crime [to counsel] any individual to engage in action which is not criminal."[264] In response, the Attorney General has concurred stating that the provision would "prohibit attorneys and other professional advisors from 'counsel[ing]' their clients to engage in an estate-planning strategy that itself is lawful."[265]

Theoretically, this is a logical conclusion. It would be inconsistent to say that the government can punish encouragements as a crime when the underlying action that is encouraged is not a crime.[266] If the

259. *Id.* at 448.

260. *See id.*

261. *See id.*

262. Technically, the person who wants to engage in expressive conduct must show the First Amendment applies before the burden is placed on the government to justify infringing on First Amendment interests. *See* Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984). Clearly, First Amendment interests are implicated here. Attorneys informing clients about the law is communicative and infringing on this speech burdens the free flow of ideas.

263. *See Brandenburg*, 395 U.S. at 447.

264. New York State Bar Association's Complaint ¶ 14, New York State Bar Ass'n v. Reno, No. 97-CV-1768 (N.D.N.Y. Apr. 7, 1998).

265. Letter from Janet Reno, U.S. Attorney General, to The Honorable Newt Gingrich, *supra* note 229, at 2. Also, Ms. Reno has expressed that her office will not seek to enforce the provision nor will it defend it against the Bar's constitutional attack. Because the government has not contested the unconstitutionality of section 4734, Judge Thomas J. McAvoy has granted the Bar's motion for a preliminary injunction against the government from enforcing the section. *See New York State Bar Ass'n*, No. 97-CV-1768 (order granting preliminary injunction). However, the court did not purport to adopt a theory as to why the section is unconstitutional.

266. *See* GREENAWALT, *supra* note 228, at 474.

government does not have a strong enough interest in discouraging certain behavior by making such behavior a crime,[267] then the government's interest in proscribing its encouragement does not amount to the compelling interest needed to criminalize speech.[268] It is irrelevant to this free speech analysis that the requisite interest for punishing encouragements of these transfers would be present if Congress had been successful in its attempt to criminalize asset transfers made for the purpose of qualifying for Medicaid benefits.

Although it is consistent with the First Amendment to say that the government cannot punish encouragements that do not incite unlawful action, this conclusion is too broad. Under this rule, an applicant who decides to transfer assets to become eligible for Medicaid benefits and absorb the period of ineligibility is committing a "lawful" action.[269] The period of ineligibility seems to have no bearing on the question of whether applicants should engage in such conduct and whether it should be encouraged. The period of ineligibility is intended to be a penalty and a deterrence to such behavior. However, the rule discussed above defines actions that, despite being sanctionable with civil and administrative penalties, are lawful.

The better rule is that speech that encourages an act thought to be socially harmful should not be sanctioned with greater penalties

267. *See* PACKER, *supra* note 213, at 71. All social regulation advances the interests of society through the control of action and criminal law furthers this goal by preventing socially undesirable behavior.

268. Some support for this conclusion can be drawn from Supreme Court opinions in the commercial speech area. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (reversing the conviction of editor of newspaper that printed advertisement about the availability of lawful abortions in other states but were not lawfully available in the editor's state); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (overruling Posadas de P.R. Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), to the extent that *Posadas* stands for the notion that truthful speech about a lawful product can be suppressed in order to regulate the product).

269. On the other hand, if the conduct is broadly characterized as unlawful, some interesting questions are raised under the *Brandenburg* test regarding how near in time and space would the counseling have to be in order for it to be punished. For instance, Medicaid planners are known to hold seminars or produce and sell video tapes that discuss Medicaid planning strategies. The issue then becomes whether their counseling is proximate enough to have incited the transfers. *Compare* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions of attorneys who gave seminars on tax shelters which were used for fraudulent purposes by taxpayers because the tax shelters discussed were legal), *with* United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (holding that defendants' counseling in seminars and large public meetings as to tax avoidance was sufficiently close in time and space to fraud by taxpayers). *See generally* Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47 (1997).

than those applied to the encouraged act.[270] This rule avoids mischaracterization of civil and administrative sanctions. Also, it has already been decided in *Brandenburg* that the government does have a sufficient interest in punishing encouragements of behavior that government can proscribe such encouragements within the limits of the Constitution. Thus, punishing speech with penalties not greater than those applied to the underlying behavior is still consistent with *Brandenburg*.

Applying this more consistent approach, however, may not be worthwhile because the penalties used to deter individuals from transferring assets to become eligible for Medicaid benefits may not have enough of a deterrent effect on those counseling the individuals. In essence, the penalty on the applicant is ineligibility for Medicaid benefits. The same penalty could be placed on those who counseled the individual to make the transfer, but the loss of Medicaid eligibility would probably not affect these individuals to a great degree. On the other hand, if one views the penalty as burdening the applicant with his own healthcare costs, lawmakers could force counselors to share in those costs.

V. Was It All Sound and Fury Signifying Nothing?

Now that it is definitely not a crime to transfer assets to obtain Medicaid eligibility and probably not a crime to advise an individual to make such a transfer, two questions remain: (1) whether the practice should be discontinued because it is an immoral act, and (2) whether a need still exists for further regulation in this area. These questions were raised long before Congress enacted these criminal provisions. Does the fact that Congress repealed its criminal penalty legitimize the practice? If section 4734 is unconstitutional, does this mean attorneys should engage in this kind of speech?

A. An Inherent Moral Imperative?

From the applicants' perspective, some might be motivated to transfer assets because they believe that they are "beating the system." Most, however, are probably motivated to transfer their assets in order to preserve and pass on their assets in the face of enormous

270. *See* GREENAWALT, *supra* note 228, at 274.

healthcare costs.[271] At such large annual costs, most people's assets would be wiped out after staying only a few years in a nursing home. Thus, these individuals do not view their actions as immoral, but economically rational and efficient.[272]

An individual could decide to endure a period of ineligibility for Medicaid benefits in order to gain the same benefits in the future based purely on an economic analysis of their situation. The norms of the Medicaid asset transfer regulations were in part established by the insurance industry, which was attempting to increase the market for long-term care insurance. The insurance industry recognized the decision-making pattern of these individuals and found that they were not choosing to pay for their care with insurance because Medicaid benefits can be obtained more cheaply. Thus, the purpose of ratcheting up the sanctions was to influence the economic decision-making process of individuals looking for ways to finance their long-term care needs, not to deter individuals from committing an immoral act. If the asset transfer provision is meant to regulate the economic behavior of these individuals, then the purpose of the law is not to punish immoral conduct but to conform the conduct of individuals to the law's norms.

The amorality of certain transactions has been recognized by the U.S. Supreme Court.[273] These concerns primarily arise in the context of statutes that regulate financial transactions such as the Bank Secrecy Act.[274] For example, the Court addressed these concerns in the context of the antistructuring provisions of the Bank Secrecy Act in *Ratzlaf v. United States*.[275] The statute required a domestic bank involved in a cash transaction exceeding $10,000 to file a report with the Secretary of the Treasury.[276] The statute also made it illegal to structure a single transaction into smaller, separate transactions, in order to avoid the reporting requirement.[277]

The Court rejected the argument that structuring transactions was immoral because it found that a person might structure a transaction to avoid the reporting requirement for amoral purposes and not

271. *See* Rein, *supra* note 166, at 195-96.

272. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2d ed. 1996) (applying principles of economics to the interactions between individuals and the law).

273. *See* Ratzlaf v. United States, 510 U.S. 135 (1994).

274. *See, e.g.*, United States v. Dichne, 612 F.2d 632 (2d Cir. 1979).

275. 510 U.S. 135 (1994).

276. *See id.* at 136.

277. *See id.*

just for the purpose of defrauding the government.[278] The Court also found a person might structure a transaction without any regard for the reporting requirement but for legitimate tax purposes.[279] Thus, the Court held that, in order to show "willfulness" in the context of the antistructuring provisions, the government must prove the defendant "knew the structuring in which he engaged was unlawful."[280] The Supreme Court's interpretation in *Ratzlaf* has been applied in subsequent cases in the lower courts.[281]

Like the individuals in *Ratzlaf* who structure transactions for reasons other than to avoid the reporting requirements of the antistructuring laws, individuals transfer assets for a variety of legitimate tax and probate reasons without regard for their Medicaid eligibility. Even without these other reasons present, an applicant may view their actions as lawful, based on the cost-benefit analysis discussed above. In the absence of a criminal penalty, the individual may have no notice that what they were doing was unlawful.

However, the government has a legitimate interest in limiting the funds it spends on health care and in establishing criteria to decide who is eligible for those funds.[282] The purpose of Medicaid has always been to provide "medical assistance to low-income persons."[283] The eligibility rules are designed to screen out those who can pay for their care. Thus, the issue remains whether it is unethical for an attorney to advise a person to manipulate her portfolio to make herself eligible for Medicaid benefits.

278. *See id.* at 144-45.

279. *See id.* at 145-46.

280. *Id.* at 149.

281. *See* United States v. Hayden, 64 F.3d 126, 130-31 (3d Cir. 1995); United States v. Wynn, 61 F.3d 921, 927 (D.C. Cir. 1995); Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995). *But see* United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995); United States v. Daughtry, 48 F.3d 829, 831 (4th Cir. 1995); Andrea Tuwiner Vavonese, Comment, *The Medicare Anti-Kickback Provision of the Social Security Act—Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. U. L. REV. 943, 977-80 (1996) (arguing that *Ratzlaf* stands for a method of interpreting "willfulness" and that its interpretation was not meant to be applied to all cases).

282. The government must decide how to allocate its limited resources among competing interests. *See, e.g.*, James W. Fossett & James H. Wyckoff, *Has Medicaid Growth Crowded Out State Educational Spending*, 21 J. HEALTH POL. POL'Y & L. 409 (1996) (discussing the debate over whether Medicaid spending has superseded spending on other activities, education in particular).

283. 42 C.F.R. § 430.0 (1998). *But see* Rein, *supra* note 166, at 258-64 (finding a lack of clear Congressional intent to support the position that Medicaid was only meant for the poor).

B. The Role of the Elder Law Attorney

The role of the elder law attorney in Medicaid estate planning depends on whether he is advising his clients to make asset transfers for fair market value or to make the transfers for less than that value. One common method of transferring assets to become eligible for Medicaid is to convert the assets to assets that are protected by the income and asset guidelines.[284] For example, one may use excess cash to pay off a mortgage on one's home, make improvements to the home, or purchase household goods—preferably those that will appreciate in value, such as a diamond ring.[285] Because these asset transfers are at market value, they do not result in a period of ineligibility.

The issue becomes one of state enforcement of the eligibility rules. One problem in this area is the lax enforcement policies of the states regarding applicants' personal property.[286] In fact, states may employ a "don't ask, don't tell" policy.[287] Generally, an applicant can have no more than $2,000 in personal property. The state could deter the practice of asset transferring if it more aggressively enforced the personal property limitation.

As a matter of professional ethics, an attorney must not advise a client to engage in fraud. In some cases, applicants simply do not reveal the extent of their property holdings. This omission would amount to a fraud in the application process. On the other hand, if asset holdings and transfers are disclosed, the issue becomes one of the state's enforcement policies.

Furthermore, it is not necessarily unethical for an attorney to advise clients to convert nonexempt property into exempt property.[288] The assets and income guidelines protect people from becoming financially devastated by healthcare costs. Similar property protections can be found in bankruptcy law. Under bankruptcy law, converting property into exempt property can be justified for two reasons: if

284. *See* LTC INC., THE FLORIDA FULCRUM: A COST-SAVING STRATEGY TO PAY FOR LONG-TERM CARE 125 (1989) [hereinafter FLORIDA FULCRUM].

285. *See id.*

286. *See, e.g.*, LTC, INC., THE MAGIC BULLET: HOW TO PAY FOR UNIVERSAL LONG-TERM CARE, A CASE STUDY IN ILLINOIS (1995). The authors worked from the assumption that Medicaid is a social safety net designed to help people after they spend down their assets paying for long-term care. *See* FLORIDA FULCRUM, *supra* note 284, at 2.

287. *See* FLORIDA FULCRUM, *supra* note 284, at 28.

288. *See, e.g.*, Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615 (1978).

Congress wanted to regulate such transfers they could, and such transfers should be contemplated by the debtor's creditors.[289] The same justifications apply to asset transfer regulations in the context of Medicaid eligibility: Congress has not acted in regard to the legitimacy of such transfers—only those made for less than fair market value, and it is reasonable for the government to expect such transfers will be made.

Whether attorneys should advise their clients to make transfers for less than fair market value depends in part on how one characterizes the underlying transaction. One may view the underlying transaction as lawful—even though there is an ineligibility period assigned to it—because one can absorb the ineligibility period. On the other hand, the view that an act is lawful because it is efficient has been criticized.[290]

The argument has been made that attorneys should still "know better" than the client.[291] Although section 4734 is not unconstitutional, the constitutionality of an act is not indicative of its ethical or moral quality. Thus, although the Constitution allows an attorney to advise his client about these transfers, that does not necessarily mean the attorney should give this advice. Furthermore, an attorney's character is obviously separate from the character of the client.[292] Because the attorney knows that Medicaid is intended for those who truly cannot pay for their health care costs, the attorney should not assist those who can pay for long-term care to transfer assets. However, the Ohio Bar could not find a way to formulate a rule of professional responsibility to prevent the attorney from counseling a client when the result of that relationship is a lawful transaction.[293]

The issue brings to mind the distinction between the "morality of duty" and the "morality of aspiration."[294] Rules of professional responsibility establish minimum duties of attorneys to their clients and punish them for failing in those duties.[295] Other rules are character-

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289. *See id.* at 630-31.
290. *See* Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998).
291. *See* DAVID ROSENFELD, COUNSEL FOR PUBLIC POLICY, LTC, INC., UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN COLLEGE OF LAW PRESENTATION MATERIALS 10 (1996) (citing various rules of professional responsibility).
292. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1998).
293. *See supra* notes 225-27 and accompanying text.
294. *See* LON FULLER, THE MORALITY OF LAW 5-6 (1969).
295. *See* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing that the Code of Professional Responsibility has aban-

ized as being aspirational, and the extent to which they are followed is left to the individual attorney. The rules of professional conduct only require that an attorney not advise a client to commit fraud.[296] As long as an attorney does not advise a client to misrepresent their asset holdings and transfers to state health agencies, no violation of the code has been committed.[297]

It is difficult to conclude that this practice is immoral because a real need exists for affordable long-term care.[298] Medicaid estate planning is symptomatic of this larger problem.[299] The better solution is to remove the motivation to engage in the practice by making long-term care more affordable and long-term health care insurance less expensive, more accessible and, ultimately, more attractive.[300] In the alternative, the government and insurance industry should devise a joint solution where government-subsidized care and insurance are integrated.[301]

C. The Need for Further Legislation

An important concern in Medicaid estate planning is the potential for its use as a vehicle for children to pressure a vulnerable parent into divesting himself of assets so that the estate is not consumed by the costs of nursing home care.[302] Sections 217 and 4734 addressed this issue in different ways. Section 217 would have provided a direct deterrence to parents and children from engaging in making such transfers,[303] while section 4734 would have prevented financial advisors and attorneys from assisting children and parents in effecting these transfers.[304]

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doned the conception that a lawyer should achieve a "fully integrated moral personality").

296. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d).

297. Of course, attorneys should advise clients of the attendant risks in transferring assets to become eligible for Medicaid, for example, their health care costs may not be as great as they estimated, they may not need long-term care, or the quality of care of patients on Medicaid may not be equal to that of private payers. *See* Rein, *supra* note 166, at 305.

298. *See* Kate A. Mewhinney, *Planning for the Senior Citizen*, in ESTATE PLANNING IN DEPTH 1994, at 1465, 1497-98 (ALI-ABA Course of Study in Depth, June 19, 1994) ("An attorney who advises an elderly or disabled client about estate planning . . . should inform the client about Medicaid planning strategies.").

299. *See* Regan, *supra* note 91, at 1261.

300. *See id.* at 1263.

301. *See id.* at 1265.

302. *See* Mewhinney, *supra* note 298, at 1496.

303. *See supra* Part IV.A.1.

304. *See supra* text accompanying Part IV.B.

Under these circumstances, Medicaid estate planning becomes a threat to the elder's autonomy and independence.[305] Elders have a strong desire to remain in their own homes.[306] The elder parent may prefer to privately pay for better nursing home care[307] or prefer to pay more for home care.[308]

A conflict of interest can arise when children and a parent come into the attorney's office at the same time, or when the children come into the attorney's office on their own, to discuss how the parent's assets are to be disposed.[309] Traditional legal ethics conceive the attorney-client relationship as a principal-agent relationship.[310] However, the ABA Model Rules fail to define under what circumstances an attorney-client relationship is formed.[311] Also, this situation requires an attorney to take into account the interest of third parties, which goes beyond the traditional approach in ethics, such as if the parent is competent, ill, or simply more vulnerable because of their age.[312] The first question that needs to be answered is whom will the attorney represent.[313] However, the rules of professional responsibility do not provide a clear answer as to what the attorney should do, and the attorney may become entangled in a generational conflict of interest.

Therefore, further legislation is still needed in the area of Medicaid estate planning. Lawmakers should consider how to protect the parent's right to be left alone and how to maintain the existing autonomy of a person who needs help.[314] Lawmakers can draw upon other areas of probate law, such as guardianship and the doctrine of undue influence.

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305. *See* Nancy C. Nawrocki, *Ethical Challenges in Serving the Elder Client*, ADVOCATE, May 1994, at 16.

306. *See* Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1860-61 (1992).

307. *See* Mewhinney, *supra* note 298, at 1499.

308. *See* Rein, *supra* note 306, at 1861 (finding that "65% of those surveyed would accept a higher priced program that offered home care") (quoting Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement & Inheritance*, 24 REAL PROP. PROB. & TR. 3 1, 7 (1989)).

309. *See* Narwocki, *supra* note 305, at 17.

310. *See* Peter Marguilies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1074 (1994).

311. *See* Nawrocki, *supra* note 305, at 16.

312. *See* Marguilies, *supra* note 310, at 1074.

313. *See* Nawrocki, *supra* note 305, at 19; *see also* Marguilies, *supra* note 310, at 1074 (taking the position that the attorney should represent the most vulnerable party).

314. *See* Marguiles, *supra* note 310, at 1095-96.

It would be preferable to positively reinforce the parents' autonomy in this situation. For instance, lawmakers could require attorneys to obtain signed disclosures of clients to ensure they are aware of attendant risks and that they are acting autonomously. Lawmakers might also require that the attorney make a determination as to whether the parent is vulnerable to pressure from the children and obligate the attorney to represent the vulnerable parent.[315] If the children have clearly asked the attorney to represent their interests without bringing the parent into the relationship, the attorney should not be allowed to assist the children in the divestiture of the parent's assets unless the parent is represented. Lawmakers might also require that the children be made guardians of the parent before forcing the parent to move out of their home.[316] However, it would be difficult to ultimately know whether the parent is making an autonomous decision or succumbing to the pressure of their children.

Lawmakers should also provide a mechanism for elder parents to challenge their placement in a nursing home after their placement has occurred. Once the elder is out from under the influence of his children, the elder may regain a sense of autonomy and realize that he has divested his assets and been placed in a home against his will. Lawmakers could adapt the doctrine of undue influence to this situation. If the parent only sought the return of her assets as a remedy, lawmakers could require a lesser showing of pressure by the children. Because the elder parent will lack resources, lawmakers should provide the parent with access to representation.[317]

Lawmakers may find it frustrating to legislate in this area because it involves intensely private familial relationships. Although such laws would define and strengthen an elder parent's rights in this situation, their effectiveness would rely upon the parent asserting them. Ultimately, the problem would be resolved more effectively by cheaper home health care and long-term care insurance.

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315. *See id.*

316. By this requirement, there would need to be a judicial determination that the parent is incapacitated.

317. Such a program could be modeled on Ombudsman Programs. *See* Elizabeth B. Herrington, *Strengthening the Older Americans Act Long-Term Care Protection Provisions: A Call for Further Improvements of Important State Ombudsman Programs*, 5 ELDER L.J. 321 (1997).

VI. Conclusion

After the dust has settled from Congress's failed attempts to increase the penalties for engaging in Medicaid estate planning, the problems of financing long-term care will still exist, especially for those belonging to the middle class who do not want to lose their life savings to health care expenses.[318] The income and resources of middle-class individuals is typically too high for Medicaid and yet they cannot afford long-term care. These individuals have a legitimate interest in not seeing their life savings entirely depleted.[319] Although elder law attorneys should continue to advise clients as to Medicaid estate planning strategies, attorneys and lawmakers should also consider the plight of the vulnerable parent.

318. *See* Eleanor Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, 44 SOC. SEC. REP. SERV. 897, 898 (1994).
319. *See id.*

GRADOW FINALLY LAID TO REST?: THE IMPACT OF *WHEELER V. UNITED STATES* ON JUDICIAL INTERPRETATION OF THE BONA FIDE SALE EXCEPTION TO § 2036(A) OF THE INTERNAL REVENUE CODE

Grant Robert Gulovsen

For the purposes of computing the tax consequences of a decendent's estate, § 2036(a) of the Internal Revenue Code states that when a decedent transfers property to another party while retaining a life estate, the property's full value shall be included in the valuation of the decedent's estate. The provision provides for an exception to this inclusion in situations where property transfers to the party are effectuated through a bona fide sale for an adequate and full consideration in money or money's worth. The bona fide sale exception has important implications for estate planners and their clients in choosing the most tax advantageous means of structuring an estate.

Mr. Gulovsen argues that although the U.S. Claims Court's decision in Gradow v. United States *lacked a clear economic justification,* Gradow *is still more sound than* Wheeler *from a statutory reading perspective. According to Mr. Gulovsen, there is no acceptable interpretation of the bona fide sale exception to § 2036(a) as applied to the sale of remainder interests. As a result, only a statutory change can ensure confidence from estate planners and their clients that estate plans involving the sale of remainder interests will be treated uniformly by the courts.*

I. Introduction

In *Wheeler v. United States*,[1] the U.S. Court of Appeals for the Fifth Circuit held that the bona fide "sale of a remainder interest for its actuarial value . . . constitutes an adequate and full con-

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1. 116 F.3d 749 (5th Cir. 1997).

sideration"[2] under § 2036(a)[3] of the Internal Revenue Code. As a result, none of the property needs to be included in the decedent's gross estate for federal estate tax purposes.[4] This decision, coupled with the Third Circuit's decision in *Estate of D'Ambrosio v. Commissioner*,[5] directly conflicts with a 1987 decision by the U.S. Claims Court in *Gradow v. United States*.[6] Unfortunately, because *Gradow*'s interpretation of the bona fide sale exception to § 2036(a) has not been universally rejected,[7] the *Wheeler* and *Estate of D'Ambrosio* decisions will not necessarily provide estate planners with greater certainty when setting up transactions involving the sale of a remainder interest in property for their clients.

This note has three purposes. First, this note will provide an overview of the mechanics of § 2036(a) and the bona fide sale exception, the section's legislative history, and the case law interpreting § 2036(a) that ultimately culminated in the *Wheeler* decision. Second, this note will undertake an analysis of the *Wheeler* decision itself, evaluating the prudence of estate planners' reliance on it. This second portion will focus heavily upon the *Wheeler* court's economic analysis of § 2036(a), an analysis that many commentators have argued was lacking in *Gradow* and its progeny.[8] Third and finally, this note will point out the severe faults in both the *Wheeler* and *Gradow* decisions, concluding that the only way to ensure certainty in this area of the law for estate planners and clients is through legislation.

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2. *Id.* at 767.
3. I.R.C. § 2036(a) (1994).
4. *See Wheeler*, 116 F.3d at 770.
5. 101 F.3d 309 (3d Cir. 1996).
6. 11 Cl. Ct. 808 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990).
7. *See, e.g.*, Pittman v. United States, 878 F. Supp. 833 (E.D.N.C. 1994); Estate of Magnin v. Commissioner, 71 T.C.M. (CCH) 1856 (1996); Estate of D'Ambrosio v. Commissioner, 105 T.C. 252 (1995), *rev'd*, 101 F.3d 309 (3d Cir. 1996). *See generally* Martha W. Jordan, *The Present State of Sales of Future Interests*, 88 J. TAX'N 336 (1998).
8. *See, e.g.*, Martha W. Jordan, *Sales of Remainder Interests: Reconciling* Gradow v. United States *and Section 2702*, 14 VA. TAX REV. 671 (1995); Jeffrey N. Pennell, *Cases Addressing Sale of Remainder Interest Wrongly Decided*, 22 EST. PLAN. 305 (1995).

II. A Historical Look into § 2036(a) and the Courts' Interpretations

A. Mechanics of § 2036(a) of the Internal Revenue Code

Under § 2033 of the Internal Revenue Code, "[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.'"[9] Courts have interpreted the language of § 2033 to exclude from the decedent's estate the value of all property where the decedent possesses only a life estate because this property interest, by definition, terminates immediately upon death.[10] However, when the decedent transfers property to another and retains a life estate, § 2036 includes the full value of this property in the decedent's estate.[11] This inclusion prohibits taxpayers from escaping federal estate taxation by simply giving away remainder interests in their property during their lifetime while also retaining a life estate.[12] Because this is effectively the same as keeping one's property until death and giving it away to one's issue via a testamentary transaction, the federal estate tax would be rendered irrelevant for all but the wealthiest individuals.[13] Although the actuarial value of the remainder interest in the property given away would still be subject to the gift tax,[14] this value would be especially low unless the decedent was already very old at the time of the transfer.[15] There-

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9. I.R.C. § 2033 (1994).
10. *See, e.g.*, Williams v. United States, 41 F.2d 895 (Ct. Cl. 1930).
11. Section 2036(a) states as follows:

> The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life . . . (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

I.R.C. § 2036.

12. *See* RICHARD B. STEPHENS ET. AL, FEDERAL ESTATE AND GIFT TAXATION ¶ 4.08[10], at 4-236 (1991).
13. Note, however, that such a transfer would still have to be made at least three years before the decedent's death for the property to escape the federal estate tax. *See* I.R.C. § 2035.
14. *See generally* I.R.C. §§ 2501-2524.
15. For example, an individual donor age 40 who gives away a remainder interest in real estate valued at $1,000,000 at the time of the gift would only be subject to a gift tax upon $102,660, the actuarial value of the remainder interest under the Treasury Regulations. *See* Treas. Reg. § 20.2031-7(d) (West 1997). After the $10,000 exclusion, the donor would only be subject to gift tax upon $92,660. *See* I.R.C. § 2503(b). Assuming instead that the person were to die today under the

fore, § 2036(a) serves as a necessary protective measure to keep the federal estate tax viable.[16]

Section 2036(a), however, does have a very important exception. In the event that the remainder interest in property is transferred via a "bona fide sale" in exchange for an "adequate and full consideration in money or money's worth," § 2036(a) will not apply and the property will not be included in the decedent's gross estate.[17] As with the general provision under § 2036(a), the justification for the bona fide sale exception is fairly straightforward. If the decedent receives an amount from the sale considered to be an "adequate and full consideration" for the value of the property transferred, this amount will be included in the decedent's gross estate, albeit in another form, when the decedent dies and the federal estate tax applies. Unfortunately, neither the Internal Revenue Code nor the Treasury Regulations define the terms "bona fide sale" or "adequate and full consideration" as used in § 2036(a).[18] As a result, the courts have been left to create these definitions. The cases described in the following sections reveal the erratic path taken by the courts in their attempt to arrive at satisfactory definitions.[19]

One other section of the Internal Revenue Code, § 2043,[20] is important to the full understanding of the application of § 2036(a) to the sale of remainder interests. Under § 2043, when calculating the amount includible in the gross estate, any amount received by the decedent for property subject to § 2036(a) is deducted from the value of that property.[21] Again, the justification for § 2043 is that the amount received in the sale will be included in the decedent's estate at the

existing law, the estate tax would be levied upon the entire $1,000,000. *See id.* § 2033.

16. *See* REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 322-23 (1997).

17. I.R.C. § 2036(a).

18. *See Wheeler*, 116 F.3d at 754-55.

19. *See infra* Parts II.C through II.E.

20. I.R.C. § 2043.

21. *See id.* § 2043(a). It states:

> If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

time of death. Without § 2043, the estate would effectively be subjected to double taxation by the federal estate tax. One important consideration, however, is that § 2043 only applies in circumstances in which the decedent's estate fails the "bona fide sale for an adequate and full consideration" test under § 2036(a).[22]

B. Legislative History of § 2036(a)

The historical counterpart to § 2036(a) is section 202(b) of the Revenue Act of 1916,[23] the first enactment of the federal estate tax.[24] The portion of section 202(b) dealing with transfers with a retained life estate bears a similarity to § 2036(a) in that it also includes in the decedent's gross estate the value of all property transferred by the decedent during his or her lifetime for testamentary purposes, except where such transfer was made for a "fair consideration in money or money's worth."[25]

Although Congress modified section 202(b) many times during the next thirty-eight years,[26] it did not change the bona fide sale exception until it codified the § 2036 provision concerning transfers with a retained life estate.[27] At that time, Congress changed the language only insofar as replacing "fair consideration" with "adequate and full consideration."[28] As will be discussed later, this modification provides no guidance as to the proper application of the § 2036(a) bona fide sale exception to transfers of remainder interests.[29]

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22. *See* I.R.C. § 2043(a).
23. Pub. L. No. 64-271, 39 Stat. 756.
24. *See* STEPHENS ET AL., *supra* note 12, ¶ 4.08[10], at 4-236.
25. The relevant portion of § 202(b) of the Revenue Act of 1916 reads as follows:

> [T]he value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth.

§ 202(b), 39 Stat. 777-78.

26. *See* Revenue Act of 1918, § 402(c), Pub. L. No. 62-254, 40 Stat. 1057, 1097; Revenue Act of 1924, § 302(c), Pub. L. No. 68-176, 43 Stat. 253, 304; Revenue Act of 1932, § 803(a), Pub. L. No. 72-154, 47 Stat. 169, 279; Internal Revenue Code of 1939, § 811(c), Pub. L. No. 76-1, 53 Stat. 1, 121.
27. Internal Revenue Code of 1954, § 2036(a), Pub. L. No. 83-591, 68A Stat. 3, 382.
28. *See id.*
29. *See infra* Part III.2.A.

C. *Gradow v. United States* and Its Progeny

In *Gradow v. United States*,[30] the U.S. Claims Court interpreted the bona fide sale exception to § 2036(a) in the context of a widow's election under her deceased husband's will in a community property state.[31] Under the will, the widow could have elected one of two options. First, she could have rejected the will and received only her share of the community property.[32] Second, she could have taken under the will and transferred her part of the community property to a trust consisting of the community property of both spouses.[33] If she did choose to take, she would have continued to receive all the trust income for life and, upon her death, the trust corpus would have been distributed to her son.[34]

Upon filing a written election to take under the will, the widow asserted that the value of her half of the community property was greater than the actuarial value of a life estate in her deceased husband's half.[35] Upon the death of the widow, her son filed an estate tax return but included none of the trust assets in her estate, asserting that "the life estate retained was . . . received in a transfer for full and adequate consideration within the meaning of § 2036."[36] The Commissioner of Internal Revenue subsequently filed an estate tax deficiency against the widow's estate.[37] In the filing, the Commissioner asserted that the widow transferred to the trust not just her remainder interest in her half of the community property, but the entire value of

30. 11 Cl. Ct. 808 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990).

31. *See id.* at 809. In its discussion of the *Gradow* decision, the *Wheeler* court described such arrangements as follows:

> In a community property state, a husband and wife generally have an undivided, one-half interest in the property owned in common by virtue of their marital status, with each spouse having the power to dispose, by testamentary instrument, of his or her share of the community property. Under a widow's election will, the decedent spouse purports to dispose of the entire community property, the surviving spouse being left with the choice of either taking under the scheme of the will or waiving any right under the will and taking his or her community share outright.

Wheeler v. United States, 116 F.3d 749, 755 (5th Cir. 1997).

32. *See Gradow*, 11 Cl. Ct. at 809.

33. *See id.*

34. *See id.*

35. *See id.* Specifically, the widow asserted that the value of her half of the community property was $461,610.00, the lifetime income interest of her husband's half of the community property was $192,039.00, the total value of the consideration received from the trust was $300,695.00, and the value of the remainder interest given to the trust was $211,367.00. *See id.*

36. *Id.* at 809.

37. *See id.* at 809.

her half in exchange for the life interest in her deceased husband's share of the community property.[38] As a result, the Commissioner included in the widow's gross estate the value of her contribution to the trust, less the value of the consideration received by her under § 2043.[39]

The *Gradow* court framed the issue as whether the consideration flowing from the widow was the remainder interest left to her son or the entire value of the property she placed into the trust.[40] Resolution of this issue would allow the court to determine whether she had received full and adequate consideration for the life interest in her deceased husband's property.[41] The *Gradow* court held that the consideration flowing from her was the entire value of her half of the community property, not merely the remainder interest in her half of the community property, as the estate asserted.[42] The court relied heavily upon *Estate of Gregory v. Commissioner*,[43] *United States v. Past*[44] and *United States v. Allen*,[45] to reach this holding.[46] The court also based its decision upon a "natural reading" of § 2036(a), stating that the term "property" in the opening clause of the statute refers to "that part of the trust corpus attributable to [the taxpayer]."[47] It therefore followed, according to the *Gradow* court, that the exception found in § 2036(a) must also refer to the same property and not a remainder interest in the property.[48]

Upon concluding that the property transferred by the widow to the trust was her entire one-half undivided interest in the property in exchange for a life estate in her deceased husband's property, the *Gradow* court was then able to determine the applicability of the bona fide sale exception to § 2036(a).[49] If the value of the widow's one-half

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38. *See id.* at 809-10. Both the estate and the Commissioner of Internal Revenue stipulated that the widow's share of the community property was greater than the actuarial value of a life estate in her deceased husband's share. *See id.* at 809.

39. *See id.* at 809. The Commissioner excluded $169,815 from the gross estate because this was the value of the consideration received by the widow, resulting in a total deficiency of $162,271. *See id.*

40. *See id.* at 810.

41. *See id.*

42. *See id.* at 816.

43. 39 T.C. 1012 (1963).

44. 347 F.2d 7 (9th Cir. 1965).

45. 293 F.2d 916 (10th Cir. 1961).

46. *See Gradow*, 11 Cl. Ct. at 810-13.

47. *Id.* at 813.

48. *See id.*

49. *See id.* at 815-16.

undivided interest exceeded the value of her husband's life estate in his one-half undivided interest, the court stated that the widow's estate would fail to fall within the "adequate and full consideration" test of the bona fide sale exception to § 2036(a).[50] Because both the estate and the Commissioner of Internal Revenue stipulated that the widow's share of the community property was greater than the actuarial value of a life estate in her deceased husband's share, the transfer failed to fall within the exception.[51] The *Gradow* court did, however, acknowledge that § 2043 should be applied to reduce the amount of the property subject to estate taxation by the value of her husband's life estate in his one-half undivided interest.[52]

Although the *Gradow* court's holding was actually limited to a legal determination that the consideration flowing from the widow to the trust consisted of the value of her half of the community property, the greatest impact that the *Gradow* decision has had upon the interpretation of the bona fide sale exception to § 2036(a) is its dictum regarding a hypothetical posed by the widow's estate.[53] In the estate's hypothetical, a forty-year-old man contracted to put $100,000 into a trust, reserving the income for life but selling the remainder.[54] The estate noted that, based on the seller's life expectancy, he might receive up to $30,000 for the remainder, but certainly no more because no potential purchaser of the remainder interest would be willing to pay more.[55] The estate argued that this hypothetical demonstrated the unfairness on the part of the Commissioner to insist that consideration equal to $100,000 be placed into trust before it would be exempt from the § 2036(a) provision.[56] Under this type of scenario, the estate reasoned, a seller of a remainder interest in property could never meet the adequate and full consideration test of § 2036(a), rendering the bona fide sale exception worthless.[57]

The *Gradow* court's response to this hypothetical became the cornerstone rationale for the cases that followed the *Gradow* decision.[58] In the words of the *Gradow* court:

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50. *See id.*
51. *See id.* at 809, 816.
52. *See id.* at 810.
53. *See id.* at 815.
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See* Wheeler v. United States, 116 F.3d 749, 758-59 (5th Cir. 1997).

> There are a number of defects in plaintiff's hypothetical. First, the transaction is obviously not testamentary, unlike the actual circumstances here. In addition, plaintiff assumes his conclusion by focusing on the sale of the remainder interest as the only relevant transaction. Assuming it was not treated as a sham, the practical effect is a transfer of the entire $100,000.00, not just a remainder. More importantly, however, if plaintiff is correct that one should be able, under the "bona fide sale" exception to remove property from the gross estate by a sale of the remainder interest, the exception would swallow the rule. A young person could sell a remainder interest for a fraction of the property's worth, enjoy the property for life, and then pass it along without estate or gift tax consequences.[59]

This dictum from *Gradow* has had an enormously unsettling effect upon the estate-planning community due to the number of lower courts that have relied upon it.[60]

In the years following the *Gradow* decision, a number of lower courts directly applied this dictum to their interpretation of the bona fide sale exception to § 2036(a).[61] Such reliance has led them to include in the gross estate of the decedent the full value of property of which the decedent sold a remainder interest during life. In *Pittman v. United States*,[62] the district court applied *Gradow* with almost no additional discussion.[63] The court included in the gross estate of the decedent the full fair market value of real estate offset by the value of a down payment and promissory notes that the daughter had paid for the remainder interest in the real estate.[64] In *Estate of Magnin*,[65] the U.S. Tax Court, relying primarily upon *Estate of Gregory* and *Past* but with reference to *Gradow*, included in the gross estate of the decedent the full fair market value of a trust created by decedent offset by the value of a payment made by the decedent's son for a remainder interest in the trust.[66] Finally, in *Estate of D'Ambrosio v. Commissioner*,[67] the Tax Court, relying upon *Gradow* and *Estate of Gregory*, included in the gross estate of the decedent the full fair market value of stock in a

59. *Gradow*, 11 Cl. Ct. at 815.
60. *See Wheeler*, 116 F.3d at 758-59.
61. Two other courts also applied the *Gradow* analysis, but they did so reluctantly. *See* Parker v. United States, 894 F. Supp. 445, 447 (N.D. Ga. 1995); Estate of McLendon v. Commissioner, T.C. Memo. 1993-459, 66 T.C.M. (CCH) 946 (1993), *rev'd*, 77 F.3d 477 (5th Cir. 1995).
62. 878 F. Supp. 833 (E.D.N.C. 1994).
63. *See id.* at 835.
64. *See id.*
65. 71 T.C.M. (CCH) 1856 (1996).
66. *See id.*
67. 105 T.C. 252 (1995), *rev'd*, 101 F.3d 309 (3d Cir. 1996).

closely-held corporation offset by the value of consideration paid by the decedent's child for a remainder interest in the stock.[68] On appeal, however, the Third Circuit reversed the Tax Court's ruling in *Estate of D'Ambrosio*[69] and became the first post-*Gradow* case that fully challenged the reasoning of *Gradow* and the cases that relied upon it.

D. *Estate of D'Ambrosio v. Commissioner*

In *Estate of D'Ambrosio*, the decedent sold her remainder interest in stock in a closely-held corporation to the corporation in exchange for a private annuity amounting to the actuarial value of her remainder interest in the stock.[70] The decedent retained the income interest in the shares for life, so the Tax Court was faced with applying § 2036(a) and its bona fide sale exception to the transaction.[71] Relying in part upon *Gradow*, the Tax Court held that "the consideration received is compared to the value of the property that would have been included in the gross estate if the transfer had not occurred."[72]

On appeal, the Third Circuit reversed the Tax Court and found *Gradow*, *Estate of Past*, *Estate of Gregory*, and *Allen* either inapposite or unpersuasive.[73] The Third Circuit disagreed with *Gradow*'s reasoning on a number of different points. In regards to the "natural language of the statute" argument, the court explicitly rejected *Gradow*'s insistence in defining the word "property" as a fee simple interest and in determining that the consideration must be measured against that value.[74] Looking further into the statutory language, the Third Circuit focused upon the phrase "to the extent of any interest therein,"[75] and concluded that the clear import of the phrase is that "the gross estate shall include the value of the remainder interest, unless it was sold for adequate and full consideration."[76] In the words of the court, "[i]t strains the judicial imagination . . . to conclude that the drafters used the term of art 'interest in property' when they meant simply 'property.' "[77]

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68. *See id.* at 256, 260.
69. *Estate of D'Ambrosio*, 101 F.3d at 317.
70. *See* 105 T.C. at 253-54.
71. *See id.* at 254-55.
72. *Id.* at 260.
73. *See* Estate of D'Ambrosio v. Commissioner, 101 F.3d 309, 312-15 (3d Cir. 1996).
74. *See id.* at 314-15.
75. *See id.*
76. *Id.* at 314.
77. *Id.* at 315.

The Third Circuit also disagreed with the *Gradow* court's concern about the potential abuse of the federal estate tax code as explained in the *Gradow* decision's dictum hypothetical.[78] In the Third Circuit's opinion, even if the removal of the fee simple interest from the decedent's estate resulting from the sale of a remainder interest for the fair market value of that interest might be deemed an "abuse," Congress clearly expected this abuse to occur.[79] The Third Circuit further stated that such an act was not an abuse and posed its own hypothetical for consideration.[80] Finally, the Third Circuit expressed concern over the same issue that the hypothetical in *Gradow* first introduced, namely that it was impossible to sell a remainder interest for a value that would satisfy the *Gradow* court's interpretation of the phrase "adequate and full consideration."[81]

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78. *See* Gradow v. United States, 11 Cl. Ct. 808 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990).

79. *See Estate of D'Ambrosio*, 101 F.3d at 315.

80. The Third Circuit's hypothetical is as follows:

> A fee simple interest is comprised of a life estate and a remainder. Returning to the widow's election cases, assume that the surviving spouse's share of the community property is valued at $2,000,000. Assuming that she decides not to accept the settlement and to keep that property, its whole value will be available for inclusion in the gross estate at death, but only as long as the widow lives entirely on the income from the property. If she invades principal and sells some of the property in order to meet living expenses or purchase luxury items, then at least some of that value will not be included in the gross estate. Tax law, of course (with the exception of the gift tax), imposes no burdens on how a person spends her money during life.
>
> Next, assume that same widow decides to sell her remainder and keep a life estate. As long as she sells the remainder for its fair market value, it makes no difference whether she receives cash, other property, or an annuity. All can be discounted to their respective present values and quantified. If she continues to support herself from the income from her life estate, the consideration she received in exchange for the remainder, if properly invested, will still be available for inclusion in the gross estate when she dies, as Frothingham and Gregory require. On the other hand, if her life estate is insufficient to meet her living expenses, the widow will have to invade the consideration she received in exchange for her remainder, but to no different an extent than she would under the previous hypothetical in which she retained the fee simple interest. In sum, there is simply no change in the date-of-death value of the final estate, regardless of which option she selects, at any given standard of living.

Id. at 316.

81. *See id.*

E. *Wheeler v. United States*

In *Wheeler v. United States*,[82] the Fifth Circuit dealt what might very well turn out to be the deathblow to the *Gradow* court's interpretation of § 2036(a)'s "adequate and full consideration" language as applied to the sale of a remainder interest.[83] Furthermore, it shed new light upon the meaning of the phrase "bona fide sale" for purposes of applying § 2036(a) to sales of remainder interests.[84]

In *Wheeler*, the decedent sold the remainder interest in his ranch to his two adopted sons when he was sixty years old, retaining a life estate.[85] The decedent used the actuarial tables in the Treasury Regulations[86] to determine the price to charge his sons for the remainder interest.[87] The sons paid for the remainder interest with a personal liability real estate lien note.[88] Then the sons paid off the note through a combination of gifts received by the decedent[89] and bonuses received by the decedent's company.[90]

When the decedent died at age sixty-seven, his federal estate tax return did not include any value for the ranch.[91] The IRS issued a note of deficiency claiming that, under §§ 2036(a) and 2043(a), the estate should have included in the gross estate the difference between the date-of-death value of the ranch ($1,074,200) and the consideration

82. 116 F.3d 749 (5th Cir. 1997).
83. *See id.* at 751.
84. *See id.* at 763.
85. *See id.* at 751-52.
86. Treas. Reg. § 20.2031-7(d) (West 1997).
87. *Wheeler*, 116 F.3d at 752. The decedent multiplied the sum of the appraised fair market value of the ranch's fee simple interest, $1,314,200, plus $10,000, by 0.25509, the factor set forth in the appropriate actuarial table in the Treasury Regulations for valuing future interests in property for someone aged 60. *See id.*
88. *See id.* The note was valued at $337,790.18, or $1,314,200 plus $10,000 multiplied by 0.25509. *See id.* The note initially bore interest at a rate of seven percent and called for annual payments of at least $10,000 principal plus accrued interest. *See id.* The note was later revised to provide for monthly payments of $833.33 principal plus accrued interest, which remained at seven percent. *See id.*
89. *See id.* The father gave $10,000 each to the sons in 1986 by forgiving the amount of each son's indebtedness under the note. *See id.* The father also gave shares of stock and bonuses to the sons that they used to pay off part of the principal. *See id.*
90. *See id.* At the end of 1987, the sons received a $250,000 bonus from the father's company that was used to pay off the remaining balance due on the note the same day. *See id.* Although all of these transactions seemed rather contrived under the circumstances, the *Wheeler* court noted that the sons paid income taxes on all the money received by the company, the company continued to make year-end bonuses after the note was retired, and the sons continued to pay the monthly amounts as required by the terms of the note. *See id.*
91. *See id.* at 752-53.

paid by the sons for the remainder interest ($337,790.18).[92] Accordingly, the IRS determined that the gross estate should have included an additional $736,200 resulting in an estate tax deficiency of $320,831.[93] The lower court, following the *Gradow* decision, agreed with the IRS and determined that the estate had been properly assessed an additional $320,831 in federal estate tax.[94]

On appeal, the Fifth Circuit framed the issue as:

> [W]hether the phrase "adequate and full consideration" as used in the italicized parenthetical clause of section 2036(a) is to be applied in reference to the value of the remainder interest transferred, as the estate contends, or in reference to the value of the full fee simple interest which the transferor had immediately before the transfer, as the government contends.[95]

The Fifth Circuit noted that the lower court ruled in favor of the Commissioner for two reasons: (1) following *Gradow*, the court held that the value received by the decedent must be compared to the value of the entire underlying property, rather than the present value of the future interest transferred, and, in this case, the amount received by the decedent was inadequate to trigger the exception to § 2036(a);[96] and (2) the sale of the remainder interest was not a "bona fide sale" as envisioned by the exception to § 2036 because the series of transactions between the father and his sons constituted a single transaction intended to avoid the payment of estate taxes.[97]

The Fifth Circuit rejected both of these holdings by the lower court based upon a number of different considerations. First, the court analyzed *Gradow* and expressed its concern that reliance upon that decision would not only force the decedent to find a purchaser willing to pay the full fair market value for a remainder interest in property, but the purchaser would be subject to the gift tax for making a gift of the amount in excess of the actuarial value of the remainder interest.[98] This, the court stated in the words of Professor Gilmore, "carr[ies] a good joke too far."[99]

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92. *See id.* at 753.
93. *See id.*
94. *See id.*
95. *Id.* at 754.
96. *See id.* at 753.
97. *See id.*
98. *See id.* at 759.
99. *See id.* (quoting Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE. L.J. 364, 375-76 (1952)).

The *Wheeler* court then considered the general rule that the estate and gift taxes should be read together, *in pari materia*.[100] Under the gift tax, the phrase "adequate and full consideration" has been interpreted to include the amount paid for a remainder interest in property.[101] The Supreme Court itself held in two cases that the phrase "adequate and full consideration" is to be construed similarly in both statutes.[102]

Finally, the *Wheeler* court undertook an economic analysis concluding that the sale of a remainder interest for its actuarial value does not deplete the seller's estate.[103] It based its conclusion on the idea that "the actuarial value of the remainder interest equals the amount that will grow to a principal sum equal to the value of the property that passes to the remainderman at termination of the retained interest."[104] The *Wheeler* court considered two possible objections to this analysis: (1) "that the fee interest holder . . . might squander the proceeds from the sale of the remainder interest,"[105] and (2) that "the estate holder [could] successfully 'freeze' the value of the transferred remainder at its date-of-transfer value."[106] The court, however, rejected both of these objections.[107]

After accepting the estate's argument that the amount transferred for the remainder interest in the real estate constituted "adequate and full consideration" for the property under § 2036, the court went on to consider the IRS's contention that the transaction did not involve a "bona fide sale" under § 2036(a).[108] As a general rule, the court approached intrafamily transfers with heightened scrutiny when inquiring into their nature as "bona fide sales."[109] However, according to the court, "the only possible grounds for challenging the legitimacy of the transaction are whether the transferor actually parted with the remainder interest and the transferee actually parted with the requisite adequate and full consideration."[110] Thus, the court

100. *See id.* at 761.
101. *See id.*
102. *See id.* (citing Merrill v. Fahs, 324 U.S. 308, 309-11 (1945); Commissioner v. Wemyss, 324 U.S. 303 (1945)).
103. *See id.* at 762.
104. Jordan, *supra* note 8, at 692-93, *quoted in Wheeler*, 116 F.3d at 762.
105. *Wheeler*, 116 F.3d at 762.
106. *Id.* at 763.
107. *See id.*
108. *See id.*
109. *See id.*
110. *Id.* at 764.

ignored the fact that the sons could not pay the full purchase price in cash at the time of the transfer[111] and viewed the bonuses received by the sons as merely "a way of life in corporate America."[112] The court also ignored the fact that the parties did not negotiate over the purchase price of the real estate.[113] Lastly, it failed to consider the compelling fact that the father continued to give the sons annual gifts of $10,000 plus stock in the closely-held corporation over the term of the note and that these were used to pay for the remainder interest in the real estate.[114] The court ultimately concluded that the transaction was a "bona fide sale" within the meaning of § 2036(a) and, as a result, excluded the value of the real estate from the decedent's gross estate.[115]

III. An Evaluation of the Courts' Reasoning

Given the history of case law leading up to and including *Wheeler*, each of *Wheeler*'s arguments can be analyzed to determine their legitimacy. First, this analysis will consider the basic statutory argument; namely, what did Congress say, or mean to say, when it enacted § 2036(a) of the Internal Revenue Code. Second, this analysis will dissect what has been regarded as the centerpiece of the *Wheeler* decision—its economic analysis. Third, this analysis will focus on a threshold problem that arises when the *Wheeler* interpretation of the bona fide sale exception to § 2036(a) is applied to the sale of remainder interests. Finally, this analysis will reconsider a portion of the *Gradow* decision that distinguishes it from the *Wheeler* decision.

A. The Basic Statutory Argument

To determine what the bona fide sale exception to § 2036(a) actually means when applied to the sale of remainder interests, one should consider the natural reading of the provision as well as the congressional intent when Congress passed the statute.

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111. *See id.* at 768 ("It is not unusual for purchasers of real property, whether purchasing a remainder interest or a full fee, to lack the financial wherewithal to complete the transaction without incurring a debt obligation.").

112. *See id.*

113. *Id.* at 769.

114. *See id.* ("[T]here is no testamentary synergy that arises from a taxpayer's decision to utilize fully the annual gift exclusion and other tax-saving techniques sanctioned by Congress . . . .").

115. *See id.* at 770.

A natural reading of the statute provides no clear answer. In fact, the section is ambiguous when one attempts to apply its language to the sale of a remainder interest. The phrase immediately preceding the exception—"the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer"[116]—does, as the *Gradow* court asserted,[117] clearly make reference to the value of the entire property (i.e., the full fair market value of fee simple ownership). This is so because the section recognizes that an "interest therein" can be transferred, e.g., a remainder interest in the property.[118] Therefore, according to the *Gradow* decision, this phrase would be rendered nonsensical by an interpretation that "all property" only refers to the remainder interest.[119]

The *Estate of D'Ambrosio* decision, on the other hand, focused its analysis upon the language "interest therein" to conclude that Congress recognized that such interests could be sold, and, therefore, a sale of the remainder interest for its actuarial value could amount to adequate and full consideration for the entire fee simple value of the property under § 2036(a).[120] In defense of the *Gradow* court's reading of the statute, however, the mere fact that the statute refers to the ability to sell an "interest" in property, as opposed to the entire property itself, does not thereby mean that the "adequate and full consideration" language of the statute refers to that interest. Much of the concern expressed by the courts over the *Gradow* court's interpretation of the bona fide sale exception to § 2036(a) involves the possibility that such an interpretation effectively prohibits property owners from ever selling a remainder interest in property and reaping the benefits of § 2036(a).[121] According to these critics, a buyer would be simply unwilling to pay the full fee simple value for a remainder interest in property.[122] This criticism cannot be disputed. However, what can be

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116. I.R.C. § 2036(a) (1994).

117. *See* Gradow v. United States, 11 Cl. Ct. 808, 813 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990).

118. *See id.*

119. *See id.* at 815.

120. *See* Estate of D'Ambrosio v. Commissioner, 101 F.3d 309, 314-15 (3d Cir. 1996).

121. *See, e.g., Wheeler*, 116 F.3d at 759; *Estate of D'Ambrosio*, 101 F.3d at 316.

122. Using the estate's hypothetical in *Gradow* to explain this phenomenon, assume a 40-year-old man puts $100,000 into a trust and attempts to sell the remainder interest to a willing buyer, reserving the income from the trust for life. *See Gradow*, 11 Cl. Ct. at 815. When the grantor dies, the trust will still be worth only $100,000. Assuming that the grantor is in good health, no rational person

disputed and still needs to be resolved in such an analysis is whether Congress intended the bona fide sale exception to § 2036(a) to apply to the sale of remainder interests at all. *Estate of D'Ambrosio* claimed that, if the ability to sell remainder interests at their actuarial value was an abuse in the form of escaping federal estate taxation on the full fee simple value of the property, the situation was an abuse that Congress anticipated.[123] Such a statement merely begs the question as the language is simply not clear enough to make such a determination without further consideration.

Turning to congressional intent, Congress clearly passed the statute in order to prohibit taxpayers from merely (1) giving away remainder interests in their property, (2) paying an inconsequential gift tax, if any, on the value of the remainder interest while continuing to use the property until their death, and (3) paying no tax on the rest of the property.[124] Doing such acts is effectively the same as keeping the property until death and giving it away via a testamentary transaction.[125] In such cases, Congress wanted the estate to pay tax upon the full fee simple value of the property in question, which would, in turn, be offset by the gift tax paid earlier.[126] Congress provided an exception in the case of a bona fide sale because the money transferred into the estate as a result of the sale would be subject to federal estate taxation just as if the decedent kept the property.[127] Thus, there still remains a question as to how much property Congress wanted includible in the estate. One method that can be used to achieve the answer to this question may be to find any inconsistencies that may arise under different interpretations of the statute; this method will be used in the following sections.

B. The Economic Argument

As mentioned before, the greatest criticism of the *Gradow* decision is its flawed economic rationale.[128] The problem commentators most often cite is that "the consideration received for the sale of the

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would be willing to invest $100,000 in property that will be worth only $100,000 in 30 or more years. Following the actuarial tables in the Treasury Regulations, the remainder interest would certainly be worth no more than $20,000. *See* Treas. Reg. § 20.2031-7(d) (West 1997).

123. *See Estate of D'Ambrosio*, 101 F.3d at 315 n.2.

124. *See* STEPHENS ET AL., *supra* note 12, ¶ 4.08[b], at 4-236.

125. *See id.*

126. *See, e.g.*, *Estate of D'Ambrosio*, 101 F.3d at 315 n.2.

127. *See* I.R.C. § 2036(a) (1994).

128. *See, e.g.*, Jordan, *supra* note 8; Pennell, *supra* note 8.

remainder would grow and produce income over that one young person's life and would equal the value of a full fee interest at death in the property that was subject to the original sale."[129] *Wheeler*, in contrast, is heralded as the first decision to give a thorough economic analysis to the bona fide sale exception to § 2036(a).[130]

All of these criticisms of the *Gradow* decision make a valid point. The sale of a remainder interest in property for its actuarial value does include in the decedent's gross estate at the time of death an amount equal to the worth of the fee simple interest in the property at the time of the transfer.[131] This concern simply cannot be disputed, as it is the very purpose of actuarial tables to determine such values.[132]

Unfortunately, none of these economic analyses present the whole picture,[133] because the estate tax does not concern itself with the value of the property at the time of the transaction, but, instead, at the time of death. As § 2033 clearly states, "The value of the gross estate

129. Pennel, *supra* note 8, at 305. The most extensive economic analysis of the sale of a remainder interest under § 2036(a) can be found in Jordan, *supra* note 8.

130. *See* Wheeler v. United States, 116 F.3d 749, 763-64 (5th Cir. 1997).

131. *See infra* notes 170-74 and accompanying text. This, of course, assumes that the lifespan of the decedent corresponds with that assumed by the actuarial tables.

132. *See* Jordan, *supra* note 8, at 700-01.

133. Even the most extensive economic analyses of this problem have presented only one side of the issue. For example, in *Sales of Remainder Interests: Reconciling* Gradow v. United States *and Section 2702*, Professor Jordan uses two examples to explain this phenomenon. Jordan, *supra* note 8. In the first example, a 40-year-old taxpayer owns real estate worth $500,000 that will remain at this value until the taxpayer's death. If the taxpayer sells the property for the value required by *Gradow* to fall within the bona fide sale exception to § 2036(a), not only will the taxpayer's estate have an amount of money far in excess of the $500,000 at the time of death, but the purchaser will be required to pay a gift tax on the amount in excess of the value of the remainder interest in the property. *See id.* at 682-83. In the second example, a taxpayer owns property having a current fair market value of $500,000 that appreciates each year at a rate of 10%. After 10 years, the value would be $1,296,871. If instead the parent placed the property in trust, retained a life income interest, sold the remainder interest for the amount required by *Gradow* (in this case $500,000), and reinvested the annual $50,000 payments at 10%, the amount that would be in the decedent's gross estate after 10 years would be $2,093,742, an amount far greater than $1,296,871. *See id.* at 689-95.

The problem with these two examples is that although they do represent two types of property that create extremely unfair results to the taxpayer under *Gradow*, there are many other types of property and transactions that would not. The value of most real estate does not remain constant, and although dependent upon many factors, will increase significantly over time. Also, in the case of trusts where the grantor retains a life interest and sells the remainder, the life interest need not include an income interest.

shall include the value of all property to the extent of the interest therein of the decedent *at the time of his death*."[134]

To illustrate this point more fully, it will help to look at another example. Assume that a property owner sells her remainder interest in property worth $1,000,000 when she is sixty years old. Assume as well that the prevailing interest rate is eight percent. According to the actuarial tables, the remainder interest in the property is worth $366,760. Table 1 below shows the increase in value over time of the amount of money received:

TABLE 1

YEAR	AMOUNT	YEAR	AMOUNT	YEAR	AMOUNT
0	$366,760	5	$538,891	10	$ 791,807
1	$396,101	6	$582,002	11	$ 855,152
2	$427,789	7	$628,562	12	$ 923,564
3	$462,012	8	$678,847	13	$ 997,449
4	$498,973	9	$733,155	14	$1,077,245

As Table 1 shows, somewhere between the property owner's seventy-third and seventy-fourth birthday (between years 13 and 14), the amount paid for a remainder interest in her property will, in fact, be worth the $1,000,000 that the property was worth at the time of the transaction. This result justifies the holding in *Wheeler* and *Estate of D'Ambrosio* that the amount paid for the remainder interest represented adequate and full consideration of the property in question. However, the unanswered question is this: Exactly what will the property itself be worth at the time of the seller's death? The answer to this question will vary, of course, with the type of property involved (e.g., real estate, stocks, bonds, etc.). However, for the purposes of this brief analysis, one should assume that the property also appreciates at a rate of eight percent in Table 2:

TABLE 2

YEAR	AMOUNT	YEAR	AMOUNT	YEAR	AMOUNT
0	$1,000,000	5	$1,469,328	10	$2,158,925
1	$1,080,000	6	$1,586,874	11	$2,331,639
2	$1,166,400	7	$1,713,824	12	$2,518,170
3	$1,259,712	8	$1,850,930	13	$2,719,623
4	$1,360,489	9	$1,999,004	14	$2,937,194

134. I.R.C. § 2033 (1994) (emphasis added).

As Table 2 shows, the value of the property has appreciated to $2,937,194 at the time the value of the amount exchanged for the remainder interest reaches $1,000,000. Not surprisingly, the value of a remainder interest in $2,937,194 for a person aged sixty at the rate of eight percent is $1,000,000. This result is therefore consistent with *Gradow* and not *Wheeler*.

For some types of property, however, the result will be more consistent with the *Wheeler* decision's holding. If, for instance, the property in question was a trust and the transferor retained a life interest in income amounting to $80,000 per year, the trust corpus would remain at $1,000,000 for the entire life of the trust, and the $366,760 paid thirteen to fourteen years ago would unquestionably be adequate and full consideration. However, in order to fall within § 2036(a), there is no requirement that the transferor withdraw any income from the trust.[135]

There is obviously a great deal of uncertainty in property valuation, but one of the purposes of the actuarial tables is to create some degree of certainty. If these tables can be applied to the amount paid for a remainder interest and be relied on to show that the decedent will have, before his or her death, invested this amount in such a fashion as it appreciates over time to eventually equal the value of the full property interest at the time of the transfer, one could logically argue that no reason exists as to why it cannot also be applied to the property itself.

Upon consideration of this analysis, it is important not to lose sight of the federal estate and gift tax—to include in the decedent's gross estate "the value of all property to the extent of the interest therein of the decedent at the time of death."[136] Applying the actuarial tables and general principles of the time value of money consistently, it would appear that, at least in some cases, *Gradow*, and not *Wheeler*, stands upon a better economic justification.

C. The Threshold Problem

Although the *Wheeler* decision's economic analysis suffers some shortcomings, it is arguably adequate to justify the conclusion that the

135. *See id.* § 2036(1)-(2). The decedent need merely retain "the possession or enjoyment of, or the right to the income from, the property, or . . . the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom." *Id.*

136. *Id.* § 2033.

bona fide sale exception to § 2036(a) should be applied to the value of a remainder interest in property. Accepting this conclusion, however, creates a unique statutory difficulty that will be referred to as the "threshold problem."

According to the *Wheeler* decision, as long as the property owner sells a remainder interest in the property for the fair market value of that remainder interest as determined by the actuarial tables set out in the Treasury Regulations,[137] the full fee simple value of the property will be excluded from federal estate taxation.[138] This treatment is justified under the reasoning that the money received by the estate as consideration for the remainder interest will theoretically be subject to taxation at a later date, when the property owner passes away.[139] Accepting the *Wheeler* court's interpretation of § 2036, the taxpayer is presented with a curious "threshold" that must be overcome in order to prevent his or her estate from having the full fee simple value of its property subjected to federal estate taxation. If the estate fails to meet this threshold amount, and thus comes up short of "adequate and full consideration," the entire fee simple value of the property will be includible in the decedent's gross estate, offset by the amount of consideration received by the decedent under § 2043.[140]

An example can most easily illustrate the full impact of this threshold problem. Assume that a taxpayer age sixty sells to her child, in a bona fide transaction as defined in § 2036, the remainder interest of real estate worth $1,000,000 at the time of the transfer for $366,760—the exact value of a remainder under the Treasury Regulations[141]—and retains a life estate. Under *Wheeler*, the estate would pay no tax upon the real estate, but, of course, any portion of the $366,760 that remained in the decedent's estate would be subject to taxation, because § 2043 only applies in situations where the exception to § 2036 is not met.[142] If, however, the child paid only $360,000 in cash, the bona fide sale exception would not apply, thus triggering the general rule of § 2036, and the entire value of the real estate would be included in the decedent's gross estate less the $360,000 paid under § 2043. As a result, due to only a $6,760 difference in consideration

137. Treas. Reg. § 20.2031-7(d)(6) (West 1997).
138. *See* Wheeler v. United States, 116 F.3d 749, 770 (5th Cir. 1997).
139. *See id.* at 763.
140. *See* I.R.C. § 2043.
141. Treas. Reg. § 20.2031-7(d)(6). For purposes of this analysis, the interest rate will be assumed to be six percent.
142. *See* I.R.C. § 2043.

received, there is a total difference in the taxable gross estate of $640,000. One could argue that this is merely a de minimis situation and that the courts could easily fashion a test to prevent an unfair result, but the very fact that such a test would be required seems far beyond the intent of Congress in passing § 2036. Surely Congress did not intend for such strict treatment when it passed a statute designed solely to prevent taxpayers from escaping the federal estate tax by transferring remainder interests to their issue.[143]

Reading § 2036 in line with the *Gradow* interpretation of the bona fide sale exception of § 2036(a), this threshold problem never arises.[144] According to the *Gradow* decision, "adequate and full consideration" is determined in reference to the full fair market value of the fee simple interest in property.[145] Using again the above example to illustrate the lack of a threshold problem under this interpretation, the $366,760 received by the decedent in the first scenario fails the test because the fair market of the fee simple interest of the property is $1,000,000, the amount required under *Gradow* to fall within the bona fide sale exception to § 2036(a).[146] As a result, the estate would be taxed upon $1,000,000 less the § 2043 offset of $366,760, or $633,240. In the second scenario, the tax would be upon $1,000,000 less $360,000, or $640,000. Under *Gradow*'s interpretation, a difference of $6,606 in consideration results in a difference of $6,606 of the estate subject to tax.[147] In fact, the difference in consideration received up to $1,000,000 would be reflected by the exact same difference in the estate subject to taxation.[148]

Although this result is certainly not as taxpayer friendly as the result following the *Wheeler* interpretation, the outcome is consistent, and estate planners and their clients need not be "surprised" in the event that a court finds that an amount paid for a remainder interest falls short of the "adequate and full consideration" standard.[149] At the same time, although this threshold problem seems unfair and inconsistent, one cannot assume for purposes of interpreting a statute that Congress necessarily intended the statute to be fair or consistent.

143. *See* STEPHENS ET AL., *supra* note 12, ¶ 4.08[b], at 4-236.
144. *See* I.R.C. § 2036; Gradow v. United States, 11 Cl. Ct. 808, 815 (1987), *aff'd*, 897 F.2d 516 (Fed. Cir. 1990).
145. *See Gradow*, 11 Cl. Ct. at 815.
146. *See id.*
147. *See* Jordan, *supra* note 8, at 683 (citing I.R.C. §§ 2036(a), 2043).
148. *See id.*
149. *See Gradow*, 11 Cl. Ct. at 815; Wheeler v. United States, 116 F.3d 749, 764 (5th Cir. 1997).

Again, however, as the natural reading and legislative history are devoid of any real help in fashioning a proper interpretation of the bona fide sale exception to § 2036(a), the economic arguments proposed by *Wheeler* and *Estate of D'Ambrosio* are problably more helpful in terms of guidance.[150]

D. *Gradow* Revisited

Although *Wheeler*'s economic analysis is not as airtight as many commentators insist, the *Gradow* analysis is far from perfect. *Gradow* did not focus upon the economics of the sale of a remainder interest, but the decision did focus on the property definitions of life estates and remainder interests to come to its conclusion.[151] This analysis is flawed when one looks at the transaction in the widow's election case and focuses closely upon the elements of the transaction itself; namely, what exactly was given by the decedent in exchange for adequate and full consideration in money or money's worth, and what exactly was received by the decedent that amounted to adequate consideration in money or money's worth.

As already alluded to, *Gradow* placed a very heavy emphasis upon this part of its own analysis of the statutory language, i.e., the meaning of the term "property" in the statute. *Gradow* determined that the term "property" could only refer to the fee simple interest in the property and not just the remainder interest.[152] As a result, the court compared the value of the fee simple interest in the wife's property as of the time of the transaction with the value of the husband's life estate in his half of the community property at the same time.[153]

This reasoning is questionable on at least two possible grounds. First, in order to determine what "property" was actually transferred in any given transaction, one should turn away from the form of the transaction and focus upon its substance, i.e., what property did each party (in the case of *Gradow*, the wife and the trust) own before and after the transaction.[154] Before the transfer, the widow owned a one-half undivided interest as a tenant in common.[155] Because a tenancy in common entitles the owner of the undivided interest to transfer that

150. *See Gradow*, 11 Cl. Ct. at 809-16; *Wheeler*, 116 F.3d at 754-70.
151. *See generally Gradow*, 11 Cl. Ct. at 816.
152. *See id.*
153. *See id.*
154. *See id.* at 811.
155. *See id.* at 810.

interest in property to another either by sale, exchange, or other means, the owner could possibly divide the interest into a life estate and remainder.[156] Viewed in this manner, Mrs. Gradow had a life estate and remainder in a one-half undivided interest in the property before the transaction, and she had a life estate in the entire property after the exchange.[157] The only property that really passed from the widow to the trust was a remainder in the one-half undivided interest, and all that passed from the trust to Mrs. Gradow was the husband's life estate in his one-half interest.[158] The estate advanced this argument, but the Claims Court outright rejected it.[159]

The second area of criticism regarding the courts reasoning concerns its interpretation of the statutory language. As mentioned above, the *Gradow* court interpreted the word "property" in § 2036 to mean the fee simple value of the property and not just a remainder interest.[160] In rejecting the interpretation that "property" just encompassed the remainder interest, the court spent a great deal of time addressing the statutory language and ultimately held that "property" must mean the entire interest.[161] Even accepting the court's reading of the statute, the same "before and after" analysis may be applied to the transaction in question. Viewing her interest in the property as a "whole" (i.e., not parsing out the life estate and remainder interest during analysis), she had a one-half undivided interest in the property before the transaction and a life estate in the entire property after the transaction.[162] Thus, the property transferring from the widow was the entire one-half undivided interest, and the property passing from the trust to the widow was a life estate in the entire property.[163] Valuing each of the interests passing between the party under the regulations, the value of the property passing from Mrs. Gradow to the trust was $461,610, and the value of the life estate in the entire property was $384,078, not $192,039, as the Commissioner asserted and the *Gradow* court accepted.[164] The *Gradow* court refused to accept this interpretation and, instead, found that the property passing from the widow to

156. *See id.* at 809.
157. *See id.*
158. *See id.* at 810.
159. *See id.* at 813.
160. *See id.* at 816.
161. *See id.* at 810-12.
162. *See id.*
163. *See id.*
164. *See id.* at 810.

the trust was the entire one-half undivided interest.[165] In addition, it found the property passing from the trust to the widow was only a life estate in the husband's property.[166] As a result, the court found that the life estate in only the husband's property failed to be adequate and full consideration for the entire one-half undivided interest received by the trust.[167] Thus, § 2036 did not apply.[168]

Under both of these analyses, the *Gradow* court should have held that the property should not have been included in the widow's estate. This result is consistent with *Gradow*'s own interpretation of the bona fide sale exception to § 2036(a).[169]

IV. Conclusion

Although the *Wheeler* court's economic analysis of the bona fide sale exception to § 2036(a) is relatively sound, it does not consistently apply to every form of property. Furthermore, no statutory basis for the *Wheeler* court's holding really exists. Finally, *Wheeler* suffers from the threshold problem that arises when the purchase price fails the full and adequate consideration test. Such problems in *Wheeler* bolster support for the approach taken in *Gradow*.

At least two commentators[170] acknowledge that estate planners should not rely too heavily on *Wheeler* and *Estate of D'Ambrosio*. Given this current state of confusion, and the inability to adequately apply the bona fide sale exception of § 2036(a) to the sale of remainder interests, the only satisfactory solution is for a modification of § 2036(a) to handle this kind of property transaction. Only then can estate planners and their clients be confident that their property will not be included in their gross estate.

The first possible statutory solution would be to create yet another exception to § 2036(a) in order to deal with the specific issue of sales of remainder interests in property. Such an exception would simply provide that the bona fide sale exception to § 2036(a) shall not

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165. *See id.* at 816.

166. *See id.*

167. *See id.* The court did, however, remand the case as they believed that the valuation issues in the case were not fully flushed out. *See id.*

168. *See id.*

169. *See id.* at 810-12.

170. *See, e.g.*, Martha W. Jordon, *The Present State of Sales of Future Interests*, 88 J. TAX'N 336 (1998); Pamela L. Rollins et al., *Remainders of the Day: The Demise of* Gradow?, May-June 1998, PROB. & PROP. at 31.

apply to the sale of remainder interests in property. This solution, although bringing clarity to the application of the bona fide sale exception to § 2036(a) and solving the threshold problem encountered with § 2043, is in effect the holding from the *Gradow* decision. Thus, it is not the most taxpayer friendly statutory solution.

The other possible statutory solution is much more complicated, requiring a number of modifications to the statute. The first modification would have to be to § 2036(a). In order to bring clarity to the bona fide sale exception, the statute would need to explicitly state that the exception did apply to the sale of remainder interests. As already noted, this solution is consistent with the *Wheeler* and *Estate of D'Ambrosio* decisions.

The next modification would have to be to § 2043 to eliminate the threshold problem. Unfortunately, there is no modification that can eliminate the threshold problem entirely, but one proposal seems to be most fair.

One possible modification to § 2043 would be to simply state that § 2043 should not apply in the case of the sale of remainder interests in property. However, such an exclusion would actually make the threshold problem worse. For example, taking the hypothetical discussed earlier, if the taxpayer failed the bona fide sale test of § 2036(a) by a few thousand dollars and lost the offset of § 2043 entirely, her estate would be subject to taxation on the full $1,000,000 value of her estate. This is clearly more unfair to the taxpayer than the current application of § 2043.

One means of minimizing the threshold problem would be to modify § 2043 so that the difference in consideration received by the estate is reflected by the same difference in the estate subject to taxation. For example, in the threshold problem hypothetical discussed above, it was noted that the whole unfairness of the threshold problem arose because a failure to meet the adequate and full consideration test by only a few thousand dollars could mean that the estate would be subject to a tax upon a much greater portion of the estate's value. By creating a one-to-one ratio in § 2043, this problem could be eliminated. Thus, in the case of sales of remainder interests in property, the amount of the estate subject to tax would be proportional to the amount that the consideration missed the adequate and full consideration test. As an example, if property valued at $1,000,000 was sold for $360,000, thus failing the adequate and full consideration test by $6,670, the estate would only be subject to taxation on $6,670. This solution, however, has a severe flaw in that another threshold problem is created. For example, assume the estate only received $1 in consideration for the remainder interest. In this case a difference of $366,759 would result in a tax upon $366,759. If, however, the estate received no consideration, thus failing the test entirely, the estate would be subject to tax upon the full fee simple value of the property, or $1,000,000. Thus, a difference in $1 would result in a difference in estate tax upon $640,001. Again, this is an extreme scenario. The flexible "bona fide sale for adequate and full consideration" test was designed to give courts some flexibility, but there is an obvious line-drawing problem.

The best and fairest approach would be to apply the actuarial tables to the difference in question. Thus, in the above example, by missing the amount by $6,760, and multiplying the amount by 1.08 for a little over fourteen years, the taxpayer's estate would be subject to taxation on an amount of about $18,400. For a taxpayer who missed the amount by $100,000, the estate would be subject to a tax upon about $272,000. And, finally, for the taxpayer who only received $1, creating a difference of $366,759, the estate would be subject to taxation on an amount equal to about $1,000,000, the original fee simple value of the estate. This solution would be the most consistent with *Wheeler*, by allowing adequate and full consideration for the value of the remainder interest to remove the fee simple value of the property from the decedent's estate subject to taxation. This also removes the threshold problem of § 2043 in a manner that is consistent with the general principles of § 2036(a)—namely, to prohibit taxpayers from escaping federal estate taxation by simply giving away remainder interests in their property during their lifetime while also retaining a life estate.

Has the Age Discrimination in Employment Act Remained Effective in the United States as Well as Abroad in an Increasingly Globalized Economy?

Cynthia Jean Robertson

Despite congressional amendments to the Age Discrimination in Employment Act of 1967, elder Americans working both in the United States and abroad continue to experience discrimination from their employers. While Congress attempted to limit the negative effects of international employment loopholes, various courts' interpretations of the ADEA fall short of effectively implementing Congress's intent to protect the elderly plaintiff. Such interpretations essentially allow foreign employers in the United States and U.S. employers operating overseas to discard older workers without regard to the underlying purposes of the ADEA. As the economy continues to globalize, age discrimination claims reflecting these situations, along with a number of defenses utilized by employers to escape liability, have grown significantly.

In this note, Ms. Robertson first analyzes the different types of defenses available to foreign employers operating within the United States. While concluding that a plain text reading of the ADEA should not provide a valid defense to the employer, she finds that treaties between the United States and foreign countries create a more formidable hurdle for the ADEA plaintiff to overcome. The note then shifts focus to the defenses specific to American employers operating in a foreign country. Ms. Robertson, acknowledging that the United States must abide by the principles of a foreign law defense, recommends that, at the least, U.S. courts should refuse to recognize contract agreements that bargain away ADEA plaintiff rights as a matter of genuine foreign law.

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Ms. Robertson wishes to thank all of the professors at the University of Illinois for their advice and inspiration. Ms. Robertson also extends heartfelt thanks to family and friends for their continued support throughout her life and legal career.

I. Introduction

Two of the greatest forces shaping the United States today are the globalization of the economy[1] and the "graying of America."[2] These two forces naturally overlap, due to both the increase in the overall number of older American workers[3] and the growing trend among foreign corporations in the United States and American corporations in foreign countries to employ U.S. citizens.[4] This environment often makes it difficult for American workers age forty and over to prevail in age discrimination suits.[5]

Compared to a time where the United States had little involvement in the global market place, U.S. corporations funded approximately 6400 international mergers and acquisitions in 1996, totaling nearly $300,000,000,000 in investments.[6] In 1990, almost 250,000 Americans worked for Japanese companies in the United States,[7] and within the following decade, Japan's Ministry of Trade anticipated that this number would reach nearly 1,000,000.[8] While foreign corporate expansion within the United States continues to rise, executives in charge of their U.S. offices often come unprepared for the myriad of U.S. discrimination laws that do not exist in their own home country.[9] Furthermore, these same executives argue that U.S. discrimination statutes deter foreign businesses from investing in and relocating to the United States.[10] In fact, many international executives view dis-

1. *See* Pietro S. Nivola, *Having It All? Domestic Regulations and the Global Economy*, 14 BROOKINGS REV. 16, 18 (1996).

2. OLDER AMERICANS IN THE WORKFORCE: CHALLENGES AND SOLUTIONS 1 (BNA 1987) [hereinafter OLDER AMERICANS].

3. *See id.* at 16, 17.

4. *See* Michael Starr, *Who's the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635, 636 (1996) (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

5. *See id.*

6. *See* Robert Frank & Thomas M. Burton, *Cross-Border Merger Results in Headaches for a Drug Company*, WALL ST. J., Feb. 4, 1997, at A1.

7. *See* Professor Phillip McConnaughy, Legal Pitfalls Confronting Japanese Employers in the United States (July 17, 1990) (unpublished comments from a speech delivered in 1990 to the Japan-American Cooperative Committee of the American Chamber of Commerce in Japan) (transcript available in the University of Illinois College of Law Library).

8. *See id.* Japan's estimates likely have become more conservative, given its current economic crisis. Naturally, foreign direct investment within the United States will ebb and flow according to foreign countries' ability to expend capital resources overseas.

9. *See* Frank & Burton, *supra* note 6, at A1.

10. *See* Nivola, *supra* note 1, at 20.

crimination statutes, such as the Age Discrimination in Employment Act (ADEA),[11] as a hindrance to employment decision making.

As with cases involving U.S. domestic employers, the ADEA creates litigation for foreign employers within the United States,[12] as well as for American employers operating overseas.[13] However, international employers often successfully combat ADEA suits by advancing several defenses based on either their foreign status within the United States (and commensurate treaty rights)[14] or on their geographical location in another country (and commensurate foreign law rights).[15] In other words, foreign corporations in the United States may escape liability for age discrimination for which similarly situated American corporations would be held accountable.[16] At the same time, U.S. corporations might also escape liability due to their operations overseas.[17]

The nature of the ADEA defenses, both for foreign corporations operating within the United States and for American corporations operating overseas, becomes increasingly important as more working Americans each year fall within the ADEA's protected class.[18] As such, it becomes imperative to examine the nature of these defenses to determine whether they, in effect, unreasonably reduce the chances of recovery for age discrimination plaintiffs, thereby eviscerating the underlying purpose of the ADEA.[19]

The first goal of this note is to analyze the different types of defenses available to foreign employers within the United States. The two defenses are: (1) a plain text argument that the ADEA exempts foreign employers within the United States from compliance;[20] and, (2) an argument that treaty rights allow foreign employers to select and terminate certain types of employees without regard to the

11. 29 U.S.C. §§ 621-634 (1994).

12. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

13. *See, e.g.*, Mahoney v. RFE/RL, Inc., 47 F.3d 447 (D.C. Cir. 1995).

14. *See, e.g.*, Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 443 (N.D. Tex. 1994).

15. *See, e.g.*, *Mahoney*, 47 F.3d at 447-48.

16. *See, e.g.*, Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994); *see also* discussion *infra* Part III.A.

17. *See, e.g.*, *Mahoney*, 47 F.3d at 451; *see also* discussion *infra* Part III.B.

18. *See* OLDER AMERICANS, *supra* note 2, at 16, 17.

19. The chance of recovery for all ADEA plaintiffs hovers around only 10%. *See* Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 126 (1996) (reviewing RICHARD A. POSNER, AGING AND OLD AGE (1995)).

20. *See, e.g.*, *Mochelle*, 823 F. Supp. at 1309.

ADEA.[21] An important subargument to this treaty analysis focuses on whether a domestic subsidiary employer is indistinguishable from the foreign parent, thereby enabling that subsidiary to assert its foreign parent's treaty or statutory rights.[22]

Following an examination of the defenses used by foreign employers within the United States, this note will then focus on the defenses specific to American employers operating in a foreign country. Based on their international location, American employers have raised two key defenses: (1) that the foreign country's law conflicts with the ADEA and, therefore, exempts the employer from ADEA compliance (also known as simply "the foreign-law" defense);[23] and, (2) that the American subsidiary, rather than being controlled by its American parent, is instead a separate and distinct foreign entity and, thus, exempt from the ADEA's reach overseas.[24]

In part II, this note will give an overview of the history and growing importance of the ADEA and, in particular, the specific provisions which affect international enforcement. Part III will examine the defenses available to both foreign employers within the United States and American employers within a foreign country. Part IV will conclude that at least some of the international defenses raised by defendants do indeed eviscerate the underlying purpose of the ADEA by unreasonably reducing the chances of a plaintiff's recovery. This note recognizes, however, that, given today's global reality, certain international defenses do seem to find an appropriate balance between compliance with the ADEA and important competing interests, such as international comity. Following this resolution, this note will discuss the ways in which Congress could amend the ADEA to nullify those defenses that seem to swallow the underlying purpose of the ADEA without suspending those defenses which strike the proper

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21. *See, e.g.*, Spiess v. C. Itoh & Co. (Am.), Inc., 643 F.2d 353, 359 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982). The treaty defense appears to be litigated with greater frequency and debate than does the plain text argument, lending greater legitimacy to this defense. *See* discussion *infra* Part III.A.2. However, the fact that foreign employers have raised the plain text argument as recently as 1995 in *EEOC v. Kloster Cruise Ltd.*, 888 F. Supp. 147 (S.D. Fla. 1995), indicates that employers have not yet given up on the inartfully phrased ADEA amendment that arguably exempts all foreign employers within the United States from ADEA compliance. *See* discussion *infra* Part III.A.1.

22. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991); Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 443 (N.D. Tex. 1994).

23. *See, e.g.*, *Mahoney*, 47 F.3d at 451.

24. *See, e.g.*, Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56, 58-59 (D. Mass. 1980).

balance between an international employer's prerogatives and an employee's rights. In addition, part V of this note will conclude that the continued rapid globalization of our economy may soon render some of these defenses obsolete, as treaties may no longer be necessary to stimulate foreign investment, fair competition, and equal protection under the laws.

II. Background

A. The Age Discrimination in Employment Act—Its Continued Necessity in the Workplace

The text of the ADEA manifests its purpose: (1) to promote employment of older persons based on their qualifications rather than age; (2) to prohibit arbitrary age-based discrimination in employment; and, (3) to help employers and workers find ways to address problems arising from the impact of age on employment.[25] The legislative history of the ADEA indicates that Congress enacted the statute as "a matter of basic civil rights," and thereafter expanded the ADEA's scope of protection as new data regarding older workers' abilities became available.[26]

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25. *See* 29 U.S.C. § 621 (1994).

26. *See* S. REP. NO. 95-493, at 2 (1977). The Senate Committee of Human Resources found that "people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about . . . age." *Id.* Because "chronological age alone is a poor indicator of ability to perform a job," *id.*, Congress enacted the ADEA in 1967 to ensure that older workers would not be denied employment solely on the basis of age. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

While the purpose of the ADEA has remained constant since its enactment, the scope of the ADEA has gradually, but continuously, increased by way of congressional amendment. *See, e.g.*, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189; Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767; Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342. Congress expanded the scope of the ADEA in several ways. First, the age of persons protected by the Act was increased to employees age 40 and over, as opposed to employees between the ages of 40 and 65, as was originally enacted. Second, the number of private employers liable under the Act was increased by redefining "employer" to require only 20 as opposed to 25 employees. Third, while the original ADEA excluded States from liability, the current ADEA has been amended to encompass the liability of any State, its political subdivisions, agencies or instrumentalities, as well as any interstate agency. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), (b)(1), (c)(1), 92 Stat. 190, 191 (codified as amended at 29 U.S.C. § 626(d) (1994)). Congress gave the ADEA extraterritorial effect in 1984 by amending the statute to expressly cover Americans working overseas for American companies or American-controlled foreign subsidiaries. Older Ameri-

Despite the ADEA's enactment, employers continue to terminate older employees based on the following arguments. First, employers insist that they can reduce overhead costs by replacing older, more experienced employees with equally productive younger employees who can be paid a much lower wage.[27] Unlike race and sex, age is often linked directly to an employee's earning capacity, thereby creating a pure economic motivation for an older employee's termination or failure to be hired.[28] Although reducing overhead in this manner creates an immediate gain, these rather shortsighted terminations often fail to account for the added costs of retraining and retaining a younger employee.[29] In addition, such terminations fail to consider that younger employees' loyalty and job performance are perhaps more suspect than that of older employees who have worked for a single employer for a number of years.[30]

Second, some employers argue that terminating older employees creates a younger and more productive work force.[31] However, stud-

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cans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), 98 Stat. 1767 (codified as amended at 29 U.S.C. § 623(h) (1994)). Important to note in looking at this section's passage through legislation is that it was originally enacted at subsection (g). In 1990, Congress redesignated subsection (g) as subsection (h) in Pub. L. No. 99-272, § 9201(b)(3), and Pub. L. No. 99-592, § 2(b).

27. *See* Ulen, *supra* note 19, at 127.

28. *See, e.g.*, Zahourek v. Arthur Young & Co., 567 F. Supp. 1453, 1456 (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984). Here, the plaintiff employee argued that he was discriminated against because of his age (43) and the "concomitant fact that his pay scale was too high" for Arthur Young's international job openings. *Id.*

29. *See* WILLIAM S. SWAN, HOW TO PICK THE RIGHT PEOPLE xviii (1989). Swan points out that,

> factoring in salary, wasted benefits, placement fees, training costs, time wasted by interviewers, relocation costs, the effects on fellow employees, and, most of all, the reduced efficiency and opportunities lost due to the actual inferior work of the person who should never have been hired in the first place—the cost of this mistake may be measured in tens to hundreds of thousands of dollars per hire.

Id. Please note that Swan is not specifically discussing the differences in hiring older as opposed to younger employees, but only the costs associated with making an unfortunate hiring decision (which, of course, would apply to those situations where the older employee is at least equally effective as a younger hire, and more loyal to the corporation).

30. *See* S. REP. NO. 95-493, at 3 (1977) ("[T]here is substantial evidence that many workers can continue to work effectively beyond age 65 and may, in fact, be better employees because of experience and job commitment."). Furthermore, "with regard to absenteeism, punctuality, on the job accidents, and overall job performance" workers over the age of 65 performed "about equal to and sometimes noticeably better than younger employees." *Id.* at 3 (quoting David A. Andelman, N.Y. TIMES, Sept. 22, 1972, at 45).

31. *See* S. REP. NO. 95-493, at 3.

ies from a number of industries indicate that older employees, even those age sixty and over, all rated equal if not superior to younger workers regarding "dependability, judgment, work quality, work volume, and human relations."[32] Other employers maintain that retaining older employees decreases promotion channels for younger employees who require incentives such as increased job responsibility and salary in order to stay loyal to the employer.[33] Without the enticement of promotion, employers predict difficulty in retaining younger employees targeted for advancement.[34] The ADEA remedies this situation by exempting from coverage certain highly compensated management employees age sixty-five and older,[35] thereby freeing these positions for promotion opportunities.[36]

Although the ADEA's provisions attempt to guard the rights of older Americans without placing an undue burden on employers, employers still see benefits in simply violating the ADEA and have gotten more savvy in terms of how to do so.[37] Because more Americans each year fall within the protected class of employees age forty and over,[38] the incidence of ADEA violations will steadily increase both at home and abroad, even if employers continue to discriminate at the present rate.[39] Therefore, adequate enforcement of the ADEA will become increasingly important and should be carefully guarded.

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32. *Id.*
33. *See id.* at 7.
34. *See id.*
35. *See* 29 U.S.C. § 623(i)(5) (1994).
36. *See* S. REP. NO. 95-493, at 7.
37. *See* Ulen, *supra* note 19, at 127.
38. According to the Administration on Aging, life expectancies for Americans have increased 29 years during the last century and continue to rise. *See* Administration on Aging, *Profile of Older Americans: 1997* (visited June 20, 1998) <http://www.aoa.dhhs.gov/aoa/stats/profile>. In 1996, persons aged 65 and older totaled 33.9 million, or 12.8% of the U.S. population. *See id.* Since 1990, the number of Americans over the age of 65 has increased about 11 times, from 3.1 million in 1990, to 33.9 million in 1997. *See id.* Naturally, America's aging population has had a fairly direct impact on the American workforce. Population experts predict that by 2010, *half* of the workforce will consist of workers age 40 and over. *See* OLDER AMERICANS, *supra* note 2, at 1.
39. The number of suits filed under the ADEA has commensurately increased with the "graying" population trend. *See* DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 1 (Labor Relations & Pub. Policy Series No. 33, 1989). The ADEA, at first, served as "a relatively obscure and unimportant law." In recent years, however, the number of age discrimination cases have skyrocketed. *Id.* at 1; *see also* OLDER AMERICANS, *supra* note 2, at 8. In the six years between 1980 and 1986, age bias suits more than doubled. *See id.* Current data supplied by the Equal Employment Opportunity Commission (EEOC), the administrative agency that enforces the ADEA, estimates that employers spent approximately $170 million between 1983

B. The Globalization of the Economy: Creating More Foreign Employers Within the United States and a Greater Likelihood of Working Abroad

Currently, the ADEA's efficacy appears to be thwarted by a trend not foreseen by Congress when it enacted the ADEA in 1967[40]—the increasing globalization of our economy.[41] Economic globalization creates more foreign employers in the United States, as well as more U.S. employers operating overseas.[42] In turn, these employers may utilize defenses to employment discrimination charges that are unavailable to U.S. employers on U.S. soil.[43] While some courts limit the negative effects of international employment loopholes, other courts provide interpretations of the amendments of the ADEA that do not give effect to Congress's intent to protect the ADEA plaintiff.[44]

Forty years ago, one could describe the U.S. economy as "self-contained."[45] The present situation, however, reflects drastic changes. Currently, overseas sales and inward foreign investments generate vital "engines of U.S. growth," with imports and exports accounting for more than a fifth of the Gross National Product.[46] By 1991, at least 2000 U.S. employers operated 21,000 overseas offices in 121 coun-

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and 1987 in litigating and settling age discrimination cases. *See id.* at 14. This figure comprises various forms of relief under the ADEA including: equitable relief (back pay); legal relief (monetary damages); and punitive damages (in cases of intentional discrimination).

It also stands to reason that a significant number of American employees working overseas could constitute potential ADEA plaintiffs. Corporations often need older, more experienced employees to manage an international satellite office or other type of subsidiary. *See Hearings, infra* note 54, at 30 (comment by Mr. William M. Yoffee, Executive Director of American Citizens Abroad, Inc.). These employees, by virtue of their age, necessarily fall under the ADEA's protection.

40. *See* Nivola, *supra* note 1, at 18. When the ADEA was passed, the American economy was "self-contained," meaning that foreign corporations rarely operated in the United States, and American corporations rarely operated outside U.S. borders. *See id.*

41. *See* discussion *infra* Part II.C.

42. *See* discussion *infra* Part II.C.

43. *See* Starr, *supra* note 4, at 636 (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

44. *See* discussion *infra* Part III.

45. *See* Nivola, *supra* note 1, at 18. According to Nivola, a writer for the Brookings Institution, "[international] trade [40 years ago] amounted to a negligible fraction of the gross national product (GNP), and inflows of capital from abroad were small." *Id.*

46. *See id.*

tries.[47] Approximately 300,000 Americans currently work abroad on expatriate assignments, and that number is expected to rise.[48]

Not only is the American corporate presence felt abroad, but foreign investors are increasingly purchasing or merging with American companies on U.S. soil.[49] Foreign employers perceive the United States as fertile ground for manufacturing plants and have set up shops in the United States.[50] Moreover, foreign businesses in the United States have moved beyond manufacturing enterprises by developing service agencies that capitalize on the growing number of foreign businesses within the United States.[51]

Regardless of whether the foreign investment involves an international merger or creation of an overseas manufacturing plant, the increased globalization of the economy is apparent both in the United States and abroad. This economic globalization raises several important questions relating to employment decision making on the part of foreign corporations operating within the United States, as well as for American companies operating overseas. Such questions become even more apparent with an ever increasing number of age discrimination claims.[52]

C. The Passage of Section 623(h): Extending ADEA Protection Overseas

The ADEA has not always expressly covered American citizens working abroad, and it was not until the early 1980s that American workers presented extraterritorial ADEA claims to a number of federal district courts.[53] In 1983, the U.S. district courts of New Jersey

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47. *See* Starr, *supra* note 4, at 636 (citing 137 CONG. REC. H3934 (daily ed. June 5, 1991)).

48. *See Cyberscope: Globetrotters' Friend*, NEWSWEEK, June 22, 1998, at 8.

49. For example, foreign corporations have recently purchased American companies such as Columbia Pictures, Zenith, Firestone, and Southland/7-Eleven. *See After Japan: South Korea's Firms Are on a Buying Binge Overseas. Will They Repeat the Mistakes or the Successes of the Japanese?*, ECONOMIST, Oct. 5, 1996, at 17 [hereinafter *After Japan*]; *see also Back on Top? (A Survey of American Business)*, ECONOMIST, Sept. 16, 1995, at 64, *3 [hereinafter *Back on Top?*].

50. *See After Japan*, *supra* note 49, at 17-18.

51. *See, e.g.*, Goyette v. DCA Adver., Inc., 830 F. Supp. 737, 740 (S.D.N.Y. 1993). For example, a large advertising/communications agency of Japanese incorporation purchased an American advertising agency in order to service the Japanese-owned U.S. subsidiaries of its Japanese clients. *See id.*

52. *See* discussion *supra* note 39.

53. *See, e.g.*, Zahourek v. Arthur Young & Co., 567 F. Supp. 1453 (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984); Cleary v. United States Lines, 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

and Colorado created a "major loophole," by refusing to extend the ADEA's protections to Americans employed overseas by American companies.[54] The *Cleary v. United States Lines*[55] and *Zahourek v. Arthur Young & Co.* decisions,[56] later affirmed by the U.S. Courts of Appeals for the Third and Tenth Circuits respectively, held that the ADEA, which incorporated certain provisions of the Fair Labor Standards Act (FLSA),[57] did not apply overseas.[58] The two courts relied on the FLSA's express provision that the FLSA did not apply to situations occurring in foreign countries.[59] Equally significant, the *Cleary* court found that "the investigatory apparatus of the EEOC is not structured or empowered to function abroad."[60] The *Cleary* finding at that time represented the consensus among the Federal Circuit Courts of Appeals that had reviewed the ADEA's international scope for American corporations operating overseas.[61]

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54. *See Reviewing Certain Provisions of the Age Discrimination and Employment Act (Public Law 90-202), which Affect Americans Working Abroad: Hearings Before the Subcomm. on Aging of the Senate Comm. on Labor & Human Resources*, 98th Cong. 1 (1983) [hereinafter *Hearings*] (opening statement of Senator Charles E. Grassley, Chairman). *See infra* note 55 and accompanying text.

55. 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984). Mr. Cleary was fired in England, at the age of 60, on four days notice, after having worked for the same American company for 33 years. *See id.* at 1253-55.

56. 567 F. Supp. 1453, (D.C. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984). Mr. Zahourek, a CPA, had worked for Arthur Young as an international specialist for approximately 10 years prior to his termination in 1981. Zahourek argued that he was discriminated against because of his age (43) and the additional fact that his pay scale was too high for Arthur Young's international job openings. *See id.* at 1453-54.

> When terminated, Zahourek was 43 years old and a principal employee, the last rung in the partnership ladder. Arthur Young's partnership structure is such that the early forties are critical years for a would-be partner. Typically, it takes ten years to pay back the sum advanced by Arthur Young to buy into the partnership. . . . Arthur Young, says Zahourek, is accordingly reluctant to make anyone older than 45 a partner.

Id. at 1454.

57. The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994).

58. *See Zahourek*, 567 F. Supp. at 1457 (holding that the plaintiff, employed in a foreign country, does not enjoy ADEA protection); *Cleary*, 555 F. Supp. at 1263 (holding that plaintiff employed in England was not protected by the ADEA regardless in which country the adverse employment decision took place, including the United States).

59. *See* 29 U.S.C. § 213(f). Furthermore, the *Cleary* court reasoned, "unless a contrary intent appears, a statute should be construed to apply only within the territorial jurisdiction of the United States." *Cleary*, 555 F. Supp. at 1257 (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)).

60. *Id.* at 1259.

61. These courts all applied the well-established presumption against extraterritoriality of federal law. *See* Lopez v. Pan Am World Serv., Inc., 813 F.2d 1118 (11th Cir. 1987); S.F. De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th

In response to the *Cleary* and *Zahourek* decisions,[62] Congress amended § 623 of the ADEA to expressly grant coverage to overseas Americans working for American companies.[63] In expanding the ADEA coverage overseas, Congress aimed to counteract the "red flag to international employers telling them that they can freely discriminate based on age against Americans working abroad and, indeed, Americans working here who can be transferred abroad and then fired."[64] Thus, through § 623(h) Congress sought to clarify and amend the ADEA to cover executives transferred outside the country but who continued to work for an American employer.[65] Today, although § 623(h) clearly granted the ADEA extraterritorial power, § 623(h)'s purpose is only partially realized, as confusion remains as to how to extend liability to the American employer who may or may not adequately "control" its foreign incorporated subsidiary.[66] Section 623(h)(1) states, "If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer."[67] The section, then, exempts from the ADEA's extra-

Cir. 1986); Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985); Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985); *Zahourek*, 750 F.2d at 827; Thomas v. Brown & Root, Inc., 745 F.2d 279 (4th Cir. 1984); *Cleary*, 728 F.2d at 607. Even Clarence Thomas, as the Chairman of the Equal Employment Opportunity Commission (EEOC), agreed that *Cleary* represented the proper interpretation of the ADEA's domestic scope. *See Hearings*, *supra* note 54, at 2-3 (statement of Hon. Clarence Thomas, Chairman of the EEOC). At the Senate subcommittee hearing on amending the ADEA, Thomas testified that "it is the view of both the General Counsel and the Legal Counsel of the EEOC that the ADEA does not apply to . . . [overseas plaintiffs] for basically the same reasons set out by the court in *Cleary* . . . ." *Id.*

62. These cases represented the only rulings regarding the ADEA's extraterritorial application when Senator Grassley proposed the express amendment to grant extraterritorial application.

63. Age Discrimination in Employment Act, 29 U.S.C. § 623(h) (1994). Pub. L. No. 99-272, § 9201(b)(3), 100 Stat. 82, 176, and Pub. L. No. 99-592, § 2(b), 100 Stat. 3342, 3342, made identical amendments, redesignating subsection (g), relating to practices of foreign corporations controlled by American employers, as (h).

64. *Hearings*, *supra* note 54, at 7-8 (statement of Steven Kartzman, Attorney, Bourne, Noll & Kenyon). Indeed, an international marketing and management executive testified at a subcommittee hearing that after having filed an ADEA claim against his company, he was "offered a transfer" to Canada as a means of precluding the suit. *See Hearings*, *supra* note 54, at 19-20 (statement of Eugene B. Goodman).

65. *See* 29 U.S.C § 623.

66. *See* discussion *infra* Part III.B.1.

67. 29 U.S.C. § 623(h)(1).

territorial scope foreign employers "not controlled by an American employer."[68]

D. The ADEA in a Globalized Economy: Its Growing Importance at Home and Abroad

As previously mentioned, several factors lend to the increasing importance of the international implications of the ADEA. The U.S. and other world economies continue to globalize with more foreign employers in the United States[69] and more American employers in foreign countries.[70] This, in conjunction with the rising number of older Americans in the work force,[71] increases the likelihood that workers covered by the ADEA will work either for a foreign employer in the United States or for an American employer in a foreign country. The incidence of international working situations naturally implicates questions of whether the ADEA's international application differs from that applied to cases concerning employees who remain working for American companies within the United States.

III. Analysis

The effectiveness of the ADEA in an increasingly globalized economy necessarily turns on two separate inquiries. The first inquiry, which will be analyzed in section A of part III, relates to the ADEA's impact on an American plaintiff's claim against a foreign employer operating within the United States. The second inquiry analyzes the ADEA's impact on an American plaintiff's claim against his or her American employer in a foreign country; this topic will be addressed in section B of part III.

A. The ADEA at Home: How Effective Is the ADEA for U.S. Employees Working for Foreign Employers?

Employees working within the United States commonly assume that U.S. discrimination laws protect them. Contrary to this belief, employees working for foreign employers do not always benefit from statutes such as the ADEA. In addition to an ADEA exemption that

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68. 29 U.S.C. § 623(h)(2).

69. *See* Robert D. Hershey, Jr., *For U.S. Teen-Agers, the Summer Is Here, and Job Hunting Is Easy*, N.Y. TIMES, June 21, 1998, at 1.

70. *See Back on Top?*, *supra* note 49, at 64, *4.

71. *See* OLDER AMERICANS, *supra* note 2, at 1.

may cover both domestic and foreign employers,[72] an employer may raise defenses based specifically on their foreign status.[73] Because foreign employers may assert certain defenses, unavailable to American corporations, it is proper to ask whether these defenses are so broad or powerful as to eviscerate the underlying purpose of the ADEA.

Based solely on their status as a foreign employer operating within the United States, corporations utilize various defenses, including: (1) a plain text argument that the ADEA exempts foreign employers operating within the United States from compliance;[74] (2) an argument that a treaty protects a foreign employer's right to select and terminate employees without regard for the ADEA;[75] and (3) an argument that the domestic subsidiary employer is indistinguishable from the foreign parent, enabling that subsidiary to assert its foreign parent's treaty or statutory rights.[76]

1. THE PLAIN TEXT ARGUMENT

Presently, courts disagree as to whether the plain language of the ADEA exempts all foreign employers operating in the United States from liability under this Act.[77] This disagreement is surprising, given that federal discrimination laws typically apply throughout U.S. territorial jurisdiction.[78] The circuit split hinges on the interpretation of § 623(h)(2) of the ADEA, which is the extraterritorial amendment to the Act.[79] Section 623(h)(2) plainly states, "The prohibitions of [the

72. For example, an employer must have the requisite number of 20 employees to qualify as "an employer" under the Act). *See, e.g.*, Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, 920 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994).

73. *See, e.g.*, 29 U.S.C. § 623(h)(2).

74. *See, e.g.*, Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994) (foreign employer not subject to the ADEA where American citizen worked in United States).

75. *See, e.g.*, Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 355 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

76. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991); Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 443 (N.D. Tex. 1994).

77. *Compare Mochelle*, 823 F. Supp. at 1309 (holding foreign employer not subject to ADEA if American citizen worked for foreign employer in the United States), *with* EEOC v. Kloster Cruise Ltd., 888 F. Supp. 147, 149-52 (S.D. Fla. 1995) (holding that foreign employers, per EEOC regulations and legislative history of ADEA, are subject to ADEA enforcement in the United States unless a treaty is involved).

78. *See* Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987) (citing 29 C.F.R. § 860.20).

79. 29 U.S.C. § 623(h) (1994).

ADEA][80] shall not apply where the employer is a foreign person not controlled by an American employer."[81] "Person" is then defined as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons."[82]

The ADEA's legislative history indicates that § 623(h)(2) should apply only to foreign employers located *outside* the United States.[83] Notwithstanding, some courts have used ambiguous statutory language to conclude that the ADEA exempts *all* foreign employers, even those operating *within* the United States, from ADEA compliance.[84] For example, in *Robinson v. Overseas Military Sales Corp.*,[85] a case involving a plaintiff primarily working in Korea for a foreign corporation with an office in New York,[86] the District Court for the Eastern District of New York made the conclusory statement that "[i]t is clear that foreign corporations are not subject to the prohibitions of the ADEA."[87] The district court, citing § 623(h)(2), gave the impression that all foreign corporations, even those with headquarters in the United States, are not covered by the ADEA.[88] The Second Circuit

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80. The prohibitions of this section include the following:

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or, (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

81. 29 U.S.C. § 623(h)(2).

82. *Id.* § 630(a).

83. *See* S. REP. NO. 98-467, at 36 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, at 3009; H.R. CONF. REP. NO. 98-1037, at 49 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 3037.

84. *See* Robinson v. Overseas Military Sales Corp., 827 F. Supp. 915, 920 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994); *see also* Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

85. 827 F. Supp. 915 (E.D.N.Y. 1993), *aff'd*, 21 F.3d 502 (2d Cir. 1994).

86. The district court described the foreign corporation, Overseas Military Sales Corporation (OMSC), as "a Swiss corporation with an office in Woodbury, New York. OMSC was formerly known as Chrysler Military Sales Corporation and is affiliated with Overseas Military Sales Group (OMSG) and Overseas Military Sales Organization (OMSO), which are also Swiss Corporations." *Robinson*, 827 F. Supp. at 918-919.

87. *Id.* at 920 (citing 29 U.S.C. § 623(h)(2)).

88. *See id.*

Court of Appeals affirmed *Robinson* on other grounds, avoiding the question of "whether the ADEA applies to foreign corporations headquartered in the United States that employ U.S. nationals abroad."[89] Here, the Second Circuit[90] clarified that *Robinson* was an unusual case, because the American plaintiff spent a substantial amount of time in Korea as a sales representative.[91] In fact, the plaintiff had an established residence in Korea and was married to a Korean national.[92] Because the district court in *Robinson* failed to highlight the critical nature of the plaintiff's international residence, courts should not construe *Robinson* to hold that the ADEA does not, per se, cover American employees *working within the United States* for a foreign employer.[93]

a. In Conjunction with the Place of Incorporation In *Mochelle v. J. Walter Inc.*,[94] the U.S. District Court for the Middle District of Louisiana addressed the plain text argument and firmly concluded that foreign employers operating (though not headquartered) within the United States are exempt from the ADEA.[95] Here, the court noted that, if plaintiff's American employer served as an agent of a Canadian corporation, the Canadian corporation by virtue of its foreign status would exempt both itself and its American counterpart from ADEA liability under § 623(h)(2).[96] In *Mochelle*, the plaintiff-employee argued that the court should view the American office as an extension of the foreign parent company.[97] The plaintiff relied on this argument so that he could include the employees of the foreign parent in an at-

89. *Robinson*, 21 F.3d at 507 n.5 [hereinafter *Robinson II*].

90. *Id.*

91. *See Robinson*, 827 F. Supp. at 918-19. Howard E. Robinson, the plaintiff, was employed by OMSG, OMSC and OMSO to sell Chrysler automobiles at Camp Walker and Camp Humphries, which are U.S. military installations in Korea. *See id.*

92. *See id.*

93. The court in *E.E.O.C. v. Kloster Cruise Ltd.*, 888 F. Supp. 147 (S.D. Fla. 1995), incorrectly defined *Robinson* as holding a "foreign employer [is] not subject to the ADEA where [the] American citizen worked in the United States." *Id.* at 149. Although the district court's opinion in *Robinson* was unclear, the court discussed Robinson's stay in Korea, and thus must have been aware that this case was different from one where the American plaintiff worked within the United States, as the *Kloster Cruise* court incorrectly stated.

94. 823 F. Supp. 1302 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

95. *See id.* at 1309 (citing 29 U.S.C. § 623(h)(2) (1994)).

96. *See id.*

97. *See id.*

tempt to meet the ADEA's minimum employee requirement.[98] However, in the view of the court, the employer would be exempt from ADEA coverage under § 623(h)(2) by virtue of its Canadian status.[99] The court, in applying § 623(h)(2), failed to consider that the plaintiff only constructively worked for the Canadian corporation.[100] Because the plaintiff argued that his true employer was a Canadian corporation, the court determined that § 623(h)(2) clearly exempted plaintiff's foreign employer, and did not consider the plaintiff's physical presence in the United States.[101] The Fifth Circuit notably affirmed the district court's decision without opinion.[102] Thus, under *Mochelle*'s analysis, an American citizen working exclusively in the United States for a foreign company would be without ADEA coverage if that company's headquarters was outside the United States.

b. No Foreign Employer Exemption for U.S. Operations In contrast to decisions such as *Robinson* and *Mochelle*, other courts analyzing § 623(h)(2) believe that Congress could not have intended to exclude American citizens working within the United States from coverage under the ADEA.[103] To shoulder their argument, these courts look to the overall purpose of the ADEA, its legislative history, as well as to the EEOC guidelines regulating the ADEA.[104]

In doing its analysis, the court in *Helm v. South African Airways* understood § 623(h)(2) in terms of the amendment of which it was a part.[105] According to the *Helm* court, because Congress added § 623(h)(2) in 1984 as part of the amendment "to extend the Act's cov-

98. *See id.*

99. *See id.*

100. *See id.* The Court refused to take into account that the U.S. office of this Canadian corporation hired the plaintiff in the United States and defined plaintiff's sales area as exclusively restricted to the United States. *See id.* at 1304.

101. *See id.* at 1309.

102. *See Mochelle*, 15 F.3d 1079. The plaintiff in *Mochelle*, unlike that in *Robinson*, worked exclusively in the United States. *See Mochelle*, 823 F. Supp. at 1304. Yet, the *Mochelle* court simply found that "Walter Ltd.[,] as a foreign company not controlled by an American employer[,] is specifically excluded from ADEA liability under § 623(h)(2)." *Id.* at 1309.

103. *See, e.g.*, E.E.O.C. v. Kloster Cruise Ltd., 888 F. Supp. 147, 149-51 (S.D. Fla. 1995); Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987).

104. *See Kloster Cruise*, 888 F. Supp. at 149-51; *Helm*, 44 Fair Empl. Prac. Cas. (BNA) at 267.

105. *See Helm*, 44 Fair Empl. Prac. Cas. (BNA) at 267. Jack Helm filed an ADEA suit against his employer, South African Airways (SAA), after having been mandatorily retired from his pension plan benefits at age 63. SAA is headquartered in Johannesburg, South Africa, but Helm worked out of SAA's principal U.S.

erage to Americans employed abroad by American companies or their subsidiaries," the amendment does not usurp the ADEA's power within the United States.[106] The *Helm* court reasoned the following:

> We find nothing in the ADEA or its legislative history to indicate that the 1984 amendments were intended to exclude American citizens working within the United States from coverage. ADEA prohibitions apply to "discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control."[107] It is the employee's place of employment which governs the ADEA's applicability [not the foreign status of the employer].[108]

The court further reasoned that, because the amendment specifically withholds ADEA coverage from Americans working abroad for foreign employers, "Congress was careful not 'to impose its labor standards on another country.'"[109] The court then concluded, "It is inconceivable that Congress intended to respect the sovereignty of other nations and abandon that of the United States by subjecting American citizens, working inside the United States, to foreign law."[110] In other words, it was illogical to hold that Congress wanted to exempt foreign businesses in the United States from the ADEA in light of its efforts to respect a foreign country's jurisdiction and laws when American corporations expanded into the foreign country's borders.

Similarly, the U.S. District Court for the Southern District of Florida, in *EEOC v. Kloster Cruise Ltd.*,[111] went to great lengths to demonstrate the inapplicability of the foreign employer exemption in § 623(h)(2) to foreign employers operating within the United States.[112] The court adopted the EEOC's interpretation of the ADEA—that foreign employers operating within the United States were not exempt—after showing, first, that § 623(h)(2) was ambiguous, and second, that the EEOC's interpretation was reasonable.[113]

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office in New York. SAA argued that it should be "entirely exempt" because it qualified as a foreign employer under § 623(h)(2). *See id.* at 262-63.

106. *Id.* at 267.

107. *Id.* (quoting 29 C.F.R. § 860.20 (1986)).

108. *Id.* (citing Wolf v. J.I. Case Co., 617 F. Supp. 858, 863 (E.D. Wis. 1985)).

109. *Id.* (quoting S. REP. NO. 98-467, at 27 (1984)).

110. *Id.*

111. 888 F. Supp. 147 (S.D. Fla. 1995).

112. *See id.* at 149-52. In this case, the EEOC filed suit against Kloster Cruise, a Bermuda subsidiary of a Norwegian parent corporation, on behalf of several plaintiffs over age 40 who were terminated from Kloster Cruise's Florida offices. *See id.* at 148.

113. *See id.* at 149.

The *Kloster* court admitted that § 623(h)(2) specifically "exempt[ed] foreign companies from the anti-discrimination rules of § 623(a)."[114] However, in viewing the statutory scheme for clarification,[115] the court resolved that "closely related sections of the ADEA indicate that § 623(h)(2)'s exemption is limited to overseas operations."[116] For example, at the same time Congress adopted § 623(h)(2), § 623(f) was amended to expand the definition of employee to include, "United States citizens working abroad."[117] In addition, looking at the entirety of § 623(h)(2)'s legislative history, the court found that § 623(h)(2)'s sole purpose was to "fine-tune Congress' extension of the ADEA so that the statute [would] not govern the *foreign operations* of foreign companies."[118] The court emphasized that an over-broad, or "extreme,"[119] interpretation of § 623(h)(2) would greatly limit and "unnecessarily poke a gaping hole" in ADEA protections.[120]

Finding § 623(h)(2) sufficiently ambiguous, the *Kloster* court turned to the EEOC's interpretation of the ADEA.[121] The EEOC regulations clearly stated that "[t]he ADEA applies to an employer that is a foreign firm operating inside the United States unless a treaty states otherwise."[122] In addition, the court recognized that the EEOC is "entitled to great deference," and, unless its interpretation is "arbitrary [and] capricious," its interpretation should be upheld by the court.[123] Overall, the court found that the policy articulated by the EEOC was not only reasonable and "best squar[ing] with the purpose and con-

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114. *Id.* at 150.
115. *See id.* at 152.
116. *Id.*
117. *Id.* (citing 29 U.S.C. § 630(f) (1994)).
118. *Id.* at 151 (emphasis added).
119. *Id.* at 151 n.6.
120. *Id.* at 151-52.
121. *See id.* at 150.
122. *Id.* at 149 (citing EEOC Policy Guidance, N-915.039, Empl. Prac. Guide (CCH) ¶ 5183, at 6536 (Mar. 3, 1989)). The EEOC, in promulgating its policy, used the following example adopted by the court:

> *Example*—Arthur, a 55 year old resident alien of the United States, works for a foreign corporation operating in Ohio. Arthur files a charge with the [EEOC] because his foreign employer has a firm policy requiring all persons over 56 to retire. Arthur should obtain relief since the ADEA generally covers the employment practices of a foreign employer inside the United States.

Id.

123. *Id.* at 150 (citing Dawson v. Scott, 50 F.3d 884, 886 (11th Cir. 1995); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1060-61 (11th Cir. 1994); and Passer v. American Chem. Soc., 935 F.2d 322, 329 (D.C. Cir. 1991)).

text" of the ADEA's history,[124] but also the interpretation that the court would have chosen had the EEOC not issued policy guidance.[125]

Given the fact that courts' interpretations of § 623(h)(2) have varied, a firm resolution of this issue is necessary to promote better enforcement of the ADEA. As will be discussed in part IV.A, application of § 623(h)(2) under a rigid textualist approach creates outcomes overwhelmingly contrary to the ADEA's purpose and legislative history.

2. THE IMPACT OF TREATIES ON ADEA ENFORCEMENT

Foreign employers operating within the United States also look towards treaty rights as another shield against age discrimination liability. Bilateral agreements negotiated between the United States and other countries, most significantly the Treaties of Friendship, Commerce and Navigation (FCN Treaties), establish "the ground rules by which private commerce between American citizens and citizens of other countries is regulated."[126] Such treaties comprise "the supreme Law of the Land,"[127] requiring no further legislative action to become domestic law.

Broadly speaking, the FCN Treaties propose to provide a stable environment for international trade and investment.[128] The United States began negotiating commercial treaties in 1778 and has continued to do so into the nineteenth and twentieth centuries.[129] Although the early commercial treaties primarily "were concerned with the trade and shipping rights of *individuals*,"[130] twentieth century treaties typically protect corporate rather than individual interest.[131] In other words, the U.S. *corporations* did not gain the right to conduct business in other countries until the enactment of postwar FCN Treaties.[132]

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124. *Id.* at 151.
125. *See id.*
126. Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353, 355-56 (5th Cir. 1981) (citing Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958)).
127. U.S. CONST. art. VI, cl. 2.
128. *See* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 187 (1982) [hereinafter *Sumitomo I*].
129. *See id.*
130. *Id.*
131. *See id.*
132. *See id.* The Court explained that,

> [i]n the treaties antedating World War II, American corporations were specifically assured only small protection against possible discriminatory treatment in foreign countries. In the postwar treaties, however, corporations are accorded essentially the same treaty rights as individuals in such vital matters as the right to do business, taxation on a

a. "Employer-Choice" Provisions Currently, the United States has signed FCN treaties with at least sixteen countries, including Japan, Korea, Greece, and Spain.[133] The typical FCN treaty contains an "employer-choice" provision, allowing companies to hire certain professional employees "of their choice" when operating within a foreign country.[134] For example, Article VIII(1) of the U.S.-Japanese FCN Treaty states in relevant part, "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*."[135] Foreign companies have used this provision to hire executives from their home country to oversee development of both newly purchased and established companies within the United States.[136] Contrary to the purpose of the ADEA, these employment decisions often displace or limit an older domestic employee's ability to maintain or obtain these executive positions.[137]

Courts interpret these "employer-choice" provisions in three different ways: (1) the Fifth Circuit holds that a treaty's plain language unequivocally exempts foreign employers from all U.S. antidis-

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> nondiscriminatory basis, the acquisition and enjoyment of real and personal property, and the application of exchange controls. Furthermore, the citizens and corporations of one country are given substantial rights in connection with forming local subsidiaries under the corporation laws of the other country and controlling and managing the affairs of such local companies.

Id. (citing *Commercial Treaties: Hearing on Treaties of Friendship, Commerce and Navigation Between the United States and Colombia, Israel, Ethiopia, Italy, Denmark and Greece Before the Subcomm. of the Senate Comm. on Foreign Relations*, 82d Cong., 4-5 (1952) (statement of Harold Linder, Deputy Assistant Secretary of State for Economic Affairs)).

133. *See id.; see also* Gary Taylor, *Bias Cases Strike at Treaty Shielding Foreign Business: The 5th Circuit Rebuffs Effort to Pierce Immunity from Bias Suits that Japanese-owned U.S. Businesses Enjoy*, NAT'L L.J., July 31, 1995, at B1.

134. *See Sumitomo I*, 457 U.S. at 181 (citing Article XII(4) of the Treaty with Greece, Aug. 23, 1951, 5 U.S.T. 1829, 1857, T.I.A.S. No. 3057 (1951); Article VIII(1) of the Treaty with Israel, [1954] 5 U.S.T. 550, 557, T.I.A.S. No. 551 (1951); Article VIII(1) of the Treaty with the Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593 (1954)). These provisions were apparently included at the insistence of the United States. *See id.* The Court pointed out that "[i]n fact, other countries, including Japan, unsuccessfully fought for their deletion." *Id.* (citing State Department Airgram No. A-453, dated Jan. 7, 1952, pp. 1, 3, *reprinted in* App. 130a, 131a, 133a (discussing Japanese objections to Article VIII(1)); Foreign Service Dispatch No. 2529, dated Mar. 18, 1954, *reprinted in* App. 181a, 182a (discussing German objections to Article VIII(1))).

135. Treaty of Friendship, Commerce and Navigation with Japan, Apr. 2, 1953, U.S.-Japan, art. VIII, Para. 1, 4 U.S.T. 2063, 2070 (emphasis added).

136. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991).

137. *See id.* at 394.

crimination laws;[138] (2) the Third Circuit holds that a treaty cannot shield a foreign employer from *intentional* discrimination, but that a treaty can shield the same employer from a *nonintentional*, or *disparate impact* claim;[139] and, finally, (3) the Second Circuit holds that the treaty provision can shield a foreign employer only when foreign citizenship can be seen as a bona fide occupational qualification (BFOQ).[140] Because the ADEA is based in large part on Title VII, the circuits' opinions often follow the analysis of Title VII claims, which protect against discrimination based on race, gender, religion, and national origin.[141]

Before examining the various circuit courts' holdings in depth, it should be noted that the Supreme Court examined the implication of treaties and U.S. discrimination laws in *Sumitomo Shoji America, Inc. v. Avagliano*.[142] The Court's ruling in *Sumitomo* narrowly decided the question of whether an American-incorporated, wholly owned subsidiary of a foreign corporation could, itself, assert the rights of an FCN treaty.[143] Based on the language found within Japan's FCN Treaty, the Court found that an American-incorporated subsidiary "constituted under the applicable laws and regulations" of the United States cannot invoke its own treaty rights.[144] The Supreme Court reasoned that such rights are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan.[145] The Court further indicated that the purpose of the FCN Treaties "was not to give foreign corporations greater rights

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138. *See* Spiess v. C. Itoh & Co. (Am.), Inc., 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

139. *See* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1141-42 (3d Cir. 1988).

140. *See* Avagliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981) [hereinafter *Sumitomo II*], *vacated and remanded on other grounds*, 457 U.S. 176 (1982) (emphasis added); *see also* Goyette v. DCA Adver., Inc., 828 F. Supp. 227, 237 (S.D.N.Y. 1993) (applying *Sumitomo* criteria); Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1548, 1562-63 (E.D.N.Y. 1990).

141. *See, e.g., Sumitomo I*, 457 U.S. at 176 (1982) (describing scope of Title VII protections).

142. *Id.* (female secretaries argued that Sumitomo, a New York subsidiary wholly owned by its Japanese parent, was discriminating against them by hiring only Japanese males for its executive positions in violation of Title VII).

143. *See id.* Note that the analysis in Section III encompasses those issues relating to the difficult parent/subsidiary distinction. Although the treaty issues discussed in this section can become hopelessly intertwined with parent/subsidiary issues, this section attempts to separate the two analyses to heighten and clarify the issues. Thus, this section will be primarily concerned with whether courts have viewed FCN treaties as a complete defense to U.S. antidiscrimination laws, such as the ADEA.

144. *Id.* at 182-83.

145. *See id.* at 189-90.

than domestic companies, but instead to assure them the right to conduct business on an equal basis."[146] While this holding seems to significantly decrease the ability of foreign employers to skirt antidiscrimination laws such as Title VII and the ADEA, the Court expressly reserved the questions of (1) whether a domestic subsidiary may then assert any Article VIII(1) rights of its *parent*; (2) whether foreign citizenship may be used as a bona fide occupational qualification for certain positions; and (3) whether a business necessity defense may be available.[147] Thus, although *Sumitomo* clarified the Supreme Court's view of the purpose of FCN treaties, it explicitly left open many questions for the circuit courts.[148]

b. Fifth Circuit's Analysis: A U.S. Subsidiary's Treaty Defense The Fifth Circuit further considered the implications of the U.S.-Japanese FCN Treaty[149] in *Spiess v. C. Itoh & Co. (America)*.[150] In *Spiess*, a case later vacated by the Supreme Court on unrelated grounds, the Fifth Circuit concluded that foreign subsidiaries had a complete defense to U.S. discrimination laws, due to the plain language of Article VIII(1) within the treaty.[151] In reaching its conclusion, the Fifth Circuit first found that "the overriding goal" of the treaty "was to provide national treatment to foreign businesses operating in a host country."[152] The Court defined "national treatment" as granting foreigners the *same treatment* as native citizens.[153] Thus, it would appear that under this theory, foreign businesses would be subject to the same discrimination laws as their American counterparts. However, the Fifth Circuit

146. *Id.* at 187-88.

147. *See id.* at 189-90 n.19.

148. *Compare* MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988) (holding that the treaty did not intend to allow unlawful discrimination based on age, race, sex, religion, or national origin), *with* Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) (carving out a narrow exception to *Sumitomo* where foreign parent company's employment decisions would be thwarted if subsidiary could not assert treaty rights).

149. It should be noted that although the language in the Korean and Japanese FCN treaties is remarkably similar, the U.S. Supreme Court has held that each treaty must be interpreted separately, based on its own negotiation history. Thus, even if a court decides how one foreign country's treaty should be interpreted, this decision does not carry precedential weight with regard to another country's treaty which has a different negotiating history. *See Sumitomo*, 457 U.S. at 185 n.12.

150. 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

151. *See id.* at 359.

152. *Id.* at 360.

153. *See id.* at 359.

carved out a large exception to this rule.[154] In essence, the court found that, with respect to Article VIII(1)'s "of their choice" provision, the treaty's drafters did not intend to grant foreign businesses *national treatment*, but instead, "*an absolute rule* permitting foreign nationals to control their overseas investments."[155] Under this rewording, the Fifth Circuit concluded, "Considering the treaty as a whole, the only reasonable interpretation is that Article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws."[156] Of the three federal appellate courts that have considered the issue,[157] only the Fifth Circuit provides such a broad conclusion.[158]

c. Third Circuit Analysis: A Matter of Intent In *MacNamara v. Korean Air Lines*,[159] the Third Circuit Court of Appeals reversed the district court's ruling and ultimately determined that where a Korean employer *intentionally* discriminated against U.S. employees, the U.S.-Korean FCN Treaty did not exempt a Korean employer from U.S. antidiscrimination laws.[160] Mr. MacNamara, a district sales manager, began working for Korean Airlines (KAL) in 1974.[161] On June 15, 1982, KAL dismissed and replaced Mr. MacNamara, then fifty-seven, with a forty-two-year-old Korean citizen.[162] Mr. MacNamara filed a complaint alleging that KAL discriminated against him on the basis of race, national origin, and age.[163] KAL, in its defense, argued it was merely "reorganizing" its U.S. operations and moved to dismiss Mr. MacNamara's complaint on the ground that KAL's conduct was privileged under the terms of the Korean FCN Treaty.[164] Specifically, KAL argued that the "of their choice" language in the first sentence of Arti-

154. *See id.* at 360.
155. *Id.* (emphasis added).
156. *Id.* at 361.
157. *See* discussion *infra* notes 159-86.
158. *See Spiess*, 643 F.2d at 361.
159. 863 F.2d 1135 (3d Cir. 1988).
160. *See id.* at 1148.
161. *See id.* at 1137-38.
162. *See id.* In addition to terminating Mr. MacNamara, KAL discharged six American managers nationally and replaced them with four Korean citizens. *See id.* at 1138.
163. *See id.*
164. *See id.*

cle VIII(1)[165] provided a foreign corporation with the right to employ executives of its own choosing, "unhampered by domestic anti-discrimination employment statutes."[166]

The *MacNamara* district court found in favor of KAL, holding: (1) that Article VIII(1)'s express language specifically exempted a foreign company's choice of personnel from the operation of domestic employment laws; (2) that Title VII and the ADEA could not be reconciled with Article VIII(1); and, (3) that when such conflicts arose, the terms of the Treaty controlled.[167] However, the court also limited its ruling by stating it applied only to employment decisions regarding "essential personnel" and to situations favoring Korean citizens.[168] Hoping to quell fears that the use of the treaty defense would result in unbridled discrimination by foreign employers, the district court stated:

> An examination of Article VIII(1) shows no need for the expressed alarm that all the labor laws of this country will be emasculated if plain meaning were ascribed to the words of the Treaty. The Treaty would exempt only executives, accountants, attorneys, agents, specialists and technical experts whose services are necessary to insure the operational success of the foreign corporation in the host country. . . . Moreover, employees at this level are in a position to make their own bargains or at least to discover before applying for or accepting a position with a foreign corporation

165. Korea's FCN Treaty, Article VIII(1) is similar to Japan's FCN Treaty and states:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-S. Korea, art. VIII, 8 U.S.T. 2217, 2223 [hereinafter Korean FCN Treaty].

166. *MacNamara*, 863 F.2d at 1138. In response to KAL's motion, MacNamara, as well the U.S. Department of Justice in an amicus brief, claimed that "Article VIII(1) secured to a foreign business only the right to select managerial and technical personnel on the basis of citizenship and did not provide a broad exemption from laws such as Title VII and the ADEA which prohibit employment decisions on the basis of race, national origin, or age." *Id.*

167. *See id.*

168. *See id.*

> that it is doing business in this country pursuant to a Treaty and to ascertain the conditions of employment . . . .[169]

In essence, the district court held that the treaty language should be construed plainly because it would affect only "a relatively small number of persons who knowingly assume essential positions."[170]

The Third Circuit held that, while the existence of a treaty did supply foreign employers with different "rights" than their domestic counterparts, Article VIII(1) provided shelter to foreign business only in regards to personnel decisions that "logically or pragmatically conflict[ed] with the right to select one's own nationals as managers because of their citizenship."[171] The Third Circuit, in reversing *MacNamara*, determined that Article VIII(1) does not confer a foreign employer with blanket authority to choose its own citizen over a citizen of the host country simply because of age.[172] In reaching this conclusion, the Third Circuit stressed the overall purpose of the FCN Treaty—to establish equity, or equal protection of U.S. laws, between the foreign investor and the host country's competing organizations.[173] As argued by the Third Circuit, the general content of the modern FCN Treaties is guided by the principle of "national treatment."[174]

After establishing that the Korean FCN Treaty was the type of treaty that granted "national treatment," the Third Circuit reconciled

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169. MacNamara v. Korean Air Lines, 45 Fair Empl. Prac. Cas. (BNA) 384, 390 (E.D. Pa. 1987) [hereinafter *McNamara I*].

170. *Id.*

171. *MacNamara*, 863 F.2d at 1140.

172. *See id.* at 1144.

173. *See id.* at 1142-43 (citing Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 n.7 (1956)). Walker, at the State Department, served as Advisor on Commercial Treaties and was responsible for formulating the general structure of the postwar FCN Treaties. *See id.* at 1143 n.7 (citing Avagliano v. Sumitomo Shoji Am., Inc., 457 U.S. 176, 181 n.6 (1982) (citing Department of State Airgram A-105, dated Jan. 9, 1976)).

174. *Sumitomo I*, 457 U.S. at 188 n.18. Although "national treatment" was the predominant standard, two other kinds of protection were established in FCN Treaties. When the signatory nations were unwilling to grant national treatment with respect to some issues, the Treaty afforded a lesser standard of protection, "most-favored-nation treatment," or treatment no less favorable than that under which the most privileged foreign company operated. In addition, the Treaty could also provide for "absolute or non-contingent standards that gave foreign employers a certain specified protection without regard to whether the same protection was provided to host country businesses." *MacNamara*, 863 F.2d at 1143 (citing *Sumitomo*, 457 U.S. at 188 n.18).

the treaty with the intent of the parties who drafted the agreement.[175] Significantly, the court determined that treaty rights and civil rights would not conflict where the foreign employer intentionally discriminates against an American employee based on age.[176] The Court reasoned that this differed markedly from a situation where a foreign employer preferred an applicant from its own country to that of an American applicant.[177] In other words, a foreign employer would only be found liable in situations where, but for age, the foreign employer would not have dismissed the plaintiff.[178] The Third Circuit further supported its decision by pointing out that "defending personnel decisions is a fact of business life in contemporary America and is a burden that domestic competitors of foreign enterprise have been required to shoulder."[179] As such, foreign enterprises operating in the Third Circuit must be prepared to defend their motives in a court of law.[180]

d. The Second Circuit's BFOQ Standard The Second Circuit Court of Appeals applies a more stringent standard for foreign employers who are protected by FCN treaties. Under *Avigliano v. Sumitomo Shoji America, Inc.*,[181] the Second Circuit holds a foreign employer liable, even if "protected by the treaty," unless that employer can show it preferred its own nationals only for "positions where such employment is reasonably necessary to the successful operation of its business."[182] The standard utilized by the Second Circuit is referred to as the BFOQ standard, or the "bona fide occupational qualification" standard, because it requires the employer to justify its foreign citizen per-

175. *See MacNamara*, 863 F.2d at 1143. The intent of the parties to the treaty, according to the Third Circuit, was not to override domestic laws, but instead, to work with them. *See id.* at 1142-43.

176. *See id.* at 1146-47.

177. *See id.* at 1147.

178. *See id.* at 1147 n.15 ("Thus, even where a desire to favor one's own citizens may have played some role in a decision to replace an employee, there can be no liability unless the same decision would not have been made absent the . . . age of the replaced individual.").

179. *Id.* at 1147.

180. *See* Starr, *supra* note 4, at 646.

181. 638 F.2d 552, 559 (2d Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 176 (1982). This case was vacated by the Supreme Court on the basis that a wholly owned American-incorporated subsidiary could not assert the treaty rights of its parent corporation. However, the Second Circuit's opinion in this case, regarding to what degree a treaty can be used as a defense against employment discrimination claims, has never been overruled.

182. *Id.*

sonnel based on that employee's "special skills and aptitudes."[183] The BFOQ factors the Second Circuit suggests include: "(a) language fluency and cultural skills of the foreign nation; (b) knowledge of the foreign country's products, markets, customs, and business practices; (c) familiarity with the personnel and workings of the parent enterprise; and (d) acceptability to people with whom the company must transact business."[184] Unlike the approach adopted by the Third Circuit which focuses on the employer's motive,[185] the Second Circuit's approach allows a foreign employer to intentionally discriminate against American citizens over the age of forty, so long as the employer can show reasonable necessity for the success of the business.[186]

When facing an employer which is covered by an FCN treaty, the plaintiff's strategy will depend on the circuit of the pending suit. In the Fifth Circuit, the plaintiff may have limited success in dismantling the employer's privileges in employment decisions. In contrast, the Second and Third Circuits place some limitations on the "of their choice" provisions of treaties, though their tests differ. As discussed in Part VI.A.2, in order to effectuate consistent application of the ADEA to all plaintiffs facing an employer protected by an FCN treaty, a firm resolution to these different interpretations is necessary.

3. WHO HAS CONTROL: THE FOREIGN PARENT OR THE AMERICAN SUBSIDIARY?

Closely tied to any discussion of treaties and their impact on the ADEA's enforcement within the United States is the question of whether the employer is foreign and therefore potentially protected by a treaty, or domestic and therefore clearly accountable under U.S. discrimination law.[187] The relevant inquiry focuses on who controls the domestic subsidiary—the subsidiary itself or the foreign parent?[188] If the court finds that a foreign parent sufficiently controls its domestic subsidiary, the parent and subsidiary, together, are said to be the "single employer" of the employees working within the United States.[189] Examples of criteria used for determining whether the parent and its

183. Starr, *supra* note 4, at 645.
184. *Sumitomo II*, 638 F.2d at 559.
185. *See supra* discussion accompanying notes 159-80.
186. *See supra* discussion accompanying notes 181-85.
187. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 393 (7th Cir. 1991).
188. *See* Goyette v. DCA Adver., Inc., 830 F. Supp. 737, 744 (S.D.N.Y. 1993).
189. *See id.*

subsidiary are in fact a "single employer" include: "(a) interrelated operations, (b) common management, (c) centralized control of labor relations, and, (d) common ownership."[190] A finding of a "single employer" status between a domestic subsidiary and a foreign parent contains variable, yet equally important, repercussions. First, such a finding may allow the domestic subsidiary to assert the treaty rights of its foreign parent.[191] Second, it may simply impute liability to the parent corporation.[192] Finally, it may allow a plaintiff to sue a domestic subsidiary which otherwise would not have the requisite number employees to qualify as an employer under the ADEA.[193]

In order to fully appreciate the range of holdings, this analysis must, once again, turn to the U.S. Supreme Court case, *Sumitomo Shoji America, Inc. v. Avagliano*.[194] As previously discussed, the Supreme Court in *Sumitomo* determined that an American-incorporated subsidiary of a foreign corporation cannot, *itself*, claim to have FCN Treaty rights.[195] However, the Court left open the question of whether the American subsidiary of a foreign corporation *may assert the FCN Treaty rights of its foreign parent*.[196]

a. Asserting the Parent Corporation's Treaty Rights In *Fortino v. Quasar Co.*,[197] the Seventh Circuit Court of Appeals reviewed whether an American subsidiary, as an unincorporated division of a U.S. corporation wholly owned by a Japanese corporation, could assert the FCN Treaty rights of its foreign parent.[198] The *Fortino* court held that an American subsidiary of this kind should be allowed to assert its par-

190. Frischberg v. Esprit de Corp., Inc., 778 F. Supp. 793, 800 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1042 (2d Cir. 1992).

191. *See, e.g.*, *Fortino*, 950 F.2d at 393; *see also* Papaila v. Uniden Am. Corp., 840 F. Supp. 440, 446-47 (N.D. Tex. 1994).

192. *Compare* Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993) (holding that liability would not be imputed to the foreign parent corporation due to § 623(h)(2), and exempts foreign employers operating in a foreign country from the ADEA), *with Goyette*, 830 F. Supp. at 744 (holding that the foreign parent of an American subsidiary could be held liable for the actions of its subsidiary where parent exercised sufficient control over that subsidiary).

193. *See, e.g.*, *Goyette*, 830 F. Supp. at 745 (holding that even if foreign parent does not directly employ requisite number of employees in the United States, foreign parent is still an "employer" where American subsidiary of foreign parent has requisite number of employees).

194. 457 U.S. 176 (1982).

195. *See id.* at 189-90.

196. *See Papaila*, 840 F. Supp. at 446.

197. 950 F.2d 389 (7th Cir. 1991).

198. *See id.* at 393.

ent's treaty rights.[199] The court reasoned that "[a] judgment that forbids Quasar [the American subsidiary] to give preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent."[200] Notably, the court failed to set forth the required degree of control a parent must exert over its subsidiary. It merely assumed that Matsushita commanded personnel decisions at Quasar.[201]

Lower courts have addressed the "control" issue directly by examining whether the foreign parent sufficiently affects the work policies of its American subsidiary. For example, in *Goyette v. DCA Advertising*,[202] the court questioned to what extent Dentsu, a Japanese corporation, controlled DCA Advertising, its wholly owned subsidiary incorporated in New York state.[203] Although the plaintiffs in this case sued under Title VII for national origin discrimination, the court's finding of foreign parent control relied on the same analysis as in an ADEA case.[204] In this case, because the foreign parent, Dentsu, "explicitly ordered DCA not to fire any Dentsu expatriates and also . . . regulated the terms of the expatriates employment," the court held that Dentsu qualified as the employer within the meaning of Title VII.[205] According to the *Goyette* court, the key inquiry is whether the foreign parent significantly affected the subsidiary's employment policies.[206] Due to the fact that Dentsu's expatriate employment policy significantly affected DCA's decision to terminate several American employees, the court ruled that Dentsu could be held liable under Title VII.[207]

One significant ramification of the ruling is that it effectively allowed a plaintiff to sue an entity which otherwise would not have the requisite number of employees to qualify as an employer under the

199. *See id.* The court stated that such an assertion is justified "at least to the extent necessary to prevent the treaty from being set at naught." *Id.*

200. *Id.* ("[I]t would prevent Matsushita [as the foreign parent company] from sending its own executives to manage Quasar in preference to employing American citizens in these posts.").

201. *See id.*

202. 830 F. Supp. 737 (S.D.N.Y. 1993).

203. *See id.* at 740.

204. Because Title VII does not provide means for service of process, personal jurisdiction may only be exercised pursuant to state law. *See id.* at 742-43. The ADEA does not provide means for service of process and follows the same analysis. *See, e.g.*, Bane v. Netlink, Inc., 925 F.2d 637 (3d Cir. 1991).

205. *Goyette*, 830 F. Supp. at 744.

206. *See id.*

207. *See id.*

ADEA.[208] Dentsu, the foreign employer in the *Goyette* case, argued that it did not employ the requisite number of employees within the United States to be found liable under Title VII.[209] The court, however, determined that all of DCA's employees (as the American subsidiary) should be viewed as employees of Dentsu, because "[t]hey are the people who can or cannot be fired according to Dentsu's policy."[210]

b. "Single Employer" Status? In contrast to the *Goyette* case, a New York district court, in *Dewey v. PTT Telecom Netherlands, U.S., Inc.*,[211] dismissed an ADEA claim, ruling that the American subsidiary failed to meet the ADEA's requisite number of employees and that the activities between the parent corporation and its subsidiary were not sufficiently related to constitute an integrated enterprise.[212] The court considered whether the following characteristics existed in order to determine whether PTT (the American subsidiary) and Royal PTT (the Dutch parent corporation) operated as a single employer: (1) centralized control of labor relations; (2) interrelated operations; (3) common management; and (4) common ownership.[213] Under this analysis the *Dewey* court held that "the most important factor in the 'single employer analysis' is the degree of centralized control of labor relations and whether it exceeds 'the control normally exercised by a parent corporation which is separate and distinct from the subsidiary.'"[214]

The court ultimately refused to find that Royal PTT and PTT qualified under "single employer" status. It based its finding on the fact that: (1) Royal PTT did not dictate the hiring or management of the three PTT Telecom B.V. employees stationed at PTT; (2) board members did not act "in a manner inconsistent with their position on PTT's Board;" and, (3) Royal PTT did not control PTT's employment decisions simply because PTT informed Royal PTT of these deci-

208. *See, e.g., id.* at 745.

209. *See id.* To be an employer under Title VII, the party must employ 15 or more people for 20 or more weeks during the current or preceding calendar year. 42 U.S.C. § 2000e(b) (1994).

210. *Goyette*, 830 F. Supp. at 745.

211. 68 Fair Empl. Prac. Cas. (BNA) 1112 (S.D.N.Y. 1995).

212. *See id.* at 1115.

213. *See id.* at 1114. These four factors are also listed in the ADEA in § 623 (h)(3), used to determine whether an American employer controls a corporation located overseas. 29 U.S.C. § 623 (h)(3)(A)-(D).

214. 68 Fair Emp. Prac. Cas. (BNA) at 1114 (citing Kellett v. Glaxo Enter., Inc., No. 91 Civ. 6237, 1994 WL 669975 at *2 (S.D.N.Y. Nov. 30, 1994), which quoted Armbruster v. Quinn, 711 F.2d 1332, 1337-38 (6th Cir. 1983)).

sions.[215] The court, in assessing the interrelation of operations, stated the most relevant factors included, "common offices, long-distance shipping, bank accounts, payroll and shared facilities rather than . . . [an] overlap of personnel."[216] Because the court found that Dewey could not point to any such interrelation of operations, the court did not find sufficient evidence for single employer status.[217] The *Dewey* decision, when compared with the holding in *Goyette*,[218] seems to indicate that plaintiffs will have a much easier time showing the existence of a "single employer" status between a foreign parent and a domestic subsidiary when the foreign parent exercises an employment policy which generally affects the subsidiary's employees.

4. DOMESTIC ADEA ENFORCEMENT AGAINST FOREIGN EMPLOYERS: FINAL ISSUES RECAPPED

As discussed in the above three sections, plaintiffs working for foreign corporations within the United States face several additional hurdles to succeeding in their ADEA claims. Although most circuits would deny the argument that the ADEA text, in and of itself, exempts foreign employers within the United States from compliance, the fact that such a ruling has been affirmed in the Fifth Circuit may give plaintiffs pause.[219] Furthermore, plaintiffs may have difficulty in maneuvering around the treaty rights of foreign employers.[220] Even if a plaintiff is prepared to sue a foreign employer with treaty rights

215. *Id.* In contrast, Dewey argued that several factors indicated that Royal PTT (the foreign parent) had control over PTT's employment decisions. *See id.* These factors included: (1) that PTT Telecom B.V., owned by Royal PTT, stationed three of its employees at PTT's U.S. office; (2) that PTT's president could not interfere in employment agreements without the consent of Mr. Volbeda, a Royal PTT employee, who was also on PTT's Board; and (3) that Royal PTT was kept informed of PTT's hiring and firing decisions. *See id.* Dewey's arguments focused on the interrelated operations and common management between PTT and Royal PTT. *See id.* Two out of three of PTT's Board of Directors were Dutch, and furthermore, "nine out of the ten current and past Board members . . . [had] been Dutch citizens and were employees of Royal PTT." *Id.* at *3. Although the evidence in Dewey's favor seemed fairly weighty, the court refused to grant single employer status. *See id.*

216. *Id.*

217. *See id.* The court further cautioned that "[t]he fact that the directors of the subsidiary are all employees of the parent does not establish that the parent controls the subsidiary." *Id.*

218. *See* Goyette v. DCA Adver., Inc., 830 F. Supp. 737, 745 (S.D.N.Y. 1993).

219. *See* Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D.La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).

220. *See* Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982).

under the ADEA, the various tests used by different circuit courts of appeals create uncertainty as to the likelihood of recovery.[221] Finally, plaintiffs may employ the "single employer" doctrine to enhance their ability to recover,[222] although the utilization of such a doctrine is not without risks.[223] Plaintiffs making the "single employer" argument face the possibility of a domestic subsidiary employer asserting its foreign parent's treaty rights, which may effectively counteract their ADEA claims.[224] Part IV of this note examines whether these defenses are so broad as to eviscerate the underlying purpose of the ADEA.

B. The ADEA Overseas: Feasible Protection or Pipe Dream?

In 1984, Congress amended the ADEA to include coverage for American citizens working for American companies outside the territory of the United States.[225] Prior to this amendment, courts refused to grant extraterritorial rights under the ADEA unless the employee's transfer abroad served as "a transparent evasion of the Act."[226] Though U.S. citizens may now rely on statutory protection against age discrimination overseas,[227] the value of such protection is suspect because of the number of defenses specifically available to American companies located overseas.

Age discrimination plaintiffs working abroad for an American employer encounter two main obstacles. The first obstacle involves proving that the American parent corporation sufficiently controls the foreign subsidiary for which the plaintiff works.[228] The second obstacle involves a "foreign law defense," exempting American employers

221. *Compare id.* (which held that treaties allow foreign employers within the United States to unequivocably discriminate in favor of employees "of their choice"), *with* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3d Cir. 1988) (which precludes foreign employers from intentional discrimination within the United States).

222. *See Goyette*, 830 F. Supp. at 744.

223. *See e.g., Mochelle*, 823 F. Supp. at 1309.

224. *See* Papaila v. Uniden Am., Corp., 840 F. Supp. 440, 446 (N.D. Tex. 1994).

225. *See* Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(b)(2), 98 Stat. 1767, 1792 (codified as amended at 29 U.S.C. § 623 (h)(1)-(3) and § 623 (f)(1)) (1994)).

226. Wolf v. J.I. Case Co., 617 F. Supp. 858, 861 (E.D. Wis. 1985) (citing Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985)). An example of such an evasion is where an employer transfers an employee abroad for a short period of time for the purpose of avoiding the Act's coverage.

227. *See* 29 U.S.C. §§ 623(h)(1)-(3), 623(f)(1)).

228. *See, e.g.,* Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56, 58 (D. Mass. 1980).

that operate in a foreign country from ADEA provisions where the foreign country's law conflicts with the ADEA.[229]

1. FOREIGN SUBSIDIARIES OF U.S. COMPANIES: AGAIN, WHO CONTROLS?

When adopting the amendment granting the ADEA's extraterritorial power, Congress recognized that American employers may attempt to escape liability by simply incorporating subsidiaries overseas.[230] To counteract an employer's evasion of ADEA coverage based on the mere appearance of foreign status, the ADEA expressly calls for a determination of who controls the foreign subsidiary.[231] Section 623(h)(1) of the ADEA states, "If an [American] employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer."[232] In order to help explain this notion of "control," Congress also adopted § 623(h)(3), which states, "[T]he determination of whether an employer controls a corporation shall be based upon the—(A) interrelation of operations, (B) common management, (C) centralized control of labor relations, and (D) common ownership or financial control."[233]

a. A Standard of Significant Control If an American corporation does not "sufficiently control" its foreign counterpart, as in *Mas Marques v. Digital Equipment Corp.*,[234] an American citizen working abroad for a foreign subsidiary remains uncovered by the ADEA. Mas Marques, a U.S. citizen who resided in West Germany at the time of the suit, claimed that Digital Equipment GmbH (Digital GmbH), a West German corporation, and its parent, Digital Equipment Corporation (Digital), a U.S. corporation, discriminated against him on the basis of age, sex, and national origin.[235] The court refused Mas Marques's claim to

229. *See, e.g.*, Mahoney v. RFE/RL, Inc., 47 F.3d 447, 450 (D.C. Cir. 1995).
230. *See Hearings*, *supra* note 54, at 1-2 (comments of Senator Grassley).
231. *See* 29 U.S.C. § 623(h)(1).
232. *Id.*
233. *Id.* § 623(h)(3). This section of the ADEA mimics the standard applied in both Title VII cases as well as the standard promulgated by the National Labor Relations Board. *See Mas Marques*, 490 F. Supp. at 58.
234. 490 F. Supp. 56. This case was decided prior to the 1984 amendment which expressly granted ADEA rights to overseas American plaintiffs working for American-controlled companies. However, the court proceeded to analyze the "control" issue using exactly the same four-factored analysis that was later expressly incorporated in the statute. *See id.* at 58.
235. *See id.* at 57. It should be noted that Mr. Mas Marques proceeded as a pro se plaintiff in this matter, which may explain why his complaint had not gone

recover under the ADEA because Digital did not sufficiently control its West German subsidiary.[236] First, the court noted that Digital Equipment International governed the personnel policies at Digital GmbH without any input from Digital Equipment Corporation.[237] Second, the court also found that Digital GmbH and Digital Equipment Corporation maintained "separate corporate structures, with independent business records, bank accounts, tax returns, financial statements and budgets."[238] Finally, the two organizations utilized completely separate marketing strategies and sales goals with Digital GmbH focusing exclusively in the "repair, retail sale and distribution of computers and computer components solely within West Germany."[239] All in all, the only input Digital provided to its foreign subsidiary's operation was the infrequent performance of administrative services, such as accounting and bookkeeping.[240] The court, therefore, deemed the entities sufficiently separate and refused to apply the ADEA abroad.

b. Which Entity Controls? *Denty v. SmithKline Beecham Corp.*[241] represents a more recent consideration of whether the U.S. corporation sufficiently controlled its foreign subsidiary's alleged discrimination. In April 1989, SmithKline merged with the Beecham Group plc, a British corporation, resulting in an overseas corporate partner, SmithKline Beecham plc (SB plc).[242] Garland Denty, the plaintiff, began working in the United States for SmithKlein Beecham Corp. (SBC) in 1984.[243] In 1990, at fifty-two years old, and in 1992, at fifty-four years old, Denty applied for several positions based outside the United States.[244] Denty

through the proper procedural remedies, nor was pleaded properly. As such, his ADEA complaint was not considered because he (1) "failed to resort to a mandatory state remedy before the Massachusetts Commission Against Discrimination, as required by the [ADEA], 29 U.S.C. §§ 621 et seq. . . . (2) fail[ed] to allege a cause of action under the ADEA in his complaint, and (3) [even] failed to allege his age." *Id.* at 58.

236. *See id.* at 59.

237. *See id.* at 58. Specifically, "[a]ll employment decisions of Digital GmbH, including recruitment, hiring, training, promotion, termination, and establishment of working conditions [were] exclusively determined and implemented by Digital GmbH and Digital International." *Id.*

238. *Id.*

239. *Id.*

240. *See id.* at 58.

241. 907 F. Supp. 879 (E.D. Pa. 1995).

242. *See id.* at 881.

243. *See id.*

244. *See id.*

claimed that he failed to acquire these positions because of his age, indicating that all of the positions were filled by younger men.[245]

Here, the court found "substantial evidence" of integrated operations between SBC and SB plc.[246] For example, the corporations organized operations not by location, but by the type of work performed.[247] The court found a sufficient interrelationship between SBC employees and SB plc employees because many SBC employees reported directly to SB plc employees.[248] In addition, both firms operated under common management, represented by one CEO, a single director, and a vice-president—all of whom had offices in England.[249] Both companies filed only one annual report with revenues reported on a consolidated basis.[250] In fact, just about every aspect of the two companies was integrated, from employment decisions to financial operations. Ironically, this integration of operations did not save Mr. Denty's ADEA claim.[251] Instead of finding the integration indicative of the American corporation controlling SB plc in England, the court found that all the factors conversely indicated that the SB plc was the foreign parent that controlled SBC as an American subsidiary.[252] Therefore, Denty failed to show the requisite control of a foreign entity by an American employer.[253]

c. *Contracted Services Abroad* The analysis of this situation is similar with contracted services between two entities. In *Brownlee v. Lear Siegler Management Services Corp.*,[254] Lear, an American government contractor, hired plaintiffs, Harry Brownlee and Roy Waddell, to provide technical assistance and support to the Royal Saudi Air Force (RSAF) for three years in Saudi Arabia.[255] Upon their arrival in Saudi Arabia,

245. *See id.* Because the court found "[t]he promotion decisions . . . were made by SB plc executives in England, while Denty worked for SBC in Philadelphia," the proper defendant in this case was not SBC in Philadelphia, but SB plc, in England. *Id.* Once this determination was made, the court evaluated whether SBC in Philadelphia (the American counterpart) sufficiently controlled SB plc (the foreign employer) to be held liable under the ADEA. *See id.* at 882.
246. *See id.* at 885.
247. *See id.*
248. *See id.*
249. *See id.*
250. *See id.*
251. *See id.*
252. *See id.*
253. *See id.*
254. 15 F.3d 976 (10th Cir. 1994).
255. *See id.* at 977.

RSAF barred plaintiffs from their workstations—allegedly because of their age.[256]

The court's analysis focused on the principle/agent theory in order to determine whether the RSAF's alleged discriminatory intent could somehow be imputed to Lear.[257] Although the court acknowledged that "a principal's *status as an employer* can be attributed to its agent to make the agent statutorily liable for *his own* age-discriminatory conduct, . . . no authority [exists] for imputing a principal's *discriminatory intent* to an agent to make the agent liable for his otherwise neutral business decision."[258] In addition to finding no authority to support the idea that a culpable principal's action could be imputed to an innocent agent,[259] the court implicitly concluded that RSAF could not be held liable under the ADEA because it clearly was not controlled by an American entity.[260]

2. THE "FOREIGN LAW" DEFENSE: SCAPEGOAT OR VALID PRECAUTION?

The ADEA excuses U.S. corporations operating in a foreign country from ADEA compliance if such compliance would require it to violate laws of that foreign country.[261] This provision, known as the "foreign laws" exception to the ADEA, preserves international comity when U.S. businesses avail themselves to the benefits of foreign laws in setting up their businesses overseas.[262]

Moreover, the U.S. Court of Appeals for the D.C. Circuit recently strengthened this exception by exempting an American overseas corporation from the ADEA if the corporation would have to breach its collective bargaining agreement with a foreign labor union.[263] In *Mahoney v. RFE/RL, Inc.*,[264] Radio Free Europe/Radio Liberty (RFE/RL), a Delaware nonprofit corporation located in Munich, Germany, terminated plaintiffs De Lon and Mahoney once they reached age sixty-five

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256. *See id.*
257. *See id.* at 978.
258. *Id.* at 978 (citing 29 U.S.C. § 630(b) (1994)) (emphasis in original); Owens v. Rush, 636 F.2d 283, 286-87 (10th Cir. 1980); House v. Cannon Mills Co., 713 F. Supp. 159, 161-62 (M.D.N.C. 1988).
259. *See id.*
260. *Id.* at 978 & n.3.
261. 29 U.S.C. § 623(f)(1); *see, e.g.*, Mahoney v. RFE/RL, Inc., 47 F.3d 447 (D.C. Cir. 1995).
262. *See generally* Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261, 267 (S.D.N.Y. 1987) (citing S. REP. NO. 98-467, at 27 (1984)).
263. *See Mahoney*, 47 F.3d at 449.
264. 47 F.3d 447.

based on the collective bargaining agreement in operation.[265] The district court in *Mahoney* held § 623(f)(1) did not apply because the mandatory retirement provision "is part of a contract between an employer and unions—both private citizens—and has not in any way been mandated by the German government."[266] As such, the bargaining agreement was not covered by a law of general application and, thus, could not be applied as a foreign law.[267]

Relying upon several Supreme Court cases, the Court of Appeals for the D.C. Circuit reversed the district court. The D.C. Circuit found that a company that breaches a labor contract indeed violates a "law," and the statutory exemption from "law" relieved carriers of their contractual obligations.[268] Further,

> [i]f RFE/RL had not complied with the collective bargaining agreement in this case, if it had retained plaintiffs despite the mandatory retirement provision, the company would have violated the German laws standing behind such contracts, as well as the decisions of the Munich Labor Court. In the words of § 623(f)(1), RFE/RL's "compliance with [the Act] would cause such employer . . . to violate the laws of the country in which such workplace is located."[269]

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265. *See id.* at 448. RFE/RL applied to the "Works Council" for limited exceptions to the mandatory retirement age for the Americans they now believed covered by both the ADEA as well as the German bargaining agreement. "Works Council (*Betriebsrätes*) exist in all German companies with twenty or more employees, [and] are bodies elected by both unionized and nonunionized employees. Their duties include insuring that management adheres to all provisions of union contracts." *Id.* (citing Christopher S. Allen, *Principles of the Economic System*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE; A GERMAN-AMERICAN SYMPOSIUM 339, 348 (Paul Kirchhof & Donald P. Kommers eds., 1993)). The Works Council in question denied RFE/RL's request, and upon appeal to the Labor Court of Germany, the Works Council's decision was affirmed. *See id.* Thus, RFE/RL claimed it had no choice but to terminate plaintiffs once they reached the mandatory retirement age of 65. *See id.*

266. Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 3 (D.D.C. 1992), *rev'd*, 47 F.3d 447 (D.C. Cir. 1995).

267. *See id.* Although the district court felt the bargaining agreement was legally binding, it found this to be "precisely the sense in which such contracts in this country may be said to have 'legal' force; yet they are not ordinarily thought of as 'laws.'" *Id.* Courts, however, should be wary in making generalizations about foreign collective bargaining agreements, which often differ from American collective bargaining agreements regarding enactment and enforcement. *See* Abbo Junker, *Labor Law*, *in* INTRODUCTION TO GERMAN LAW 305, 327-38 (Werner F. Ebke & Matthew W. Finkin eds., 1996). Unlike U.S. labor law, the law in Germany permits the Federal Minister of Labor and Social Affairs to "extend the scope of application of a collective agreement to all employees within the industry covered by the collective agreement." *Id.* at 328.

268. *See Mahoney*, 47 F.3d at 449-50 (D.C. Cir. 1995).

269. *Id.* at 450 (quoting 29 U.S.C. § 623(f) (1994)).

Thus, the court of appeals viewed the foreign collective bargaining agreement as a contract to be upheld by a valid foreign law for purposes of the foreign law exception.[270] The court held that such a conclusion sustains the purpose underlying the ADEA's foreign law exception—"to avoid placing overseas employers in the impossible position of having to conform to two inconsistent legal regimes, one imposed from the United States and the other imposed by the country in which the company operates."[271] Although the opportunity to assert the foreign law defense does not surface in many cases, *Mahoney* clearly demonstrates its potential sweep. Indeed, what one country may consider a "law," another may not.

Notwithstanding, an argument can be made that the employee who accepts a position overseas has, in fact, "assumed the risk" that the ADEA will conflict with the foreign law where the American corporation operates. In addition, now that the ADEA has express extraterritoriality, it remains to be seen whether an employer could be held liable for bargaining with a foreign union for a mandatory retirement age. It is not hard to imagine a scenario in which an American employer situated overseas accepts a mandatory retirement age as part of a foreign collective bargaining agreement, even if it meant violating the ADEA, in an attempt to keep "all things equal" between its foreign and American employees for purposes of morale. The American employer would not likely hesitate in bargaining away ADEA rights for its American employees, given that foreign employees are accustomed to mandatory retirement ages.

IV. Resolution

A. Has the ADEA Remained Effective for Plaintiffs Suing Foreign Employers Operating Within the United States: Should Congress Do More?

As previously stated, foreign employers have essentially created three defenses against ADEA claims by American citizens. These defenses include: (1) a plain text argument that the ADEA exempts foreign employers within the U.S. from compliance;[272] (2) an argument that a treaty protects a foreign employer's right to select and terminate

270. *See id.*
271. *Id.*
272. *See supra* notes 77-125 and accompanying text.

certain types of employees without regard for the ADEA;[273] and, (3) an argument that the domestic subsidiary employer is indistinguishable from the foreign parent, thereby enabling that subsidiary to assert its foreign parent's treaty or statutory rights.[274]

1. THE PLAIN TEXT ARGUMENT

Although the majority of circuits have not reviewed cases involving foreign employers using a § 623(h)(2) plain text defense, logic and legislative history seems to favor the EEOC interpretation adopted by the *Kloster Cruise* and *Helm* courts. First, automatically granting all foreign employers within the United States the freedom to discriminate on the basis of age would eviscerate the very purpose of the ADEA[275]—namely, to provide an appropriate remedy for various forms of age discrimination. The focus of the ADEA is to protect the rights of older employees, whose rights are no less valuable when working for a foreign employer than when working for a domestic employer within the United States. Second, allowing all foreign employers operating within the United States to escape ADEA liability would greatly disappoint the employee's reasonable expectation that they are protected by this Act. Many employees may not realize that their employer, an American subsidiary of a large foreign parent corporation, may legally be considered a foreign employer. Thus, it is doubtful that employees would investigate how their ADEA rights change when working for a foreign employer within the United States. In many cases, an employee, due to financial hardship or unavailability of other job offers, may not have a true choice when deciding whether to accept or reject the foreign employer's offer in favor of working for a domestic employer. Therefore, the disadvantage an employee may face when working for foreign employers may, in many cases, be unknown or outside an employee's control. Third, granting foreign employers the unlimited power to discriminate on the basis of age would skew the competitive marketplace, giving foreign companies an advantage over American companies that must continue to litigate ADEA claims. It makes no sense for two neighboring companies to have a different set of laws governing their behavior when the only difference between them is their country of origin.

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273. *See supra* notes 126-86 and accompanying text.
274. *See supra* notes 187-218 and accompanying text.
275. *See supra* Part II.A for a discussion of the ADEA's express and implied purposes.

If we do not hold foreign employers to the same discrimination standards as the rest of employers within the United States, then what law should govern their actions—that of their own country? Even if the laws of a foreign country impose some age discrimination standard upon the foreign business operating within the United States, should foreign businesses not first be held accountable under the law of the United States, as they have purposefully availed themselves to our laws and economic advantage? Such logic is the rule of thumb for the ADEA's extension overseas, as the Act only applies to American employers when it is not in conflict with the foreign law of the country where the American employer operates.[276] What is most ironic is that an amendment that sought to further the ADEA's scope overseas is now working to the detriment of Americans in their own country, due to some courts' restrictive, plain text interpretation.[277] Because the foreign employer avails itself of other U.S. laws in setting up its business, the employer should subsequently be held accountable under all the laws of the United States, including the ADEA, unless application of a particular U.S. law would be in violation of the Constitution or a treaty.

Nothwithstanding, employees who allege age discrimination by a foreign employer should be aware that the foreign employer may attempt to argue an exemption based upon a strict construction of the statute.[278] With cases like *Mochelle* upholding the language of § 623(h)(2) to exempt foreign employers, this issue remains uncertain.[279] Even if an employee can overcome the plain-text hurdles presented by § 623(h)(2), an employee may find no recourse under the ADEA based on a foreign employer's ability to use a treaty to shield its employment decisions.

Though one circuit affirmed the plain text argument that the ADEA exempts foreign employers within the United States from compliance,[280] it is unlikely to win many cases for defendants. This is mainly because it takes a very rigid plain text interpretation to reach the outcome that the ADEA, per § 623(h)(2), exempts foreign employers from coverage.[281] Perhaps the reason why we have not seen a

276. *See* 29 U.S.C. § 623(f)(1) (1994).
277. *See, e.g.*, Mochelle v. J. Walter Inc., 823 F. Supp. 1302, 1309 (M.D. La. 1993), *aff'd without opinion*, 15 F.3d 1079 (5th Cir. 1994).
278. *See id.* at 1309.
279. *See id.*
280. *See, e.g.*, *id.* at 1302.
281. *See* 29 U.S.C. § 623(h)(2) (1994).

great deal of cases based on this interpretation of the ADEA is that it would, as one court stated, "poke a gaping hole" in the ADEA's coverage within the United States.[282] However, if presented to a court of rigid textualists, such an outcome may occur, as the provision quite clearly states that the ADEA shall not apply to a "foreign person not controlled by an American employer."[283] To remedy even the remote chance that such an inflexible interpretation takes hold, Congress would be well advised to simply label the subsection under which this provision occurs as the "ADEA Extraterritorial Provisions," or create some other notation which would make it abundantly clear that the provision exempting foreign employers only applies to foreign employers located outside the United States. Still, the chances that Congress would make such an amendment to the act are slim, because, in many ways, a majority of ADEA provisions apply to foreign corporations operating within the United States.

2. THE TREATY ARGUMENT

An argument that a treaty protects a foreign employer's right to select and terminate certain types of employees without regard for the ADEA constructs a more formidable hurdle for ADEA plaintiffs to overcome. Because the circuit courts differ in the extent to which they allow a FCN treaty to exempt a foreign employer operating within the United States from employment discrimination laws,[284] employees may be more or less likely to succeed in their ADEA claims based on where they file their suits. The prevailing view seems to be that a treaty does not mean what it says; in other words, the power of foreign employers to select employees "of their choice" does not necessarily provide foreign employers with unlimited reign in their employment decisions.[285] Instead, foreign employers protected by an FCN treaty are constrained to various degrees, depending on circuit court tests utilized to enforce the ADEA.[286] Ideally, the Supreme

282. *See* E.E.O.C. v. Kloster Cruise, Ltd., 888 F. Supp. 147, 151 (S.D. Fla. 1995).
283. 29 U.S.C. § 623(h)(2).
284. *See supra* discussion accompanying notes 138-40.
285. *See supra* discussion accompanying notes 159-86.
286. ADEA plaintiffs may in fact have an advantage over Title VII plaintiffs in proving discrimination by a treaty-protected employer. *See* Fortino v. Quasar Co., 950 F.2d 389, 394 (7th Cir. 1991). Title VII plaintiffs occasionally mistake the notion of national origin discrimination as being equal to that of citizenship discrimination. *See id.* at 393. A recent Seventh Circuit case, in which an American subsidiary of a foreign parent corporation discharged certain American but not Japanese executives, dismissed the plaintiffs' national origin claims, but nonetheless ruled

Court will grant certiorari and provide lower courts with the most viable interpretation of the interaction between these treaty rights and discrimination statutes, such as the ADEA.[287] Based on the language found within the Court's *Sumitomo* decision which described the underlying purpose of treaties to be the provision of equal, rather than "special," treatment for foreign businesses,[288] the likely outcome of such a ruling would be more in line with either the Second or Third Circuits, which place at least some restriction on treaty power when that power is used to shield age discrimination.[289]

Notwithstanding, a question remains as to which treaty interpretation to adopt. Should the determination of discrimination hinge on the employer's motivation, as the Third Circuit established,[290] or should the determination hinge on business necessity (or BFOQ), as the Second Circuit established,[291] or both? It bears noting that, regardless of whether the employer is foreign or domestic, the ADEA (and the accompanying EEOC regulations) contemplates the idea of a BFOQ defense in all age discrimination suits,[292] lending some credence to this approach. Still, the approach taken by the statute and regulations is one which contemplates an age limit as a BFOQ,[293] rather than a person's foreign status as a BFOQ. The Third Circuit approach, which limits recovery for ADEA plaintiffs to only instances of intentional discrimination,[294] arguably places these ADEA plaintiffs at a decided disadvantage to those who can recover under a disparate impact claim, which does not require a finding of intentional discrimination by the employer. However, showing that an employer's choice was motivated by purposeful discrimination is a burden shared by many ADEA plaintiffs, regardless of whether they are suing a foreign or domestic company. Thus, while the outcome of the Third Circuit's reasoning may put some ADEA plaintiffs at a disadvantage, the Third Circuit's analysis may be the most reasonable, given the language

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that claims of age discrimination by the fired American executives would have to be sent to a jury trial. *See id.* at 394.

287. Considering that the Court was unwilling to address just such a question in *Sumitomo*, the grant for certiorari to decide this issue may be a long time in coming. *See* Aviglimo v. Sumitomo Shoji Am., Inc., 457 U.S. 176, 189 n.19 (1982).

288. *See supra* text accompanying note 144.

289. *See supra* discussion accompanying notes 159-86.

290. *See supra* discussion accompanying notes 159-79.

291. *See supra* discussion accompanying notes 181-86.

292. *See* 29 U.S.C. § 623(f) (1994).

293. *See id.*

294. *See* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3d Cir. 1988).

found in the treaties which protect certain employment decisions by foreign employers.

Is there a way to even the playing field between plaintiffs suing foreign, as opposed to domestic, companies within the United States? Probably not so long as FCN treaties are impossibly cemented between the United States and its most popular trading partners. However, practitioners specializing in employment law offer the ADEA plaintiff hope, believing that FCN treaties "are on their way out . . . to be replaced by other bilateral treaties that incorporate discrimination laws and anticipate these sorts of problems."[295]

3. THE PARENT/SUBSIDIARY DILEMMA

Plaintiffs working for foreign corporations face additional challenges in their age discrimination suits when forced to determine whether their employer is "the parent or the subsidiary making the decisions."[296] The justification for continuing to grant the treaty rights to foreign corporations that allow them to choose their employees in contravention of employment laws within the United States is that treaties establish good public policy, "essential to the continued growth of trade."[297] The fact remains that the United States maintains similar employee selection rights when it operates overseas, as it is also governed by a bilateral FCN treaty. Because the United States sets forth more stringent age discrimination standards, deleting the "of their choice" employment provision will create harsher effects on foreign direct investment in the United States, rather than the ability of U.S. entities to invest and grow overseas. However, one may question whether the treaty provisions are truly necessary when many foreign investors have sound reasons for directly investing in the U.S. economy without such protection.[298] With the delicate initial stages of

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295. Gary Taylor, *Bias Cases Strike at Treaty Shielding Foreign Business: The 5th Circuit Rebuffs Effort to Pierce Immunity from Bias Suits that Japanese-owned U.S. Businesses Enjoy*, NAT'L L.J., July 31, 1995, at B1.

296. *Id.* One attorney currently working for the export administration of the Department of Commerce, and formerly employed by the EEOC, observed, "the situation [between foreign parents and their American subsidiaries] allows too much room for collusion [to bypass U.S. discrimination laws]." *Id.*

297. *Id.*

298. Reasons for investing in the U.S. economy include: (1) in general, the United States's stable economy usually creates good investment returns; and, more specifically, (2) auto manufacturers, while having some voluntary export caps from their own country, have no restriction on the number of cars they can build inside the United States. *See generally* Michael M. Phillips, *The Outlook: Foreign Executives See U.S. as Prime Market*, WALL ST. J., Feb. 3, 1997, at A1.

global economic relations behind, there are sound reasons for recognizing the situations, particularly when plaintiff's civil rights have been violated, where the economy necessarily heeds to U.S. discrimination law.

B. Has the ADEA Remained Effective for Overseas Plaintiffs Suing American Corporations?

More likely than not, an American citizen's ADEA claim will be dismissed based on an employer defense that: (1) the foreign subsidiary of an American parent is not sufficiently controlled by such American parent to be covered by the ADEA's extraterritoriality;[299] or, (2) the law of the foreign country where the corporation operates conflicts with the ADEA.[300] With these defenses in tact, will the ADEA ever be effective overseas?

If, for example, U.S. courts equate foreign collective bargaining agreements with a "foreign law," employers overseas can more readily terminate individuals in direct conflict with the ADEA.[301] The dramatically higher incidence of labor unions in overseas workplaces creates a lasting and notable effect for ADEA plaintiffs. Under such collective bargaining agreements, mandatory retirement was ruled "lawful" only because it had been entered into prior to the ADEA's express extraterritoriality amendment in 1984, and thus should demand an inquiry as to whether American companies overseas will be in a position currently to bargain themselves out of ADEA compliance.[302] If the answer is no, the ADEA may remain effective. The employer will be in a position to bargain and, wary of violating the ADEA's extraterritoriality, refrain from adopting a mandatory retirement age during that bargaining process. If, however, employers will no longer be constrained in their bargaining by the ADEA because, once a bargaining agreement is entered into, it becomes the law of the foreign country, then the purpose of the ADEA's extraterritoriality might be completely eviscerated.

When the ADEA's extraterritorial amendment was considered in 1984, Mr. William M. Yoffee, Executive Director of the nonprofit or-

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299. *See, e.g.,* Mahoney v. RFE/RL, Inc., 47 F.3d 447 (D.C. Cir. 1995).

300. *See, e.g.,* Mas Marques v. Digital Equip. Corp., 490 F. Supp. 56 (D. Mass. 1980).

301. *See Mahoney*, 47 F.3d at 449-50.

302. *See id.*

ganization entitled "American Citizens Abroad, Inc." (ACA), testified at the Senate Subcommittee Hearings, and stated,

> ACA recognizes that any extraterritorial application of national laws creates the potential for conflicts of national laws and extra-legal conflicts such as result from shopping for friendly treatment among overlapping jurisdictions. Normally, we oppose extraterritorial application of laws. There are many aspects of this issue, however, which we believe argue convincingly for an exception to our usual view. . . . [the ADEA] sets a standard which if found to be valid and worthwhile in our own country can hardly be found otherwise elsewhere. Those employees to whom this standard applies are given a cause of action and offered a venue. They must still meet the burden of proving their cases. The burden on the employers is far less onerous: to assure that the standard is applied honestly to workers.[303]

To argue that the ADEA must be enforced regardless of its conflicts with foreign law would go too far. After all, to hold such a proposition would cut both ways, and imply that foreign corporations operating within the United States, with less stringent age discrimination policies, have free reign to abide by their own laws, rather than those of the United States. Thus, while the foreign laws defense may not be interpreted to encompass private contractual agreement, its enforcement at a legislative or statutory level is fundamental to ADEA enforcement.

V. Conclusion

The globalization of the economy and its accompanying growth of foreign employers certainly threatens the strength of ADEA enforcement. More Americans age forty and over continue to find themselves either working for a foreign employer within the United States or for an American employer overseas, as the economy continues to globalize. Given this fact, employees need to become acquainted with the ramifications of such employment situations, in the event they are discriminated against on the basis of their age. The defenses that foreign employers within the United States and American employers overseas can raise make it much more difficult for an ADEA plaintiff to succeed in his or her claim of age discrimination.

The incentives for continuing some form of international age discrimination also persist. The cultural norms regarding forms of age

303. *Hearings, supra* note 54, at 25 (statement of William M. Yoffee).

discrimination vary greatly among foreign countries.[304] The United States, with relatively strong fundamental values in civil rights, is generally regarded as having the most protection available for plaintiffs who allege age discrimination. Conflicting with this strong tradition of individual rights, however, is the desire of American employers to enable their overseas business operations to run smoothly and without cultural clashes.[305] Furthermore, American employers are anxious not to chill their access to foreign direct investments when contending with mandatory U.S. regulations.[306] With strong business and economic incentives causing employers to inappropriately discriminate against employees on the basis of their age, U.S. citizens working for foreign corporations within the United States, or overseas for American corporations, may have difficulty in their ADEA litigation efforts.

Although there are some ways in which Congress and the courts can clarify the scope of the ADEA, particularly in relation to FCN treaties and foreign bargaining agreements, many of the defenses available to employers have some validity based on international comity and policy reasons. However, given that the world economic engines seem to be progressively pushing in the direction of globalization, one wonders whether treaties in particular will be needed in the near future to stabilize what was once nonexistent foreign direct investment. If treaties are no longer necessary to ensure and stabilize such economic growth, ADEA enforcement will certainly become more uniform for American citizens working within the United States, whether their employer is foreign or domestic.

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304. *See, e.g., Mahoney*, 47 F.3d at 447 (representing a case where employees in Germany are subject to a mandatory retirement age). Mandatory retirement ages in the United States, for all but a very small number of employees, are illegal under the ADEA.

305. *See generally* William Scheibal, *When Cultures Clash: Applying Title VII Abroad*, 38 BUS. HORIZONS 4 (1995); Bodo B. Schlegelmilch & Diana G. Robertson, *The Influence of Country and Industry on Ethical Perceptions of Senior Executives in the U.S. and Europe*, 26 J. INT'L BUS. STUD. 859 (1995).

306. *See* Pietro S. Nivola, *Having It All? Domestic Regulations and the Global Economy*, 14 BROOKINGS REV. 17 (1996).

EEOC v. Johnson & Higgins, Inc.: Making the World Safe for Millionaires

Daniel P. O'Meara

In the recent case of EEOC v. Johnson and Higgins Inc., *both the U.S. District Court for the Southern District of New York and the Second Circuit concluded that Johnson and Higgins, Inc. unlawfully discriminated on the basis of age in enacting a mandatory retirement program for its Board of Directors and, thus, violated the Age Discrimination in Employment Act (ADEA). Mr. O'Meara suggests that both courts were misguided in reaching this conclusion. More specifically, he criticizes the appellate court's reasoning that allowed the Equal Employment Opportunity Commission (EEOC) to proceed with the case despite the absence of an aggrieved party.*

Finally, the essay criticizes the EEOC's decision to pursue this particular case. The author posits that the EEOC misallocated funds in seeking to protect wealthy corporate executives through an ADEA suit. He bases this conclusion on the fact that the employees at issue were not likely to need government-subsidized counsel to fight for protection from employment discrimination. Given the EEOC's limited resources and backlog of cases, Mr. O'Meara recommends that the best use of public resources in a similar case is to advise the allegedly aggrieved executives of their right to file a charge, and of the EEOC's willingness to challenge the policy in court, instead of initiating expensive litigation on behalf of such relatively wealthy individuals.

The judicial reasoning applied in *EEOC v. Johnson & Higgins, Inc.*[1] is open to some question. This essay argues that the district court and Second Circuit relied too heavily on case law under the Fair Labor Standards Act in deciding *Johnson & Higgins, Inc.* It also questions the decision of the Equal Employment Opportunity

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1. 887 F. Supp. 682 (S.D.N.Y. 1995), *aff'd*, 91 F.3d 1529 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 47 (1997).

Commission (EEOC) to prosecute this case. Indeed, the EEOC's decision reflects a gross misdirection of public resources.

I. Johnson and Higgins's Corporate Structure and the Employment Practice at Issue

Until several years ago, Johnson and Higgins, Inc. (J & H) utilized a unique structure for its senior management that intertwined employment status as an officer, ownership of stock, and participation on the Board of Directors.[2] J & H was a privately held insurance brokerage and employee benefits consulting firm with its headquarters in New York City and offices throughout the world.[3] A Board of Directors, which at the start of the lawsuit contained thirty-five members, managed J & H.[4] There were no "outside directors" of J & H; all directors at the time of their election were officers and employees of J & H or its subsidiaries.[5] J & H directors retained their prior duties upon becoming directors and remained employees of J & H.[6]

Status as a director, however, marked a substantial promotion within the organization.[7] Directors attended Board meetings and served on various Board committees.[8] Equally as important, appointment to the Board enormously enhanced the new director's prestige and personal stature within the organization, as well as his ability to accomplish goals within the organization.[9]

Directors owned virtually all the stock of J & H and the corporation required all directors to maintain a specified level of stock ownership in order to retain their director seats.[10] Upon appointment to the Board, a new director could purchase the requisite stock for a nominal cost.[11] When a director left the Board for any reason, J & H required him to surrender his stock and then reallocated it to the other directors.[12] Departing directors continued to receive dividends on this

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2. *See* 887 F. Supp. at 684; 91 F.3d at 1532.
3. *See* 887 F. Supp. at 683; 91 F.3d at 1531.
4. *See* 91 F.3d at 1531.
5. *See* 887 F. Supp. at 684; 91 F.3d at 1531.
6. *See* 91 F.3d at 1532.
7. *See* 887 F. Supp. at 684; 91 F.3d at 1532.
8. *See* 887 F. Supp. at 684.
9. *See id.*
10. *See* 887 F. Supp. at 683; 91 F.3d at 1532.
11. *See* 887 F. Supp. at 684.
12. *See id.* at 683; 91 F.3d at 1532.

stock for the first ten years after leaving the Board, during which time they served as consultants to the Board.[13]

At issue in the litigation of Johnson and Higgins, Inc. was a policy requiring all directors age sixty-two to resign from the Board, resign as officers, and resign from employment.[14] If the director was a Board member for fifteen or more years, J & H required him to resign at age sixty.[15] Retired directors could act only as consultants and receive dividends for ten years. J & H formalized and adopted this mandatory retirement practice in 1983.[16]

II. The EEOC's Investigation of J & H's Mandatory Retirement Policy

Although twenty-two directors have retired under this policy since 1983, none have filed charges with the EEOC challenging the practice.[17] The EEOC became aware of the policy when J & H forced a director younger than the mandatory retirement age to leave for assertedly non-age-related reasons.[18] He filed an EEOC charge against J & H, alleging that age was the true reason that J & H fired him.[19]

In May 1992, the EEOC began an investigation of the mandatory retirement policy applied to J & H directors.[20] The investigation concluded several months later when the EEOC issued a Notice of Determination stating it found reasonable cause to believe unlawful age discrimination had occurred.[21] After unsuccessful efforts to conciliate, the EEOC initiated a lawsuit against J & H in the U.S. District Court for the Southern District of New York.[22]

III. The District Court Decision

At the district court level, J & H posed several arguments in hopes of escaping liability under the ADEA. First, J & H contended

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13. *See* 887 F. Supp. at 683; 91 F.3d at 1532.
14. *See* 91 F.3d at 1532.
15. *See id.*
16. *See id.*
17. *See* 887 F. Supp. at 684; 91 F.3d at 1533.
18. *See* 91 F.3d at 1533.
19. *See id.* (describing the manner in which the EEOC became aware of the policy); *see also* Sempier v. Johnson & Higgins, Inc., 45 F.3d 724 (3d Cir. 1995) (ADEA lawsuit brought by a former J & H Director).
20. *See* 91 F.3d at 1533.
21. *See id.*
22. *See* 887 F. Supp. at 682; 91 F.3d at 1533.

that its practice was based upon "reasonable factors other than age" (RFOA) and therefore permissible under the ADEA's RFOA defense.[23] More specifically, J & H asserted that the forced resignation from *employment* was based upon the resignation from the *Board of Directors* in that it would be awkward and unrealistic to move former directors into subordinate roles within the organization.[24] The court predictably rejected this argument, because the loss of director status was, in turn, based upon age, and therefore the factor relied upon was age.[25]

As its second argument, J & H contended that its directors were not really "employees" within the meaning of the ADEA in that they control and manage the business.[26] J & H argued that the directors are more accurately characterized as "partners," who are generally excluded from ADEA coverage.[27] The district court characterized this argument as having "some merit" and further stated that "[e]mployees who are also co-owners and directors of their corporation arguably are in a better position to take care of themselves than the average employee and consequently may not require the protections of the ADEA."[28]

The district court ultimately rejected this argument based upon a prior Second Circuit decision, *Hyland v. New Haven Radiology Associates*.[29] In *Hyland*, the Second Circuit heard an ADEA case by a radiologist who was one of five owners and directors of a professional corporation.[30] Although the corporate employer was "a partnership in all but name," it chose the corporate form of business organization.[31] The Second Circuit held that all employees of a corporate employer are covered under the ADEA, regardless of whether their positions are, in fact, similar to those of partners.[32] The trial court in *EEOC v. Johnson & Higgins, Inc.* felt constrained to follow *Hyland*, and therefore rejected J & H's argument that its directors were not "employees" within the meaning of the ADEA.[33]

23. 887 F. Supp. at 685-86.
24. *See id.* at 686.
25. *See id.*
26. *See id.* at 687.
27. *See id.*
28. *Id.*
29. *See id.* (citing Hyland v. New Haven Radiology Assoc., 794 F.2d 793 (2d Cir. 1986)).
30. *See id.*
31. *See id.* (citing *Hyland*, 794 F.2d at 794).
32. *See id.* at 687.
33. *See id.* at 687-88, 687 n.7.

Third, J & H argued that because no J & H director filed a charge with the EEOC, and because all the present and retired J & H directors were apparently pleased with this policy, no harm occurred.[34] Therefore, J & H reasoned that the EEOC had no power to bring the action.[35] J & H made similar arguments that the case did not present a justiciable case or controversy, and that the matter presented was not ripe for adjudication.[36]

The district court not only rejected all these arguments,[37] but began its analysis by noting that J & H discriminated based upon age against directors in their status as employees.[38] The court noted that the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act (FLSA) and cited cases stating that the EEOC may proceed without the consent of, and even against the wishes of, the assertedly injured individuals.[39] The court also cited a FLSA case for the proposition that the obligation to pay minimum wages and overtime cannot be modified or waived.[40]

The district court also rejected J & H's final argument that the EEOC had not engaged in sufficient conciliation prior to initiating the lawsuit.[41] The court recognized that the EEOC has a duty to attempt to end the discriminatory practice by conciliation, but it concluded that the EEOC had fulfilled this duty prior to filing.[42]

In short, the trial court concluded that J & H had discriminated based upon age through the use of its retirement policy.[43] In addition, it stated that J & H effectively sought to create an exception to the ADEA that Congress did not intend to include.[44] Congress established age sixty-five as the minimum retirement age for high-level executives, and the district court was not willing to lower the age Congress established.[45]

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34. *See id.* at 688.
35. *See id.* at 688-89.
36. *See id.* at 688 n.8.
37. *See id.* at 688-89.
38. *See id.* at 685.
39. *See id.* at 688.
40. *See id.* (citing Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 513 (9th Cir. 1978)).
41. *See id.* at 689.
42. *See id.*
43. *See id.* at 685; EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1531 (2d Cir. 1996), *cert. denied*, 118 S. Ct. 47 (1997).
44. *See* 887 F. Supp. at 688.
45. *See id.*

In ultimately granting the EEOC's motion for partial summary judgment on liability and reserving judgment on the question of damages, the district court entered an injunction prohibiting J & H from enforcing its unlawful retirement policy and directed J & H to present the EEOC with a modified retirement policy for its employee-directors that complied with the ADEA.[46] The district court even proposed one possible modification of the policy that would bring the policy into conformity with the ADEA: a decoupling of director and employee status, thus allowing directors to remain as employees even after resigning as directors.[47]

IV. The Second Circuit Decision

A panel of the Court of Appeals for the Second Circuit affirmed the district court's decision.[48] In doing so, the appellate panel rejected J & H's arguments that: (1) the EEOC did not meet its duty to conciliate, and (2) the policy was based upon reasonable factors other than age.[49] In addition to these arguments, the Second Circuit panel addressed J & H's argument that the employee-directors should not be considered "employees" within the meaning of the ADEA because they are more akin to "partners."[50] Like the district court, the Second Circuit panel relied upon the *Hyland* decision to determine that corporate employees cannot be exempted from the ADEA as de facto partners.[51]

The Second Circuit addressed another issue not raised by J & H—whether the directors were employers, rather than employees, because they exercised such extensive control as directors.[52] The court concluded that the directors were "employees" within the meaning of the ADEA because they had, in fact, continued with traditional employment duties, were not employed by any other entity, and reported to someone higher in the hierarchy.[53]

46. The district court opinion did not state the relief, but merely stated at the conclusion of the opinion, "Submit Order." The discussion of the relief is taken from the court of appeals decision. *See* 91 F.3d at 1533-34.

47. *See id.*

48. *Id.*

49. *See id.* at 1535, 1540-42.

50. *See id.* at 1537-38.

51. *See id.*

52. *See id.* at 1538-40.

53. *See id.*

Finally, the Second Circuit addressed the argument that the EEOC had no standing to bring the lawsuit in the absence of an EEOC charge or an aggrieved individual.[54] The court characterized J & H's argument as twofold: (1) the directors expressly waived any ADEA claim they might have against J & H; and (2) the EEOC lacked authority to litigate in the absence of a charge or an aggrieved person.[55]

In support of its waiver argument, J & H submitted affidavits signed by its former directors opposing the EEOC's lawsuit.[56] The Second Circuit disposed of this argument by relying upon express ADEA language that no waiver agreement can affect the EEOC's rights and responsibilities to enforce the ADEA.[57] Regarding J & H's argument challenging the EEOC's authority to litigate the matter, the Second Circuit initially stated that "[t]his argument has some appeal inasmuch as it appears anomalous that the EEOC should be authorized to bring suit on behalf of individuals who do not believe themselves to be victims of discrimination and who seem to have no interest in pursuing a suit against their employer."[58] Nevertheless, the appellate court ultimately rejected the argument, relying upon several prior cases that allowed the EEOC to proceed in the absence of an aggrieved party.[59] Finally, the Second Circuit panel also noted that the EEOC had a legitimate concern in protecting the interests of future J & H directors.[60]

In a dissenting opinion, Judge Jacob[61] described J & H's senior management structure as a well-designed system structured to foster long-term growth and stability, rather than short-term objectives.[62] He was troubled by the EEOC's decision to allocate resources to attack this structure and noted that there "is no grievance, no victim, no loss, and no claim."[63] He agreed with the majority opinion that the EEOC had the right to pursue a claim in the absence of an aggrieved person and noted that fears of retaliation among employees support this result.[64]

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54. *See id.* at 1535-37.
55. *See id.* at 1535.
56. *See id.*
57. *See id.* at 1535-36 (citing 29 U.S.C. § 626(f)(1) (1994)).
58. *Id.* at 1536-37.
59. *See id.* at 1535-37.
60. *See id.* at 1537.
61. *See id.* at 1543-47.
62. *See id.* at 1543.
63. *Id.*
64. *See id.*

Judge Jacob based his dissent on his belief that the J & H directors were employ*ers* as opposed to employ*ees*, and therefore not protected under the ADEA.[65] Judge Jacobs believed that, under the totality of the circumstances, material facts were in dispute and, as such, summary judgment on this issue was inappropriate.[66]

V. Commentary on the Courts' Decisions

EEOC v. Johnson & Higgins, Inc. is a case rich in ADEA analysis. It will be cited most frequently for the propositions that: (1) the EEOC can proceed in the absence of a charge or an aggrieved person, and (2) all corporate employees are covered under the federal employment discrimination laws, regardless of their status within the organization.

EEOC v. Johnson & Higgins, Inc. does not call into question the long-standing rule of law that positions on corporate boards of directors are beyond the reach of the ADEA and other employment discrimination laws. Nor does it call into question the rule of law that true partners within legal partnerships are not protected by the ADEA. J & H utilized a unique senior management structure intertwining directorship, stock ownership, and employee status.[67] Both the district court and the Second Circuit noted that if J & H did not require resignation from employment at the same time it required resignation from the Board and sale of J & H stock, the result would likely have been different.[68]

EEOC v. Johnson & Higgins, Inc. does not limit the right of employers to require senior executives to retire at age sixty-five under certain circumstances. When Congress amended the ADEA in 1978 to prohibit mandatory retirement, it added an exemption excluding from ADEA coverage certain qualifying bona fide executive and high corporate policy makers.[69] Had J & H required its directors to retire at

65. *See id.* at 1543-47.

66. *See id.*

67. *See* EEOC v. Johnson & Higgins, Inc., 887 F. Supp. 682, 683-84 (S.D.N.Y. 1995).

68. *See id.* at 685 ("We might conclude differently if J & H's employee-Directors were merely forced under the policy to sell their stock and to resign from their position as Director.").

69. *See* 29 U.S.C. § 631(c) (1994) (permitting the compulsory retirement of anyone age 65 or older who had worked in the two preceding years in a bona fide executive or high policy-making position and meeting pension eligibility specifications).

age sixty-five, instead of age sixty or sixty-two, it would likely have prevailed over any legal challenge.[70]

The analyses of both the district court and of the majority of the Second Circuit are open to some question. The district court, for example, was misguided when it rejected J & H's argument that the directors waived their rights.[71] Both courts erred by incorrectly relying upon FLSA case law, because such reliance is grossly inappropriate and has long since been rejected by the courts and by Congress.[72] Although the Second Circuit superficially corrected the district court's error by looking to ADEA authority on waivers,[73] it ultimately concluded that the EEOC can bring suit in the absence of an aggrieved individual.[74] In doing so, it relied on cases that, in turn, looked to the Secretary of Labor's authority under the FLSA.[75]

Overreliance on FLSA case law and procedures in order to shape ADEA procedures is inappropriate. It is true that Congress incorporated certain FLSA procedural language into the ADEA, but this incorporation was intended to facilitate the enforcement efforts of the Wage and Hour Division of the Department of Labor, the agency that originally enforced the ADEA.[76] With the transfer of the enforcement function from the Wage and Hour Division to the EEOC, the purpose for that incorporation vanished, and, therefore, the courts should construe the ADEA accordingly.[77]

Moreover, very real differences exist between minimum wage and overtime law, as opposed to an employment discrimination law. It makes imminent sense to give a wage/hour enforcement agency the right to sue in the absence of aggrieved employees of the defendant employer. When an employer fails to pay a minimum wage or mandated overtime premium, it gains a competitive advantage over em-

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70. *See* 91 F.3d at 1533 n.2; 887 F. Supp. at 687 ("J & H could easily solve this problem without violating the ADEA by structuring its retirement plan for Directors so that it took effect at age 65 rather than age 60 or 62.").

71. *See* 887 F. Supp. at 686-87.

72. *See, e.g.*, 29 U.S.C. § 626(f) (regulation of waivers and releases under the ADEA, which was added in 1990); Runyan v. National Cash Register Corp., 787 F.2d 1039 (6th Cir. 1986) (en banc) (refusing to apply FLSA standards to ADEA release issues).

73. *See* 91 F.3d at 1535-37.

74. *See id*. at 1537.

75. *See id.*

76. See generally discussion in DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 82-88 (1989).

77. *See id.*

ployers that comply with the FLSA, resulting in marketplace harm to those employers and their employees.

The same phenomenon does not necessarily exist under the ADEA. The legislative history of the ADEA discloses that Congress considered age discrimination to be an arbitrary and irrational practice depriving the economy of the services of valuable workers.[78] Indeed, it is hard to believe that J & H's competitors breathed a collective sigh of relief after its retirement policy was invalidated.

A final fallacy of the Second Circuit decision must be noted. In support of its conclusion that the EEOC should be allowed to proceed against the wishes of the current and past directors, the majority stated that its decision would benefit future directors.[79] In fact, the opposite was true. Candidates for director positions were the biggest beneficiaries of the early retirement policy in that it would vacate director positions. In reality, future directors were the primary victims of the Second Circuit's decision.

VI. Commentary on the EEOC's Involvement

Although the district court and Second Circuit decisions are questionable, they are not the most disturbing component of this case. The EEOC took that role when it decided to spend taxpayer dollars to litigate the case. To that effect, Judge Jacobs's dissent described the case as "a nonsensical waste of public and private resources."[80] Essential to this conclusion is the fact that any J & H director affected by the retirement policy had *the right to bring civil action* seeking make-whole relief, liquidated (double) damages, and attorney's fees.[81] It is hard to imagine a group of employees with readier access to private counsel than the directors of J & H.

It is also hard to imagine a group of employees less needy of government subsidization. J & H directors were estimated to make more than $1 million per year.[82] The EEOC's decision to expend taxpayer dollars to pursue the interests of a group of millionaires—against the apparent wishes of those millionaires—is even more dis-

78. *See* 29 U.S.C. § 621 (1994) ("Congressional statement of findings and purpose," focusing on prohibition of arbitrary discrimination).
79. *See* 91 F.3d at 1537.
80. *Id.* at 1543 (quoting the J & H brief).
81. *See* 29 U.S.C. § 626.
82. *See* EEOC v. Johnson & Higgins, Inc., 5 F. Supp. 2d 181, 185 (S.D.N.Y. 1998).

turbing in light of studies showing that the primary beneficiaries of the ADEA are white males in professional and managerial positions.[83]

If the EEOC was regarded as a smooth running administrative machine, its pursuit of the J & H case would be less disturbing. This, however, is not the case. As Judge Jacobs's dissent noted, the EEOC has a 100,000 case backlog and has been criticized regularly for delay in processing claims.[84] Practitioners dealing with the EEOC find that having phone calls returned is often the exception and not the rule. Indeed, the judiciary has criticized EEOC attorneys for ineffectiveness in their representation of aggrieved persons.[85]

Given the finite resources of the EEOC,[86] the pursuit of J & H presumably meant the neglect or abandonment of other cases. Unlike the directors of J & H, not all victims of age discrimination have plentiful damages, quick access to private counsel, and the money to pay an attorney's retainer. Many victims of discrimination look to the EEOC as the government agency that will vindicate their interests. Such vindication is not likely to occur with the EEOC's pursuit of claims like the J & H claim.

In defense of the EEOC, it is staffed by well-intentioned public servants working under a limited budget on an essential mission. Additionally, the agency is overwhelmed by a growing number of charges.[87] These realities and the importance of the EEOC's mission, however, do not explain the otherwise questionable use of public funds. Instead, the EEOC's decision to prosecute this case may be best explained by its general focus in case selection and by J & H's attitude during the investigation.

A review of the cases the EEOC historically has selected for litigation discloses an admirable emphasis on challenging facially discriminatory policies and practices.[88] In addition, when investigated, J

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83. *See* Cathie A. Shattuck, ADEA Litigation Survey (1983), *reprinted in Recipients of ADEA Settlements Are Mostly Long-Term Male Employees*, 7 Daily Lab. Rep. (BNA) A-3 (Jan. 12, 1984); Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REV., Oct. 1984, at 64.

84. *See* 91 F.3d at 1543.

85. *See* EEOC v. MCI Int'l, 829 F. Supp. 1438, 1451-52 & 1481 n.30 (D.N.J. 1993).

86. *See* 91 F.3d at 1543 (Jacobs, J., dissenting) (citing congressional testimony by EEOC Chairman and prior judicial acknowledgments of understaffing and delay).

87. *See id.*

88. *See* Office of General Counsel Memorandum, ADEA Lawsuits Filed by the EEOC (available in the library of the EEOC Headquarters in Washington, D.C.).

& H was totally unapologetic.[89] In fact, J & H responded to one information request by stating that it did not regard the EEOC's letter as "an acceptable response from an agency of the United States to a corporate citizen whose almost one-hundred-year-old arrangements for the governance of its ownership and management affairs are being challenged by the agency."[90] If this passage is typical of J & H's approach as a whole, the EEOC's decision to litigate is more understandable.

Regardless, in spite of the facially discriminatory nature of the practice and J & H's response to the EEOC's investigation, the best use of public resources would have been to advise each and every director and former director of his right to file a charge, and of the EEOC's willingness to challenge the policy in court. Initiating litigation on behalf of a group of millionaires who opposed the litigation was, as Judge Jacobs noted, a "nonsensical waste of public and private resources."[91]

VII. EEOC Response

When contacted in regard to this essay, the EEOC offered a series of explanations for its decision to pursue this case.[92] First, an EEOC representative, Vince Blackwood, explained that J & H utilized a facially discriminatory policy in flagrant and open violation of the ADEA, a statute the EEOC is mandated to enforce.[93] Moreover, Blackwood stated, J & H was unapologetic about its practice during conciliation and was unwilling to modify it.[94] Blackwood also noted that, even if the current and former directors did not come forward to complain about the age-discriminatory policy, the EEOC's focus was on the lawfulness of the policy, not on the opinions of the incumbents.[95]

According to Blackwood, the EEOC also questioned the voluntariness of the waivers J & H secured during the course of the litigation and believes the subsequent repudiation of those waivers by many of

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89. *See* 91 F.3d at 1533.

90. *Id.*

91. *Id.* at 1537 (quoting the J & H brief).

92. Telephone Interview with Vince Blackwood, Assistant General Counsel for the EEOC (Sept. 22, 1998).

93. *See id.*

94. *See id.*

95. *See id.*

the retired directors vindicates its decision to pursue the case.[96] Finally, Blackwood stated that the EEOC was concerned about the impact of the mandatory retirement policy on J & H employees other than directors.[97] The EEOC reasoned that continued application of the policy might reduce the motivation of older employees to aspire to senior management positions and may send a signal throughout the organization that J & H does not value employees in their sixties.[98]

VIII. Postscript

As if to accentuate the uniqueness of this case, in March 1997, J & H sold itself to Marsh McClennan, another international brokerage and consulting firm, for $1.8 billion.[99] Active directors each received between $36 million and $55 million.[100] The forty-five retired directors received a total of $297 million, or an average of $6.6 million each.[101]

In December 1997, nine retired J & H directors filed a lawsuit against J & H, Marsh McClennan, and the twenty-four J & H directors at the time of the sale, alleging that the former directors were shortchanged in the distribution of the $1.8 billion sale price.[102] The plaintiffs asserted that money was not their primary motivation, but rather that they wanted to correct a wrong.[103] They alleged that the then-active directors took 152 years of effort by a variety of people and in an act of shameless self-dealing, put the money resulting from such effort in their own pockets.[104] The retired directors alleged that the active directors, immediately prior to the sale, amended the J & H corporate bylaws to disenfranchise the retired directors of their ability to block a sale, thereby preventing the retired directors from receiving their fair share of the purchase price.[105]

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96. *See id.*
97. *See id.*
98. *See id.*
99. *See Melting in the Hands of M&M*, BEST'S REVIEW, PROP.-CASUALTY INS. EDITION, May 1, 1997, at 70, *available in* 1997 WL 9572717.
100. *See Retired J & H Directors File Suit Disputing Distribution Proceeds in Sale to M&M*, NAT'L UNDERWRITERS PROP. & CASUALTY-RISK & BENEFITS MGMT., Dec. 15, 1997, at 3, *available in* 1997 WL 9332573.
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.*

J & H also moved for summary judgment in district court as to thirteen former directors who signed waivers of rights after the initial district court decision on liability.[106] They received $1,000 each for the waivers, and the EEOC noted that it would be seeking $3-10 million for each of them at trial.[107] In addition, a number of the retired directors, subsequent to the sale of J & H, repudiated the waivers.[108] Judge Sand denied J & H's motion for summary judgment and directed the parties to be ready for trial on the issue of damages in October 1998.[109]

106. *See* 5 F. Supp. 2d 181 (S.D.N.Y. 1998).
107. *See id.* at 185.
108. *See id.* at 183; *see also id.* at 183 n.2 (referring to lawsuit brought by former directors).
109. *See id.* at 188.

WHOSE DECISION IS IT ANYWAY?: IDENTIFYING THE MEDICAID PLANNING CLIENT

David M. Rosenfeld, J.D., M.S.W.

In the Medicaid planning context, the answers to seemingly easy questions are often quite elusive. Client identification is fundamental to every attorney-client relationship, yet resolving this basic question for Medicaid planners has sparked some debate. This essay explores the difficult question Medicaid planners encounter regarding client identification. The author, Mr. Rosenfeld, reveals the lack of guidance provided by contemporary legal ethic codes and then investigates some of the client representation models currently used by practitioners. Upon identifying the inherent conflict of interest that often develops in estate planning, Mr. Rosenfeld argues that individual client representation is the only ethically acceptable model of representation.

I. Introduction

Medicaid is the nation's major public financing program that provides health and long-term care coverage to low-income people. Authorized under Title XIX of the Social Security Act,[1] Medicaid is a means-tested public assistance program that places limits on the amount of assets and income an individual can possess in order to be eligible for benefits.[2] A growing specialty among mem-

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1. Pub. L. No. 89-97, § 121(a), 79 Stat. 343, 343 (1965) (codified as amended at 42 U.S.C. § 1396 (1994)).
2. *See* Michael Bagge, *The Eye of the Needle: Trust Planning, Medicaid and the Ersatz Poor*, 64 N.Y. St. B.J. 14, 15 (1992).

bers of the elder law bar is the ability to take advantage of eligibility rules so that clients who are not in the low-income bracket can obtain Medicaid-financed long-term care.

Elder law attorneys engaged in Medicaid planning, the practice of transferring or sheltering assets in order to qualify clients for Medicaid's long-term care benefits, operate in an increasingly complex environment. Mastery of sophisticated planning tools and techniques is now a prerequisite to successfully maneuver through Medicaid's nebulous eligibility rules. It is therefore ironic that an issue as basic as client identification—the foundation of the attorney-client relationship[3]—continues to frustrate Medicaid planners.[4] This dilemma is apparent in even the most fundamental questions:

> Who is the client when an adult child contacts an attorney?
>
> Who is the client when an entire family arrives for the initial consultation?
>
> Who is the client when a senior insists on family approval of financial decisions?

Several models of multiple-party representation have been offered as alternatives to individual representation, including the multisystems approach and the intermediation approach. Yet, despite these alternatives (which unfortunately validate de facto practices for many practitioners), individual representation remains the only model that adequately protects the paramount interests of a senior seeking long-term care guidance in the Medicaid planning setting.[5] This essay first explores contemporary ethical guidelines, revealing

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3. Client identification is important also in terms of defining the essence of the lawyer-client relationship vis à vis the lawyer's relationship to others. *See* GEOFFREY C. HAZZARD, JR., ETHICS IN THE PRACTICE OF LAW 3 (1978) (suggesting that the central problem in professional ethics is the "tension between the client's preferred position resulting from the professional connection and the position of equality that everyone else is accorded by general principles of morality and legality.").

4. *See, e.g.*, JOAN L. KRAUSKOPF ET AL., ELDERLAW: ADVOCACY FOR THE AGING § 11.38 (2d ed. Supp. 1996) (stressing the importance of identifying the client as between a senior in need of care and a potentially overeager family member).

5. Representation of a senior unable to physically or mentally participate in the representation is beyond the scope of this essay. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1997); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 (1996); *see also* Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 SAN DIEGO L. REV. 54, 66-74 (1991); *Recommendations of the Conference*, 62 FORDHAM L. REV. 989 (1994) ("Client Capacity" section includes recommendations for improving Model Rule 1.14 and accompanying commentary as well as recommendations for practice guidelines, education, and further study.).

their inability to resolve the basic issue of client identification in the Medicaid planning context. Second, popular models of multiple-party representation are critically evaluated demonstrating their inadequate preservation of the senior client's interests. The dangers inherent in multiple-party representation arising in the form of conflicts of interest are then illustrated. Finally, the essay reviews recent recommendations on representing the senior client and concludes by emphasizing the profound importance of individual representation.

II. ABA Codes

Neither the ABA Model Code of Professional Responsibility[6] nor the successor ABA Model Rules of Professional Conduct[7] defines the word "client" or provides meaningful guidance for client identification. Although there are general references to client identification in both the Model Code and the Model Rules, these references are less than helpful in defining the client in the Medicaid planning context. Comment [2] to Model Rule 1.7 (the general rule on conflict of interest) states: "[a]s to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope."[8] In turn, the relevant language in the Comment to Model Rule 1.3 addresses only the question of a continuing relationship, while the Scope section reveals that resolution of the issue is not to be found in the Model Rules.[9] The earlier Model Code fails to resolve the issue to any greater extent. In the absence of any direct statements, the Model Code offers only a series of rebuttable presumptions with respect to client identity. For example, the Model Code presumes that the client is the paying,[10] contracting,[11] or employing[12] party unless, of

6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1997).

7. MODEL RULES OF PROFESSIONAL CONDUCT (1997).

8. *Id.* at Rule 1.7 cmt. 2.

9. *Id.* at Rule 1.3 cmt. 3 ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."); *id.* at Scope ("[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.").

10. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1997).

11. *See id.* at DR 7-101(A)(2).

12. *See id.* at EC 4-1.

course, the client consents to a different arrangement.[13] There is also an unhelpful reference to a possible reasonableness standard for identifying a client. Disciplinary Rule 2-104(A)(1) states: "A lawyer may accept employment by . . . one whom the lawyer reasonably believes to be a client."[14] Consequently, there is now support in the elder law community for the promulgation of practice-specific rules to address client identification and other crucial issues.[15]

III. Multiple Party Representation

Several commentators have proffered models of multiple-party representation in the Medicaid planning setting as progressive alternatives to individual representation. One seductive example is the "multisystems approach" advocated by Stephen H. Hobbs and Faye Wilson Hobbs.[16] Interestingly, this approach is based upon a model developed by Dr. Nancy Boyd-Franklin for counseling black families in therapy.[17] According to the Hobbses:

> [a] multisystems approach can help identify the elder-law lawyer's ethical responsibilities by enhancing the lawyer's understanding of the familial context within which an elder person confronts the challenges of aging. Furthermore, by using a multisystems approach, the lawyer will more competently recognize the needs of the elder person, understand the values of the legal regime of asset management, and enable the elder person to finish well.[18]

The Hobbses conclude that treating a family unit as the client with the attorney in the role of intermediary best reflects the benefits

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13. *See id.* at DR 5-107(A)(1), (B).

14. *Id.* at DR 2-104(A)(1).

15. *See, e.g.*, Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1 (1987); Jeffrey N. Pennel, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 REC. ASS'N B. CITY N.Y. 715 (1990); Patricia M. Batt, Note, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 325 (1992).

16. *See* Steven H. Hobbs & Faye Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, 62 FORDHAM L. REV. 1411 (1994).

17. *See* NANCY BOYD-FRANKLIN, BLACK FAMILIES IN THERAPY: A MULTISYSTEMS APPROACH (1989). The Hobbses assert that Boyd-Franklin's model is "adaptable equally to families with elderly members who have asset management problems." Hobbs & Hobbs, *supra* note 16, at 1414.

18. Hobbs & Hobbs, *supra* note 16, at 1412.

of this multisystems approach.[19] In application, the principal function of the attorney becomes "the distribution or use of assets in a manner that maximizes resources for the family unit."[20] In so doing, "[e]veryone with an interest can be engaged in solving the management of assets problem."[21] However, family members must subordinate their interests to those of the senior, the focus of the attorney's loyalty.[22]

This multisystems approach suffers from numerous and insurmountable failings. Family members are often not as willing to subordinate their personal interests as required to adequately protect a senior client's well-being in the Medicaid planning setting. The

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19. *See id.* at 1412; Batt, *supra* note 15, at 339-42; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1997). Rule 2.2 states:

> Model Rule 2.2. Intermediary
>
> (a) A lawyer may act as an intermediary between clients if:
>
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
>
> (2) the lawyer reasonably believes the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
>
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
>
> (b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
>
> (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

20. Hobbs & Hobbs, *supra* note 16, at 1413.

21. *Id.* at 1417. The authors explain: "A spouse or significant other might also have an equally or complimentary interest in the asset management process. . . . children or other family members who may be dependent on the elder person . . . may share a present or contingent interest in an asset." *Id.* at 1425.

22. *See id.* at 1422. The vague role definition in this model of representation is magnified by the authors' inability to decide who is on a "journey through the aging process." *Id.* at 1412, 1420 ("Having reached this plateau, *elder persons* need to be free from worries about the remainder of their journey . . . . Ultimately, what we are discussing is placing the attorney as a professional in the context of a *family* travelling through the aging process." (emphasis added)). The Hobbses go on to note that "[t]his approach helps to promote self-determination and enhances the dignity of the *individuals* traversing the aging process." *Id.* at 1424 (emphasis added).

Hobbses are forced to recognize this when admitting that "human nature (greed in particular) often pits the individual against the family."[23] In this situation, the Hobbses concede that an attorney must protect a senior client utilizing a "more traditional representational analysis," in other words, as an advocate for the senior client's best interests and against the conflicting desires of loved ones.[24]

In her article, *The Ethics of Intergenerational Representation*,[25] Teressa Collett rejects family entity representation as unnecessary and potentially dangerous:

> In its attempt to emphasize the very real benefits of an understanding of family as more than a mere collection of competing individual interests, it disregards the threat that such an understanding poses to both family and individual autonomy when used to define the responsibilities of lawyers to clients.
>
> . . . .
>
> . . . It is repugnant to think that a decision . . . concerning institutionalization of an elderly family member should be controlled exclusively by majority vote. This excludes all consideration of the fact that the institutionalized family member will bear the greatest burden of complying with the decision. Only when there is an equality of interests should majoritarian principles control.[26]

"Equality of interests" is lacking in the Medicaid planning setting. The senior is the only one who risks subjection to inferior welfare-financed care. Medicaid suffers from a notorious reputation for problems with access, quality, discrimination, reimbursement, and institutional bias.[27] Medicaid's deficiencies are acknowledged even in

23. *Id.* at 1425; *see also* Batt, *supra* note 15, at 323 (alerting attorneys to the possibility of exploitation when senior clients rely on others to communicate with an attorney).

24. Hobbs & Hobbs, *supra* note 16, at 1425.

25. Teressa S. Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).

26. *But see* Hobbs & Hobbs, *supra* note 16, at 1425 (explaining that a spouse or significant other can have an equal or complimentary interest in the asset management process).

27. *See, e.g.*, James D. Reschovsky, *Demand for and Access to Institutional Long-Term Care: The Role of Medicaid in Nursing Home Markets*, 33 INQUIRY 16 (1996) (reporting strong evidence that Medicaid patients face substantially lower access to nursing homes than private payers and connecting the overrepresentation of Medicaid dollars in nursing home budgets to the ability of states to provide reimbursement at rates below those charged to private payers for equivalent services.); Jacqueline S. Zinn, *Market Competition and the Quality of Nursing Home Care*, 19 J. HEALTH POL. POL'Y & L. 555, 573, 575 (1994) (asserting that a higher Medicaid census correlates to lower quality with little incentive for improvement due to excess demand); Eric Carlson, *Illegal Guarantees in Nursing Homes: A Nursing Facility Cannot Force a Resident's Family Members and Friends to Become Financially Responsible for Nursing Facility Expenses*, 30 CLEARINGHOUSE REV. 33, 44 (1996) (revealing

Medicaid planning literature.[28] As a result of this disproportionate risk, family members' interests, regardless of merit, must always be considered of second order to the interests of the one person whose quality of life hangs in the balance.[29]

An attorney cannot adequately protect and promote a senior's paramount interests if the attorney is seeking to uncover the best interests of the family unit as a whole.[30] Crosby and Leff[31] are adamant on this point: It is the senior who needs long-term care and whose finances are under consideration.[32] Children have no present interest in their parents' assets and no authority to effect transfers without express delegation in a power of attorney.[33] This is true even when adult children solicit the Medicaid planning advice or assistance.[34]

IV. Intermediation

Intermediation as an independent model must also be rejected for failing to place the senior's best interests above all others.[35] In the role of intermediary, "[t]he lawyer seeks to resolve potentially con-

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that most nursing homes illegally require third-party guarantees of payment using, for example, deceptive "responsible party" provisions).

28. *See, e.g.*, William H. Overman, *Medicaid Program*, *in* ADVISING THE ELDERLY CLIENT §§ 29:3, 29:58 (Louis Mezzullo & Mark Woolpert eds., 1997) (asserting that increasingly serious Medicaid cutbacks at the state level raise "grave" quality of care issues to discuss with potential Medicaid planning clients for whom Medicaid eligibility may not be in their best interests); Patricia Nemore, *Drawbacks of Medicaid for Nursing Home Residents*, 11 BIFOCAL 1 (1990) (acknowledging that some long-term care facilities with Medicaid wings at capacity will try to evict residents who convert from private-pay to Medicaid status).

29. *But see* Batt, *supra* note 15, at 340 ("[T]he lawyer can ethically recommend long-term legal decisions for the family's betterment, even if such decisions would negatively impact an individual family member."). Of course, overzealous heirs may feel their own quality of life hanging in the balance as well.

30. In attempting to do so, attorneys inappropriately elevate themselves to the status of family member. *See* Collett, *supra* note 25, at 1500 ("Empowering lawyers to determine the best interest of the family denies the inherent limitations on lawyers' understanding of the families they serve.").

31. Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1503 (1994). Crosby and Leff use a case study as the basis for their analysis of ethical dilemmas facing elder law practitioners. Sadly, the authors acknowledge that "most lawyers engaged in this area of practice would not make the same decisions made by the lawyer in the case study." *Id.* at 1505.

32. *See id.* at 1509.

33. *See id.*

34. *See id.* at 1505-08.

35. Collett treats family entity representation and intermediation as separate models with unique characteristics. *See* Collett, *supra* note 25, at 1465-84. *But cf.* Hobbs & Hobbs, *supra* note 16, at 1421; Batt, *supra* note 15, at 341.

flicting interests by developing the parties' mutual interests."[36] In fact, a lawyer may act as an intermediary between clients only if the lawyer "reasonably believes that the common representation can be undertaken impartially."[37] Impartial representation necessitates harmonizing client interests and is completely inappropriate in the Medicaid planning setting for reasons previously discussed.[38]

The Medicaid planning context is not an instance where an attorney should take a "wait and see" approach.[39] An attorney representing a family unit in the role of intermediary must withdraw upon the emergence of an actual conflict and may not continue to represent any of the parties in the matter.[40] The risk of mandatory withdrawal and its unpleasant consequences are strong arguments against treating a family unit as the client, even if the attorney is unwilling to acknowledge an inherent conflict of interest at the outset.[41]

V. Inherent Conflict of Interest

There is an inherent conflict of interest between a senior seeking quality long-term care and an adult child or spouse who would be the recipient of transferred assets or otherwise benefit from Medicaid planning activities.[42] Suggesting this inherent conflict of interest, Ste-

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. 3 (1997).

37. *Id.* at Rule 2.2(a)(3).

38. *See* Collett, *supra* note 25, at 1474, 1476 (noting that the operational premise of the intermediary is accommodation of others' interests, which could lead to acceptance of substandard care in the name of asset preservation); Falk, *supra* note 5, at 63-64 (suggesting that an infirm senior or a senior with diminished capacity may be unable to protect his or her interests in the intermediation process, resulting in an unfair advantage for a relative); *see also* Marshall B. Kapp, *Who's the Parent Here? The Family's Impact on the Autonomy of Older Persons*, 41 EMORY L.J. 773 (1992). Kapp states:

> In the name of negotiated or accommodated autonomy, an older person may be too quick to compromise personal interests for those perceived to benefit the family as a whole. The older person may inauthentically acquiesce to family suggestions or imagined family preferences in order to maintain the peace or to avoid being a burden on loved ones. This readily compliant behavior may encourage families and professionals to collude intentionally or subconsciously . . . with insufficient meaningful involvement of the affected individual.

Id. at 796 (footnote omitted).

39. *See, e.g.*, Hobbs & Hobbs, *supra* note 16, at 1425-26.

40. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(c).

41. *See* Collett, *supra* note 25, at 1476 (noting that the unpleasant consequences of withdrawal include loss of time, money, and valued relationships).

42. *See* Patricia B. Rumore, *Elder Law: Pitfalls for the Unwary*, 58 ALA. LAW. 160, 161 (1997) (urging adoption of individual representation from the outset in

phen Moses queries: "Is [the client] . . . the senior whose best interest is red carpet access to top quality care that private payments will buy? Or is it the heir whose inheritance can be preserved from $50,000 a year losses only by putting a parent on welfare?"[43]

As principal heirs, adult children often instigate the Medicaid planning process. According to Dobris: "the engine that drives the divestment of assets to qualify for Medicaid is the children. They feel entitled to an inheritance that, if denied, they regard as a breach of the social contract as they read it."[44] Seniors may not even be aware that their assets have been transferred, for example, by an adult child with an expansive power of attorney.[45] Many seniors would be "mortified" to learn of their new status as charity cases.[46]

A recent case illustrates how this conflict of interest between a senior in need of care and an adult child can manifest itself. In *McMichael v. Flynn*,[47] the Alabama court affirmed a judgment ordering a daughter to return conveyed property and money to her mother for

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order to avoid problems associated with diverging interests of multiple clients); *see also* Falk, *supra* note 5, at 62 (concluding that an attorney's duty of loyalty favors representation of a single client).

43. Stephen A. Moses, *Health and Long-Term Care Insurance*, *in* ADVISING THE ELDERLY CLIENT, *supra* note 28, § 24:16; *see also* Kenneth Hubbard, Note, *The Medicaid Cost Crisis: Are There Solutions to the Financial Problems Facing Middle-Class Americans Who Require Long-Term Health Care?*, 43 CLEV. ST. L. REV. 627, 627-28 (1995) (affirming that inheritance protection is a principal motivation of younger generations in attempting to shift the burden of long-term care costs).

44. Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1, 8 (1989).

45. *See* Jeffrey L. Soltermann, *Medicaid and the Middle Class: Should the Government Pay for Everyone's Long-Term Health Care?*, 1 ELDER L.J. 251, 273 n.117 (1993); *see also* Joel C. Dobris, *supra* note 44, at 22; Shawn Patrick Regan, *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care*, 44 CATH. U. L. REV. 1217, 1222 n.17 (1995). Dobris states that

> it seems fair to say that middle-aged children have much less concern about propriety than their elderly parents. The funds are there, at least for the moment, the planning is legal, and the stakes are high. The chances are the children do not care what people think, especially if the children do not live in the same community as the parents. In other words, the social sanction is gone. Moreover, once people become frail and 'old-old' it is much easier to do paperwork on their behalf without their realizing the full impact of being on Medicaid.

Dobris, *supra* note 44, at 22. *But see* A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 WAKE FOREST L. REV. 445, 490 n.350 (1997) ("Most often, if the children are involved, they just merely want their parents to have the highest quality of life possible at the end of their lives.").

46. *See* Regan, *supra* note 45.

47. 686 So. 2d 254 (Ala. Civ. App. 1995), *cert. quashed*, 686 So. 2d 257 (Ala. 1996).

failure to provide lifetime support per their agreement.[48] Irma Flynn, seventy-five years old and in ill health, transferred her 114-acre farm to her daughter, Leila Flynn McMichael, in exchange for her daughter's promise to support Flynn during her life.[49] McMichael also received certificates of deposit from Flynn worth $22,000 in total.[50]

Subsequently, Flynn filed an action to set aside the deed pursuant to Alabama Code § 8-9-12, "which allows a grantor to void any conveyance of realty where a material part of the consideration was an agreement by the grantee to support the grantor during the grantor's life."[51] The trial court found that a promise to support was a material consideration for the conveyance and ordered the property and money returned.[52]

On appeal, McMichael argued that the trial court erred in setting aside the deed because her mother acted "with unclean hands" by allegedly conveying the property in order to defraud Medicaid.[53] McMichael offered this claim despite Flynn's undisputed testimony that McMichael was the one who obtained all the information on Medicaid and filled out all the application paperwork.[54]

McMichael broke her promise of lifetime support, forced her elderly mother into two rounds of litigation, and, even though she was the mastermind behind her mother's Medicaid application, argued that her mother "defrauded" the government. It may be difficult to find a more pathetic illustration of the inherent conflict of interest between a senior and a Medicaid planning beneficiary. Practitioners must avoid representational models that could lead to such extraordinary abuses of vulnerable clients.

This inherent conflict of interest precludes joint representation both under the Model Rules and the Model Code. Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

48. *See id.* at 257.
49. *See id.* at 255.
50. *See id.*
51. *Id.*
52. *See id.* While unnecessary to pursue a claim under ALA. CODE § 8-9-12 (1975), Flynn testified that her daughter did not fulfill her promise of lifetime support. *See id.* at 256.
53. *Id.* at 256.
54. *See id.*

> (1) the lawyer *reasonably believes* the representation will not be adversely affected; and (2) the client consents after consultation.[55]

Similarly, Disciplinary Rule 5-105(C) states: "[A] lawyer may represent multiple clients if it is *obvious* that he can adequately represent the interests of each and if each consents to the representation after full disclosure . . . ."[56]

It is neither "reasonable" nor "obvious" that an attorney can represent multiple family members in the Medicaid planning setting for the reasons discussed herein.[57] Moreover, the Comment to Model Rule 1.7 advises that an attorney is held to an objective standard in determining whether a request for consent is even appropriate: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."[58] The risk of potential family member clients exerting undue pressure upon the senior client in undetectable ways is too great to even request informed consent. Identifying and protecting a senior client's best interests demands individual representation.

VI. Fordham Conference

The 1994 Fordham Conference on Ethical Issues in Representing Older Clients resulted in a series of conference recommendations

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55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997) (emphasis added).

56. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(c) (1997) (emphasis added).

57. *See* Batt, *supra* note 15, at 328 (concluding that Model Rule 1.7 requires an attorney to decline multiple family member representation). Some courts have found multiple representation inappropriate even where the potential conflict of interest is neither obvious nor actual. *See, e.g.*, Haynes v. First Nat'l Bank, 432 A.2d 890, 900 (N.J. 1981) (holding that the mere possibility of a conflict is sufficient to create a breach of ethics where an attorney represented both the testatrix and beneficiary of a will).

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 5; *see* Falk, *supra* note 5, at 61-62 (asserting that dual representation would be objectively inappropriate where, for example, an attorney is approached by a senior and others to request an involuntary commitment or a judicially ordered guardianship for the senior). Falk concludes that "[s]ince '[l]oyalty is an essential element in the lawyer's relationship to a client,' representation of a single client is generally the safest course. Dual representation is generally advisable only where the potential for conflict of interest is minimal." *Id.* at 62 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1).

which confirm the senior's status as sole client in the area of asset divestment:[59]

> A. Recommendation for Practice Guidelines:
>
> In representing clients where divestment of assets is or may be considered, the attorney should:
>
> 1) Counsel clients about the full range of long-term care issues, options, consequences, and costs relevant to *the client's circumstances*;
> 2) Endeavor to preserve and promote dignity, self-determination, and quality of life of *the elderly client* in the face of competing interests and difficult alternatives;
> 3) Strive to ascertain the client's fundamental values in order to be responsive to the goals and objectives of the client.[60]

The language of these recommendations does not suggest that the senior is one of several clients whose interests must be balanced against those of others. In fact, wording such as "self-determination" and "in the face of competing interests" suggests that attorneys must be vigilant in guarding against undue influence exerted upon the attorney-senior client relationship.

VII. Conclusion

Individual representation is the only model capable of safeguarding the best interests of a senior engaged in long-term care planning. The absence of other clients ensures the complete loyalty necessary for the senior client to explore and resolve long-term care issues on their merits alone without the constraints and pressures associated with compromise solutions.[61] Moreover, individual representation in no way prevents a senior client from seeking advice or

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59. *See Recommendations of the Conference*, 62 FORDHAM L. REV. 961, 989-1001 (1994).

60. *Id.* at 1001 (emphasis added).

61. *See* Collet, *supra* note 25, at 1468 (discussing the enhancement of decisional privacy when other family members are excluded from the client's formal decision-making process as occurs with individual representation); *see also* Michael Gilfix, *Advising Aging Clients*, 6 CAL. LAW. 50, 52 (1986) (recommending that attorneys meet alone with senior clients to guard against dissenting family members or improper influences); Nancy C. Nawrocki, *Ethical Challenges in Serving the Elderly Client*, 72 MICH. B.J. 24, 26 (1993) (cautioning attorneys to watch for undue influence where a senior client requests that relatives be present during discussions). Of course, influence may be exerted upon a senior client outside the confines of an attorney's office. Practitioners must be alert for signs of undue influence and refer such matters to authorities as warranted.

opinions from family members and other concerned persons outside the attorney-client relationship.[62]

At least with respect to the ordering of one's finances, long-term care planning within an attorney-client relationship is a personal process. A senior client may, in fact, decide that asset divestment for the benefit of family members or others is the goal of representation. On the other hand, a senior client may decide that maintaining personal independence and quality of life for as long as possible are primary concerns. In either case, the decision belongs to the person who has spent a lifetime building his or her estate and who will be most affected by the decision: the senior client. Individual representation is the only model which allows for identifying and protecting a senior client's best interests in this last and most vulnerable stage of life.

62. Model Rule 2.3 permits an attorney to provide information to third parties such as family members at the client's direction and with his or her consent. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3. The Comment to Model Rule 2.3 cautions, however, that legal duties to third parties may or may not arise as a result of providing the information. *Id.* Thus, practitioners must be careful not to inadvertently create obligations inconsistent with individual representation.

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